



## Major Competition Law Issues in E-Tail Market

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**Abstract:** *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. Utilisation of this new way of purchasing products by Indian retail customers has shaken the well-established offline retail market; and offline retailers fear the loss of business at a great extent because of E-Tailers. 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. This paper explains the meaning of offline and online retail market (E-Tail market) and examines 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.*

**Keywords:** *Online Retail Market, E-Tail Market, Offline Retail Market, E-Commerce, Competition Issues, Horizontal Agreement, Vertical Agreement, Predatory Pricing.*

### I. INTRODUCTION

IMF expects growth in India this year at 7.2%, and that at 7.5% next year, making India one of the fastest growing economies in the world. India's online retail market will be among the top sectors which will show the fastest growth. Last year, India based Flipkart announced \$1 billion investment in E-Tail market. The very next day, US based Amazon announced \$2 billion investment. China based Alibaba is also said to be in talks with India based Snapdeal. Thus India seems to be the focus for major online shopping market players of the world. All wants to get the benefits from the large consumer base of India.

The reasons behind such excitement are due to proliferation of IT devices in India. Table-top computing devices like 'laptop' and 'desktop computers' as well as hand-held computing devices in the form of 'smart-phone' and 'tablets' are now cheap and has reached the middle class of India. As a result, online shopping market is growing rapidly in India.

An attractive feature of E-Tail market is that the customers are in direct contact with the E-Tailers like Amazon, Flipkart and Snapdeal. Therefore they have low cost of operation. Further due to high turnover, they have better bargaining power when purchasing from vendors. To attract Indian customers to their websites; these players offer huge discounts on many products sold by them. Flipkart had come up with a 'Big Billion-day' sale where they offered huge discounts; some products were available at a tenth of their original price.

Unfortunately, the traditional retail market and mall market (offline retail market) does not have a low cost of operation; either because of low turnover or because of high operating costs. Therefore they do not have ability to provide huge discounts. The largest offline retailer; Future Group has accused online players for following anti-competitive strategy by way of selling products below the cost price. On the other side; vendors who sell to such online players have also complained that such online players are forcing vendors to sell their products at the price which is sometimes lower than their buying prices. Traders have also accused E-Tailers of adapting to the predatory pricing practices.

There is a fear that if such a practice is allowed to continue then it may result into a monopolistic situation where E-Tailers will control and dominate the retail market. It is difficult to answer whether such a fear is genuine or not. Is all major investment in E-Tail market intended for growth or it has some other purpose as well? This paper intends to understand if the practices followed by the E-Tailers are anti-competitive or not. What is the relevant market for these E-Tailers and should the benefits of E-Tail model affect this analysis in their favour or not will also be discussed in this paper.



## II. UNDERSTANDING E-TAILING CONCEPT

### 1. What is Offline Retail

Traditional retail refers to these thousands of small, mostly family-owned retail businesses. They are also referred to as the "unorganized" retail sector. The "organized" sector refers to large, modern regional and national retail stores.<sup>1</sup>

Since very long time, Indians shop from local and small vendors, which use abovementioned style for business. In only last 2 decades the organized shopping malls have come up which offer products in very large store type shops. However, this trend is limited to urban areas only and has not reached rural India yet.

Supporters of traditional retail note several benefits---buyer proximity, personal service and monthly credit. Even though it is small, traditionalists understand their customer base and only stock goods suitable for them.

Traditional retail model is fairly simple to execute. Customers understand the retail business model, companies have clear value propositions, and the market presents very high revenue potential to traditional retailers. But the model also has its weaknesses as a result. The high revenue potential ensures that a company will operate in a crowded marketplace with a lot of competitors. This makes it difficult to differentiate from the competition and leads to generally low profit margins (with obvious exceptions like the premium retail business model).<sup>2</sup>

### 2. What is E-Tailing

E-Tailing is a term used to represent the Electronic Commerce in Retail sector. Electronic Commerce is defines as:

*'Electronic commerce is the exchange of information across electronic networks, at any stage in the supply chain, whether within an organisation, between businesses, between businesses and consumers, or between the public and the private sectors, whether paid or unpaid.'*<sup>3</sup>

While dealing with E-Tailers; e-commerce transaction is an essential ingredient. OECD defines e-commerce transaction as:

*'An e-commerce transaction is the sale or purchase of goods or services, conducted over computer networks by methods specifically designed for the purpose of receiving or placing of orders. The goods or services are ordered by those methods, but the payment and the ultimate delivery of the goods or services do not have to be conducted online. An e-commerce transaction can be between enterprises, households, individuals, governments, and other public or private organisations. To be included are orders made over the web, extranet or electronic data interchange. The type is defined by the method of placing the order. To be excluded are orders made by telephone calls, facsimile or manually typed e-mail.'*<sup>4</sup>

However, there are some similarities between retail as well as E-Tail market. In both the cases; it is extremely easy for the customer to switch the retailer or E-Tailers. In case of retailer, it may be a next shop and in case of E-Tailer; it is an alternative website. Thus for the customers; the switching cost is very low. However, in this low switching cost; there is an opportunity of getting the customer of competitor easily. Due to this low switching cost; the E-Tailers Weighing these strengths and weaknesses, traditional retailers spend most of their time fighting for sales volume and trying to build customer loyalty.

### 3. Major Competition issues in E-Tailing

Following are the categories under which the major competition issues for E-Tail market can be categorised:

#### i. Vertical Agreements:

The E-Tailers enter into an agreement with the product sellers for procuring the products for further sale to customers. In fact, all major web portals operate as a marketplace wherein different sellers sell their products by showcasing them to the customers on the website and for the same the website charges a commission that depends upon the product being sold.

However, 'exclusive supply agreements' or 'exclusive distribution agreements' are considered sometimes as anti-competitive. The next chapter discusses this issue in detail.

#### ii. Predatory Pricing:

<sup>1</sup>Jeff Fulton, 'Traditional Retail In India | Ehow' (eHow, 2015) <[http://www.ehow.com/facts\\_6768490\\_traditional-retail-india.html](http://www.ehow.com/facts_6768490_traditional-retail-india.html)> accessed 1 May 2015.

<sup>2</sup>Digitalbusinessmodelguru.com, 'The Traditional Retail Business Model' (2013) <<http://www.digitalbusinessmodelguru.com/2013/01/the-traditional-retail-business-model.html>> accessed 1 May 2015.

<sup>3</sup>Graeme Wearden, 'UK Retailers Facing E-Commerce Divide' (ZDNet, 2002) <<http://www.zdnet.com/article/uk-retailers-facing-e-commerce-divide-5000297360/>> accessed 1 May 2015.

<sup>4</sup>OECD Directorate, 'OECD Glossary Of Statistical Terms - Electronic Commerce Definition' (Stats.oecd.org, 2011) <<https://stats.oecd.org/glossary/detail.asp?ID=4721>> accessed 1 May 2015.



Country's largest retailer Future Group owner Kishore Biyani accused E-Tailers like Flipkart of adopting anti-competitive strategy by selling products below cost price. He asked that how can someone sell products below its manufacturing price? He alleged that E-Tailers are able to do such undercutting only to destroy competition and is because of foreign funding.<sup>5</sup>

However, Flipkart has said that such offers were common in the marketplace and helped sellers to attract a larger number of customers. It also said that sellers are the ones who decide on the pricing of their products – and only they can change these prices.<sup>6</sup>

Confederation of All India Traders (CAIT) and the newly formed Online Vendors Association of India (OVAI), wanted the CCI to look into the matter of price undercutting by e-commerce players in the festive season.<sup>7</sup>

### III. EXAMINING ANTI-COMPETITIVE PRACTICES BY E-TAILERS

#### 1. Possibility of Horizontal Agreement

Section 3(3) of the Competition Act presumes Appreciable Adverse Effect on Competition in certain circumstances mentioned in the said section.

##### a) *Directly or indirectly determines purchase or sale prices;*

Online portals are online platforms wherein different sellers sell their products by showcasing their products on the portal for which the web portal charges a commission depending upon the product category. Online portals tie-up with cargo/ logistic companies and they pick up the ordered consignment from the seller's place and deliver it at the buyer's address for a fee and the amount charged is credited to the sellers account depending on the payment cycle.

There are many competitors in E-Tail market and they all procure items from whichever source they find best after considering their store location, price of product, delivery mechanism etc. Therefore in such competition; price fixation by E-Tailer is not possible currently given their less market share.

##### b) *Limits or controls production, supply, markets, technical development, investment or provision of services;*

Effectively the E-Tailers work as an intermediary which provides platform to the sellers across India to sell their products to the customers. Customers access their platform (website, mobile application etc.) and

In such scenario, online portals do not have any control to control production or supply. It can be exercised by the sellers however that too is most unlikely as there will be other sellers selling similar products.

##### 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;*

Allocation of geographic area of market is as such not applicable to the E-Tailers since they operate on a pan-India basis due to the inherent nature of any technology platform which makes it accessible from anywhere in India.

#### 2. Possibility of Vertical Agreement

As per Section 3(4) of the Competition Act; vertical agreements/arrangements under and other agreements/arrangements which do not fall under section 3(3) would be considered as an anti-competitive agreements/arrangements only if the Appreciable Adverse Effect on Competition is proved.

**Case:** Mr. Mohit Manglani vs M/s Flipkart India Private Limited & Ors., Case No 80 of 2014, CCI8

<sup>5</sup>timesofindia-economictimes, 'Future Group's Kishore Biyani, Vendors Accuse Flipkart Of Undercutting To Destroy Competition' (2014) <[http://articles.economictimes.indiatimes.com/2014-10-08/news/54784739\\_1\\_future-group-kishore-biyani-marketplaces](http://articles.economictimes.indiatimes.com/2014-10-08/news/54784739_1_future-group-kishore-biyani-marketplaces)> accessed 1 May 2015.

<sup>6</sup>Subhash Narayan, 'Flipkart Hits Out At Future Group Chief Kishore Biyani Over Discounts, Says 'Prices Set By Sellers'' (The Financial Express, 2014) <<http://archive.financialexpress.com/news/Flipkart-hits-out-at-Future-Group-chief-Kishore-Biyani-over-discounts--says--prices-set-by-sellers-/1298052>> accessed 1 May 2015.

<sup>7</sup>Nivedita Mookerji, 'Big Billion Day Sale Cost Flipkart Big; Govt Takes Notice' (Business-standard.com, 2014) <[http://www.business-standard.com/article/companies/billion-day-sale-cost-flipkart-big-govt-sits-up-114100900029\\_1.html](http://www.business-standard.com/article/companies/billion-day-sale-cost-flipkart-big-govt-sits-up-114100900029_1.html)> accessed 1 May 2015.

<sup>8</sup>cci.gov.in, 'Order Of Commission' (2015) <<http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf>> accessed 1 May 2015.



In this case; Informant alleged that Flipkart India Private Limited ['FIPL'] had an exclusive agreement with Rupa publications for sale of the book titled 'Half Girlfriend' written by author Chetan Bhagat. The said book was exclusively available on FIPL's website. Buyers who wish to purchase the book have to unconditionally agree to all the terms and conditions.

Informant alleged that the e-portals/e-commerce websites and product sellers enter into 'exclusive agreements' to sell the selected product exclusively on the selected portal to the exclusion of other e-portals or physical channels or through any other physical channel. Accordingly, the portal operator decides terms of re-sale, sale price, terms of payments, delivery period, quality and service standards etc. All of these conditions are non-negotiable for a consumer who intends to buy those products. Further, to create hype for the product, the supply is controlled by the e-portal with whom the exclusive arrangement has been made, creating an impression of scarcity.

The CCI ruled that every product cannot be taken as a relevant market in itself. Commission also held that irrespective of consideration of e-portal market as a separate relevant product market or as a sub-segment of the market for distribution, none of the E-Tailers seems to be individually dominant. There are several players in the online retail market offering similar facilities to their customers. As a result commission did not find any merit in the case.

For proving the Appreciable Adverse Effect on Competition under section 3 of Competition Act; following factors need to be evaluated for any behaviour of the E-Tailers:

*a) Creation of barriers to new entrants in the market;*

There seems to be no entry barrier given the fact that more and more investment is pouring in from different venture capital funds. This has resulted in constant increase in the number of E-Tailers in the market. New business concept in different segment of the markets are introduced and as a result market is becoming more and more competitive. This as a result has increased the competition between these new players and established players. The efforts made to stay in the market or to maintain the customer base in the market cannot be termed as anti-competitive.

*b) Driving existing competitors out of the market;*

As mentioned in the point-(a) above; currently this is not a situation in the online retail market. The online market is in the initial phase where different platforms are in competition to establish them in the market. They still do not have the capability to do so as they have very less command on the market due to very less market share.

*c) Foreclosure of competition by hindering entry into the market;*

E-Tailers deal into variety of product categories ranging from books, toys, stationery, electronic and accessories, fashion items, clothing etc. Each of this category consist of products of many different brands. Further, each brand offers many types of products on the same category. As a result a typical online portal normally offers thousands of products.

When the share of total E-Tail market is very less and there are thousands of products offered by normal E-Tailer; it is currently difficult to implements the measures that may foreclose the competition in the E-Tail market which may have an appreciable adverse effect on competition in India.

**Case: Mr. Ashish Ahuja vs Snapdeal.com & Ors., Case No 17 of 2014, CCI 9**

The Informant has an online agreement with Snapdeal for sale of goods through their website. As per this agreement; Informant started selling various products like pen drives, hard disks, laptops etc. through the website. However, suddenly Snapdeal stopped the sale of Informant's products through its website and took off its products. When contacted, Snapdeal informed that only authorized partners of M/s SanDisk India could sell SanDisk items through its web portal; and demanded NOC from M/s SanDisk India if Informant wanted to continue the sale through Snapdeal website.

Informant had alleged that Snapdeal in collusion with SanDisk are trying to stop the Informant from offering competitive pricing which was much below than the other sellers of the same product.

In this case, relevant geographic market was considered to be India. Commission observed that both offline and online markets differ in terms of discounts and shopping experience and buyers weigh the options available in both markets and decides accordingly. If the price in the online market increase significantly, then the consumer is likely to shift towards the offline market and vice versa. Therefore, the Commission is of the view that these two markets are different channels of distribution of the same product and are not two different relevant markets. Based on the above discussion, the relevant market was considered as the market for portable small-sized consumer storage devices such as USB pen drives, SD Memory Cards and Micro SD Cards in India.

The Commission observes that the insistence by SanDisk that the storage devices sold through the online portals should be bought from its authorised distributors by itself cannot be considered as abusive as it is within its rights to protect the sanctity of

<sup>9</sup>cci.gov.in, 'Order Of Commission' (2014) <<http://www.cci.gov.in/May2011/OrderOfCommission/262/172014.pdf>> accessed 1 May 2015.



its distribution channel. In a quality-driven market, brand image and goodwill are important concerns and it appears a prudent business policy that sale of products emanating from unknown/ unverified/ unauthorised sources are not encouraged/allowed.

The Commission ruled that that the conduct of SanDisk in restricting the market to its authorised sellers alone as alleged by the Informant, prima facie is not a violation of Section 3 of the Competition Act.

d) *Accrual of benefits to consumers;*

For the customers following benefits are there by usage of the online purchase from E-Tailers.

- i. To see the product specifications, compare the product prices and check the benefits and disadvantage of products (through rating and review mentioned by customers who purchased the product earlier).
- ii. The option of product delivery at home of the customers is of great value too. Customers have an option of accepting the delivery at their own time.
- iii. Few hours that they might have spent while purchasing the product from offline retail market are saved.

e) *Improvements in production or distribution of goods or provision of services;*

E-Tailers are in a way nothing but the new distribution channel operating via online model. Thus E-Tailers are an option for the consumers to see the product specifications, compare the product prices and check the benefits and disadvantage of products (through rating and review mentioned by customers who purchased the product earlier). The option of product delivery at home of the customers is of great value too. Customers have an option of accepting the delivery at their own time and as a result they save few of hours that they might have spent while purchasing the product from offline retail market.

f) *Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.*

The E-Tailers have deployed SAP platforms that enhance their ability to analyse the requirement of products and to see the current stock in any store on real time basis. Through usage of technology, they are able to provide appropriate time within which the product may be delivered to customers in case of stock or in case of out of stock as well.

For home delivery of the goods; E-Tailers have entered into agreements with courier service providers due to which their revenue has increased as well. Within a year of joining the e-commerce bandwagon as a distribution channel, government entity India Post has transacted business worth Rs. 280 crores in the Cash-on-Delivery (CoD) segment alone for firms like Flipkart, Snapdeal and Amazon.<sup>10</sup> Further, India Post will be setting up a separate e-commerce center in New Delhi to improve efficiency of its handling capacity of online purchase deliveries for its e-commerce customers.<sup>11</sup>

### 3. *Predatory Pricing*

a) *What is Predatory Pricing?*

The explanation<sup>12</sup> given 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.

**OECD defines 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.

Under the **Competition Act 'predatory pricing'** 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"<sup>13</sup>

b) *Predatory Pricing in E-Tail Market*

<sup>10</sup>Press India, 'India Post Collects Over Rs. 280 Crores Via Cash On Delivery For E-Commerce' (NDTV Gadgets, 2014) <<http://gadgets.ndtv.com/internet/news/india-post-collects-over-rs-280-crores-via-cash-on-delivery-for-e-commerce-628115>> accessed 1 May 2015.

<sup>11</sup>WordlyPost, 'India Post To Set Up E-Commerce Centre To Handle Growing Online Purchase Deliveries - Wordlypost' (2015) <<http://www.wordlypost.in/india-post-to-set-up-e-commerce-centre-to-handle-growing-online-purchase-deliveries/>> accessed 10 May 2015.

<sup>12</sup>Ftc.gov, 'Predatory Or Below-Cost Pricing | Federal Trade Commission' <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost>> accessed 1 May 2015.

<sup>13</sup>Explanation (b) of Section – 4 of The Competition Act, 2002



In E-Tail market too; instances of companies like Flipkart and Snapdeal using low prices to boost their revenues and attract customers from offline market as well as customers of other competitors are observed. However, if it is done with an intention to remove smaller competitors from the market with an intention to raise prices after they leave are unreasonable to think off. As soon as the E-Tailers will increase prices in future; it will become a very profitable business and competition will enter into which will ultimately force the established E-Tailers to reduce prices.

However; the basic assumption about the predatory pricing is that the firm exercising predatory pricing must be in a dominant position in the market.

E-Tailers claim that in spite of growing demand of e-commerce and online retailing, it accounts for less than 1% of the total retail in India. They further claim that online retail is a sub-set of the organized retail market and since organized retail itself constitutes a miniscule portion, about 8% approximately of the total retail market in India, the share of online retail is extremely less.<sup>14</sup>

Therefore, none of the E-Tailers can be said to have dominant position in the market since they all combined are said to have not more than 2% market share of the total retail market. Therefore the complaints that the E-Tailers are indulging in predatory price does not have such weight. It should further be noted that such heavy discount sales are limited in products being offered and are for limited period and stock only. Therefore such sale cannot be said to be a predatory pricing sale.

#### IV. CONCLUSION

E-Tail business model as a retail experience, is now well accepted model by the consumers. Whenever there is a change in any established system; there will be resistance to changes. Same is the case in retail market in India. Due to successful entry of E-Tailers in retail space; offline retailers are at unrest. However, there are many offline retailers who have started using the online channel. Success of E-Tailers have caused worries in those offline retailers to an extent that they fear that their shop will turn into a warehouse. As a result; the shop owner will stay in business but they will have to lay off the staff that is working in their store.

When machines started replacing factory employees; there were protest and unhappiness among the factory employees. However, factory owner and consumer were happy due to reduction in price and better product quality. Same seems to be the case with E-Tail market.

Although the offline and online markets differ in terms of discounts and shopping experience; buyers weigh the options available in both markets and decides accordingly. Any significant change in the price in one market will result in shift of consumer towards the other market. Therefore, these two markets are different channels of distribution of the same product and are not two different relevant markets. Due to very less market share of all the E-Tailers together makes it almost impossible for them to exercise any anti-competitive measures. Moreover, any heavy discount sale of a short duration is merely a demonstration of fierce competition in the retail market and not a case for predatory pricing. Moreover, E-Tail market is also contributing to development of other models like online payment system and cash on delivery services.

*'People are always going to go shopping. A lot of our effort is just: How do we make the retail experience a great one?'* <sup>15</sup>

-Philip Green, Retail Businessman

Since E-Tail market has successfully started poaching the customers of offline (organised and unorganised both) retail; the offline market vendors are worried. However the E-Tailers and the end customers are happy due to reduction in price, home delivery of product and ease of shopping. Similar mood was seen in the unorganised offline market when organised offline market poached their customers in last decade. However, unorganised offline market has very much survived. Same way, offline market as a whole will stay there as a choice for customers for a very long time for country like India. Online market will not be able to replace the offline market significantly as is the case in developed countries.

<sup>14</sup>cci.gov.in, 'Order Of Commission' (2015) <<http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf>> accessed 1 May 2015.

<sup>15</sup>BrainyQuote, 'Philip Green Quotes At Brainyquote' <[http://www.brainyquote.com/quotes/authors/p/philip\\_green.html](http://www.brainyquote.com/quotes/authors/p/philip_green.html)> accessed 1 May 2015.



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