THE NEED TO REVISIT THE 'RELEVANT MARKET' DEFINITION FOR THE E-COMMERCE SECTOR

Pranav Bharghav [*]

In competition law, antitrust authorities must first delineate the relevant market by identifying the relevant product market and the relevant geographic market, so that they can accurately assess the competitive domain within which the allegedly anti-competitive conduct operates. In India, while determining the 'relevant market' in antitrust matters concerning e-commerce retail, the Competition Commission of India ("CCI") has issued contrasting orders: earlier decisions treated online retail and physical retail as part of the same broader relevant market (as alternative distribution channels), whereas more recent orders have delineated narrower, separate and distinct online and offline relevant markets. This article examines whether this shift is consistent with judicially established competition law principles and the statutory emphasis on demand-side product substitutability under the Competition Act, 2002. It critiques the Commission's recent narrow approach by applying established market-definition tests, including the Small but Significant Non-Transitory Increase in Price ("SSNIP") test, to assess whether consumers would switch between online and offline channels in response to a small but significant price increase. The article finds that the recent narrow approach can underweight demand-side substitutability and thus mis-delineate the relevant market, leading to an erroneous assessment of market power and the alleged anti-competitive practices. It therefore advocates a more dynamic approach to market definition that, absent evidence of materially higher switching costs or other constraints defeating substitution, recognises competitive constraints across online

[*] The author is a Fourth-Year student at School of Law, Christ University, Bangalore.

and offline retail, promoting fair competition without chilling growth in India's e-commerce sector.

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I. INTRODUCTION AND RELEVANT MARKET IN COMPETITION LAW

Competition law, is a relatively new domain of law that primarily focuses on restricting anti-competitive behaviour. It ensures that firms and industries do not establish themselves as monopolies and do not engage in other unfair practices and agreements that reduce competition. For these laws to function effectively and efficiently, one of the primary analyses must be conducted to determine the relevant market. This determination plays a crucial role as it establishes the competitive domain in which the firm allegedly engages in anti-competitive practices. By determining the same, we can understand whether or not the practices of such firms truly have an anti-competitive effect within the competitive domain in which they operate.

Determining the relevant market is generally done on two considerations: the relevant product market, which refers to a market where the producers of similar products compete, and the relevant geographic market, which refers to the geographical boundaries within which such competing firms operate.

In India, antitrust law has been codified as the Competition Act, 2002 (**Act**). Section 2(r) of the Act defines the concept of the relevant market as *"the market which may be determined with reference to the relevant product market or the relevant geographic market or both"*.[1] Section 2(t) of the Act goes on to further define the relevant product market as *"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"*.[2] These definitions make it clear that products deemed substitutable or interchangeable by consumers based on their price and intended use would fall within the domain of the same relevant product market.

[1] The Competition Act, 2002 (12 of 2003) s 2(r).
[2] The Competition Act, 2002 (12 of 2003) s 2(t).

An example where substitutability of products has played a vital consideration in determining the relevant product market can be seen in the combination registration of RIL/Den/Hathaway by the Competition Commission of India (**CCI**), where the CCI determined that there was a high degree of demand-side substitutability between DTH Service Providers and Cable TV Operators as customers frequently switched between the two.[3] As a result, the market was broadly determined as "*the market for aggregation and distribution of broadcast TV channels to homes through cable TV and DTH services*".[4]

Section 19(5) of the Act makes it clear that the CCI must give due regard to the relevant product market and the relevant geographical market while determining the relevant market and Section 19(6) gives the factors used in determining the relevant geographical market.[5] Additionally, Section 19(7) of the Act lays down certain factors such as physical characteristics or end-use of goods, price of goods or services, consumer preferences, exclusion of in-house production, existence of specialised producers, & classification of industrial products, which have to be given due regard to in determining the relevant product market.[6] The case of *M/s Saint Gobain Glass India Ltd. v M/s Gujrat Gas Company Limited* also talks about the importance of giving due regard to the factors laid out in Section 19(5) & Section 19(7) of the Act when it comes to the determination of relevant markets.[7]

The Small but Significant Non-Transitory Increase in Price (SSNIP) Test, also known as the Hypothetical Monopolist Test (HMT), is a test that has often been applied by antitrust regimes all over the world to determine the boundaries of the relevant market accurately.[8] Under this test, the relevant market determination is deemed too narrow if a hypothetical monopolist can impose a small but significant increase in price (typically considered as an increase of 5-10%) without losing a significant number of customers to other available alternatives.[9]

The Indian antitrust regime is a relatively new regulatory framework inspired by existing frameworks such as the United States & European Union antitrust laws. In the United States, competition law is governed by the Sherman Act & the Clayton Act. The United States has also released a note on the Roundtable on Market Definition that clarifies the US Antitrust

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[3] *RIL/Den/Hathway*, Combination Reg. Nos. C-2018/10/609 & C-2018/10/610, paras 14-15 (CCI).
[4] *Ibid.*
[5] The Competition Act, 2002 (12 of 2003) s 19(5).
[6] The Competition Act, 2002 (12 of 2003) s 19(7).
[7] *M/s Saint Gobain Glass India Ltd. v M/s Gujarat Gas Co. Ltd.* (2015) SCC OnLine CCI 65.
[8] Anuncia William & Bhakti Khule, 'Validity of the SSNIP Test to delineate the Relevant Market' (2022) 2 JCLJ 12, 13.
[9] *Ibid.*

perspective on the definition of the relevant market based on the relevant product market and a relevant geographic market, similar to the case in India.[10] This note also clarifies the importance of substitutability or interchangeability of products as the critical consideration in determining the relevant product market in cases of antitrust violations.[11] This definition of relevant market and relevant product market has been applied in several US Antitrust judgements. An example is the case of *United States v E.I. du Pont de Nemours & Co.*, where cellophane was considered a substitutable product under the relevant product market of flexible packaging materials.[12] This case also established the '*Cellophane Fallacy*', which discusses the adverse anti-competitive impact that may arise from a narrow or broad interpretation of the relevant market. Similarly, the antitrust regime of the European Union also provides similar definitions for the relevant market and the relevant product market.[13] These definitions and the determination of relevant markets and relevant product markets have also been reiterated in landmark EU cases such as *Hoffmann-La Roche v Commission.*[14]

II. CONTRASTING DECISIONS OF THE CCI FOR THE E-COMMERCE SECTOR

Businesses across sectors are increasingly leveraging digital platforms to expand their reach and connect with a wider audience. From social media marketing to e-commerce websites and mobile applications, companies are using online tools to enhance visibility, improve customer engagement, and streamline sales. This digital shift has also transformed the retail industry, where traditional brick-and-mortar stores are establishing online storefronts, adopting omnichannel strategies offering a high degree of convenience to their customers by providing features such as doorstep delivery, accessible payment gateways, ease in product return or exchange, and a variety of other features. With this, we have seen the emergence of various third-party platforms, such as Amazon & Flipkart, that offer services that facilitate the sale of

[10] Organisation for Economic Co-operation and Development, 'Note by the United States on Market Definition' DAF/COMP/WD(2012)12 (15 June 2012), para 6.
[11] Ibid, para 9.
[12] *United States v E.I. du Pont de Nemours & Co.* 351 U.S. 377,379 (1956).
[13] Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (1997) OJ C372/5, para 2; Commission Notice on the Definition of Relevant Market for the Purposes of Community Competition Law (1997) OJ C372/5, para 7.
[14] Case 85/76 *Hoffmann-La Roche & Co AG v Commission of the European Communities* (1979) ECR 461.

products and services between retailers and end consumers online, ensuring that the e-retail industry is feasible for all the parties involved.

While digital commerce has positively impacted the retail sector, the third-party platforms that facilitate the same have grown exponentially. However, at the same time, we also see an increasing number of allegations against such digital platforms for engaging in various forms of anti-competitive practices, resulting in many cases filed against the digital e-commerce platform before the Antitrust regulatory authorities worldwide.

This has undoubtedly been the case in India, where the CCI passed orders on antitrust allegations levelled against such e-commerce platforms. In all these cases, the primary question that the CCI has had to address is whether or not the online e-retail industry and the old-school physical retail industry form a part of the same 'relevant market' or whether they function as distinct relevant markets for antitrust regulation.

As to that effect, we have seen that the CCI has passed contrasting orders. Many of the earlier judgements have taken the position that the e-retail and physical retail industries form a part of the same relevant market. In contrast, newer and more recent orders passed by the CCI take a contrary view.

1. *Ashish Ahuja v Snapdeal*[15] - In this case, the informant, Ashish Ahuja, alleged that Sandisk, a company that was a dominant player in the portable consumer storage device market, entered into an anti-competitive agreement with Snapdeal, the Opposite Party, which is an e-commerce platform on which retailers could list their products for sale. The informant contended that Sandisk only permitted authorised sellers to list their products on the Snapdeal platform, which was argued as a contravention of Section 3 of the Act and hindered the informant's ability to sell the Sandisk products online.

   The CCI defined the relevant market as the *"market for portable small-sized consumer storage devices"*, including products such as USB Pen Drives, SD Memory Cards, etc., which were determined as substitutable products based on their prices and intended end-use.

   With regards to the question as to whether or not the online and the offline retail segments constitute the same relevant market, the Commission held that the online and the offline retail segments constitute a part of the same relevant market and that the online and the

[15] *Ashish Ahuja v Kunal Bahl* (2014) SCC OnLine CCI 67.

offline retail platforms merely serve as distinct distribution channels of the same market. As a result, the Commission held that the agreement between Sandisk & Snapdeal cannot be construed as anti-competitive as the same would not have an Adverse Appreciable Effect on Competition on a broader market, which included both the online and offline segments.

2. *Mohit Manglani v Flipkart*[16] - In this case, the informant, Mohit Manglani, alleged that Flipkart & other e-commerce platforms had entered into exclusive distribution agreements with manufacturers, which meant that the manufacturer's products could only be exclusively sold on the online e-commerce platforms. The informant contended that these exclusive distribution agreements violate the Act, as it is in contravention of Sections 3 & 4 of the same.[17]

   In the present case, the CCI determined that the relevant market should be defined based on goods that were substitutable for each product.

   With regards to the question as to whether or not the online and the offline retail segments constitute the same relevant market, the Commission followed a similar stance as to that taken in the *Ashish Ahuja v Snapdeal case*, where they held the online and the offline retail market to be a part of the same relevant market. The Commission held that the products sold on both the online and the offline markets remain very close substitutes of each other and that the customer has the choice to choose between the online and the offline market based on their convenience, which is why the online and offline retail segment were considered as a part of the same relevant market. The Commission also pointed out the fact that online retail contributed to less than 1% of total retail sales and held that the alleged anti-competitive practices of the platforms would not have an Adverse Appreciable Effect on the retail industry, thus passing the order in favour of the Opposite Party.

3. *Fast Track Call Cab & Meru Travel Solutions v ANI Technologies (Ola)*[18]- In this case, the Informant, Fast Track Call Cab & Meru Travel Solutions, alleged that the Opposite Party, ANI Technologies (Ola), had engaged in deep discounting practices on its online platform-based application, which had the effect of foreclosing the competition for other radio taxi

[16] *Mohit Manglani v Flipkart India Pvt. Ltd.* (2015) SCC OnLine CCI 66.
[17] The Competition Act, 2002 (12 of 2003) s 3,4.
[18] *Fast Track Call Cab Pvt. Ltd. v ANI Technologies Pvt. Ltd.* (2015) SCC OnLine CCI 70.

services, such as that of the Informant, which they argued was in contravention to Section 3(4) of the Act.

In this case, the CCI defined the relevant market as the "*market for radio taxi services*". The Opposite Party argued that they do not operate within the identified relevant market as they are a technology-based taxi service provider. However, the Commission rejected this contention of the Opposite Party, which stated that Ola operated within the identified relevant market, as the difference in business model does not affect the same.

In this case, while the Commission did not explicitly deal with the question as to whether online and offline platforms form a part of the same relevant market or not, they did state that a difference in business models followed by entities does not result in the creation of a distinct relevant market. This position of the Commission goes in line with the view of the Commission expressed in the *Ashish Ahuja* & the *Mohit Manglani* cases, which held online and offline platforms to be a part of the same relevant market, irrespective of the difference in the business models.

4. *All India Online Vendors Association (**AIOVA**) v Flipkart India Pvt. Ltd. and Another*[19] (*AIOVA case*) - In the present case, the Informant, AIOVA, which represented a large number of sellers, alleged that the Informant, Flipkart, was engaging in anti-competitive practices of preferential treatment to certain favoured sellers such as WS Retail and was offering deep discounts on the products offered by its preferred sellers. As a result, other sellers contended that they could not compete with the preferred sellers, which the Informant argued was a contravention of Sections 3 & 4 of the Act.

   In this case, the CCI defined the relevant market as the "market for services provided by online marketplace platforms for selling goods in India". From the identified relevant market, it was evident that the CCI took a contrary view to earlier orders passed by the Commission and held online retail platforms to constitute a distinct relevant market. The reasoning for the same was that even though it may seem that the online and the offline markets operate in the same market, the competitive dynamics of both platforms are very different, which is why the Commission believed that online platforms are a distinct market in itself. Despite this, the Commission did not establish a prima facie case against the

[19] *All India Online Vendors Association v Flipkart India Private Limited and Another* (2018) SCC OnLine CCI 97.

Opposite Party as they felt that the e-commerce sector was still nascent, and taking any action against the same could have an adverse anti-competitive effect on the industry.

5. *Delhi Vyapar Mahasangh v Flipkart Internet Pvt. Ltd. and Amazon Seller Services Pvt. Ltd.*[20] (*Delhi Vyapar Mahasangh case*) – The facts of this case are similar to those of the *AIOVA case.* Delhi Vyapar Mahasangh, who represented a number of MSME traders, contended that Flipkart & Amazon engaged in preferential treatment and further deep discounting of the products of such preferred sellers, which ultimately meant that the MSME traders were unable to compete with the preferred sellers effectively, and therefore had the effect of foreclosing competition in the retail industry.

   The relevant market that the CCI identified was yet again similar to the *AIOVA case*, wherein online intermediary services were considered as a distinct relevant market in itself.

   In this case, the Commission not only deemed the online retail industry to be a distinct relevant market in itself but also eventually established a prima facie case against the Opposite Parties.

   While the detailed investigation report of the Director General nor the decision regarding the same has been made public yet, rumours suggest that the Director General has held the actions of the Opposite Parties to be in contravention of the provisions of the Act after a detailed perusal of the evidence on hand.[21] If the rumours regarding the DG report are to be believed, it would further affirm the stance that online platforms form a separate, distinct, relevant market in itself.

6. *Lifestyle Equities C.V. and Anr. v Amazon Seller Services Pvt. Ltd. and Ors.*[22] - In this case, the Informant, Lifestyle Equities C.V., are the brand's owners and licensees, which goes by "*Beverly Hills Polo Club*". The informants alleged that the Opposite Party had sold counterfeit products of the informant on their website, which were listed at deeply discounted prices. The Informant argued that this resulted in diverting traffic away from the Informant's website, which was claimed as violative of Sections 3 & 4 of the Act.

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[20] *Delhi Vyapar Mahasangh v Flipkart Internet Private Limited and Another* (2020) SCC OnLine CCI 3.

[21] Reuters, 'Amazon, Flipkart breached antitrust laws: CCI' (*The Hindu*, 13 September 2024) https://www.thehindu.com/sci-tech/technology/amazon-flipkart-breached-antitrust-laws-cci/article68637232.ece accessed 8 October 2024.

[22] *Lifestyle Equities C.V. and Another v Amazon Seller Services Private Limited and Others* (2020) SCC OnLine CCI 33.

The CCI defined the relevant market as the "market for services provided by online platforms for selling fashion merchandise in India", thereby yet again upholding the stance put forth in the *AIOVA* case and the *Delhi Vyapar Mahasangh* case that the online retail industry constitutes a separate and a distinct relevant market in itself. The Commission pointed towards the unique characteristics of online platforms, such as the existence of cross-network effects, which result in a competitive dynamic different from that of physical retail outlets. However, despite this, the Commission did not establish a prima facie case against the Opposite Party as the Commission could not establish an *Adverse Appreciable Effect on the Competition* due to other equally dominant competitors within the relevant market.

III. THE NEED TO REVISIT THE NARROW DEFINITION OF RELEVANT MARKET FOR E-COMMERCE

While the narrow definition of the relevant market for the online e-commerce sector, which has been seen in the more recent orders passed by the CCI, does make it easier to establish an Adverse Appreciable Effect on Competition, the same still needs to be revisited as it ignores one of the most integral factors in determining the relevant market or the relevant product market to be more specific. The relevant product market is determined based on substitutability or the interchangeability of products as per the provisions of the Act, and the same has not been taken into consideration by the CCI in some of their more recent orders that apply a narrower determination of the relevant market.[23]

The judgements that applied a broader determination of the relevant market, in which it held the online and offline retail segments as part of the same relevant market, make it explicitly clear that there exists substitutability between the products sold on the online and the offline platforms, where the customer chooses either distribution channel based on convenience & costs.

On the other hand, the recent judgements that apply the narrow determination of the relevant market, where the online and offline retail markets have been deemed as separate, distinct relevant markets, try to reason the same by citing the difference in competitive dynamics. While it may be true that there exists a difference in dynamics between the two, there is no evidence

[23] The Competition Act, 2002 (12 of 2003) ss 2(t), 19(5), 19(7).

to suggest that the different dynamics impact the substitutability of products sold on the online and offline markets. Irrespective of the differences between the online and the offline markets, it must be noted that the products sold on both markets are often very similar, or in many instances, the same product is sold on both the online and physical retail platforms.[24] Additionally, it is also seen very often that the same retailers operate both online and offline.[25] All these factors point towards the substitutability of products in online and offline platforms, and the end customer ultimately has a choice between the two platforms, which is exercised based on the costs and convenience of either platform.

It may very well be true that online platforms have been growing exponentially in recent years and offer many advantages to the retailers and the end consumers that are not matched by the physical retail platforms, but that would not negate the fact that the offline retail industry would always serve as a viable alternative or substitute to the online platform, and vice versa. This is particularly true when considering the market for FMCG goods and other goods such as fashion merchandise and smartphones, as seen in the above cases, as these types of markets have a significant presence in both the offline and online segments.

If we are to apply the SSNIP Test or the Hypothetical Monopolist Test in this case, we would indeed find the determination of the relevant market to be too narrow. Let us assume the relevant market is limited to the online retail markets and that an e-commerce platform enjoys a dominant position within this hypothetical market. Suppose the products listed on the e-commerce platform undergo a small but significant increase in price. In that case, the customers will likely have no other viable alternative, indicating that the defined relevant market is too narrow. At the same time, if an e-commerce platform does the same within a broader relevant market that includes physical retail outlets, it would likely be that the end customer would be left with adequate substitutes or alternatives, indicating that the relevant market has been appropriately defined. The SSNIP Test has been a tool that was used to accurately determine the relevant market in several famous cases, such as the case of *United States v Microsoft Corp.*, where the SSNIP Test was used to reject the narrow definition of the relevant market.[26] Similarly, in the present case, the SSNIP Test explains how the narrow interpretation of the definition of the relevant market is erroneous.

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[24] Herhausen, Daniel, Jonas Binder, Michael Schoegel and Andreas Herrmann, 'Integrating Bricks with Clicks: Retailer-Level and Channel-Level Outcomes of Online–Offline Channel Integration' (2015) 91 J. Retailing 309, 313.
[25] *Ibid.*
[26] *United States v Microsoft Corp.* 253 F.3d 34 (D.C. Cir. 2001).

The famous European Union antitrust case, the *Google Search Shopping case,* also talks about how the relevant market may be narrower in the event of higher switching costs between substitutable products.[27] However, that is not the case in the present case, as both the online and offline retail markets have developed to serve as close alternatives for each other, indicating lower switching costs.

It may be understandable if a narrow definition of the relevant market is applied when considering more niche markets with a significant presence in online or physical retail markets. But that was not the case in the *AIOVA, Delhi Vyapar Mahasangh or the Lifestyle Equities cases*, which all dealt with markets well established in the online and the offline retail market, thus indicating substitutability between the two channels of distribution.

IV. Implications Of A Narrow Market Definition For E-Commerce Platforms

It may be true that in specific cases, such as the case of *Delhi Vyapar Mahasangh,* we see that the narrow definition of the relevant market has resulted in a more practical assessment of the alleged anti-competitive practices and their effect on the competition. However, the same narrow relevant market definitions could pose other challenges.

Such a narrow determination of relevant market which deems online and offline to be separate and distinct relevant markets would indicate that the online and the offline markets do not interact within their competitive realm. However, such is not the case, as noted in the evident substitutability of products on online and offline platforms. Going by the narrow relevant market definition, it could result in a scenario where dominant players in either the online or the offline retail platforms could engage in anti-competitive practices that have the effect of foreclosing competition within the other type of retail industry, and we would be left with no legal recourse due to the narrow definition that erringly makes a clear distinction between the online and offline retail markets.

Additionally, such narrow, relevant market definitions could also threaten the growth of e-commerce platforms, which will, in turn, result in an anti-competitive effect on the industry.[28]

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[27] Case T-612/17 *Google Search Shopping Case* (2021) General Court of the European Union.

[28] Unnati Agrawal, 'Delineation of relevant markets by the CCI: Change in practice' (*Bar & Bench*, 25 May 2022) https://www.barandbench.com/columns/delineation-of-relevant-market-by-the-cci-change-in-practice accessed 9 October 2024.

Regarding these apprehensions, the CCI took a conservative step in dealing with the antitrust allegations against Flipkart in the *AIOVA case*, where the CCI refused to establish a prima facie case against the e-commerce giant.[29]

Furthermore, the narrow relevant market definition that separates online and offline retail platforms can inadvertently place offline retailers at a competitive advantage, as such narrow interpretations mean that regulatory interventions by the CCI may disproportionately target online platforms while leaving offline retailers largely unaffected. Offline retailers could benefit from reduced compliance burdens and less scrutiny, despite operating in overlapping markets and competing for the same consumer base. For example, an offline retailer engaging in exclusive distribution agreements or aggressive pricing strategies may escape antitrust action simply because the relevant market has been narrowly defined to exclude online competitors. This creates an uneven regulatory landscape, where online platforms are subject to stricter regulatory compliance & scrutiny. Likewise, there may also arise situations where regulatory action of the CCI could disproportionately target offline retailers, while the online retailers reap the benefits of such an approach. Addressing this imbalance requires a more integrated market definition that considers the substitutability of products across both platforms, ensuring a level playing field & improving the competitive environment of the retail industry.

V. CONCLUSION

While the narrow interpretation of the CCI in its recent orders may or may not have effectively addressed the anti-competitive concerns pertaining and limited to those cases, the same narrow interpretation could have several other negative implications with regard to the growth and development of emerging markets, such as the e-commerce industry, and also inadvertently result in creating an anti-competitive effect on other related markets, that have been deemed to be a separate competitive domain in itself, even if the same is not the case in reality. Therefore, it is required to establish a more dynamic approach in determining relevant markets, particularly in cases involving the e-commerce industry. In doing so, it must be understood that identifying the relevant markets narrowly or more broadly might not necessarily address the anti-competitive concerns in all cases. In such special circumstances, a more dynamic approach

[29] *All India Online Vendors Association v Flipkart India Private Limited and Another* (2018) SCC OnLine CCI 97.

could be fruitful. It goes without saying that such a dynamic approach must also be subject to certain safeguards so as to prevent the CCI from subjecting entities to hindrances.