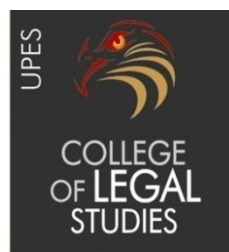


E-COMMERCE AND ANTI-COMPETITIVE AGREEMENTS

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*This dissertation is submitted in partial fulfillment of the degree of
B.B.A., LL.B. (Hons)*



College of Legal Studies
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Dehradun
2016

DECLARATION

I declare that the dissertation entitled “**E-COMMERCE AND ANTI-COMPETITIVE AGREEMENTS**” is the outcome of my own work conducted under the supervision of Prof. Charu Srivastava, at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

I declare that the dissertation comprises only of my original work and due acknowledgement has been made in the text to all other material used.

Shreya Bahuguna

12 April 2016

CERTIFICATE

This is to certify that the research work entitled “**E-COMMERCE AND ANTI-COMPETITIVE AGREEMENTS**” is the work done by Shreya Bahuguna under my guidance and supervision for the partial fulfillment of the requirement of B.B.A., LL.B. (Hons) degree at College of Legal Studies, University of Petroleum and Energy Studies, Dehradun.

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12 April 2016

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- 2) Trimex International FZE Ltd. Dubai v. Vedanta Aluminum Ltd 2010 (1) SCALE 574
- 3) Bhagwandas v. Girdharilal AIR 1966 SC 543
- 4) Entores Ltd v. Miles Far East Corporation [1955] 2 QB 327
- 5) LIC India v. Consumer Education & Research Center 1995 AIR 1811.
- 6) Lily White v R Munuswami AIR 1966 Mad 13
- 7) Kharak Singh v State of UP AIR 1963 SC 1295
- 8) People's Union of Civil Liberties v. the Union of India 1997 (1) SCC 318
- 9) Standard Oil Co. of California and Standard Station Inc. v U.S., 337US 293.
- 10) United States v. E.L. Du Pont De Nemours & Co.
- 11) Varca Druggist & Chemist & Others v/s Chemist & Druggists Association, Goa MRTP C-127/2009/DGIR4/28(decided on 11 June, 2012)
- 12) Board of Trade of City of Chicago v. US 246 US 231(1918)
- 13) Northern Pac. R. Co. v. United States, 356 US 1
- 14) Mr. Ashish Ahuja vs Snapdeal.com & Ors., Case No 17 of 2014, CCI
- 15) Le Baron v. Rohm and Hales Co., CA-9, 1971
- 16) U.S. v. Atlantic Co., DC Ga 1950
- 17) Electronics v. Sharp Electronics 485 US 717 (1988)
- 18) Flat Glass Carrel-EU
- 19) United Brands v. Commission of the European Communities, 1978
- 20) Mr. Mohit Manglani vs M/s Flipkart India Private Limited & Ors., Case No 80 of 2014, CCI

ABBREVIATIONS

&.....	And
Edn.....	Edition
HC.....	High Court
Ors.....	Others
p.....	Page
para.....	Paragraph
S.....	Section
SC.....	Supreme Court
IT Act.....	Information Technology Act, 2000
ICA.....	Indian Contract Act, 1872
PSS Act.....	Payment and Settlement Systems Act, 2007
US.....	United States
V.....	Versus
VOL.....	Volume
AAEC.....	Appreciable Adverse Effect on Competition
E-Comm.....	E-Commerce

INTRODUCTION

“E-commerce” stands for electronic commerce and pertains to trading in goods and services through the electronic medium, i.e. the Internet or phone. It involves conducting business with the help of the electronic media and making use of the information technology such as “Electronic Data Interchange”.

Chapter 1 will deal with the general introduction to e-commerce. Chapter 2 will deal with nature and development of e-commerce in India which will convey the advantages and facilitators of e-comm. in India. Thereafter the different categories of e-comm. and the barriers to e-comm. are discussed. Chapter 3 will deal with the legal validity and security issues in electronic transactions. Chapter 4 will deal with competition issues in e-commerce. Chapter 5 will deal with particular case study of Flipkart in which first the structure of online retail is discussed then the challenges to online retail are discussed and lastly the Flipkart case is discussed. Finally Chapter 6 will conclude the thesis and author will confer suggestions to reduce the anti- competitive practices in e-comm.

RESEARCH METHODOLOGY

STATEMENT OF PROBLEM

E-comm. has changed buying preferences and patterns of the customers. Both buyers and sellers are benefited by e-comm. as it has made transactions easier, quicker and smooth.

This thesis explains the meaning and development of E-Comm. In layman’s language we can say buying and selling of goods and services over internet is called E-Comm. The major types of e-comm. used today based on the nature of the transactions are as follows: Business-to-Consumer (B2C), Business-to-Business (B2B), Consumer-to-Consumer (C2C), Consumer-to-Business (C2B). Besides great advantages e-comm. has posed many threats because of it being faceless and borderless are also discussed in this dissertation. Thereafter in this thesis there is discussion about some of the pertinent security related issues that relate to E-comm. businesses in light of applicable Indian laws. The major part of the thesis however, has been dedicated to the exploration of the E-comm. and competition issues.

Different anti-competitive practices like horizontal agreement, vertical agreement and predatory pricing in E-Comm. are discussed considering the relevant provisions in Competition Act, 2002. The practices of E-comm. are evaluated considering Section 3, Section 4 and Section 19 of the Competition Act, 2002. Lastly the role of government should be to provide a legal framework for e-comm. so that while domestic and international trade are allowed to expand their horizons, basic rights such as privacy, intellectual property, prevention of fraud, consumer protection etc are all taken care of. At the same time, care must be taken to ensure that the opportunities for competition in the dynamic new area of economic activity are not stifled by anti-competitive issues.

OBJECTIVES OF STUDY

The objectives of the present study are:

1. To analyze the facilitators and barriers to e-comm.
2. To evaluate the legal validity of electronic contract as well as the security issues related with the electronic contract.
3. To examine the anti-competitive agreements or conduct in the e-comm. sector

SCOPE OF RESEARCH

This thesis will critically analyze e-commerce with the help of various definitions of e-comm. and case studies. Then the thesis will discuss some of the pertinent security related issues that relate to e-comm. businesses in light of applicable Indian laws. Therefore an in-depth understanding of the actual and possible issues that an e-comm. business would face will be discussed. The main focus will be on the competition issues with respect to e-comm. The scope of the thesis is limited to legal background. The focus of thesis is in India but case studies of other countries will also be looked into.

RESEARCH QUESTIONS

The thesis consists of the following research questions-

- ❖ What the concept of e-comm. means?
- ❖ What are the facilitators and constraints of e-comm.?
- ❖ Whether electronic contract are valid or not as well as the security issues associated with the electronic contract?
- ❖ What are the actual and potential competition issues in the area of e-comm.?
- ❖ What are the anti-competitive practices in online retail market?

HYPOTHESIS

“E-comm.may become a platform for anti-competitive agreements between companies. CCI must keep an eye on developing E-comm. market in India as companies might indulge in the anti-competitive practices to increase their own profits.”

METHODOLOGY

The methodology for research for the completion of the thesis would be doctrinal. The thesis requires gathering relevant data from the specified documents and compiling databases in order to analyze the material and arrive at a more complete understanding of the concerned topic. This thesis will utilize the deductive method of research as the general findings have in the end been concluded to lay about a result summing up the entire research.

Mode of citation: The method of citation is as per the 19th Edition of Bluebook.

LITERATURE REVIEW

BOOKS

- (1) NANDAN KAMATH FOREWORD BY N.R. MADHAVA MENON, COMPUTERS INTERNET & E-COMMERCE,A GUIDE TO CYBERLAWS & THE INFORMATION TECHNOLOGY ACT ,Universal Law Publishing Co (4th Ed 2009)

The relevant parts for my research are the need to tax and the Indian Tax structure. Then the background to Internet commerce in which problems and

solutions are discussed. Secure payments for purchases made on the Internet, the use of cryptography to hide the real value of intangible products, Intellectual property concerns including copyright and trademark use are areas of concern.

- (2) JUSTICE YATINDRA SINGH, CYBER LAWS, Universal law publishing (4 Ed 2010)

The relevant part for my research is in Chapter 10 consist of E-Commerce and Taxation and the relevant part for my research is should E-Commerce be taxed or not and how should it be taxed. A high power committee on e-commerce and taxation was constituted by the Central Board of Direct Taxes on 16th December, 1999. They submitted a report in the nature of preliminary study which highlights problems which the taxation of e-commerce incomes is likely to pose.

- (3) T. RAMAPPA, COMPETITION LAW IN INDIA POLICY, ISSUES, AND DEVELOPMENTS, Oxford University Press, (3 Ed 2014)

The relevant part for my research are chapters which contain the provisions regarding law prohibiting agreements, practices, and decisions that are anti-competitive contained in Section 3 of the Act. The factors that are to be taken into consideration in determining whether an agreement has appreciable adverse effect on competition are set out in Section 19(3). Next relevant part is the discussion regarding the abuse of dominant position. Some forms of abuse discussed are price fixing, imposing discriminatory prices, 'predatory' prices, denial of market access, etc. along with that Section 19(4) is discussed in which the factors to be considered to determine the dominant position are discussed.

JOURNALS, ARTICLES AND WHITE PAPERS

- (1) Sarbapriya Ray, *Emerging Trend of E-Commerce in India: Some Crucial Issues, Prospects and Challenges*, Computer Engineering and Intelligent Systems Vol 2, No.5, 2011 ISSN 2222-1719 (Paper) ISSN 2222-2863 (Online)
Available at www.iiste.org

This article tries to present a snapshot of the evolution of e-commerce, category of e-commerce business, to examine the growth of e-commerce in both physical and financial terms, to evaluate the benefits obtained from e-business, to critically analyze the barriers and constraints involved in flourishing e-commerce businesses in India and finally to develop a framework for effective dissemination of e-commerce in India.

The relevant part for my research is the growth of e-commerce and critical analysis of barriers involved in e-commerce in India.

- (2) ANKITA PAHUJA, *E-commerce in India and the potential competition issues - With special reference to credit cards market in India*, Competition Commission of India, 2010

This article deals with e-commerce and the facilitators of e-commerce. Potential competition issues include evidence of price fixing or tacit collusion, or anti-competitive discrimination against, or refusal of access to third parties. Issues will not arise in all cases, and this will depend on the details in each case. In many situations there will be pro-competitive and other public benefit issues that should be taken into account. E-commerce may have implications for the nature, prevalence, and monitoring of a variety of forms of anti-competitive agreements and conduct, including *excessive pricing, collusion, price discrimination, predation, vertical restraints, and refusal to supply/essential facilities*

The Competition Act 2002 aims to prevent practices having an adverse affect on competition and abuse of dominance of enterprises either by entering into anti competitive agreements, or combinations. The Act typically focuses on four areas:

- (a) (Section 3) Anti-Competitive Agreements (b) (Section 4) Abuse of dominance
(c) (Section 5) Combination Regulation (d) (Section 49) Competition Advocacy

- (3) PRIYANKA SINGH, *E-commerce and competition law*, Competition Commission of India New Delhi October 2012

In this report a background of e-commerce is discussed. Then the nature and development of e-commerce is discussed. Thereafter market is defined and factors for assessment of market power are discussed. Lastly individual agreements and conduct in e-commerce are discussed with reference to competition issues.

The relevant part for my research is the individual agreements and conducts that includes Excessive prices, Collusion, Price discrimination and undue preference, Predation, Vertical restraints ,Refusal to supply access to essential facilities ,Actions in related markets.

- (4) EER. HARJOT KAUR AND MRS.DALJIT KAUR, *-Commerce in India – Challenges and Prospects*, International Journal of Engineering and Techniques - Volume 1 Issue 2, Mar - Apr 2015

This paper explains the concept of e-Commerce and prospects of India in e-commerce. Finally this paper attempts to highlight the different challenges faced by e-commerce in India and to understand the essential growth factors required for e-commerce.

- (5) NISHA CHANANA AND SANGEETA GOELE, *Future of e-commerce in India*, International Journal of Computing & Business Research ISSN (Online): 2229-6166

This paper gives an overview of the future of E-Commerce in India and discusses the future growth segments in India's E-Commerce. Also find out various factors that would be essential for future growth of Indian E-commerce market. And

represent the various opportunities for retailers, wholesalers, producers and for people. In this paper we found that the Overall E-Commerce will increase exponentially in coming years for India.

- (6) ABHIJIT MITRA, *E-Commerce in India- A review*, International Journal of Marketing, Financial Services & Management Research ISSN 2277- 3622 Vol.2, No. 2, February (2013) Online available at www.indianresearchjournals.com

This paper discusses that Electronic commerce or business is more than just another way to sustain or enhance existing business practices. It is a “disruptive” innovation that is radically changing the traditional way of doing business. E-commerce is showing tremendous business growth in our country. Increasing internet users have added to its growth. E-commerce has helped online travel industry in many ways and added a new sales avenue through online retail industry in our country.

The relevance to my research is the description of the present status and facilitators of E-Commerce in India, analysis of the present trends of E-Commerce in India and the barriers of E-Commerce in India.

- (7) ASHISH PATEL, *Major Competition Law Issues in E-Tail Market*, RESEARCH HUB – International Multidisciplinary Research Journal (RHIMRJ) Volume-2, Issue-6, June-2015 ISSN: 2349-7637 (Online)
Available online at: www.rhimrj.com

This article deals with how E-Commerce has changed the dynamics of many businesses since its inception. Retail market has also experienced the effect of E-Commerce. In recent years, Online Retail (E-Tail) market has become a buzzing word in Indian Economy as well as in the mind of many retail customers. Utilization of this new way of purchasing products by Indian retail customers has shaken the well-established offline retail market; this fear is more intense because of the allegations of the anti-competitive practices being followed by the E-Tailers. Offline retailers are considering the flash sales and never ending discount

sales offered by E-Tailers as anti-competitive. Exclusive sales arrangement of any products on a particular website of specific E-Tailer is also seen as anti-competitive. Specific allegations of predatory pricing are levelled against Flipkart and other E-Tailers.

The relevant part of my research is the meaning of offline and online retail market (E-Tail market) and the major competition law issues relating to E-Tail market. Different anti-competitive practices like horizontal agreement, vertical agreement and predatory pricing in E-Tail market are discussed considering the relevant provisions in Competition Act, 2002. The practices of E-Tailers are evaluated considering Section 3, Section 4 and Section 19 of the Competition Act, 2002.

- (8) Nishith Desai Associates (NDA) *E-Commerce in India Legal, Tax and Regulatory Analysis*, 2015

In this paper the relevant part for my research are some of the common business models which are facilitated by e-commerce are discussed: Business-to-Consumer (B2C), Business-to-Business (B2B), Consumer-to-Consumer (C2C), Consumer-to-Business (C2B). Then security issues in E-Commerce- (a) Authentication and Identification (b) Privacy (c) Data Protection (d) Security of Systems discussed are also relevant for my research.

CHAPTER 1. GENERAL INTRODUCTION TO E-COMMERCE

GENERAL INTRODUCTION TO E-COMMERCE

Internet has turned into a very key element in our life and we cannot imagine our life without internet now. With the diminishing cost for the utilization of web along with the change in way of life in urban territories that the web has brought has upheld and supported this revolution from connecting to one another to seeking information and from entertainment to news, web has now acquired a central point. Data Technology has changed the way business was being carried on. Presently it is done electronically-without utilization of paper. The benefit of a signed document has been considerably sorted out by using Electronic Data Interchange (EDI), which is PC to PC transmission of business information in a standard organization and is more secure than an email. The outcome is that in business correspondence, paper is supplanted by organized electronic messages. There are issues so far as typical elements of paper are concerned. They are yet to be determined. Better approaches to deal with them are being proposed yet they have far to go. The Information Technology Act, 2002 gives legitimate assent to “*electronic records*” (Section 4) and to “*electronic signature*” (Section 5). Electronic records might be validated by affixing them (Section 3 and 3A). Before the 2008 Amendment Act, the electronic records could be validated by “*digital signature*”, which is characterized in Section 3 of the IT Act but now “*electronic signature*” is used to validate electronic records.

E-commerce has developed to end up with the trendy expression in corporate circles. A page on the World Wide Web can get in touch with web surfers in each and every state in the country and each and every country on the earth but then there emerges the issues of where precisely a person might sue in case of any default. The prospect that setting a page on the Internet can subject the web distributor to a claim anyplace on earth can positively have chilling impact. Electronic commerce is the facility to carry out dealings involving exchange of goods & services by means of electronic tools and techniques. Net bring down the entry barriers which will enhance the competition and finally bring the prices to a lower level. We can thus conclude that over the time every firm in the online

sector will possibly earn only normal profit.¹ The business action directed through electronic means falls inside of e-commerce. One can say that the E-Commerce sector is flourishing because of different variables that were fundamental for future development of E-trade. The move to internet from customary buying has progressed significantly. Electronic trade or business is more than simply one more approach to support or improve existing business hones. Maybe, e-business is an outlook change. It is a disruptive development that is drastically changing the conventional method for working together.

E-Commerce

There is however no universal description for the word “e-commerce” but diverse associations have characterized it in various ways according to their own understanding. One can define “Electronic commerce” as “Electronic buying and selling on the Internet and includes all the activities that a firm performs or selling and buying services and products are using computers and communication technologies.”²

E-commerce is understood to denote the

*“production, distribution, marketing, sale or delivery of goods and services by electronic means.”*³

While explanation provided by “Asia Pacific Economic Co-operation (APEC)” states that

*“all business activity conducted using a combination of electronic communications and information processing technology”*⁴

- Electronic Commerce (EC) is where business transactions take place via telecommunications networks, especially the Internet.⁵

¹ YOGESH UPADHYAY & S.K. SINGH, PERFECT COMPETITION: FROM MYTH TO REALITY (3 ed. 2008)

²SV JOGA RAO, COMPUTER CONTRACTS & INFORMATION TECHNOLOGY LAW (2nd ed. 2005)

³ "The Work Programme on Electronic Commerce; Background Note by the Secretariat", Council for TRIPS, WTO

⁴ A Didar Singh, *Electronic Commerce: Issues for the South*, pg 4, Working Paper, South Centre (1999)

- E-commerce, ecommerce, or electronic commerce is defined as the conduct of a financial transaction by electronic means.⁶
- Electronic commerce describes the buying and selling of products, services, and information via computer networks including the Internet.⁷

There have been advancements in area of computer technology, information technology and telecommunication so utilization of World Wide Web has attained significant appreciation lately; also they provide channel to trade electronically all over the world. One doesn't simply signify the utilization of world wide web to facilitate exchange but electronic exchanging additionally implies those agreements that two legitimate individuals enter into by the assistance of "computer network" and the computer network is acting as an operator even though it has nil mindful of its very own and depends on the person who is operating him.

An agreement which is displayed finally executed as well as established through the online mode is termed as an e-contract. Basically program in the computer system are utilized in order to computerize the business and that will also supervise the-contracts. E-contracts can be mapped between related projects, which must be indicated to fulfill the agreement necessities. These projects don't include the capacities so that they can handle composite connections among different parties that are involved in an e-contract. Any agreement which is shaped in the way of e-trade by contact of any number of individuals who utilize electronic operator, which may include an email or a PC program that are modified in order to identify the existence of any valid agreement.

Customary principles of contract as well as the remedies for the traditional contract will apply to e-contracts as well. The need and necessity for electronic type of agreement can fundamentally be credited to the requirement for a speedy, effective and efficient method of contracting. The internet being efficient and unbound by difficulties of separation

⁵ E. TURBAN J LEE, D KING & H M CHUNG ELECTRONIC COMMERCE: A MANAGERIAL PERSPECTIVE (1999)

⁶ http://www.straight-on.com/ecommerce_definition.htm9801 (Last updated December 15, 2015)

⁷ www.whatis.com/ecommerce01928 (Last updated December 15, 2015)

gives an open door for people to enter into an agreement over web. In the electronic age, the entire exchange can be finished in seconds, with both sides essentially attaching their electronic signature to duplicate (electronic) of the agreement. There is no requirement for postponed messengers and extra voyaging costs in such a situation.

More organizations are encouraging exchanges by the means of online platform. We encounter remarkable competition in order to aim every single owner of the computer who is associated to internet. In spite of the reality that the business-to-business exchanges have imperative influence in e-commerce, the main source of income in all the developed nations is created from the business-shopper exchanges. Electronic trade give a variety of advantages to the purchaser like accessibility of items at a lesser expense, extensive assessment can be made and also it is less time consuming as everything is available at the click of the mouse. Purchase of the product can be done from home or office or from any place where one has internet connection. Likewise online administrations, example, banking, booking ticketing (aircrafts, railroads, and bus), hotel reservation and so forth have been of remarkable advantage to the clients. Most of the specialists have trust that in the broad-spectrum “e-commerce” will only be showing increase exponentially in the years to come. Business-to-business exchanges shall be the leading income generator however one cannot ignore the power of internet retailing which will also have an exceptional progress.

The instabilities connected with the future improvements of e-commerce make it hard to anticipate its feasible effect on business sector rivalry. Certain attributes of e-business may be relied upon to encourage entry and decrease costs, with the advantages of more prominent competition being transferred to customers. Then again, first mover preferences, system externalities, switching costs and other limitations might present market to a small number of huge players and thus diminish competition. Globally competition authorities are facing the problem to ensure competitive forces are liberal to function in the ever changing e-commerce environment. The test is to shield shoppers from organizations' against anti-competitive conduct, without smothering new and inventive types of competition.

CHAPTER 2. E-COMMERCE IN INDIA

E-COMMERCE IN INDIA

E-commerce has challenged the customary structure of organizations exchanging with buyers. India which is a developing country, e-commerce offers an impressive prospect. E-commerce in India is in the beginning phase, yet even the most-cynical projections show a blast. It is assumed that minimal price of PCs, a developing base for use of Internet, and an undeniably focused Internet Service Provider (ISP) business sector will fuel e-commerce development. To make an effective e-business exchange the “payment and delivery” administrations should thrive to become proficient. Increase in the quantity of organizations utilizing e-commerce sector in the later past has been seen. Significant websites have moved towards electronic commerce as opposed to relying upon advertising income. Numerous websites are currently offering various items and services from electronic items, travel tickets, movie tickets to greeting cards, groceries etc. With “stock” trades coming online the ideal opportunity for genuine e-business in India has at last shown its presence. But on pessimistic view numerous difficulties are confronted by e-commerce destinations. The moderately little “credit card populace” along with that absence of “uniform credit offices” make difficulties in online payment in India. Conveyance of items to shopper through dispatches and postal administrations is not extremely dependable in small cities and rural areas. Indian Banks have come up with “Internet banking facilities” along with that lately postal and courier services has also enhanced enormously. Cutting edge PC innovation like “*secured socket layer (SSL)*” ensures people against installment extortion (“*payment fraud*”) so that they can impart the data to traders and business accomplices. With further change in “Payment and delivery” framework it is anticipated that soon India will turn into a noteworthy performer in the e-commerce sector.

Numerous associations, groups and organizations are starting to exploit the capability of e-commerce but basic difficulties continue and they have to be defeated before e-comm. would turn into a benefit for ordinary individuals. India's e-commerce business is on the development bend and encountering a spurt in development. The greatest portion in e-commerce is of Online Travel Industry and is thriving because of the Internet-smart urban populace. Alternate portions, comprise e-Tailing (online retail), online classifieds

and Digital Downloads. Online travel industry consists of a mix of private players along with a strong government presence. Example of private players are Makemytrip, Cleartrip and Yatra along with that a strong Government presence through IRCTC which is an effective Indian Railway activity. The online classifieds portion is comprehensively separated into three segments: Jobs, Real Estate & Matrimonial. M-Commerce is additionally becoming quickly and turned out to be a steady and secure addition to e-Commerce because of the huge development in versatile client foundation in India, as of late. Expansion and limitations are available in equivalent amount for new e-commerce wanders. Clearly, more online clients in India are willing to make buys through the Internet. E-commerce industry is ready to encounter a soaring development in the following years.

To understand the competition issues in e-commerce it is vital first to comprehend the way of e-commerce and how it might vary from conventional sale channels and how probable it is to grow. In a few occasions e-commerce might speak to an extra delivery or advertising channel, similarly that mail request speaks to an alternate deals channel from retailing. In others, e-trade might make new items, administrations and commercial centers. In either case, “transaction efficiencies” drive the expanded significance of the Internet.

ADVANTAGES OF E-COMMERCE

- It can build benefits by expanding sales and diminishing expenses.
- It offers organization to do business 24*7.
- It gives assistance to organization to have clients in the entire world and not be restricted to a particular region.
- It assists organization to identify new suppliers, accomplices and clients.
- It builds adaptability and simplicity for the clients.
- It can give customized item and client customization.

FACILITATORS OF E-BUSINESS IN INDIA

1. Research have shown a few variables in charge of the unexpected spurt in development of E-comm. in India, for example:

- Swiftly expanding net client base.
- Technology headways, for example, VOIP (Voice over-IP) have conquered any hindrance involving purchasers and dealers online.
- The development of sites as a parkway for data broadcasting and two-route correspondence for online retailers and e-business sellers.
- Enhanced extortion anticipation advances which present a protected and safe business surroundings and forestall Visa cheats, character burglaries, etc.
- The youthful populace finds online exchanges much simpler and advantageous.

2. “Information directories”: Listing of products and services in proper headings and then bifurcating them also to legitimate sub-headings so as to make it very simple task for a genuine data hunter to discover all the information he needs. More over related services which are given by e-commerce platform: Chat rooms, Message boards and so forth.

3. Banks:

(a) “Internet Banking/Phone Banking”: This is an internet keeping money facility accessible for investment account holders and also current record holders. “A few of the exceptional Net banking administrations are: Demat represents deal/buy of stocks and shares, Foreign Exchange administrations, Direct/Instant installment of bills for the record holder’s sake, Financial Planning.”⁸

(b) Credit/Debit Cards : Banks encourage E-commerce by giving the payment instruments such as: Credit or Debit Card, without which E-commerce would be

⁸ Sarbapriya Ray, *Emerging Trend of E-Commerce in India: Some Crucial Issues, Prospects and Challenges*, 2:5 CEIS (2011), available at : www.iiste.org

inconceivable. Banks are focusing on working populace forcefully for Credit or Debit Card.

4. Cash on Delivery: E-commerce has embraced a novel strategy of “Cash on Delivery” to draw in clients and enhance deals. It suits Indian mind of seeing the item physically and afterward paying for it. It blocks clients to uncover the points of interest of their records, and stay away from the fakes that can happen. In this manner, this practice is getting up to speed and large portions of the E-comm. locales are putting forth the same, obviously, at an extra cost.

FIVE EXCEPTIONAL COMPONENTS OF E-COMMERCE INNOVATION

Ubiquity

In customary trade, a commercial center is physical spot you visit so as to transact. E-commerce, conversely, is described by its omnipresence: it is accessible pretty much all around, all the time. It frees the business sector from being confined to a physical space and makes it conceivable to shop from your PC, at home, at work, or even using your cell phone. The outcome is known as a “market space”: “*a marketplace extended beyond traditional boundaries and removed from a temporal and geographic location.*”⁹ From a customer perspective, universality decreases exchange costs—the expenses of taking a part in a business sector. To carry out a transaction, it is no more essential that you invest time, energy and cash going to a business sector.

Global Reach¹⁰

Innovation in e-commerce makes the business exchanges possible to culturally diverse and across the national limits considerably more advantageously and cost viably than is valid in conventional trade. Subsequently, the potential business sector size for e-commerce shippers is generally equivalent to the span of the world's online populace.

⁹ Id

¹⁰ Id

Universal Standards

The specialized measures of the Internet, and thus the specialized benchmarks for transmitting e-commerce, are universal—shared by all countries around the globe. Conversely, most conventional business advances differ with one country to the next.

The all inclusive specialized principles of the Internet and e-commerce enormously bring down business sector “entry costs”—the cost dealers must pay just to offer their merchandise for sale to the public. In the meantime, for customers, all inclusive models lessen “search costs”—the exertion required to discover suitable items. What's more, by making a solitary, one-world market space, where costs and item depictions can be cheaply shown for all to see, value revelation gets to be easier, quicker, and more exact.

“Information Density”

Internet and Web immensely build data thickness—the comprehensive summation and the nature of information which is accessible to all the members of the business sector, customers, and shippers in a similar way. E-commerce innovations lessen data gathering, storing, preparing, and connection costs. In the meantime, these advances increment significantly the precision, and appropriateness of data—thus making data more helpful and imperative than any time in recent memory. Therefore, data turns out to be more abundant, less costly, and of higher quality. In e-commerce markets, costs and expenses turn out to be more straightforward. “*Price transparency*’ refers to the ease with which consumers can find out the variety of prices in a market; *cost transparency*’ refers to the ability of consumers to discover the actual costs merchants pay for products.”¹¹ In any case, there are points of interest for shippers too. Online vendors can find a great deal more about customers; this permits traders to portion the business sector into gatherings willing to pay diverse costs and allows them to take part in “*price discrimination*”—offering the same products, or almost the same merchandise, to diverse focused gatherings at various costs.

¹¹ Id

Personalization/Customization

E-commerce innovations grant personalization: vendors can focus on their advertising so as to messages to particular message to a man's name, intrigues, and past buys. The innovation likewise allows customization-changing the item or service by taking into account a client's inclinations or former conduct. Given the intuitive way of e-commerce innovation, much data about the buyer can be accumulated in the commercial center right now of procurement. With the expansion in data thickness, a lot of data about the shopper's past buys and conduct can be put away and utilized by online vendors. The outcome is a level of personalization and customization unimaginable with existing business advancements.

BENEFITS OF E-COMMERCE

The advantages of e-commerce can be seen to influence three noteworthy stakeholders:

Benefits to organizations

Worldwide commercial center. The solitary physical commercial center situated in a topographical territory has at present turned into a “borderless commercial center” includes national and international markets. To be empowered by online trade, organizations now have entry to people all around the globe. As a result every e-commerce organizations have appearance of virtual multinational enterprises.

“Operational cost reduced”. The expenditure of preparing, disseminating and recovering paper-based data has diminished to a very large extent.

“Mass customization”- E-commerce has changed the manner in which customers procure goods and services. Preparing takes into account items to be altered to the client's prerequisites.

Empowers “reduced inventories”. This is especially helpful for organizations in the high innovation division, where loads of parts held could rapidly get to be old within months.

Lower telecommunication expenditure. Net is less costly than renting phone for the utilization of the association and its accomplices. It is additionally less expensive to send a fax or email through the Internet than direct dialing.

Digitization of items . Especially on account of programming and music/video items, this can be downloaded or messaged specifically to clients through the net in programmed or electronic arrangement.

24-hour-time imperatives is not present by way of e-commerce- Traders and merchants can be reached by or they can contact clients or suppliers whenever they like.

Benefits to consumers

24*7 access. Empowers clients to shop or purchase 24 hours a day as well as throughout the year and from any area of the globe.

More choices. Clients not just have an entire scope of items that they can look over and personalize according to their preference; additionally a worldwide determination of suppliers is also available.

Price comparisons. Clients can "shop" the world over and conduct examinations either straightforwardly by going to various websites, or by going to a solitary site where costs are amassed from various suppliers and thought about.

Enhanced conveyance forms-The quick delivery of electronic merchandise, like, programs or media documents by downloading through the Internet, to the on-line following of the advancement of merchandise being conveyed via mail or dispatch.

Competition. A domain of rivalry where considerable rebates can be found or “value added services” included, as various retailers compete for clients. It likewise permits numerous individual clients to total their requests together into a solitary request and then it is displayed to wholesalers or producers to get a more focused value (total purchasing),

Benefits to society

Empowers more adaptable working practices, which upgrades the personal satisfaction for an entire host of individuals in the public eye. In addition to the fact that this is more advantageous and gives more content and less unpleasant workplaces, it likewise conceivably lessens natural contamination as fewer individuals need to go to work consistently. There is flexible work practice as people can “work from home”.

Interfaces individuals. Empowers individuals from each and every region to connect and get items, services and data which generally would not be so effortlessly accessible to them.

Encourages “delivery of public services”. For instance on-line counsel with specialists or medical caretakers is available, filing of taxes through internet.

RESTRICTIONS OF E-COMMERCE

Applying Newton’s Law “For every action there is equal and opposite reaction”, we can conclude that for every advantage there are confinements to e-commerce. These again will be dealt by looking at three noteworthy stakeholders.

Limitations to organizations

Absence of adequate security framework and steady quality- There are news of websites and databases which are hacked as well as the security loopholes in programs.

Quickly developing and evolving technology, so there is dependably a sentiment attempting to 'make up for lost time' and not be abandoned.

Under pressure to advance and create plan of action to use the new open doors .The simplicity with which plans of action can be replicated and copied over the Internet expand that weight and abridge longer-term upper hand.

Confronting expanded rivalry both national and global frequently prompts price wars and consequent unsustainable misfortunes for the business. The high level of competition may lead to loss for organizations.

Issues with similarity of old with the newer innovation. There are issues where more established business frameworks can't correspond with web based and Internet foundations, prompting them in establishing two frameworks (Conventional along with the online). This frequently prompts investing in new system or a foundation, which connects the diverse frameworks. In both cases this is both monetarily unreasonable and also problematic to the proficient running of associations.

Limitations to consumers

Requirement of Computer for people to take part in the latest "advanced" economy, which implies an underlying investment expense to clients.

A fundamental learning is necessary of computer and of the net.

Expenditure for the access to Internet, whether dial-up or broadband duties.

The underlying cost of purchasing hardware as well as ensuring that the innovation is redesigned routinely to be good with the changing prerequisite of the Internet.

Absence of safety and privacy of data- No one can control information which is gathered over the Web. Internet laws are not universal thus sites facilitated in various nations could probably have laws that guarantee protection of information or there is possibility that they don't have any such laws.

Electronic procedures have supplanted physical contact and connections. Clients can't touch and feel items that are sold online.

A deficiency of confidence since they are communicating with faceless PCs

Limitations of e-commerce to society

Collapse in human communication. As individuals turn out to be more used to cooperating electronically there could be a disintegration of individual and social aptitudes which may in the long run lead to where individuals are more open to associating with a screen than vis-à-vis than personal communication.

Social division. A potential danger of expansion in the social separation – so individuals who don't have specialized aptitudes will not be able to secure employments that pay them better and they might shape into an underclass with probably perilous ramifications for societal stability.

Reliance on the information transfer framework, power and IT abilities, which decreases the advantages with regard to developing nations when power, propelled information transfer bases and IT aptitudes are unfocused, infrequent or else undeveloped.

Worn out assets- With the rapid innovation the question appears how one shall get rid of the old PCs, speakers and other equipment or program.

Facilitates “Just-In-Time manufacturing”- Which could plausibly immobilize an economy at the time of emergency because stock is kept to a base and conveyance depend on pre-set level of stock which goes for a considerable length of time rather than weeks.

Policing Internet is troublesome task, which implies various wrongdoings regularly go undetected. There is likewise a disagreeable ascent in the accessibility and access of ‘foul material’ on the internet.

The advantages and constraints talked about here are in no way conclusive or a thorough list.

CATEGORIES OF E-COMMERCE¹²

Mainly e-commerce refers to “buying, selling, marketing and servicing of products or services over internet” and it is divided into four main categories B2B (Business to Business), B2C (Business to Consumer) and C2C (Consumer to Consumer) and C2B(Consumer to Business).

“Business-to-business (B2B)”: The trading of items or data between business elements. B2B exchanges are to a great extent between mechanical producers, accomplices, and retailers or else involving organizations. B2B alludes to the complete range of e-comm. which can happen among any two associations. In B2B e-comm. the activities involved include “purchase and procurement, supplier management, inventory management, channel management, sales activities, payment management, and service and support.”

“Business-to-customer (B2C)” :The trading of items or data among business and shoppers in a retailing relationship.

“Consumer to-Consumer (C2C)”: They don't structure high partition of electronic business. For example they include sites which facilitate auction. Fundamentally, if somebody has anything to offer, in that case he can offer for it through public sale websites. Consumer to-Consumer trades include exchanges between and among shoppers.

“Consumer-to-Business (C2B)”: Purchasers unite as one so that they frame and present themselves like aggregate purchaser to organizations in a “consumer-to-business” classification. These gatherings might be monetarily spurred or they may be socially arranged with the cause which they are supporting.

Business-to-Government (B2G) :The trading of data and items between business associations and government organizations on-line.

¹² Id

BARRIERS TO E-COMMERCE IN INDIA

i) “Payment Collection”: When get paid by net banking, one need to give “revenue” even with a business of meager edge. This viably implies one separates with half of benefits. Fake charges, charge backs and so on all turn into vendor's obligation and henceforth to be represented in the plan of action.

ii) Logistics: E-comm. needs to convey the item safely in the hands of the right person in the allotted time. Normal post doesn't offer an adequate administration level so one may needed to take protection for high esteem sent articles expanding the expense.

iii) Seller Management: However propelled framework might be, merchant will need to descend and bargain in a wasteful framework for stock administration. The majority of these sellers won't convey any of computerized information for their items. Neither are there any pleasant appearing photos, nor any advanced information, or system to verify at day by day costs, accessibility to keep your site up to date.

iv) Tax assessment: VAT, Octroi and bunches of state particular tax structures which go with them. This can be mistaking often with bunches of exemptions and uncommon standards.

v) “Excessive pricing”: Over the more extended term unreasonable valuing might turn into a genuine concern toward those online organizations which create “dominant positions” in their important business.

vi). “Collusion”: There are various qualities of e-trade that may be relied upon to encourage this deceitful conduct, even without joint endeavors and online commercial centers.

vii). “Cyber wrongdoing” in online transaction:

Digital wrongdoing is causing alert to the buyers with respect to online transaction in e-commerce sector. Nobody wishes to end up being a victim of digital wrongdoing, which is a genuine peril to e-trade. Cybercrime incorporates criminal acts, for example, PC infections, phishing, hacking, etc which are the root cause for the e-trade sites to drop

their incomes. Knowledge and safety in opposition to digital wrongdoing should be basic for organizations included in e-commerce.

CHAPTER 3.
LEGAL VALIDITY
OF ELECTRONIC
TRANSACTIONS

LEGAL VALIDITY OF ELECTRONIC TRANSACTIONS

Legal issues concerning development and legitimacy of electronic exchanges like online contracts are discussed and in addition enforcement issues are also dealt with at last:

Formation of an E-Contract

An "*e-contract*" means an agreement made electronically. An e-contract is in this manner a species of an enforceable agreement created completely or somewhat in electronic structure. The expressions "*e-contract*" and "*online contract*" are frequently used synonymously; however "*e-contract*" is a broader expression which includes in its ambit "*online contacts*". In e-contract, all or some of the activities are carried out by electronic means. It is, in this way, not necessary that all process (negotiation, proposition, and acceptance, so on) ought to have been carried out electronically.

The most well-known types of e-contracts in e-commerce are "*click wrap*", "*browse wrap*" and "*shrink-wrap contract*". The provisions provided in each of the contract are accessible to the contracting party in a structure which is fundamentally dissimilar from the standard paper document.

In "*click wrap contract*", the parties to the contract give their confirmatory approval by clicking on an "*I accept*" icon. There is a scroll box which allows the parties to contract to scrutinize the provisions of the contract.¹³ While surfing internet we generally come across these types of agreements, for example, "*I AGREE*" to the provisions or "*I DISAGREE*" to the above conditions. "Click-wrap agreements" are those in which a contracting party goes through the terms and conditions in the website or the program and then the party has to show his consent to the same, by a click on "I Agree" or his decline by click on "I Disagree". These types of contracts are widely used on the Internet, from giving permission to enter a site or download any software.¹⁴

¹³ Nishith Desai Associates (NDA), *E-Commerce in India Legal, Tax and Regulatory Analysis*, 2015

¹⁴ JUSTICE YATINDRA SINGH, *CYBER LAWS* (4th ed. 2010)

A “*browse wrap agreement*” is proposed to be obligatory on the contracting party by the mere use (or browse) of the site.¹⁵

“*Shrink wrap agreements*” is not directly related to e-comm. sector but is applicable in the circumstance where the type of goods sold through them is connected with “shrink-wrap agreements”. The contracting party can examine the provisions of contract subsequent to the opening of the container in which the product is packed.¹⁶ Generally CD Rom of software contains such agreements. Though the main provisions are printed on the cover of CD Rom but some extra terms are forced when such licenses emerge on the screen when the CD is downloaded to the computer. If the user does not like the extra terms of the license then he has the right to return the CD. The validity of the “Shrink-wrap agreements” came up for deliberation in the famous case of *ProCd, Inc v. Zeidenburg*¹⁷ in which it was held

“that the very fact that purchaser after reading the terms of the license featured outside the wrap license opens the cover coupled with the fact that he accepts the whole terms of the license that appears on the screen by a key stroke, constitutes assent to those terms.”

“Electronic Data Interchange or (EDI)”: These agreements used in trade exchanges that facilitate the transmission of information starting with one computer then onto the next in a manner that each exchange in the exchanging cycle will be processed through basically no requirement of paper. There is transfer of data and conclusion of agreements involving the two computers thus we can say that there is transfer of data between an individual and a computer.

LEGITIMACY OF ONLINE CONTRACTS

A valid contract is *sine qua non* of any business transaction and in case of e-comm. also valid contract is the crux of the transaction. Like every other contract electronic contracts

¹⁵ Supra 14

¹⁶ Supra 14

¹⁷ 86 F.3d 1447 (7th Cir. 1996)

are also governed with the essential ideologies that are governing offline contracts, i.e. "Indian Contract Act, 1872 (ICA)" further "Information Technology Act, 2000 (IT Act)" provide for the reinforcement for the legitimacy of online contracts. In this way, ICA and IT Act need to be read together so as to appreciate and offer legitimacy to online contracts.

Section 10 of Indian Contract Act, 1872 states as -

"10. What agreements are contracts

All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained should affect any law in force in [India], and not hereby expressly repealed, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

To summarize up we can say that for legitimate agreement certain conditions ought to be fulfilled-

- i. Contracting parties should have "*free consent*" to enter into the agreement;
- ii. "*Lawful consideration*" should be present;
- iii. Contracting parties should be "*competent to contract*";
- iv. There should be "*lawful object*" of the agreement.

In Information Technology Act, 2000 basically three parties are identified in an electronic transmission process, to be named as, 'the originator'¹⁸, 'the intermediaries'¹⁹ and 'the addressee'²⁰.

¹⁸ Section 2 (1)(za) Information Technology Act, 2000 "originator" means a license granted to a Certifying Authority under section 24 IT Act;

¹⁹ Section 2. Definition Information Technology Act, 2000 "intermediary" with respect to any particular electronic message, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message;

²⁰ Section 2(1)(b) Information Technology Act,2000 "addressee" means a person who is intended by the originator to receive the electronic record but does not include any intermediary;

There are some provisions, in particular, relating to legality of online contracts like Section 10A²¹, Section 11²², Section 12²³ and Section 13²⁴ of the IT Act which deals with

²¹ **Section 10A of Information Technology Act, 2000- Validity of contracts formed through electronic means.**

Where in a contract formation, the communication of proposals, the acceptance of proposals, the revocation of proposals and acceptances, as the case may be, are expressed in electronic form by means of an electronic record, such contract shall not be deemed to be unenforceable solely on the ground that such electronic form or means was used for that purpose.

²² **Section 11 of Information Technology Act, 2000- Attribution of electronic records-**An electronic record shall be attributed to the originator:

- (a) if it was sent by the originator himself;
- (b) by a person who had the authority to act on behalf of the originator in respect of that electronic record; or
- (c) By an information system programmed by or on behalf of the originator to operate automatically.

²³ **Section 12 of the Information Technology Act, 2000-Acknowledgment of receipt**

1- Where the originator has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by—

- (a) any communication by the addressee, automated or otherwise; or
- (b) Any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received.

2- Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator.

3- Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

²⁴ **Section 13 of the Information Technology Act, 2000- Time and place of dispatch and receipt of electronic record**

1. Save as otherwise agreed to between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator.

2. Save as otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely :—if the addressee has designated a computer resource for the purpose of receiving electronic records-

- a. receipt occurs at the time when the electronic record enters the designated computer resource; or
 - b. If the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;
- If the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee.

1. Save as otherwise agreed to between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business.

2. The provisions of sub-section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3).

3. For the purposes of this section, —

- a. if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

‘validity of contracts formed electronic means’, ‘attribution of electronic records’, ‘acknowledgement of receipt’ and ‘time and place of dispatch and receipt of electronic record’ respectively. These all provisions in the IT Act are based on the UNCITRAL model law on e-comm. 1996.

Court in “*Trimex International FZE Ltd. Dubai v. Vedanta Aluminum Ltd*”²⁵ held that

“*e-mails exchanges between parties regarding mutual obligations constitute a contract*”

Section 13 of IT Act just clarifies when “dispatch and receipt of *electronic records*”²⁶ occur and is intended to ascertain “time of dispatch and receipt of information”, which is a significant aspect in several contracts. Therefore Section 13 of the IT Act offers a framework for understanding the formation of online contracts. It does not alter or modify the existing “substantive law of contract”. To determine the formation of online contracts, we have to read Section 13 of the IT Act with Section 4²⁷ of the Indian Contract Act, 1872.

The Supreme Court of India, observed and recognized the difference between ‘postal rules’ and ‘receipt rules’ as explained in *Bhagwandas v. Girdharilal*²⁸, following the English decision in *Entores Ltd v. Miles Far East Corporation*²⁹, had held that “Section

b. if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

c. ‘Usual place of residence’, in relation to a body corporate, means the place where it is registered.

²⁵ (2010) 1 SCALE 574

²⁶ Section 2(1) of the Act defines an ‘electronic record’ as: ‘data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

²⁷ Section 4. Communication when complete. – The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete. -

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge, of the proposer.

The communication of a revocation is complete. -

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

as against the person. to whom it is made, when it comes. to his knowledge.

²⁸ *Bhagwandas Goverdhandas Kedia v. Girdharilal Parshottamdas and Co.*, AIR 1966 SC 543

²⁹ (1955) 2 QB 327

4 of the ICA is applicable only in non-instantaneous forms of communication and does not apply to instantaneous forms of communication.”³⁰

This technique is helpful only for non-instantaneous form of communication, for example, contracts that are completed by E-mail and this method may be inapplicable in instantaneous forms of agreement like “*web click agreement*”. In instantaneous form of communication it is often held that a contract is formed when the offeror receives the acceptance. But in online contracts “an offer or acceptance is complete when the addressee is in receipt of the electronic record” as defined in Section 13(2) of the IT Act, 2000.

Electronic contracts such as “*click wrap agreements*” shall be legal as well as enforceable in case the necessities of a legitimate contract according to Indian Contract Act, 1872 are fulfilled, unless it is expressly prohibited under any statute. In e-comm. sector provisions of the contract are of significance in order to determine if the online exchange meet the necessities of legal validity of any contract.

The Information Technology (Amended) Act, ITAA, was amended in 2008 to increase security of e-comm. transactions, with special provisions for legal recognition of digital signatures and electronic documents. Section 43A³¹ of ITAA holds e-comm.companies accountable for protection of personal data. However IT Act is not applicable related to negotiable instruments, power of attorneys, trust, wills contracts available to be purchased or conveyance of immovable property.

The terms and conditions connected with online commerce are important to ensure and decide if the online exchange has met with necessities of a legitimate contract. Unless expressly prohibited click wrap agreements would be valid as well as enforceable if the necessities of legitimate contract as per Contract Act, 1872 are fulfilled.

³⁰ MURRAY ANDREW, ENTERING INTO CONTRACTS ELECTRONICALLY: THE REAL W.W.W. (3rd ed. 2000)

³¹Section 43A. Compensation for failure to protect data. - Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected. (Change vide ITAA 2008)

According to the Indian Contract Act, 1872 there is no requirement for physically signed written contract. But there is signature requirement under certain statutes, for example Copyright Act, 1957 states that “an assignment of copyright needs to be signed by the assignor.” In such a case the IT Act treats “electronic signature” equivalent to “physical signatures”. The only condition attached is that “electronic signature” should be issued by the competent authorities under the IT Act.

Further in online contract it is not to check and confirm the age of person executing online contracts. The problem with this is that in Indian Law “minor is not competent to enter into contract” and such an agreement entered by a minor is not enforceable against the minor.³²

*“Section 11 of Indian Contract Act, 1872- Who are competent to contract – Every person is competent to contract who is of the age of majority according to the law to which he is subject, 3*and who is of sound mind, and is not disqualified from contracting by any law to which he is subject.”*

In India, all instruments that create certain rights or they transfer certain rights then such instruments require stamping and it is further dependent on particular stamp duty enactment of various states in India.³³

Online contracts in e-commerce stage

Often customers have little or no scope for negotiations in e-comm. while entering into any online contract. Jurisprudence related with standard structure electronic agreements if conscionable or not is not developed so well in India. So then the problem arises if such “standard structure of electronic contracts” is to be considered conscionable or not and if it is liable to be struck down by the courts. However, many times courts in India have to deal with instance in which the provisions of the agreements were negotiated among the parties who were in disproportionate positions.

³² Supra 14

³³ Supra 14

Under the Indian Contract Act, 1872 some provisions expressly deal with the unfair or invalid contracts, for example, the purpose of the agreement is conflicting with “*public policy*” subsequently in such case the agreement is invalid and it cannot be enforced. The burden is on the individual having dominating place to establish that the agreement was not induced by “*undue influence*” in the case of unconscionable contracts. “*Public policy*” or “*opposed to public policy*” is not defined anywhere in the Act. However court has authority to seize any clause which is against the “*public policy*” and declare it void and inadmissible.

“16. Undue influence- (1) *A contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.*

(2) *In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another-*

(a) *Where he holds a real or apparent authority over the other or where he stands in a fiduciary relation to the other; or*

(b) *Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.*

(3) *Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.....”*

“23. What considerations and objects are lawful and what not. – The consideration or object of an agreement is lawful, unless- it is forbidden by law;

or is of such a nature that, if permitted, it would defeat the Provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another or; the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.”

“24. Agreement void, if considerations and objects unlawful in part .-If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.”

In *LIC India v. Consumer Education & Research Center*³⁴ an insurance arrangement which was issued under the guidance of “Life Insurance Corporation of India (LIC)” was interpreted by Court. The arrangement had brought in itself some essentials of public policy. The court declared

“Certain clauses in the policy, pertaining to restricting the benefit of the policy only to those people employed in the Government as void under Article 14 of the Constitution of India. The Court noted that in dotted line contracts there would be no occasion for a weaker party to bargain as to assume to have equal bargaining power. He has either to accept or leave the service or goods in terms of the dotted line contract. His option would be either to accept the unreasonable or unfair terms or forgo the service forever”

In *Lily White v R Munuswami*³⁵ it was held that

³⁴ (1995) AIR 1811

³⁵ (1966) AIR 13

“a limitation of liability clause printed on the back of a bill issued by a laundry which restricted the liability of the laundry to 50% of the market price of the goods in case of loss was against public policy and therefore void.”

It can be concluded from the discussion in the two cases that it is particularly imperative to have a well drafted provisos of the online contracts as well as customers are provided with ample opportunity to familiarize with those terms of the contract.

SECURITY ISSUES RELATED WITH E-COMMERCE

➤ AUTHENTICATION AND IDENTIFICATION

In spite of the fact that the net has removed the requirement for bodily contact, internet has not been able to get rid of agreement or exchange that need to be validated and in some cases it has to be recorded. With the passage of time various authentication technologies have come up for validating electronic documents furthermore in order to make sure the correct identity of parties is looked into before they enter into any sort of online exchange. Processing the payments is a fundamental element of online business and to facilitate this different and innovative system of payment have evolved.

Frequently online dealings occur among the parties having no former association. This might create issues related with the person's ability, power and legality to enter into a valid agreement. One way to verify the power and legality of an individual is through “electronic signature” in any online data or record.

Truth is that merely appending “electronic signature” according to the Information Technology Act, 2000 gives legal validity to the data or record till the tying of “electronic signature” there is adherence to the manner prescribed in IT Act. Moreover regulatory structure concerning “electronic signature” and to issue “electronic certificate signature” is also provided by the IT Act.

Conditions required to be fulfilled in order to ascertain that the electronic signature is a “secured electronic signature”:

- i. No person other than the signatory had private control over the signature making information at the time of affixing the signature.
- ii. The manner of storing as well as affixing the signature formation information was adhered as might be approved.

Identity Theft and Impersonation

- i. “The IT Act provides that the identity of a person shall be deemed to have been stolen when any unique identification of a person (such as the electronic signature or password) is fraudulently or dishonestly used. The Act prescribes a penalty of imprisonment of up to 3 years and fine up to INR 1 lakh.”³⁶
- ii. “The IT Act provides that whoever, by means of any communication device or computer resource cheats by impersonation, shall be punished with imprisonment of up to 3 years and with fine of up to INR 1 lakh.”³⁷
- iii. “The IPC further provides that any person who cheats by personation shall be punishable with imprisonment of up to three years and/ or fine.”³⁸

➤ Privacy

Although it is practically very hard to implement any online exchange without any personal data of the users, in the online stage, for example, their identity and monetary data. E-traders might gather other data which is not directly related with the transaction but just to survey the choices, pattern of search or the preference in their search. An essential area of concern for online business is to keep up security of all users safe and secured.

Areas of concern for e-trader are:

- i. Access to personal data of its user in unauthorized manner, or
- ii. Personal data of the users being misused.

³⁶ Section 66-C of the Information Technology Act 2000

³⁷ Section 66-D of the Information Technology Act 2000

³⁸ Indian Penal Code, 1860 Section 419 - Punishment for cheating by personation

Whoever cheats by personation shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

Earlier due to lack of any specific enactment, Supreme Court of India in *Kharak Singh v State of UP*³⁹ and *People's Union of Civil Liberties v. the Union of India*⁴⁰ recognized the “right to privacy” under the “right to life and personal liberty”⁴¹. But this right under the Constitution of India, 1956 could be exercised only in opposition to any government action. Violations of “privacy” by any Non-state entity may perhaps be dealt with principles of torts such as breach of confidence, trespass and defamation as and when it can be applied to the given situation.

The IT Act states the concept of privacy in very restricted sense-

*“the privacy of a person is deemed to be violated where images of a private areas are captured, published or transmitted without his or her consent in circumstances where he or she would have had a reasonable expectation of privacy”*⁴²

The punishment in violation of privacy in India is also prescribed by the IT Act as “imprisonment of up to 3 years and/or fine of up to INR 2 lakhs”.

➤ INFORMATION PROTECTION

In 2011 rules under the Section 43A of the IT Act were notified as "*Reasonable practices and procedures and sensitive personal data or Data Rules, 2011*". These rules offer an outline for the security of such information in India ("Data Protection Rules").

“43A of IT Act. Compensation for failure to protect data. - Where a body corporate, possessing, dealing or handling any sensitive personal data or information in a computer resource which it owns, controls or operates, is negligent in implementing and maintaining reasonable security practices and procedures and thereby causes wrongful loss or wrongful gain to any person, such body corporate

³⁹ AIR (1963) SC 1295

⁴⁰ (1997) 1 SCC 318

⁴¹ Article 21 of the Constitution of India, 1956

⁴² Section 66-E of the Information Technology Act, 2000

shall be liable to pay damages by way of compensation, not exceeding five crore rupees, to the person so affected. (Change vide ITAA 2008)”

A. Sorts of Information which is enclosed in the “Data Protection Rules”: Essentially only two categories of data need protection:

i. “Personal information (PI)” which includes

“any information that relates to a natural person, which, either directly or indirectly, in combination with other information available or likely to be available with a body corporate, is capable of identifying such person”.

ii. “Sensitive personal data or information (SPDI)” that includes

“such PI of a person which consists of a. password; b. monetary data, for example, Bank record or credit card or debit card or other payment instrument details ; c. physical, physiological and mental health condition; d. sexual orientation; e. medical records and history; f. Biometric data.”⁴³

The Data Protection Rules, lay down certain compliances in order to defend “SPDI” in electronic medium by “a corporate entity which possess, deals with or handles such SPDI”, for example,

i. A privacy policy should be framed according to the Data Protection Rules;

ii. A valid consent from the contributor of “SPDI”;

iii. An “opt out option” should be given to the contributor of “SPDI”;

iv. Preserve “reasonable security practices and procedures” according to the necessities of “The Data Protection Rules”.

B. Accountability under “The Data Protection Rules”

The IT Act prescribes penalties for wrongful disclosure of PI for imprisonment up to three years and/or a fine up to INR 5 lakhs. Similarly the Information Technology

⁴³ http://www.nishithdesai.com/New_Hotline/IT/Technology%20109i0Law%20Analysis_June180u91.htm
(Last updated at December 3,2015)

Act “prescribes compensation to be awarded by companies that are negligent in the protection of SPDI of any person.”⁴⁴

➤ SECURITY OF SYSTEMS

Security over the Internet is of immense importance to promote e-commerce. Since e-comm. companies keep sensitive data (counting SPDI) on their servers, e-comm. companies must ensure that they have adequate security measures to safeguard their systems from any unauthorized interruption. An organization could face security threats externally and also internally. Externally, the organization could face problems from hackers, viruses and trojan horses, etc. Internally, the organization must ensure security against its technical staff and employees.

PAYMENT MECHANISMS FOR E-COMMERCE

Payments are an integral part of working together, whether in the conventional way or online. The Payment and Settlement Systems Act, 2007 (PSS Act) regulates both conventional and electronic payment system in India

The Payment and Settlement Systems Act, 2007 describes a “payment system” in the following words: “*a system that enables payment to be effected between a payer and a beneficiary, involving clearing, payment or settlement⁴⁵ services or all of them but does not include a stock exchange*”.

The Payment and Settlement Systems Act, 2007 elaborately explains that “payment system includes the systems enabling credit card operations, debit card operations, smart card operations, money transfer operations or similar operations.” The Payment and Settlement Systems Act, 2007 gives authority to the “Reserve Bank of India (RBI)” to administer the payment systems that is equipped in our nation.

⁴⁴ Section 43A Information Technology Act, 2000

⁴⁵ Section 2 (n) of the PSS Act defines ‘Settlement’ as settlement of payment instructions and includes the settlement of securities, foreign exchange or derivatives or other transactions which involve payment obligations.

Notwithstanding The Payment and Settlement Systems Act, 2007, there are quite a few additional rules and regulations, which include all those regulations that are recognized by the Reserve Bank of India which oversee a system involving “clearing, payment or settlement of a payment, depending upon the nature of service or undertaking involved.”

Payment Instruments

Any kind of instrument whether electronic/physical having an economic value is described as a “Payment instrument”. Some of the conventional “payment instruments” include checks, drafts, money orders etc. But now with the advancement of knowledge we have encountered progress in the kinds of the “payment instruments” also which are accessible for the utilization. These “payment instruments” are a key to e-commerce as they facilitate online payments.

A few crucial “payment instruments” that are helpful for e-comm. exchanges are:

1. Debit/Credit cards

In spite of the fact that these cards are not fresh tools in any way, credit card exercise has witnessed development in India over the previous two decades. These cards have become an essential requirement now whether one has to make payment & is short of cash or else one has to do online shopping. Moreover there is increment in the disposable income which also attracts the payment to be made through the card. RBI regulates the issue of both credit cards and debit cards and currently just “banking and non-banking financial institutions” are permitted to issue such cards, subject to guidelines issued by the RBI.

2. Pre – Paid Instruments

“Pre-paid Instruments” is defined in The RBI in its guidelines⁴⁶ as

“...payment instruments that facilitate purchase of goods and services, including funds transfer, against the value stored on such instruments...”

⁴⁶ “Issuance and Operation of Pre-paid Payment Instruments in India – Consolidated Revised Policy Guidelines”, DPSS.CO.PD.No. 2074/02.14.006/2013-14

Pre-paid instruments can include “smart cards, magnetic stripe cards, internet accounts, internet wallets, mobile accounts, mobile wallets, paper vouchers and any such instrument which can be used to access the pre-paid amount”. According to the RBI guidelines⁴⁷ Pre-paid instruments can be of 3 kinds:

“Closed system payment instruments”

“Semi-closed system payment instruments”

“Open system payment instruments”

Issue of “pre-paid instruments”, entities which can issue “pre-paid instruments”, the capital requirements, the safety measures regarding “money laundering”, purposes to issue a “pre-paid instrument” etc. is all under the control and is regulated by Reserve Bank of India.

3. Payments by online mechanism

“Secure electronic assets transfer (EFT)” is very significant to e-comm. sector. Payments through credit card, computerized money, smart card, e-wallets, and micropayments are ways to do transaction by online means.

⁴⁷ Id

CHAPTER 4.

E-COMMERCE

AND

COMPETITION

E-COMMERCE AND COMPETITION

General terms used under competition law with regard to e-commerce sector

In competition law relevant market is an epicenter. And to discuss the potential competition law issues in e-commerce we need to first study what is “relevant market” in the perspective of Competition law. Relevant market is further subdivided into two categories- “relevant product market” and “relevant geographic market”. Market means where the buyers and sellers have access to each other. The relevant market is the area of effective competition.⁴⁸ Further we need to assess the market share and market power.

Section 2(r) of the Competition Act, 2002.

“‘relevant market’ 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;”

Section 2(s) of the Competition Act, 2002 states as follows

“‘relevant geographic market’ means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas ”

Section 2(t) of the Competition Act, 2002 is described as follows

“‘relevant product market’ means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”

The “European Commission’s notice of 9 December 1997”, on the definition of the “relevant market” for the purpose of Community competition law states:

⁴⁸ Standard Oil Co. of California and Standard Station Inc. v U.S., 337US 293.

“Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, both in terms of products/services and geographical location of suppliers .”⁴⁹

One of the leading cases in U.S.A. on the issue of ‘Relevant Market’ is that of *United States v. E.L. Du Pont De Nemours & Co.*⁵⁰ the court, inter alia, observed that:

- *“Determination of the competitive market of commodities depended upon how different from one another are the offered commodity in character or use;*
- *What are the market alternatives that buyer may readily use for their purpose;*
- *How far the buyers will go for substitution of one commodity for another;*
- *Products need not be fungible to be considered in the relevant market;*
- *Party has monopoly power, if it has, over any part of trade or commerce, a power of controlling prices or unreasonably restricting competition;*
- *In considering what is relevant market for determining the control of price and competition, no more definite rule can be laid down than that commodities reasonably are interchangeable by consumers for the same purpose.....”*

The question before us is if e-commerce is creating any new market for purpose of competition approach or if it merely constitutes new channel for sale, lying inside the same market and which is challenging with the customary channel of sale. The existing framework is sufficient to deal with e-commerce issues but we have to look if the change in “*search cost*” and “*switching cost*” will make the market narrow or it will make the market wide also the impact on “*geographical market*” as with e-commerce whole world is open for business.

⁴⁹ The Official Journal: OJ 372 dated 9/12/1997

⁵⁰ 351 US 377

For the purpose of “market definition” is e-commerce creating any new market for purpose of competition approach or if it merely constitutes new channel for sale?

The issue if conventional commerce and e-commerce are lying inside same market will most likely appear in many cases. Basically e-commerce sometimes creates an extra sales channel inside the same market. But sometimes it appears to generate new items, and consequently it appears to create a whole “*new economic markets*”.

The main issue to consider is if the “*different sale channel*” is inside the same “*product market*”. Basically the competition authorities have to determine if mail order is competing with the other traditional retail channels.

First one need to scrutinize what the *customer perceive* with regard to the difference in online transaction and conventional channel of sale. To assess such questions, one should firstly examine customers' perceptions as to the differences between online exchanging and conventional channels. This requires an analysis of prices in both the channels as well as analysis of the supplementary services that are provided by different channels.

Then one needs to assess if e-commerce and the conventional commerce are characterizing opposing channels or they represent separate market. The assessment is mainly an empirical issue and we need to analyze it on every case differently. For such assessment “*relevant market*” needs to be looked into.

With the increase in the scope of “price discrimination” imply that market definition will become narrow?

In e-commerce there is a greater scope for price segregation by charging a different price from every customer according to their readiness to pay for an item and thus business might also increase profits.

Whether there is any impact of changes in “Search cost” & “Switching cost” on “market definition”?

Specialized search engines facilitate to reduce search as well as selection cost in e-commerce for some items. Thus consumers are in a better position to compare and then

evaluate diverse items as well as various sellers, and these items as well as the sellers pose to be substitutable. This may result to expand the “*product market definition*”. Then again, widening of market depends on consumer’s readiness to switch the items. Although there is no doubt that there is decrease in “*search cost*” but the issue will be if e-commerce ends up with the increase in “*switching cost*”, which will ultimately make the “*product market*” narrow again as the suppliers will be competing against each other in order to secure more consumers for their items.

Geographic market definition with regard to e-comm.

Internet enables to easily locate buyer as well as seller irrespective of their location. Thus the market of e-commerce is most likely to be wider as compared to the conventional geographic markets. Internet expands the scope of geographic market and makes it a global market. To assist cross-border trade one has the option of credit card payment.

However certain barriers will remain in order to transact across the national boundaries like where physical delivery of item is required even though the item is purchased online will require dissemination cost which will act as important barrier to international trade.

Some other components that limit international trade include preference for any local seller or any particular brand, security issues in payment mechanism, national regulations or sometimes language may also act as a barrier. Nearby physical outlets and tax issues as well as advertisements by local dealers for e-commerce is likely to limit capacity of seller in order to draw international customers.

Lastly seller may also impose some restrictions to sustain separate “*geographical markets*”. Example certain websites recognizes nationality of its consumers which might act as a potential for price differentiation among different countries. Price segregation inside a nation is very hard to attain but when consumers register their address prior to receive price data there is a possibility of “*price discrimination*”.

Assessment of ‘market power’

“‘Market power’ presents undertakings with the possibility of profitably raising prices over a period of time; the expression ‘raising price’ here includes, and is a shorthand for, other ways in which competition can be restricted, for example by limiting output, suppressing innovation, reducing the variety or quality of goods or services or by depriving consumers of choice, all of which are clearly inimical to consumer welfare.”⁵¹

No firm has “market power” in a perfectly competitive market as against in a monopolistic market where only one firm has “market power” or one firm has absolute control over the market.

“There are numerous ways in which this key concern – the exercise of market power – is manifested, by implication if not expressly, in EU and UK competition law. A variety of legal tests and expressions will be found, but in essence they all express a concern about the misuse of market power:

- There are rules that firms should not enter into agreements to restrict competition (Article 101 TFEU; Chapter I prohibition, Competition Act 1998); however any such restriction must be appreciable, and there are various ‘de minimis’ exceptions where the parties lack market power⁵²*
- Block exemption is not available to parties to agreements where the parties’ market share exceeds a certain threshold⁵³*
- Firms should not abuse a dominant position (Article 102 TFEU; Chapter II prohibition, Competition Act 1998)*

⁵¹ Vickers, *Market power in competition cases*, 2:3 ECJ (2006)

⁵² The e *De Minimis* Doctrine

⁵³ Article 3 of Regulation 772/2004, OJ [2004] L 123/11.; Article 3 of Regulation 330/2010, OJ [2010] L 102/1, on vertical agreements; Article 4 of Regulation 1217/2010, OJ [2010] L 335/36, on research and development agreements; and Article 3 of Regulation 1218/2010, OJ [2010] L 335/43, on specialization agreements.

- *Concentrations can be prohibited under the EUMR that would significantly impede effective competition, in particular by creating or strengthening a dominant position*
- *Mergers can be prohibited under UK law that would substantially lessen competition (Part 3 of the Enterprise Act 2002)*
- *‘market investigations’ can be conducted by the Competition Commission where features of a market could have an adverse effect on competition (Part 4 of the Enterprise Act)*
- *Other variants can be found: for example in the electronic communications sector regulatory obligations can be imposed upon firms that have ‘significant market power’, which has the same meaning for this purpose as ‘dominance’ under Article 102 TFEU.”⁵⁴*

Market shares

Normally market share is not a dependable criterion to market power. But there is possibility of existence of high “*market power*” if the firm has a very high “*market share*” as opposed to a firm which has low “*market share*”.

In order to assess the “*market power*”, examination of “*market shares*” shall persist being a vital factor but a few of the distinctive characteristics of online commerce might have an impact on the investigation of market shares.

The emergence of online transaction recently might create difficulties for the competition authorities to collect the exact sales information. This will decrease their ability to define market further it will also limit their ability to calculate market shares for the online transactions. But over the time it is anticipated that there will be improvement in the accessibility of information regarding sales.

Entry barriers

⁵⁴ RICHARD WHISH AND DAVID BAILEY , COMPETITION LAW (7 ed. 2012)

There is expectation of lower barriers to entry in e-comm. business than in the customary commerce due to these reasons-

- Expenses of setting up an online retail is comparatively lower when we compare the expenses of setting a customary store.
- The search cost is comparatively lower due to the use of specialized search engines for online shopping.
- Innovation and growth of e-commerce markets.

Likewise some features of e-commerce might increase the entry barrier as against the conventional commerce which are mainly classified-

- *“Absolute advantages”*
- *“Strategic advantages”*
- *“Exclusionary behavior”*

Excessive pricing in e-commerce markets

“Excessive price” is charging of *“excessive selling price by a dominant undertaking”*

Factors which encourage correspondence amongst the competitors

For the purpose of reaching at any consensus on any collusive strategy there need to be correspondence between the competitors.

INDIVIDUAL AGREEMENTS AND CONDUCT

Certain acts which are regulated or prohibited under The Competition Act, 2002 are-

- Anticompetitive agreements
- Abuse of dominant position
- Combinations.

ANTI-COMPETITIVE AGREEMENTS

‘Agreement’ is defined in the Section 2 (b) Competition Act, 2002 as

“includes any arrangement or understanding or action in concert,—

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;”

Sections 3 of the Competition Act, 2002 elaborately deal in anti-competitive agreements.

“ (1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in subsection (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution,

storage, acquisition or control of goods or provision of services.

Explanation.—For the purposes of this sub-section, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding

(4) Any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including-

(a) tie-in arrangement;

(b) exclusive supply agreement;

(c) exclusive distribution agreement;

(d) refusal to deal;

(e) resale price maintenance,

shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

Explanation.—For the purposes of this sub-section,—

(a) ‘tie-in arrangement’ includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods;

(b) ‘exclusive supply agreement’ includes any agreement restricting in any manner the purchaser in the course of his trade from acquiring or otherwise dealing in any goods other than those of the seller or any other person;

(c) ‘exclusive distribution agreement’ includes any agreement to limit, restrict or withhold the output or supply of any goods or allocate any area or market for the disposal or sale of the goods;

(d) ‘refusal to deal’ includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods are sold or from whom goods are bought;

(e) ‘resale price maintenance’ includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

.....”

In *Varca Druggist & Chemist & Others v/s Chemist & Druggists Association, Goa*⁵⁵

“This case was initiated on a complaint filed by Varca Druggist & Chemist through its proprietor Mr. Hemant Pai Angle and two other proprietors of pharmaceutical drugs and medicines firms before the Director General (Investigation & Registrations), Monopolies & Restrictive Trade Practices Commission (DGIR, MRTPC) alleging that the Opposite Party, namely, Chemist

⁵⁵ MRTP C-127/2009/DGIR4/28(decided on 11 June, 2012)

& Druggist Association, Goa (CDAG) was indulging in restrictive trade practices. The case was transferred to the CCI on the repeal of MRTP Act.

The CCI comes to the conclusion that the conduct and practices of CDAG were limiting and controlling the supply of drugs in the district of Baroda in the state of Gujarat in violation of provisions of Section 3(3) (b) read with Section 3(1) of the Competition Act. The CCI imposed a penalty Rs. 2,00,000 on CDAG.”

The Competition Act states that “*any agreement which causes or is likely to cause*” an “*appreciable adverse effect (AAE) on competition in India is deemed to be anti-competitive*”. Any agreement with respect to “*production, supply, distribution, storage, and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India*”⁵⁶ is prohibited under the Competition Act, 2002

In spite of the fact that the Competition Act, 2002 does not characterize AAEC also there is no prescribed regulation in order to decide when an agreement causes or is prone to bring about AAEC however Section 19 (3) of the Competition Act, 2002 indicates a few variables for deciding AAEC. As expressed above AAE is not characterized rather Section 19 (3) of the Competition Act, 2002 gives the accompanying components that the Competition Commission of India shall have appropriate respect when figuring out if an undertaking has an AAEC under Section 3 of the Act.

“Section 19(3) of the Competition Act, 2002

- i. creation of barriers to new entrants in the market;*
- ii. driving existing competitors out of the market;*
- iii. foreclosure of competition by hindering entry into the market;*
- iv. accrual of benefits to consumers;*
- v. improvements in production or distribution of goods or provision of services;*

⁵⁶ Section 3(1) of the Competition Act, 2002

vi. promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.”

In *Automobiles Dealers Association v. Global Automobiles Limited & Anr.*⁵⁷, CCI held

“That it would be prudent to examine an action in the backdrop of all the factors mentioned in Section 19(3).”

The term ‘appreciable’ has been defined in Law Lexicon as follows:

“capable of being estimated, weighed, judged of , or recognized by the mind, capable of being perceived or recognized by the senses, perceivable but not a synonym of substantial(BLACK’S LAW DICT)”

The Competition Act does not classify agreements into horizontal agreements or vertical agreements still when we look carefully at Sections 3 (3) and 3 (4) of the Act, it becomes understandable that the Section 3(3) is expected at horizontal agreement⁵⁸ and Section 3(4) at vertical agreements⁵⁹. There is presumption that horizontal agreements cause AAEC but in case of Vertical agreement rule of reason is applied. Thus for vertical agreements we have to see if they are causing any AAEC or not only if they are causing AAEC then they are anti-competitive in nature.

Section 3(2) of the Act states that

“any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void”

Horizontal agreements under Section 3(3) of the Competition Act, 2002 are presumed to have AAEC in India if they:-

➤ *“Directly or indirectly fix purchase or sale prices;*

⁵⁷ CCI Case No 33 of 2011, decided on July 3, 2012.

⁵⁸ When it is in the same level of the supply chain amongst the real competitors or potential competitors

⁵⁹ When it is among competitors in the different level of the supply chain, Eg. agreement between a producer and its seller

- *Limit or control production, supply, markets, technical development, investments or provision of services;*
- *Result in sharing markets or sources of production or provision of services;*
- *Indulge in bid-rigging or collusive bidding”*

The initial three kinds of behaviors might incorporate all organizations in a business sector, or a larger part of them, planning their business, to viably act like an imposing business model and share the restraining infrastructure so that benefits can be gathered from their plot. The fourth kind of cartelized conduct might include contenders working together somehow to confine rivalry in light of a delicate invitation and may be a mix of the various practices.

The “*rule of reason*” for probing into the legitimacy of the restraints on trade was elaborately described by the US Supreme Court in *Board of Trade of City of Chicago v. US*⁶⁰ in the following manner:

“Every agreement concerning trade, every regulation of trade, restraints. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint is imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.”

⁶⁰ 246 US 231(1918)

The only exemption to “*per-se rule*” is in the nature of “joint venture arrangements which enhance the overall efficiency in terms of production, supply, distribution, storage, acquisition or control of goods or services”. In this way we have to establish a connection linking the cost/quality efficiencies, the agreement and advantages to the buyers must at any rate repay the customers for any genuine or likely negative effect created by such an understanding.

Section 3(4) of the Competition Act, 2002 states a few types of vertical agreements but the list given is not exhaustive and is merely for reference purpose. In vertical agreements there is no presumption of AEEC but CCI have to apply “*rule of reason*” before passing any order on the nature of the agreement.

“(a) *tie-in arrangement*;

(b) *exclusive supply agreement*;

(c) *exclusive distribution agreement*;

(d) *refusal to deal*;

(e) *resale price maintenance,*”

The US Supreme Court explained, in *Northern Pac. R. Co. v. United States*, 356 US 1, the foundation on which the “*per se rule*” was based :

“however , there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate enquiry as to the precise harm they have caused or the business excuse for their use . this principle of per se unreasonableness not only makes the types of restraints which are proscribed by the Sherman Act certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved , as well as related industries, in an effort to determine at large whether

a particular restraint has been unreasonable-an inquiry so often wholly fruitless when undertaken ”

The Competition Act, 2002 expressly states that anti-competitive restraints shall not affect those horizontal and vertical agreements which entail rational conditions in order to guard or restrain violation of, the rights that are approved under the intellectual property laws.⁶¹

ANALYSIS OF CASE

Mr. Ashish Ahuja vs Snapdeal.com & Ors., Case No 17 of 2014, CCI⁶²

Issue

Warranty policy was given by the company to guard its distribution channels at the online portals. In the present case Ashish Ahuja made an accusation against Snapdeal.com and Sandisk in engaging in “*anti-competitive practices*” as well as “*abuse of dominant position*” which was in contravention of the provisions of the Competition Act, 2002.

Allegation by Ahuja

Sale of his (Ashish Ahuja) products on the online portal i.e. Snapdeal had been stopped.

Response of Snapdeal

Snapdeal received a list from Sandisk in which the names of some authorized channel partners were mentioned. The sale was stopped on Snapdeal as a result of the list received.

Order by the Competition Commission of India

The assertion by Sandisk that storage device which were sold from their online portal should only be brought from authorized dealers could not be treated as “*abusive*” because they had a right to protect their distribution channel. Also it was also observed that in this case Snapdeal could not be termed as a “*Dominant player*” due to the fact that it is not

⁶¹ Section 3(5) of the Competition Act,2002

⁶²‘Order of Commission’ (2014) , available at <http://www.cci.gov.in/May2011/OrderOfCommission/262/172014.pdf>> (2 March 2016)

buying or selling storage devices but it is managing a website that will enable those sellers to sell their products by means of the website on behalf of some charge. Thus we can say that CCI has approved products sold by means of online portal should only be brought from its authorized dealers which was considered to be a “*normal business practice*”.

Anti-trust cases in U.S.A.

Profit margins: Reaping large profits by raising prices during a period of declining cost and granting price reduction only when competition from other asserts itself constitute probative evidence of price fixing conspiracy.⁶³

Uniformity of prices: Standardization of prices at an artificial level, which is not connected to the demand and supply of the goods & services, may possibly be evidence from which an conformity or undertaking, or some concert of action among the sellers may be inferred.⁶⁴

Price fixing: Buckelew v. Martens⁶⁵

“Price fixing agreements, whether in fact detriment to the public or not when entered into by competing firms for the purpose of maintain higher prices , are illegal..... the public are entitled to have competition, in order that they may buy at the lowest price, and it makes no difference whether the price-fixing agreements are reasonable or unreasonable or tend to monopoly or not”

Exclusive supply or distribution agreement: An automobile manufacturer cannot require, in his franchise agreements, that his dealers exclusively handle the manufacturer’s car parts and accessories.⁶⁶

⁶³ Le Baron v. Rohm and Hales Co., CA-9, 1971

⁶⁴ U.S. v. Atlantic Co., DC Ga 1950 224

⁶⁵ ANDREAS G. PAPANDREU, COMPETITION AND ITS REGULATION (3rd ed. 2010)

⁶⁶ Englander Motors, Inc v. Ford Motor Co. 267 F 2d 11 (6th Cir 1959).

Obtaining of undertaking from the dealers to purchase all their requirements of one (or more) products from the seller is unlawful.⁶⁷

Refusal to deal:

Business Electronics v. Sharp Electronics⁶⁸

“the termination of an agreement with a price-cutting dealer on the representation of another dealer cannot be said, in the absence of some agreement between the remaining dealer and the manufacturer on prices to be maintained after the termination of the appointment of the dealer, to be per se illegal.

The court also explained the meaning of the term 'restraint of trade' as follows:

The term restraint of trade in the statute, like the term at common law, refers not to a particular list of agreements, but to a particular economic consequence, which may be produced by quite different sorts of agreements in varying times and circumstances. The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted.

The Court decided: In sum, economic analysis supports the view, and no precedent opposes it, that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels.”

In Lorain Journal Co. v. U.S.⁶⁹ U.S. Supreme Court held that

“the right claimed by the Publisher as a private business concern to select its customers and to refuse to accept advertisement from whomsoever it please is neither absolute nor exempt from regulations. Its exercise as a purposeful means of monopolizing inter state Commerce is prohibited by the Sherman Act”

European Union

Manuele Arduenio-Case C-35/99

⁶⁷ Standard Oil Co. of California and Standard Station Inc. v U.S 337 US 293 (1949)

⁶⁸ 485 US 717 (1988)

⁶⁹ 342 US 143

“..... The question referred to the court for a preliminary ruling was: did the decision of the CNF, approved by Ministerial Decree No 585/94, fixing binding tariffs for the professional activity of members of the Bar, come within the scope of the prohibition in Article 85(1) (now Article 81(1)) of the EC Treaty?”

The court ruled that Articles 5 (duty of the Members to act towards fulfillment of Treaty objectives) and 85 of the Treaty did not preclude a member state from adopting a law or regulation 'which approves, on the basis of a draft produced by a professional body of members of the Bar, a tariff fixing minimum and maximum fees for members of the profession, where that state measure forms part of a procedure such as that laid down in the Italian legislation.’”

Flat Glass Carrel-EU

“The European Commission imposed fines totalling €486,900,000 on the following leading manufacturers of flat glass, for coordinating price increases and other commercial conditions for deliveries of flat glass in the EEA. The members of the cartel organized several rounds of price increases, fixed minimum prices and other commercial conditions in an endeavor to raise or otherwise stabilize prices. They also monitored the implementation of the price increase agreements.discussed and agreed upon the level and timing of price increase), target prices, minimum prices, and/or exchanged sensitive commercial information.”

ORDERS OF CCI IN VARIOUS CASES REGARDING ANTI-COMPETITIVE ISSUES

Sunshine Pictures Private Limited & Eros International Media Limited vs Central Circuit Cine Association, Indore & Ors.⁷⁰

⁷⁰ CCI Case No. 52 of 2010 and Case No. 56 of 2010.

“The Informant alleged that under the garb of a trade association the Opposite Party had become a vehicle for collusive conduct for persons and enterprises engaged in identical business of distribution and exhibition of films.

The CCI noted that the associations were indulging in issuing circulars and letters of restricting the exhibition of films and taking punitive action against the Informants, in violation of provisions of Section 3(3)(b) of the Competition Act.

Looking at the gravity of the allegations, the commission decided to impose a penalty on each of these associations at rate of 10% of the average of their three years total receipts.”

Film & Television Producers Guild of India v/s Multiplex Association of India & Ors.⁷¹

“The Film and Television Producers Guild of India, Informant, filed a complaint against Multiplex Association of India (MAI) and various constituents of MAI alleging that MAI was forcing producers/distributors to negotiate revenue sharing only with MAI and not individual constituents. Further, MAI was imposing terms of exhibition which was prejudicial to the producer given the nature of film industry. The Informant alleged that these practices were anti-competitive (Section 3 of the Competition Act) and that MAI was abusing its dominant position (Section (2) (a) and 4 (2) (c) of the Competition Act).

The CCI framed two issues – whether the Opposite Parties (‘OPs’) acted in violation of Section 3 and Section 4 of the Competition Act. After an examination of the detailed findings of the DG, the CCI rejected the same as there was insufficient evidence to establish that OPs had formed a cartel or acted in concert either for the purpose of revenue sharing or controlling the distribution and exhibition of films. Both issues were therefore decided in favor of the Ops.”

⁷¹ CCI Case No. 37 of 2011; decided on January 3, 2013.

Uniglobe Mod Travels Pvt. Ltd v/s Travel Agents Federation of India & Ors.⁷²

“An interesting case relating to the expulsion of a travel agent for its failure to comply with the trade associations notice that members not deal / transact with Singapore Airlines The Informant, Uniglobe Mod Travel Pvt. Ltd., did not comply with several emails of Opposite Party (Travel Agents Federation of India) and was consequently suspended. The Informant had also filed a civil suit in the High Court of Delhi and had withdrawn the same (July 7, 2009) before filing the present complaint (July 21, 2009).

The CCI had framed two issues – whether it had jurisdiction to entertain the complaint and whether OPs had contravened Section 3 of the Act

Although matters relating to transactions between foreign airlines and travel agents were broadly covered by the Director General of Civil Aviation (DGCA), CCI held that the impugned arrangement was likely to cause and appreciable adverse effect on competition and hence the CCI was empowered to enquire into the transaction. The CCI also held that the communications of OP did affect the availability of tickets and hence held the communications of OP as in violation of Section 3 of the Competition Act. As travel agents had resumed dealing in tickets of Singapore Airlines, Commission imposed a penalty of Rs. 100,000 (Rupees One Lakh Only) on the OPs and issued an injunction in favor of the Informant restraining OPs from indulging in anti-competitive practices.”

All India Tyre Dealers’ Federation v/s Tyre Manufacturers⁷³

“The information in this case was originally filed by the All India Tyre Dealers’ Federation (AITDF) against the tyre manufacturers before the Ministry of Corporate Affairs and the same was forwarded by the MRTPC. Consequent upon the repeal of the MRTP Act, the matter stood transferred to the CCI under section

⁷² CCI Case No. 3 of 2009, decided on October 4, 2011.

⁷³ MRTP Case RTPE No. 20 of 2008 decided on October 30, 2012

66(6) of the Competition Act. In the said information dated December 28, 2007, AITDF alleged that the tyre manufacturers were indulging in anti-competitive activities.

The CCI took into consideration the act and conduct of the tyre companies/ ATMA, and found that on a superficial basis the industry displays some characteristics of a cartel there has been no substantive evidence of the existence of a cartel. The CCI held that the available evidence did not give enough proof that Tyre companies and associations acting together had limited and controlled the production and price of tyres in the market in India. The CCI found that there was not sufficient evidence to hold a violation by the tyre companies of section 3(3) (a) and 3(3)(b) read with section 3(1) of the Competition Act.”

ABUSE OF DOMINANCE

The explanation for the “dominant position” is provided in the Competition Act, 2002 is analogous to the description that is provided by the European Commission in “*United Brands v. Commission of the European Communities, 1978*”. In this case the Court observed that-

“a position of strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitor, customers and ultimately of its consumers.”

OECD explains “*Predatory pricing*” as

“a deliberate strategy, usually by a dominant firm, of driving competitors out of the market by setting very low prices or selling below the firm’s incremental costs of producing the output (often equated for practical purposes with average variable costs). Once the predator has successfully driven out existing competitors and deterred entry of new firms, it can raise prices and earn higher profits.”

The term “*predatory pricing*” under the Competition Act, 2002 means

*“the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of goods or provision of services, with a view to reduce competition or eliminate the competitors”*⁷⁴

The explanation⁷⁵ on the website of “FTC about the predatory pricing” says that

“pricing ‘too low’ for a short period of time is fine however it should not happen very often. It says that consumers are harmed only if below-cost pricing allows a dominant competitor to knock its rivals out of the market and then raise prices to above-market levels for a substantial time. A firm's independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition.”

Wanadoo Interactive⁷⁶

“The European Commission found that, up to October 2002, the retail prices charged by Wanadoo Interactive, a subsidiary of France Telecom, were below cost and had abused its dominant position by predatory pricing in ADSL-based Internet access services for the general public. This practice restricted market entry and development potential for competitors, to the detriment of consumers, on a market essential for the development of the information society. In view of the gravity of the abuse and the length of the period over which it was committed, the Commission imposed a fine of 1035 million Euros.”

Section 4 of the Competition Act, 2002 elaborates on the “abuse of dominant position” by any group or an venture.

⁷⁴ Explanation (b) of Section – 4 of The Competition Act, 2002

⁷⁵ Ftc.gov, *Predatory Or Below-Cost Pricing | Federal Trade Commission*, (2012) , available at : <<https://www.ftc.gov/tips-advice/competitionguidance/28936-guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost>>

⁷⁶ Extract from European Commission Press release:IP/03/1025, Brussels, 16 July 2003

“4. [(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 4 [under sub-section (1), if an enterprise or a group].—

(a) directly or indirectly, imposes unfair or discriminatory—

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

Explanation.— For the purposes of this clause, the unfair or discriminatory condition in purchase or sale of goods or service referred to in sub-clause (i) and unfair or discriminatory price in purchase or sale of goods (including predatory price) or service referred to in sub-clause (ii) shall not include such discriminatory condition or price which may be adopted to meet the competition; or

(b) limits or restricts—

(i) production of goods or provision of services or market there for or

(ii) technical or scientific development relating to goods or services to the prejudice of consumers; or

(c) indulges in practice or practices resulting in denial of market access 5[in any manner]; or

(d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or

(e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

Explanation.—For the purposes of this section, the expression—

(a) 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) operate independently of competitive forces prevailing in the relevant market; or

(ii) affect its competitors or consumers or the relevant market in its favor.

(b) 'predatory price' means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors....."

Predation

While there are numerous types of predation, a typical definition applies:

"Predation is the strategic behavior where an undertaking deliberately brings about fleeting losses in order to eliminate a competitor in order to be able to charge excessive prices in the future."

In the Competition Act, 2002 Section 4 Explanation (b) 'predatory price' means

"the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors."

It can be hard to recognize predatory behavior from strong competition; moreover this difficulty might as well occur in the e-commerce markets. Numerous e-commerce players, who currently incur transient losses, are having the expectation of receiving payback over long period of time, as when the weaker players would crash out of market then only the survivors will be getting an increase in the market positions.

Section 4 of The Competition Act, 2002 prohibits any enterprise from ‘abusing its dominant position’. The term “*dominant position*” has been defined in the Act as

“a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favor”

The Competition Act, 2002 additionally provide that the Competition Commission of India shall decide the “*relevant geographic market*” by giving due consideration to all or any of the factors:

“Section 19 (6) The Commission shall, while determining the ‘relevant geographic market’, have due regard to all or any of the following factors, namely:—

(a) regulatory trade barriers;

(b) local specification requirements; (c) national procurement policies;

(d) adequate distribution facilities; (e) transport costs;

(f) language;

(g) consumer preferences;

(h) need for secure or regular supplies or rapid after-sales services.”

The Competition Act, 2002 provides that the Competition Commission of India shall determine the “*relevant product market*” having due regard to all or any of the following factors:

“Section 19(7) The Commission shall, while determining the ‘relevant product market’, have due regard to all or any of the following factors, namely:—

- (a) physical characteristics or end-use of goods;*
- (b) price of goods or service*
- (c) consumer preferences;*
- (d) exclusion of in-house production;*
- (e) existence of specialized producers;*
- (f) classification of industrial products.”*

The ‘abuse of the dominance’ meant for the inquiry under ‘The Competition Act, 2002’ shall start by “the determination of market”, when the relevant business segment has been determined; CCI's subsequent duty is to ascertain if the undertaking appreciates a prevailing place. Although “The Competition Act, 2002” do not forbid the sheer control of “dominance” that may possibly be attained by greater economic performance, improvement or by way of pure accident but just its “abuse of the dominance” is prohibited under the Act.⁷⁷

The Competition Act, 2002 sets out following factors which the CCI will take into account to establish the dominant position of an enterprise⁷⁸:

“Section 19(4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

- (a) market share of the enterprise;*
- (b) size and resources of the enterprise;*
- (c) size and importance of the competitors;*

⁷⁷ United States v. Grinnell Corp., 384 U.S. 563 (1966)

⁷⁸ Section 19 (4) Competition Act 2002

(d) economic power of the enterprise including commercial advantages over competitors;

(e) vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market; (k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry.”

Once the predominance of a venture is ascertained in a business sector then CCI needs to ascertain that there was misuse of such strength by an endeavor. The Competition Act, 2002 in India gives a list of actions which shall be deemed ‘abuse of dominant position’:

“i. anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices,

ii. limiting the supply of goods or services, or a market or technical or scientific development, denying market access,

iii. imposing supplementary obligations having no connection with the subject of the contract, or

iv. using dominance in one market to enter into or protect another relevant market.”

CASE LAWS REGARDING ABUSE OF DOMINANT POSITION

Kapoor Glass Private Limited Vs.Schott Glass India Private Limited decided on March 29, 2012⁷⁹

“The informant alleged certain anticompetitive acts by Schott Glass India Private Limited (“Schott Glass India”) in the market of ‘neutral USP-1 borosilicate glass tubes’ and ‘glass ampoules’ made out of such glass tubes in India.

The informant has alleged that the practices of the OP of charging unfair prices, granting quantity discounts and loyalty rebates were inconsistent with the provisions of Section 4 (2) (a) of the Competition Act. Further, hiring of the informant’s employees in order to strengthen its market share in the downstream market for glass ampoules was in violation of the Section 4 (2) (e) of the Competition Act. It was also alleged that its practice of refusal to deal with glass ampoule manufactures may be inconsistent with the provisions of Section 3 (4) of the Competition Act.

The CCI found that Scott Glass India has contravened various provisions of section 4 of the Competition Act and its acts and conduct had adversely affected competition on the relevant market(s) delineated in the instant case. Due to unfair and dissimilar discounts of Scott Glass India, the converters in the downstream market had been impacted adversely and their margins had also declined. As a dominant player in the market, there was special onus on Scott Glass India to

⁷⁹ Kapoor Glass V/S Schott Glass India Pvt Ltd Case No. 22 of 2010 Decided On: March 29, 2012.

ensure fair competition in the market. The CCI imposed a penalty at a rate of 4% on the average of three years turnover of Scott Glass India.”

Belaire Owner’s Association v/s. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana decided on August 12, 2011⁸⁰

“Belaire Owners’ Association filed this complaint against three Respondents namely, DLF Limited, HUDA and the Department of Town and Country Planning, Haryana. The informants alleged that DLF Ltd had abused its dominant position by imposing highly arbitrary, unfair and unreasonable conditions on the apartment allottees of the Housing Complex ‘the Belaire’, which has serious adverse effects and ramifications on the rights of the allottees.

The CCI concluded that DLF Ltd. was in contravention of Section 4(2)(a) (i) of the Competition Act in particular on account of the size and resources that DLF Ltd. had and the duration for which the abuse had continued leading to great advantages for DLF Ltd. and immense disadvantages to consumers. The CCI imposed a penalty at the rate of 7% of the average of the turnover for the last three preceding financial years on DLF Ltd.

For any violation of Section 4 of the Competition Act, the following components are key issues of determination:

- i. What is the ‘relevant market’?*
- ii. Is the firm a dominant undertaking?*
- iii. If the response to the query (ii) is in the affirmative, do the actions of the dominant undertaking constitute an abuse of its dominance?”*

⁸⁰ *Belaire Owner’s Association Vs. DLF Limited Haryana Urban Development Authority Department of Town and Country Planning, State of Haryana Case No. 19 of 2010 Decided On: August 12, 2011.*

CHAPTER 5.

**E- COMMERCE
CHALLENGES:
A CASE STUDY
OF FLIPKART**

E- COMMERCE CHALLENGES: “A CASE STUDY OF FLIPKART”

Structure of online retail market: Broadly online retail consists of two categories:

Vertical focused- They deal in particular categories of goods only like electronics, apparels, electronics and baby products, etc

Multi-category players- Online retailer who deals in several categories of goods like apparels, electronics, etc

Inventory : Basically whether to keep or not to keep any inventory two models have evolved in e-Stores w.r.t. inventory management:-

- “Stock-and-sell model”- According to stock and sell model the online retailer assumes “*inventory risk*” therefore to overcome that he “*invests in warehouses and logistics*”.
- “Consignment model”- According to Consignment model products are “*directly shipped from vendor to customer*” hence there is “*no investments in warehouses and logistics*”.

E-Tailing in India was traditionally a low-entry barrier business, with most E-Tailers working on a “*consignment model*” based on the following principles:

- C. Tied up with a network of merchants to source products.
- D. Web catalogs of products presented by their associate merchants were prepared.
- E. On receipt of order from the customer, notification was sent to the associate merchant to fulfill the order.
- F. Monetary settlement was completed among the e-Tailer as well as the associate merchant for the products sold when the associate merchant supplied the goods to the client.

Several intrinsic advantages of “consignment model” for an E-retailer are:

- There was very little or no investment in “inventory or warehousing”
- E-retailer had little liability as to delivery of goods as the delivery of the goods was either managed by associate merchants or by third-party providers.
- The payment was received by the E-Retailer online and later financial settlement was done with the associate merchants.

(Thus we can say that in this model the prime responsibility of the e-retailer is for managing the web catalog of the products offered and looking after the online experience of the customer.)

Challenges in online retail market

1. Lack of physical contact is a mental barrier in online retail market

It is the mentality of Indian buyers to test an item before buying it. This mindset applies to all classes from apparel, shoes, scents to electronics, etc. Absence of physical contact in internet shopping could prompt issues, like wrong item sizes (in shoes and apparel). This makes a mental hindrance for customers to do transaction on the web.

2. With the entry of international players there is increased competition

The development capability of the online retail section in India is pulling universal players. With the entrance of universal players there would be an expansion in competition in the section. The propelled innovation abilities of worldwide players in area of client investigation and suggestion box would represent a test for local organizations. Global players have superior monetary assets than their Indian allies. This in turn empowers them to manage misfortunes and confine supplies to their competitors by purchasing out all or almost all supplies from merchants, which could at some point of time drive out little domestic players from the business sector.

3. Low profit margin is inciting E-comm. players to take a look at new plans of action

The lion's share of E-Comm. organizations is value players because of the solid rivalry they confront and the race to get the most number of clients. This consequently results in low margins or none by at times to build some edge over their rivals E-Comm. players. Further they should embrace new plans of action.

Top reasons driving online retail

1. Cash on delivery which is a necessary evil

Indians have a tendency to transact in cash rather than any other payment instruments. India leads the developing nations regarding cash transactions. Indians have been moderate in utilizing credit and debit cards even though the use of credit card and debit card is on growth. E-retailers have very aptly understood the inclination for money installments and thus have readily offered Cash on Delivery.

E-retailers appear to have perceived the way that just focusing on card proprietors for online shopping would enormously restrain their objective client base. Therefore, they have, along these lines, added Cash on Delivery to their arrangement of installment alternatives. Cash on Delivery being one of the key elements impacting the quick development in online shopping has paid them off very generously.

CoD tended to a portion of the issues that clients had to transact online:

- While utilizing cards for online installments consumers often had privacy and security concerns.
- Before paying for any item consumers often had a desire to see and touch the product.
- CoD helps in the expansion of client base for purchases of higher value in which there was lack of trust among the consumers.

This method of installment extends the client base of E-Comm. organizations past credit or platinum card clients and is valuable for drawing in customers who don't have cards yet invest a considerable amount of their time in the Internet. On one hand CoD has increased the volume of sale by expanding their client base but on the other hand it has additionally expanded expense of operations. Though the COD alternative has offered Indians some assistance from overcoming their worries about shopping on the web, e-

Comm. players face operational difficulties. The high administration charges of postal and courier services lessen the margins of e-Tailers. The usage of COD includes another layer in the production network as “*cash handling*”. This increases the settlement period of online retailers and courier companies to two to three weeks, which stretches the cash collection cycle of online retailers.⁸¹ Also online purchasers who are picking the COD choice are demonstrating their low confidence in online shopping and the likelihood of the return of item if the item does not meet their expectation.

2. Discounts and value added services one of the key influencers of development of online retail.

The Indian buyer is “*price sensitive*”, and rebates are one of the significant perks for shopping on the web. E-retailers offer items at diminished costs, given that their operational and stock expenses are a not as much as those connected from the offline retailers. This, combined with the more extensive item collection offered, is the real driver of internet shopping.

Overwhelming traffic is seen in urban area along with that parking spot requirements are springing up at shopping centers combined with that there is deregulation of fuel costs which has prompted an ascent in fuel costs in India. All of these reasons have driven customers to buy their products on the web.

In India e-retailers are giving different value added services, for example, free sending, item returns, price comparison, client audits and showing recordings. Every one of these variables has driven the adjustment in inclination from offline shopping to online shopping. E-Comm. players should build their attention on client experience by giving different quality included administrations and improve client experience.

Conclusion

Online retail concentrates on web abilities as well as on how well the fringe parts of online retail are dealt with. Online retail players give careful consideration to stock administration, logistics and stockroom administration as they do to their online stages.

⁸¹ “*Cash on delivery to be prominent payment mode for domestic E-com, (2011), available at: [http:// www.vccircle.com/500/news/cash-on-delivery-to-be-the-prominent-payment-mode-for-domestic-e-com](http://www.vccircle.com/500/news/cash-on-delivery-to-be-the-prominent-payment-mode-for-domestic-e-com)*”

They have to contribute time and cash on all these, since client experience is a component of how well they function in a state of harmony. There is considerable degree of concern for online retail players to concentrate on “new product delivery models and payment mechanisms”, since clients are confronting issues with the choices accessible. The online retailers advertise presents an appealing open door for business people, since it is quickly growing and still structures just a miniscule bit of composed retail. In addition, there are various underpenetrated sections, for example, online foodstuffs in online retail. While sorted out retail players are pulled in by circumstances introduced by the online retail division, they have basic inquiries relating to “modes of entry, pricing decisions and customer segmentation”.

ABOUT FLIPKART

In the year 2007 Flipkart came into existence, due to the efforts of “**Sachin and Binni Bansal**”, who were the students of IIT-D. Previously they were employed in “Amazon.com”. Although registered in Singapore Flipkart is operating/functioning in India. Alexia internet declared Flipkart as one of the leading website visited in the Indian subcontinent.⁸²

Legitimately speaking being registered in Singapore Flipkart is not an Indian organization. Flipkart sells the products in India through “WS Retail” organization since permission is not given to outside organizations for multi-brand online retailing in India. Moreover any other remote dealer or any organization can also sell its items by Flipkart stage. “Payment mechanism” permitted by the Flipkart includes-Cash on Delivery which is one the most favored keeping in mind the trust issues of Indians, other methods of payment include Credit card payment, Debit card payment, Online/Internet Banking, Etc Initially Flipkart sold books in 2008 but seeing the huge success of online platform in India it began to offer other items also like clothing, gifts, hardware, electronics etc. Although “Flipkart” began its business by way of books, yet in a little while it began

⁸² Swapnil V. Mishra et al, *A Study on Current Status of E-Commerce in India: A Comparative Analysis of Flipkart and Amazon* ; 15 IJARCCSMS (2012)

including additional classifications. Because of the intense system it has in every part of India and viable client association administration, one can say that Flipkart has now grabbed a highest place in India and is one of the reputed players in e-comm. sector.

The plan of action utilized by this e-retailer is “*Inventory-Led Model*”. “*Inventory-Led Model*” requires enormous financial investment in distribution center and its logistics but currently “Flipkart.com” web sites are utilizing a blend of both the models. Flipkart, had a “inventory-led format”, recently it reported a movement to the “marketplace model”, which is on facilitating numerous retailers on a solitary online stage.

ANALYSIS OF CASE LAW: “*Mr. Mohit Manglani vs M/s Flipkart India Private Limited & Ors., Case No 80 of 2014, CCP*”⁸³

Mohit Manglani filed a complaint against some online retailers; which are “Flipkart India”, “Jasper Infotech (Snap deal)”, “Xerion Retail (Jabong)”, “Amazon Seller Services” and “Vector E-Comm (Myntra)”, in competition commission of India.

Allegations alleged by Mohit Manglani against the five e-retailers

They were participating in “anti-competitive practices”. The “*exclusive agreement*” among the seller of the merchandise and services was alleged to be anti-competitive and hence was in violation of Section 3(Anti—competitive agreements) and 4(Abuse of dominant position) of the Competition Act, 2002.

Another allegation by Mohit Manglani was that online retailers be gradually wrecking the inside of “physical market” and were responsible for the creation of particular imposing business model in the commercial center.

Response of the e-retailers to the allegations

E-retailers were performing as a “*third party platforms*” by providing conducive environment for business to a very large number of consumers and traders.

⁸³ 'Order Of Commission' (2015) available at:
<http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf>>

Additionally they contended that there ought to be “*appreciable adverse effect*” on competition in the “*relevant market*” for anti-competitive issues to occur further you cannot equate a product to a “*relevant product market*”.

Order of CCI

CCI passed the order in the favor of the five online retailers. Thus all charges against the online retailers under the competition act were removed. CCI in its order observed that “*exclusive agreement*” with the seller was not causing any “*appreciable adverse effect on competition*” and the reason being that such agreements do not create or appear to craft a few barriers to access intended for the “*new entrants*”. “*Exclusive agreement*” between manufacturer and online retailers seem improbable to build a few barriers to the ingress designed for “*new entrants*”. Also CCI observed in this case that each “*product*” cannot be assumed as a “*relevant market*” within itself.

CONCLUSION & RECOMMENDATION

Competition has increased with perpetually expanding players and procurement of a few old players in the business sector by the E-comm. Also it has empowered advancement of new administrations, new dissemination channels, and more prominent proficiency in business exercises. Establishment of e-hubs where there is major “market share” can prompt a few competition issues to emerge if they develop substantial “market power” because of the system impacts and/or participating in premeditated acts to protect or keep up their business sector power. Potential competition issues for the players in the e-commerce sector can be “*price fixing*” or else “*tacit collusion*” or else “*anti-competitive discrimination*” otherwise “*refusal to deal*”. E-comm. players should abstain from such individual agreements and conduct. Transparency in the market should be supported as in the online platform various types of items are offered in the same web platform which will give rise to various intermediaries and can prompt collusive behavior.

E-comm. sites ought to set buying and payment mechanism with total clarity and consistency as well as timely and regular update of data should be provided. There should not be any generic terms as regards to the character of the merchandise or the services offered rather particular provisions should be there concerning the nature of the merchandise as well as services offered shall be conveyed to customers and give abundant chance to read thoroughly and afterward acknowledge. E-business ought to guarantee sensible endeavors to avoid unauthorized exchange. Though E-comm. is still in its early stage however the development has been commendable.

Players in the e-comm. sector should work to prepare their representatives and alarm them against the dangers talked about above. For the risk mitigation of the e-comm. business it is imperative that a proper risk management strategy is framed by them and implemented. Consistent checking and assessing the conduct of the buyer for evaluation of any risk and taking additional initiative for a planned and energetic way to deal with the computerized economy is vital.

E-comm. is all about planning and administrating business rather than about being innovative. Online stage ought to give creative base as well as inventive and exclusive

data structures with adequate securities and protections for its clients. This will guarantee the issues will stay under control or if nothing else the organizations would be arranged with a procedure to handle them.

Utilization of electronic procedure in business is developing at a quick rate. There is a possibility that E-comm. might turn into a stage for agreements that are anti-competitive. Lately an ascent in the quantity of organizations grasping E-trade advancements and the web in India has been noticed.

Conclusion:

1. Online requests are to be handled appropriately and only when affirmation of the receipt of the money is provided then the products are to be dispatched. Thus the obligation of e-comm. business increases in order to control these procedures.
2. In E-business each exchange is recorded in the PC thus we can say that traditional paper based records are totally wiped out from office administration.
3. Whole system of business has changed by way of the deployment of E-comm. due to the very fact that online sites are often providing with appealing pictures and data in addition to that there is proper information on the sites.
4. E-comm. has changed the entire payment mechanism for the online transaction.

Hence the some suggestions are given to further improve the possibilities of e-comm.

- Awareness about e-comm. advantages should be spread widely.
- Strategies to build the confidence of customers so that they can use online platform to transact in a better way.
- Proper online redresal mechanism should be developed.
- Government should frame proper laws for the development of e-comm.

Though the fate of Electronic Commerce is hard to anticipate but it is most likely that some of the fundamental variables will altogether add to the expansion along with that the progress of E-Comm. business within India that is lawful prerequisite of creating

receipts for online exchanges, T and C ought to be clear and sensible, M-commerce, cash on Delivery option, replacement option incase the item does not match with consumers expectations, the item quality ought to be same as appeared on the entrance, committed client care focus ought to be there, etc. It is an era of innovation and e-comm. is just another technique for working with new innovation. A new or additional way of doing business through e-comm. has emerged in the new era. One should look at e-comm. as a mode of doing business and not as an innovation issue. In e-comm. all the activities must be coordinated completely into the current trade structure and methodology.

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