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FOREWORD

It is rightly said that when a big tree falls, the ground shakes, the squirrels fall out of their burrows, the world stands up and takes notice. For all of us who form part of the competition bar in India, the first of such moments was the Competition Commission of India's momentous 2011 decision in *DLF*. A brand which was riding high on its recall from sponsoring the glitzy Indian Premier League was suddenly hammered by a massive INR 600 crore plus regulatory fine. This decision is criticized as regulatory over-reach in many quarters – but there is no denying that it put the CCI on the global antitrust map. Those of us who were working in the fledgling competition practices of the major Indian law firms in that year remember how foreign law firms and corporates queued up to inquire about the new sheriff in town, and its powers.

The Indian competition law regime is a nascent one, having started only in 2009. However, in its nearly 8 years of operation thus far, the CCI has evolved as one of the foremost antitrust regulators of the developing world. Both the CCI and the Competition Appellate Tribunal have shown a willingness to embrace global best practices of competition regulators in order to evolve Indian competition law jurisprudence. Issues such as relevant turnover - a hotly contested concept till date – were imported from European Union law by the COMPAT in the *Aluminium Phosphide* case. Closer to home, the COMPAT's disciplining approach towards due process and procedural fairness at the investigation stage has been welcomed by the industry and practitioners alike.

One of the defining aspects of competition law is its frequent overlap with the realms of other regulators. An example of this was the differing views of CCI and SEBI on the concept of 'control'. A titanic clash between regulators was avoided when SEBI, in *Jet/Etihad*, skillfully drew a distinction between its purpose and that of the CCI, thus explaining these divergent views on control. Competition law also frequently trespasses into economic policy in general. Some sectors are especially vulnerable to antitrust action, which are consequentially referred to as 'low-hanging fruits'. Usually, as is the case for the cement sector, this is because of the inherent structure of the market itself. On the other hand, some sectors, such as pharmaceuticals, face increased scrutiny due to public policy reasons. In fact, some years ago, the powers-that-be had designated the CCI as the nodal regulator to regulate the pharmaceutical sector. It is argued that an imminent excessive pricing antitrust action against stent manufacturers was narrowly avoided when the government swung its executive axe and designated stents as 'essential medicines', thus imposing a price cap. Having

worked with the CCI on many pharmaceutical matters, be they antitrust or merger control cases such as *Pfizer/Hospira* and *Abbot/Mylan,* one can state with certainty that the officers at the CCI are well versed with how this sector operates. Given this background, issues which are arising in other jurisdictions, such as 'pay-for-delay', may one day need to be conclusively adjudicated in India as well. It would be interesting to see how the CCI puts its institutional body of knowledge to work in such cases.

Notwithstanding the fact that the CCI is a new regulator, cutting edge antitrust issues have come to its doorstep far faster than most practitioners thought they would. Cases on high-technology markets, standard essential patents and sham litigation, have all arrived before the CCI. As a much-networked regulator having forged ties with regulators from advanced jurisdictions, it will be interesting to know how the CCI deals with such issues.

In sum, the Indian competition law space is characterized by the twin attributes of nascence, and the willingness to rapidly evolve its own practices and jurisprudence. The competition bar and academia in India is thus required, in many senses, to become equal partners in this journey. In this context, the Indian Competition Law Review is a welcome initiative by the Centre for Competition Law and Policy, National Law University Jodhpur.

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DECONSTRUCTING "CONTROL" UNDER COMPETITION ACT, 2002: NEED FOR RE-LOOK?

- *Ayush Vijayvargiya*[*]

Control, as a concept, has drawn a lot of discussion in the last few years, not particularly limited to the domain of Securities Law but also spreading across other areas of law like Competition Law. This paper thus sets out to discuss the significance of control to the competition regime and outline the problems associated with its uncertain understanding, followed by reinforcement of the need for change. An attempt has been made towards clearing the mist as regards the aspects which are misunderstood to have problems i.e., inconsistent interpretation of CCI vis-à- vis SEBI, and instead focus the attention towards the real issue of uncertainty strictly within the domain of competition law. After thorough identification of problems in the initial segments, an elaborate discussion is undertaken on the various difficulties that the current regime poses, and repercussions that follow by design. Having discussed the domestic landscape comprehensively, the author then analyzes this concept as practiced across major mature competition law jurisdictions and cues, if any, which can be taken for further development in the domestic regime. Finally as decisions by CCI has turned out to be an insufficient interpretative tool, author has proposed issuance of a guidance note, drawing from a mix of avenues, in order to bring certainty in the regime.

I. JURISPRUDENTIAL CONCEPT OF CONTROL- RELEVANCE TO COMPETITION LAW

Black's Law dictionary defines Control as '*the ability to exercise a restraining or directing influence over something*'.[1]In conventional corporate parlance, it has been used in the context of parent-subsidiary Company, where it signifies the power that the former holds over the latter.[2]Over the course of years, however, this concept has come a long way from its traditional definition and now connotes a different meaning for different regulators, depending upon the context it is set in. As a result of its

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[1] Black's law dictionary, 335 (10th ed. 2014).

[2] Kosturi Ghosh, *'Control' – an Investor's Quandary*, LexisNexis Mergers & Acquisitions Law Guide, 61 (2015).

detached development amongst regulators, there is considerable definitional ambiguity that exists from the perspective of an investor.[3]

There are a number of statutes, which entail enquiry into the domain of 'control'. Companies Act, 2013[4], SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011[5] ['Takeover Code'], Competition Act, 2002[6] ['Act'] and Foreign Direct Investment policy[7] ['FDI Policy'] are a few significant ones. Under the said statutes, acquisition or shift in control triggers certain requirements, and depending upon the statute concerned, this can range from provision of an exit option to existing shareholder through an open offer[8] to notifying the regulator of the merger/acquisition.[9]With the concept having undergone significant judicial debate and differential interpretation by courts/tribunals in the context of each regulation, bringing cross-regulatory equivalence stands as a highly undesirable prospect, and rightly so. This is because interpretation happens in the context of objectives sought to be achieved by the respective regulator, and would be discussed comprehensively in subsequent segments of this paper. However, streamlining the understanding within the native domain of each regulator, Competition Commission of India ['CCI'] in this case, seems rather imperative.

A re-look at CCI's understanding of control becomes even more important in light of the recent attempt by Securities and Exchange Board of India ['SEBI']to define control in an objective way, where in a discussion paper was floated in order to invite public opinion on the proposed change.[10]SEBI succeeded in taking cognizance of the inconsistency in its regime which is primarily attributable to contrasting past interpretations of control by SEBI and Securities Appellate Tribunal ['SAT'].[11]CCI has however, failed to do the same despite widespread presence of a similar issue in the competition domain. With global organizations like Organization for Economic Co-operation and Development ['OECD']campaigning for international parity in the understanding of terms like

[3] *Ibid*
[4] Section 2(27), Companies Act 2013, Act No. 18 of 2013.
[5] Regulation 2(e), SEBI (Substantial Acquisition of Shares and Takeovers) Regulations 2011, Notification No. LAD-NRO/GN/2011-12/24/30181.
[6] Section 5, Competition Act 2002, Act No. 12 of 2003.
[7] Consolidated Policy on Foreign Direct Investment 2016, D/o IPP F. No. 5(1)/2016-FC-1, dated 7th June, 2016.
[8] *Supra* note 5, Reg. 4.
[9] *Supra* note 6, S. 6.
[10] Discussion Paper on "Brightline Tests for Acquisition of 'Control' under SEBI Takeover Regulations", http://www.sebi.gov.in/cms/sebi_data/attachdocs/1457945258522.pdf.
[11] SEBI v. Subhkam Ventures, AIR 2012 SC 1587.

'control' and 'decisive influence',[12]the failure of CCI to recognize and redress this inconsistency and uncertainty within the domestic regime itself is a major setback. In such circumstances, cross-country parity only remains a utopian hope.

Moving ahead to the relevance of this concept to competition regime, 'Control' is defined under the explanation clause of Section 5 of the Act and reads "*Controlling the affairs or management*" by *one or more 'enterprises' or 'groups', either jointly or singly, over another enterprise or group.*[13]This concept becomes relevant especially because acquisition of control, amongst others like *shares*, *voting rights* and *assets*, acts as an automatic trigger to the mandatory notification requirement of the CCI.[14] A majority of transactions involves acquisition of either shares or assets by a party to transaction, and consequently directly lie within the CCI's jurisdiction.[15]However, a number of transactions that do not involve acquisition of either of the two or fall under any of the exemptions[16]still hold the potential to create an appreciable adverse effect on competition ['AAEC'] owing to a change in control. As Section 6(1) of the Act bars any combination that causes or is likely to cause AAEC within the relevant market in India, therefore this concept aims to bring such transactions within the jurisdiction of CCI.

A meticulous review of the relevant provisions helps one identify a few circumstances wherein the analysis of 'control' becomes relevant, namely:

- When the transaction involving acquisition of shares or voting rights falls within one of the '*statutory*'[17] or '*governmental*'[18] exemptions, but owing to certain external considerations like entrustment of additional rights, alteration in 'control' takes place and consequently leads to it falling within the ambit of combination; or
- When the acquirer and target enterprises enter into an agreement, whereby certain special rights are entrusted with the former without any actual buying/selling of shares or assets taking place, which effectively translates into assignment of control; or

[12] OECD, *Policy Round table on Definition of Transaction for the Purpose of Merger Control Review,* DAF/COMP (2013) 25 [2013], http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf.
[13]*Supra* note 6, Explanation (1) to S. 5.
[14]*Supra* note 6, S. 5, 6.
[15] Umakanth Varotill, *Convertible Instruments and "Control" Under the Competition Act*, INDIAN CORPORATE LAW BLOG, (May 31, 2012), http://indiacorplaw.blogspot.in/2012/05/convertible-instruments-and-control.html.
[16] Schedule I, CCI (Procedure in regard to the transaction of Business relating to Combinations) Regulations, 2011.
[17]*Supra* note 6, S. 6(4).
[18]*Supra* note 16 & "De Minimis" exemption.

- When there is "*acquisition of control by a person over an enterprise when such person has already direct or indirect control over another enterprise engaged in production, distribution or trading of a similar or identical or substitutable goods or service.*"[19]

It is important to note that analysis of 'Control' is not merely limited to acquisition and very well extends to even mergers and amalgamations.[20] But in the Indian context, unlike the position in European Union ['EU'] or United States ['US'], the analysis of what amounts to control becomes less significant in cases of mergers and amalgamations owing to the language of the relevant provisions.[21]In addition to the absence of term 'control' under clause (c) of Section 5, clause (a) of the same section defines combination by acquisition which is rather broad in its scope and reads '*acquisition of control, shares, voting rights or assets*'. Therefore most of the mergers and amalgamations, which would otherwise involve control analysis under Section 5(c), already gets statutorily covered by other clauses like '*shares*', '*voting rights*' or '*assets*' under Section 5(a), thereby leaving the former practically un-invoked. However, this intermingling does not have larger practical implication, as the practice evolved by CCI is such that filing has to be done under (a) or (c) depending upon the way a transaction is structured and worded in the transactional documents.

Furthermore it is well established that not every acquisition by an enterprise which meets the given asset or turnover threshold needs to be notified, and certain categories stand exempted.[22]However these exemptions laid down under Schedule I of the Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 ['Combination Regulations'], are only available for transactions "*not leading to acquisition of the target enterprise/group's control*", or "*not causing a shift from joint to sole control*".[23] This essentially implies that even though some acquisitions get exempted on paper, CCI might still require their notification if it is of the opinion that the concerned transaction entails change in control. This discretionary leeway given to the CCI

[19]*Supra* note 6, S. 5 (b).
[20]*Supra* note 6, S. 5 (c).
[21] G R Bhatia, *Merger Regulations Needs Fine Tuning By The Competition Commission Of India*, MONDAQ, (March 21, 2016), http://www.mondaq.com/india/x/475792/Antitrust+Competition/Merger+Regulations+Needs+Fine+Tuning+By+The+Competition+Commission+Of+India.
[22]*Supra* note 17, 18.
[23]*Supra* note 16.

in obviously exempted transactions, on account of the loose definition of control, strengthens a realm of uncertainty and holds potential of resulting in a spate of notifications.[24]

In addition to delaying transactions and deterring the flow of investment, the uncertain nature of the extant control regime also leads to undue imposition of penalty and compromises with interpretational consistency. This paper is thus an attempt to highlight these existing problems and guide the regulators towards possible avenues of solutions and alternatives. Bearing in mind that this is a policy decision taken by a regulator after considering a range of variable factors, the paper will step short of suggesting a concrete set of guidelines that can be adopted and will instead provide suggestions that can be fine-tuned towards the same. It entails a multi-jurisdictional analysis with the aim of identifying the best practices followed in major jurisdictions, and examines the feasibility of borrowing the said concepts in Indian context. More importantly, this paper also attempts to clear the mist with respect to the aspects which are misunderstood to have problems i.e., inconsistent interpretation of CCI vis-à-vis SEBI, and instead redirect the attention towards the real issues at hand.

Besides the current segment, where the significance of 'control' to the competition regime has already been discussed and scenarios pertinent to control enquiry highlighted, the paper is sub-divided into five other segments. The second segment traces the judicial development over the course of five years and breaks down the understanding of this concept by CCI. It is followed by an elaborate account, in the next segment, on SEBI's understanding of control and a comparative analysis on the fronts where disparity exist vis-à-vis CCI. The fourth segment flags out the disadvantages that the current regime poses and reinforces the need for initiating changes. Having discussed the domestic landscape comprehensively, fifth segment analyzes the way other jurisdictions understand the said concept and what cues, if any, can be taken for further development in the domestic regime. Finally, the last segment conclusively specifies the actual points of contentions and categorically recommends a few avenues which can act as a guiding light for initiating changes.

II. DECODING CCI'S UNDERSTANDING AND TRACING THE JUDICIAL TREND

[24] Nandish Vyas & Pranati Ishwar, *The Viewpoint – The Anatomy of Control*, BAR & BENCH, (July 12, 2012), http://barandbench.com/viewpoint-anatomy-control/.

Having established the relevance of 'control' to Competition Law regime in the previous segment, this part seeks to elaborate upon the manner in which control is understood under the said regime. It has been five years since the enforcement of the combination regime, and the question 'What amounts to control?' still remains open to interpretation. As will be seen in this segment, even though the recent CCI orders have brought some echelon of clarity to an otherwise circular and inclusive definition given in the Act, uncertainty continues to linger, pending substantive guidance from the CCI. The term control has been imputed with a broad meaning for the purpose of this act and a wide range of events, like 'Contractual veto rights' and 'minority shareholdings with affirmative control', are viewed as leading to its acquisition.[25]

An inquiry into the legislative intent behind incorporation of an inclusive and uncertain definition does give some clarity and shows that the broad definition is instead a deliberate legislative attempt.[26]Legislature was of the opinion that comprehensive factual determination is the sole criterion for determining change in 'control'.[27]However, this well intentioned scheme seems to have failed, as will be elaborated in the latter part, with no clarity till date even at broad and non-specific level. It is therefore important to break down the definition literally in order to cull out its important elements. Section 5 provides that for decisive control to exist, it needs to be either over a) '*management*' orb) '*affairs of an enterprise*'.[28]

Determining decisive control over 'management' hardly poses any challenge and merely entails a few straightforward calculations in order to establish whether a person has the right to appoint a majority of directors on the board or not.[29]This notion of control, also known as 'Legal control', is principally understood to have changed hands when one entity acquires majority voting rights of another.[30]However it is not merely limited to transfer of majority voting rights and gets triggered even when minority shareholders are entrusted with extraordinary rights like power to appoint

[25] Avirup Bose, *The Concept of Control under the Indian Competition Act: an analysis*, INDIAN CORPORATE LAW BLOG, (June 6, 2012), available at http://indiacorplaw.blogspot.in/2012/06/concept-of-control-under-indian.html.
[26] REPORT OF THE HIGH LEVEL COMMITTEE ON COMPETITION POLICY AND LAW, Chairman S.V.S. Raghavan, 2000. ¶4.1.1.
[27] Neeraj Tiwari, *Merger under The Regime of Competition Law: A Comparative Study of Indian Legal Framework With EC and UK*, 23(1) BOND LAW REVIEW(2011).
[28] *Supra* note 6, Explanation (1) to S. 5.
[29] D.P. MITTAL, COMPETITION LAW AND PRACTICE 309 (3rd ed. 2011).
[30] Arshad (Paku) Khan, *A few things you should know about Indian merger control*, 20 (4) INT.TRADE.LAW AND REGULATIONS 65, 74 [2014].

majority/substantial number of directors; as it gives them the power to potentially influence tactical decisions of the acquired entity.[31]

Queries pertaining to decisive control over 'affairs of an enterprise', on the contrary, require complicated factual and circumstantial investigation to reach a particular conclusion.[32]Analysis in such circumstances doesn't stand limited to board and policy decisions and even extends to aspects like production, distribution, services et al.[33] This notion is termed as 'Factual control' and is a more indirect exercise of influence with powers like 'Veto right', amongst others, included within its ambit. Veto rights entrusted with the minority shareholders might be ineffective for the purposes of imposing a decision, but it holds the ability to strategically influence decisions by way of blocking them.[34]

Tribunals and Courts have attempted to maintain some consistency and interpreted' control over affairs' particularly as an exercise of '*decisive influence*' over the affairs of another enterprise.[35] It will become rather clear from the cases discussed under this segment that mode of exercising the said influence by minority shareholders i.e., via affirmative rights or other contractual covenants, has been held immaterial. The jurisprudence developed under Act not only includes positive or proactive control within its ambit, but also extends to affirmative and negative rights. One of the early pioneering decisions by CCI in this regard came in a matter involving shares acquisition of *Multi screen media private limited.*[36]The CCI held that entrustment of negative rights amount to control and even enlisted a few probable negative rights which, in the CCI's opinion, are likely to result in change of control.[37]

In a subsequent case[38]CCI affirmed the said enlisting and by design significantly consolidated the legal position. Besides, both these cases also briefly observed that contractual agreements between

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[31] RICHARD WHISH AND DAVID BAILEY, COMPETITION LAW 880 (7th ed. 2011).
[32]*Supra* note 29, P. 311.
[33] Jayshree P Upadhyay, *The elusive concept of Control,* August 9 2016, BUSINESS STANDARD, http://www.business-standard.com/article/opinion/the-elusive-concept-of-control-115080900762_1.html.
[34]*Century Tokyo Easing Corp.*, Combination registration no. C. 2012/09/78, dated 4th October, 2012, http://www.cci.gov.in/sites/default/files/C-2012-09-78.pdf.
[35] Naval Satarawala Chopra & John Handoll, *India: Merger Control*, ASIA-PACIFIC ANTITRUST REVIEW [2016].
[36]*Multi Screen Media Pvt. Ltd.,* Combination Registration no. C-2012/06/63, dated 9th August, 2012, http://www.cci.gov.in/sites/default/files/C-2012-06-63.pdf.
[37] An inclusive list of instances where veto rights entrustment would amount to change in control: (a) Business plans; (b) Appointment, termination and compensation of Key managerial persons; (c) Budget allocation; or (d) Key investment decisions.
[38]*Supra* note 34.

shareholders are a sufficiently significant factor for translating sole control over an enterprise into joint control. However, it refrained from making a blanket statement in this regard and distinguished the said agreements from instances involving mere entrustment of 'investment protection' rights.

Later the CCI further lowered its control acquisition threshold, and its decision in Reliance Network's subscription of convertible ZOCDs (Zero-coupon optionally convertible debentures) issued by TV18acts as an apt exemplification of the same.[39] CCI held that acquisition of these ZOCDs even without any voting rights, conferred the ability to exercise decisive influence over the affairs, and by implication the 'control' thereof. Owner of ZOCDs were given an option to convert these debentures into equity shares at any future date, and therefore in the CCI's opinion they qualify as shares within the meaning of Act.[40]In simple words, it was held that *Firstly,* the mere possibility of a convertible security holder exercising its right to convert is enough to constitute control; and *secondly*, control stands acquired from the time investment is made into the convertible security, and not deferred till the actual exercise of the conversion right.

The decision of CCI in the case of *Jet-Etihad* lowered control acquisition threshold even more drastically.[41] It held the joint initiative of the parties to enter into an Investment Agreement ['IA'], Shareholders' Agreement['SA'] and Commercial Cooperation Agreement['CCA'] as amounting to establishment of Etihad's joint control over Jet. These agreements and the governance structure provided under the CCA, in the CCI's opinion, established Etihad's control over the assets and operation of Jet airlines. This is a classic case of threshold lowering as only 24% stake was being acquired by Etihad and that too with no veto or quorum rights. In addition, Etihad was given a right to appoint just 2 out of the 12 directors present on the Board. This case categorically brings forth the approach often adopted by CCI, wherein it extends beyond its mandate of analysing the post-transaction structure for any appreciable adverse effect that it might have on the competition.[42] Ratherit delvesinto examining the dynamics of relationships between the parties, and grounding the decisions on such contextual understanding.

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[39]*Independent Media Trust*, Combination Registration no. C-2012/03/47, dated 28th May, 2012, http://www.cci.gov.in/sites/default/files/C-2012-03-47.pdf.
[40]*Supra* note 6, S 2(V)(i).
[41]*Etihad-Jet*, Combination Registration no. C-2013/05/122, dated 26th November 2013, http://www.cci.gov.in/sites/default/files/C-2012-05-122%20261113.pdf.
[42] Avirup Bose, *Lessons to Be Learned from India's Latest High Profile Merger Review: The Jet-Etihad Deal*, 35 (4) EUROPEAN COMPETITION LAW REVIEW (2014).

As a result of these confusing decisions, the tribunal has muddied its waters and completely disregarded genuine minority protection rights. Collective analysis of the past CCI decisions thus helps immensely in not only breaking down the concept of 'Control' into different levels but also in answering some key questions;' what are the different levels of control' and 'what level of control breeds ambiguity in the regime' being few such. In order to abridge this source of uncertainty, control can be catalogued into the following four levels:

1) **Participatory power**: It covers within its ambit scenarios where the entity concerned has an influential voice in the process of decision making, but lacks the ability to direct the management's decision in a particular way or block it.
2) **Decisions blocking power**: Encapsulates circumstances where even though day-to-day management is being undertaken by a different person or group of persons, the concerned entity holds the ability to block decision by exercise of negative or affirmative control. The tools employed for this exercise of negative control are, 'veto rights', 'specific quantum of shareholding' or 'significant proportion of directors'.
3) ***De facto* control**: Ability to effectively exercise control by virtue of factors like majority shareholding, management of day-to-day affairs and majority in the board.
4) **Clear or absolute control**: Exercise of control without any fetters and usually covers instances with above 75% ownership of shares without any obstacle in terms of negative control etc.

It is easy to conclude that CCI considers the last two levels as a clear signifier of effective control, whereas level one is deemed to signify exercise of no control. Level two however continues to be the bone of contention and the breeding ground of all the ambiguities. There are arguments from both factions. Proponents claim that such level of control allows for 'decisive influence' in matters related to budgetary allocation, business plan etc. and therefore is sufficient for the purpose of exercising control.[43] Claims from the other side however assert that such influence even if it exists, rarely confers the ability to control competitive behavior as it is limited to certain aspects, which are more often than not incapable of causing AAEC.[44]

[43] *Supra* note 2.
[44] *Supra* note 24.

Despite opposition from the other faction, CCI has opted for an expansive view wherein the ability to negatively affect commercial operation is considered sufficient to confer control. This unusual interpretation has led to a blurring of the quintessential distinction between '*genuine minority protection rights*' and '*negative rights*'.[45]A standard practice followed by investors across the globe is to demand entrustment of affirmative rights in order to protect investments, and with no intention of tinkering with control.[46] However, past decisions have made it an intrinsic part of change in control rather than keeping it outside the ambit. In a handful of cases, the CCI has even declared a transaction as amounting to change in control by placing reliance solely on the dynamic relationship shared by the parties concerned.[47]As a consequence, a range of pure financial investment and private equity transactions, otherwise not falling within the review jurisdiction of the CCI, have become reviewable. Hence, the extant regime demands an extensive relook and requires change on multiple fronts.

III. ASCERTAININGSEBI'S POSITION ON CONTROL VIS-À-VIS CCI

Complexity of the Indian regulatory regime, coupled with overlapping jurisdictions, has led to needless stalling of multiple transactions in the past. One such area of overlap is the divergent definition of 'control' under the Takeover Code and the Act. Even though CCI and SEBI are not the only regulators delving into control analysis, most other regulators like Foreign Investment Promotion Board ['FIPB'] et al. by and large rely on the definition provided under the Takeover Code and consequently the interpretation done by SEBI.[48] The definition under the Takeover Code, although slightly more detailed and elaborately worded than the Act, encounters similar interpretational issues.[49]

Although attempts have been made by SEBI to bring some stratum of certainty and consistency in its understanding over the course of the last few years, but little success has been achieved so far. Even if some level of consistency can be claimed to have been brought in, certainty remains a distant thought. In order to redress this lingering uncertainty, SEBI released a discussion paper

[45]*Supra* note 35.
[46]*Supra* note 12.
[47]*Supra* note 41.
[48] Cyril shroff, Nisha Uberoi, *Battle for Regulatory Supremacy: Ambiguity in the Definition of "Control" between SEBI and CCI*, CIRC WORKING PAPER(June 2014), available at http://circ.in/pdf/Battle_for_Regulatory_Supremacy_Ambiguity_in_the_Definition_between_SEBI_and_CCI.pdf
[49]*Supra* note 5, S. 2(e).

proposing two alternatives.[50]One is a subjective criteria wherein a negative list is published specifying the circumstances which wouldn't qualify as control. The second alternative pertains to an objective criterion providing for a threshold sharing percentage, which stands at 25%.It is however important to note that until the discussion paper by SEBI is converted into a concrete set of guidelines, the current regime based on the past decisions of SEBI and SAT will continue to subsist. In this context, what constitutes 'control' under Takeover code becomes an important enquiry.

SAT has held control to mean only effective control, a judicial position that still persists.[51]It essentially translates into saying that control means *de facto* control, and mere *de jure* control is insufficient.[52] On comparing SEBI's understanding of control under the Takeover Code with that of CCI's under the Act, incongruence between both is an easy conclusion to draw. In addition to having different central objectives, there are a few other significant fronts where disparity seems to exist between the regulations.

The inter-regulatory analysis under this segment seeks to recognize and thereby redress a common misconception that prevails amongst the uninitiated i.e., contrasting interpretation of the same term by different regulators is essentially flawed. One needs to understand the analysis done by respective regulators in light of the ultimate objective they seek to achieve.[53]A problem doesn't exist in *per se* differential understanding of the term 'control' by CCI and SEBI, but instead in the uncertainty and inconsistency with which each regulator has interpreted the term even within its own domain. From an investor's perspective, the disparity in regulatory approach might be a cause of concern, but this is something inevitable and unavoidable. The trickier part for an investor is the uncertainty associated with what each regulator means by 'control' within its own domain, especially because this changes to the whims of the concerned regulator.

This segment therefore involves discussion on SEBI's understanding of a few significant factors where disparity exists vis-à-vis the control regime of CCI, and is followed by a comparative analysis on these fronts. It will help provide an overall scheme in which the control determination works, along with elaborating on facets like why disparity prevails in the said aspects and not others; and how some level of divergence is not only rationally justified but indeed desirable.

[50]*Supra* note 11.
[51] Ashwin Doshi v. SEBI, [2002] 40 SCL 545 (SAT - Mum).
[52] Umakanth Varottil, *Defining 'Control' in Takeover Regulations*, INDIAN CORPORATE LAW BLOG, (May 29, 2013), http://indiacorplaw.blogspot.in/2013/05/defining-control-in-takeover-regulations.html.
[53]*Supra* note 48.

Affirmative rights:

Ambiguity pertaining to affirmative and veto rights[54] under the Takeover Code cannot be attributed solely to the past conflicting decisions of the tribunals; instead the Supreme Court's decision in the case of *Subhkam Industries*[55] stands equally culpable. In the said case, the inquiry pertained to whether affirmative voting rights and right to nominate few directors constitutes control under the Takeover Regulations or not. SEBI[56] decreed it to be 'control', whereas SAT[57] reversed the order and held otherwise. When appealed before the SC, it was disposed off without a judgment and was left open to interpretation. It has since put the extant status in a complete flux, and there exists no clarity with respect to status of affirmative or veto rights amounting to control or not.

One way of appreciating the vagueness and past inconsistencies on the question of affirmative and veto rights can be the analysis of decisional chaos which preceded SC's decision. In the case of *Re NRB Bearings*[58], SEBI decreed the affirmative rights acquired in relation to alteration of Memorandum of Association ['MOA'], dividend declarations etc. as not constituting control. Whereas SAT, on the contrary, in the case of *Rhodia SA v. SEBI*[59]held such similar affirmative rights as constituting control. In SAT's opinion, negative rights in these respects puts the acquirer in a predominant position akin to exercising control over the affairs of the company. However, this stance of SAT stands in contrast with its own decision in the case of *Sandip Save v. SEBI*[60], wherein acquisition of veto right by IDBI was held as not amounting to control. Only way to rationalize these contrasts is to perceive them as an attempt by SAT to keep *de jure* control outside the merger control analysis and limiting the analysis to *de facto* control.[61]

Comparison with CCI: While uncertainty might still persist with respect to interpretation under the Takeover Code, majority of the decisions don't consider negative right as amounting to control and believe positive rights to be the only signifiers of control.[62] CCI on the other hand, in furtherance of

[54] Although in theory and form affirmative rights might be different from each other. But for the purpose of this paper no such distinction needs to be made, as the end objective being sought remains the same i.e., negative control. It is in this context that both the words are used interchangeably.
[55] *Supra* note 11.
[56] *Acquisition of shares of Subhkam Ventures*, SEBI, dated 15th December, 2008.
[57] Subhkam Ventures v. SEBI, 2010 Indlaw SAT 12.
[58] *Re: NRB Bearings India Ltd, Securities and Exchange Board of India*, dated 29th May, 2003, Order no. CO/33/TO/05/2003.
[59] (2001) 34 SCL 597.
[60] [2003] 41 SCL 47(SAT).
[61] *Supra* note 5.
[62] *Supra* note 41.

the objective that the CCI seeks to achieve, considers these affirmative rights also to be signifiers of control. However, as elaborated in the previous part, not all the affirmative rights are bestowed with the same status and only the rights in relation to significant and relevant transactions are considered good enough to tinker with the control equation.[63]

Triggering of control analysis:

For SEBI to initiate merger analysis, actual shift of control is a pre-requisite. Mere ability to control in future, be it with respect to sole control acquisition or shift from sole control to joint control, does not qualify as control. A fitting exemplification of this proposition would be the transaction involving Reliance industries' subscription of TV18 group's convertible debentures (ZOCDs), where SEBI decreed that merger control analysis would be invoked only when the conversion actually happens, and not when the convertible security is acquired.[64]

Comparison with CCI: Under the competition regime, mere ability to control an undertaking in future is enough for control to exist and actual control in that moment isn't a prerequisite. The TV18 case remains helpful even in highlighting this divergence between the regulatory interpretations.[65] Therefore, control under the Act is understood to be acquired from the time investment is made into the convertible security, and not deferred till the actual exercise of conversion right, whereas under SEBI it is understood to have shifted when the convertible instrument is actually converted to voting rights beyond the prescribed threshold, and not just when it is acquired.[66]

Other ancillary agreements:

Ancillary agreements are entered into by transacting parties over and above the primary agreement and may pertain to a wide array of aspects ranging from 'how to vote in a given scenario' to 'co-operation on prices and supplies'. From the perspective of SEBI, these agreements can help in

[63] *Supra* note 34.
[64] *Supra* note 39.
[65] *Ibid.*
[66] *Supra* note 25.

determination of 'person acting in concert', if entered between the acquirer and the promoter, and thereby might signify a shift from sole control to joint control.[67]

Comparison with CCI: Yet again, examination of respective regulatory decisions in the case of Jet-Etihad is sufficient for bringing forth the contrasting approach adopted by CCI and SEBI. When Etihad entered into an agreement with Jet for co-operation on issues of pricing, schedule, route etc., SEBI didn't consider it to be relevant for establishment of control and reasoned that the principle of 'persons acting in concert' loses application when target company is also a party to the said agreement.[68] Whereas CCI, on the other hand, held this agreement as amounting to change in 'control', as it was entered with the joint initiative of enhancing their airline business and would undoubtedly have significant implications in the market.[69]

Finally, having gone through all major disparities in the approach adopted by CCI and SEBI, it is time to reconcile it by contextualizing the rationale behind such differences. One way of rationalizing the same would be to examine the objective that each regulator strives to achieve. SEBI aims to provide fair and equal treatment by providing quantifiable exit option to the minority[70], CCI on the other hand, seeks to prevent anti-competitive activities of an entity causing AAEC by influencing and controlling the decisions of a competitor.[71]This explains the difference in threshold employed by the respective regulators. SEBI keeps the threshold high owing to the gravity of the consequences that ensues, like making of an open offer to provide for quantifiable exit option whereas CCI keeps the threshold low owing to the less severe nature of the consequences involved i.e. notification to the CCI.

Besides, the regulators are also cognizant of these differences and SEBI in one of its orders even admitted the difference existing in meaning, scope and purpose of the definition of control under the respective acts.[72]However it is ironical that in the same case it opened the deal for re-investigation when CCI reached a different conclusion with regards to the existence of control. Irrespective, it is now a settled position that regulating agencies should take guidance from the

[67]*Jet- Etihad (Whole Time Member)*, WTM/RKA/CFD-DCR/17/2014, dated 8th May, 2014, available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1399545948533.pdf.
[68]*Ibid.*
[69]*Supra* note 41.
[70] Securities and Exchange Board of India, *Justice P.N. Bhagwati Committee Report on Takeovers*, (January 18, 1997), http://www.sebi.gov.in/commreport/bagawati-report.html.
[71]A.C. FERNANDO, BUSINESS ENVIRONMENT 412 (2011).
[72]*Supra* note 67.

findings of other agencies only when the laws involved are in substance *pari materia* and application of the same is being made to a similar set of circumstances.[73] As the definitions of control under the concerned regulations are in substance not *pari materia*, guidance should not be sought from the same.

Nevertheless, this clarity brought by the regulators, with respect to application and meaning of the term, hasn't been helpful enough to offset the detrimental effect that multiple definitions bring to the parties to transaction i.e., the investors. The obvious detriment frequently faced is in the way one regulator influences another, thereby causing the latter to re-investigate.

IV. CONCERNS POSED BY THE CURRENT UNCERTAIN REGIME

Proponents of the extant regime support an inclusive definition of control by claiming this to be a measure of mere abundant caution, which causes little or no tangible harm. Further, falling within the ambit of 'transfer of control' is considered to be unproblematic as it calls for no more than a notification to the CCI; and stands in complete disjunction from the AAEC determination process which relies solely on factors laid down under Section 19(4) of the Act for reaching conclusions. However these assertions completely disregard the difficulties with functional status quo. A range of problems can be attributed to this over inclusive reading and faulty interpretation of the term 'control'. This segment therefore aims to flag off the various concerns that the status quo poses.

Firstly, it holds the potential of delaying an innocuous transaction for months.[74] Once a transaction is deemed notifiable, it stands suspended until the grant of merger clearance by the CCI or fulfilment of 210 calendar days upper limit, whichever is earlier.[75] The grant of clearance by the CCI is a dual phased process.[76] The first phase is a *prima facie* inquiry, which is to be concluded within 30 days from the date of filing notice; however in reality, this never gets concluded before 60-90 days.[77] This is an indication of the minimum delay any transaction has to undergo once it becomes notifiable. This delay only gets further amplified if, on the basis of *prima facie* review, the tribunal is of the slight opinion that the transaction might cause AAEC. An affirmative opinion in this regard initiates a second phase review, which makes a minimum delay of 210 days inevitable.

[73] *Ibid.*
[74] *Supra* note 48.
[75] *Supra* note 4, S. 6 (2A).
[76] *Ibid,* S. 29.
[77] *Supra* note 2.

Secondly, regulatory uncertainty also breeds concerns related to security of investment, thereby deterring foreign entities from investing in the market. Absence of a definite control determination criterion even hampers free flow of investment within the domestic market. In addition, it furnishes CCI with excessive discretionary power to take *suo-moto* cognizance of any transaction, as and when deemed feasible.[78] Possibility of *suo moto* cognizance is not a mere speculation and is instead a reality with considerable past invocation. One such instance is the famous Jet-Etihad deal wherein a proposal was made by the latter to acquire 24% stake in Jet. The said investment fell well within the bounds of 25% exception provided under Schedule I of the Combination Regulations, and didn't even grant substantial directorial nomination rights or unwarranted privileges under CCA; but the CCI, through exercise of its *suo moto* powers still retained jurisdiction to review the deal.[79]

The problem is not limited to this, and a different definition of 'control' for each regulator only adds to the difficulty. Alongside causing complexity for the transacting parties, it brings a lot of uncertainty to the deal and holds potential of causing an adverse spiralling effect. As has been witnessed in the decision of SEBI in Jet-Etihad, regulators get influenced by decisions of their contemporaries and as a consequence, commence fresh investigation in a given case or reopen a predisposed one, depending upon the circumstances.

Thirdly, it compromises with interpretative consistency. Due to the lack of any strict guidelines or rules, the jurisprudence is developed on the basis of the interpretative discretion vested with the competition regulators.[80] However, in the absence of any clear precedential trail, even attempts towards maintenance of consistency are highly likely to go wayward and the recent history stands witness to the same. Therefore, in light of the failed attempts by CCI in the last five years to resolve uncertainty through interpretation, change at the primary level itself remains the most plausible resolution to the underlying issue.

Fourthly, it leads to imposition of hefty interest and penalties, owing to mismatch of timelines between the various market regulators.[81]CCI is particularly strict in terms of delay in filing requirements and numerous instances of fining corporate non-compliances can be noted in the

[78] *Supra* note 6, S. 20.
[79] *Supra* note 41.
[80] Charles A. Breer & Scot W. Anderson, *Regulation Without Rulemaking: The Force And Authority Of Informal Agency Action*, DAVIS GRAHAM & STUBB LLP, http://www.dgslaw.com/images/materials/379427.PDF.
[81] *Supra* note 48.

recent past. British retail giant Tesco[82] and travel site Thomas Cook[83] were recently fined Rs.3 Crore and Rs.1 Crore respectively for delay in combination filing. Interest payment to the affected parties is an even more problematic consideration.[84] The interest is accrued owing to contractual default on behalf of the notifying entity, which in effect is nothing but a consequence of regulatory timeline mismatch, especially between SEBI and CCI.

This is because even though processes under both the regulators start simultaneously, there have been instances in the past where acquirer had to pay penalties to SEBI or interest to the shareholders because of CCI's review taking longer than the due date of open offer under the Takeover Code.[85] Under the Takeover Code, an acquirer has to repay the shareholders within 15 days from the closure of open offer process and any delay in returning the money would invite payment of interest.[86] The shareholders who have tendered the shares cannot be paid, pending the regulatory approval of CCI, as otherwise it would amount to giving effect to combination. In the absence of any provision suspending the Takeover Code until the proceedings under CCI are concluded, interest has to be paid to the shareholders. *Lastly*, although not a substantial monetary burden but an unnecessary one irrespective for the otherwise exempted entities, the companies have to pay filing fees to the tune of Rs.15 Lakhs for Form I and Rs.50 Lakhs for Form II.[87] This amount is exclusive of the legal fees to be borne in the process of making such filings.

These are few of the many shortcomings posed by this vague regime which complicates doing business in India. Hence, in light of the aforementioned disadvantages, it is imperative that we explore possibilities which might help overcome these regulatory impediments and make our competition regulation framework more investor friendly and certain. In the concluding segment, an attempt will be made to flag off some of these viable alternatives which can be adopted by the competition regulator of India.

V. OVERVIEW OF FOREIGN JURISDICTIONS: LESSONS TO BE LEARNT

[82] *Tesco-Trent Acquisition*, Combination Registration No. C-2014/03/162, dated 27th May, 2014, available at http://www.cci.gov.in/sites/default/files/C-2014-03-162RO.pdf.
[83] *Thomas Cook-Sterling Resorts*, Combination Registration No. C-2014/02/153, dated 21st May 2014, available at http://www.cci.gov.in/sites/default/files/C-2014-02-153R.pdf.
[84] SEBI, *Frequently Asked Questions;* available athttp://www.sebi.gov.in/faq/takeover_faq.html.
[85] *Supra* note 48.
[86] *Supra* note 5, Reg. 16.
[87] Regulation 11, The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011.

A. EUROPEAN UNION:

In EU, notification of a transaction before the European Commission entails an extensive inquiry into the concept of concentration as provided under '*Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings*' ['Merger Regulations'].[88]The notification requirement stands triggered on satisfaction of two conditions[89];*firstly*, the concerned transaction should be a 'concentration' as per the definition provided under Article 3 of the Merger Regulations and *secondly*, it should meet the turnover threshold set out in Article 1 of the Merger Regulations. The assessment under Article 3 circles around the concept of 'control', and Article 3(1) at the outset identifies two kinds of concentrations; (a) Merger of independent undertakings and (b) Acquisition of control. The first kind is simple to understand and holds least relevance in context of the current analysis, whereas the second is highly relevant as it pertains to acquisition of control.

To aid interpretation of the concepts and nuances related to 'concentration', the EC released a Consolidated Jurisdictional Notice[90]('Jurisdictional Notice') in the year 2008. This notice is a comprehensive guidance tool for the purpose of interpretation, and derives heavily from the past experience of European Commission['EC'] in dealing with such similar issues.[91]Article 3(2) defines control to mean the '*possibility of exercising decisive influence on an undertaking*'. By implication it means that showing an effective decisive influence is the only requirement, and whether or not such influence is actually exercised becomes irrelevant.

A comprehensive look at the EU premerger notification policy makes it evident that the Indian regime is modelled on similar lines. Most control related nuances being similar in India to the EU, the disparity lies only with respect to the uncertainty that plagues the Indian competition practice. The Merger Regulations framed by the EC, supplemented with the Jurisdictional Notice, provide an elaborate understanding of control and give minimal leeway to the regulators in terms of interpretation of the concept. While the Jurisdictional Notice is not a legally binding document, it

[88]Council Regulation on the Control of Concentrations between Undertakings, (EC) No. 139/2004, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=EN.
[89]Ibid, Article 1.
[90] European Commission, *Commission Consolidated Jurisdictional Notice*, OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITIES, OJ C 95/1, (16th April 2008), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:095:0001:0048:EN:PDF.
[91]VAN BAEL & BELLIS, COMPETITION LAW OF THE EUROPEAN COMMUNITY 645 (5th ed. 2009).

reflects the EC's decisional practice and views on key aspects like control, and therefore plays an important role in bringing certainty to the regime.[92]

India lacks any such elaborate legal framework, thereby making it imperative for the regulators to take cognizance of the same and attempt to redress it by taking cues from EC's framework. The Jurisdictional Notice expounds on the concept of control for almost twenty-five pages[93]and seeks to envisage all possible scenarios that can arise in any given situation, followed by the most plausible interpretation of law to suit the given context. Therefore it becomes important that CCI borrow from this pivotal document and publish similar guidelines that are adapted to the Indian context in order to streamline the regime in India.

B. UNITED STATES:

The US Competition Law regime began to take shape from 1890 onwards and consists of three core anti-trust legislations in the form of Sherman Act[94], Federal Trade Commission Act[95] ('FTC') and Clayton Act.[96] They are regularly altered by passing of amendments/improvements to the Act as and when deemed necessary. One such amendment to the Clayton act is the Hart-Scott-Rodino Antitrust Improvements Act 1976[97] ['HSR Act'], through which companies are now mandated to notify the government, on meeting of the 'size of transaction' and 'size of persons' tests, of their plans to effectuate a merger or acquisition of "voting securities" or "assets". It is exceedingly clear that, unlike India, alteration of 'control' or 'material influence' is not a necessary factor for notification under HSR Act. It is perhaps in this light that even the definition of control under HSR Act is highly disjointed from practical relevance, and does not even take into consideration *inter alia* the control that a minority shareholder can exercise owing to contractual covenants.[98]

However this otherwise extremely bizarre definition does not breed as much inadequacy in U.S.as it would in the Indian regime. A probable reason for this might be the framework of US antitrust laws

[92] *Ibid*, p. 647.
[93] Supra note 92.
[94] Sherman Act, 15 U.S.C. §§ 1–7 (1890).
[95] Federal Trade Commission Act, 15 U.S.C. §§ 1-45 (1914).
[96] Clayton Act 15 U.S.C. §§ 1-53 (1914).
[97] Hart-Scott-Rodino Antitrust Improvements Act, 90 Stat. 1394 title II, §202 (1976).
[98] Control is defined under the act to mean either of these conditions:
(a) holding 50% or more of the outstanding voting securities, or
(b) having rights to 50% or more of the profits, or
(c) having the right in the event of dissolution to 50 percent or more of the asset, or
(d) Power to designate 50% or more of the directors of an entity.

that allow for a review of roughly all significant transactions, irrespective of them meeting the specified thresholds.[99]For a transaction to be challenged by the U.S. anti-trust agencies it need not necessarily be reportable under the HSR Act, and Section 7 of the Clayton Act facilitates challenging of any acquisition of stock or assets, notwithstanding fulfilment of the HSR Act reporting requirements. Besides, this challenge can be brought either before or after the transaction is consummated and numerous such instances in the past can be noted.[100]

In addition to the procedural scaffold, even at the fundamental level there are certain subsisting dissimilarities. Notification requirement in U.S. is limited to acquisition of *voting securities* and *assets*,[101]which by design exempts convertible securities' acquisition from its ambit, making the latter notifiable to FTC only on its conversion. This position is reasoned by putting across a bi-fold justification[102], wherein *firstly* it is asserted that even though acquisition of convertible securities might give some influence over the management, conversion price attached to the said security doesn't always make it an economically feasible prospect. And *secondly*, the voting rights entrusted through convertible security are highly speculative, depending highly upon conversion by fellow security owners.[103]However when the said rationales are juxtaposed with the ones acting as a basis for contrary position in India, the former seems quite absurd in the Indian context, for the reasons already discussed in the preceding segments.

The above discussion makes it exceedingly clear that U.S. pre-merger notification regime stands in complete contrast with its European and Indian counterparts. Whilst the latter two aim towards bringing certainty in the said regime through curbing of regulatory discretion, the former is modelled around the idea of giving complete regulatory independence. One possible rationalization can be the fact that U.S. is a comparatively mature jurisdiction, which sees an unparalleled judicial discipline being followed by its anti-trust agencies and hence can allow for regulatory independence, unlike other countries. Therefore, in light of the structural dissimilarity in the legal modelling of the laws in US and India, legal borrowing becomes highly restrictive and is limited to merely the inspiration and discipline with which FTC works towards maintaining a competitive market.

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[99] Directorate For Financial And Enterprise Affairs Competition Committee, *Investigations Of Consummated And Non-Notifiable Mergers*, 5th February 2014, DAF/COMP/WP3/WD(2014)23.
[100]*FTC and State of Idaho v. St. Luke's Health Sys., Ltd.*, 1:12-cv-00560-BLW-REB.
[101] Hart-Scott Rodino Antitrust Improvements Act 1976, Chapter I, Sub-Chapter H,16 C.F.R. §§ 801.32 & 802.31.
[102]*Ibid*, Rules, Regulations, Statements and Interpretations.
[103]*Ibid.*

C. OTHER JURISDICTIONS:

Across the globe, notification to a competition regulator is approached in extremely diverse ways. Not all countries follow the notion of 'decisive influence' or 'control' and many like Ecuador, Egypt or Jordan require mandatory filing even for '*any level of minority shareholding*'.[104] Some countries like Pakistan, Ukraine and Mexico maintain '*percentage of voting right*' as the threshold, with figures varying from 10% in Pakistan to 35% in Mexico. Jurisdictions like Japan and South Korea however resort to more complex thresholds like '*ranking of the shares of acquirer in the target company*'.[105]Even configuration of the market has been adopted by a few jurisdictions like Moldova and Thailand as a triggering criterion. Finally some countries like New Zealand and Venezuela lie on the extreme end, wherein filing remains a voluntary activity and becomes essential only when anti-competitive practices might occur.[106]

In conclusion, high range of cross-country diversity in domestic implementation of the notification requirement illustrates the complexity that this matter entails. It is difficult to have a single criterion, which provides the certainty of a rigid threshold and also offer the flexibility needed to accommodate market realities. A balance needs to be struck way between rigid thresholds like shareholding/voting rights on one hand, and highly inclusive notions like 'control' and 'decisive influence' on the other. In order to identify transactions which in effect require the competition regulator's attention, India needs to restrict the ambit of its highly inclusive definition of 'control' and inculcate some stratum of certainty. Although developments of case laws do act as a form of guidance, release of a circular/guideline similar to the EU Jurisdictional notice might be a much needed step in the process of infusing the required level of certainty to reach this ideal mid position.

VI. CONCLUSION

International Competition Network,an informal virtual forum that hosts annual conventions, round table conferences and workshops to facilitate a dynamic dialogue on various competition policy issues amongst competition regulators from across the globe,after thorough analysis of practices adopted by countries, has formulated a set of guiding principles and best practices for merger

[104] *Supra* note 12, p. 207.
[105] *Ibid.*
[106] *Ibid*, p.208.

notification and assessment process.[107] The broad themes advanced includes *inter alia* employment of regulating agency's resources in the most efficient manner, clear communication of pre-demarcated standard with reference to reporting obligations of the merging parties, and prevention of needless costs related with notification process -et al.[108] Analysis of India's combination notification framework in the previous segments highlights its inferior performance, vis-à-vis these broadprinciples, on almost every front. It is apparent that these objectives at times might act as competing interests thereby making their all-inclusive accomplishmenta complex issue, but failure to perform on allthe fronts signifiesthe presence of fundamental flaws within the framework itself, and therefore requiring overhaul.

With SEBI having floated a discussion paper, advancing two alternatives to choose from, it is high time that the CCI also takes note of the existing ambiguity and attempts to remedy it. Although a numeric threshold based bright line testappears unsuitable in the Indian context,a list of protective and proactive rights, tailored according to the CCI's objectives, might act as a helpful cue. These lists acquire particular significancein light of the practicalunfeasibility that is associated witha concrete definition of 'control', which by design necessitates some level of discretion to be accorded to the regulator. A list of protective and proactive rights can work towards decreasing the level of discretion possessed by the CCI and can help bring certainty to the regime.

These lists aren't intended to be exhaustive, and rightly so. Their primary purpose is to act as broad guiding principles for identifying, from a regulatory perspective, the transactions that are anti-competitive and distinguish them from the ones which are not. It is however important to note that a thorough schematic assessment of these lists helps one realize the close resemblance it has with the underlying idea behind EU Jurisdictional Notice. On one hand where the Jurisdictional Notice elaborates on all the existing legal possibilities vis-à-vis acquisition of control, followed by recommendations to determine whether a given scenario qualifies as control or not; these lists, on the other, seeks to achieve the same purpose only by an alternative way of streamlining the scenarios in separate lists. Therefore opting either of the alternatives wouldn't result in any ground breaking difference, as both are based on analogous theoretical scheme and mandatorily require substantial

[107] *The Guiding Principles and Recommended Practices for Merger Notification and Review Procedures*, INTERNATIONAL COMPETITION NETWORK; available at http://www.internationalcompetitionnetwork.org/index.php/en/publication/294.

[108] *Defining "Merger" Transactions for Purposes of Merger Review*, INTERNATIONAL COMPETITION NETWORK; available at http://www.internationalcompetitionnetwork.org/uploads/library/doc327.pdf.

modifications before successful implementation in Indian Competition context. However precedence should be given to Jurisdictional Notice owing to ancillary advantages it offers, as not only will it be an intra-discipline transplant but will also carry with itself the benefit of a decade long evolution it has undergone on account of its successful implementation in another jurisdiction.

The need for EU Jurisdictional Notice modelled guidelines becomes more pronounced in light of the regulatory landscape in India. The dearth of judicial discipline amongst the prime regulators in India is common knowledge. Time and again, tribunals and courts have chided the regulating authorities, be it CCI[109] or SEBI[110], for ignoring the ratios laid down in orders already passed by their counterparts and acting in an arbitrary manner according to their own whims and fancies. This practice is not peculiar to the competition and securities regulator alone but is quite widespread. Supreme Court in one of its landmark cases noted a similar practice for tax regulators and held that there were no legitimate grounds for not following an already passed order, unless a competent court already suspended it.[111]

In spite of these constant rebukes from superior authorities, there hasn't been much change in the approach adopted by regulators and instances of judicial indiscipline are still quite rampant. Regulators, on having failed to determine the concrete reasons behind deviation in conduct, have not effected any change in policy and therefore it is safe to presume that similar behavior is likely to continue unless the status quo is changed. Introduction of EU modelled framework, hence, might act as this policy change; which need not necessarily be binding in nature and can rather act as guidance notes or interpretative tools. They are likely to be better interpretative tools because, unlike the decisions of tribunals, which vary depending upon the inclinations of the presiding authorities, these neutral guidance notes will demand constant abidance without any discrimination.

In terms of the content of the guidelines, an objective criterion of control determination will be self-defeating owing to reasons already discussed in the preceding segments. As a result, successful achievement of stated objectives necessitates a subjective criterion. Subjectivity here doesn't signify the functional status quo, wherein excessive discretionary powers are entrusted with the regulatory authorities or standards of conduct alignment are paralyzed. Instead it means delineating all legal

[109] *Hiranandani Hospital v. CCI*, Appeal no. 19/2014; COMPAT order where CCI was chided for its failure to rely on the precedents in determination of appellant company's turnover.
[110] R.M. Shares Trading Private Limited. v. SEBI, Appeal No.204 of 2014.
[111] Union of India And Others v. Kamlakshi Finance Corporation, AIR 1992 SC 71.

possibilities and CCI's response to the same, in order to considerably limit the wide discretion that the regulators enjoy. To all intents and purposes it will overcome the existing incoherence and make decisional congruence more possible.

Past experiences how that these guiding notes, despite being non-binding in nature, acquire some reverence over a considerable period of time and are gradually even considered by courts when passing orders. One such instance is the recent judgment by SEBI where the adjudicating officers placed express reliance on the SEBIFAQs and acknowledged the need of using these interpretative notes in adjudication, as long as they are transparent and applied consistently without discrimination.[112] This reliance was shown in spite of the introductory paragraphs of these FAQs explicitly stating that "it should not be regarded as an interpretation of law nor be treated as a binding opinion/guidance".

It needs to be understood that the current stance of the regulators in allowing slow evolution of the concept of 'control' through practice, as opposed to looking at other jurisdictions for lessons and making prompt modifications, is fundamentally flawed. Even though CCI's skepticism in looking at other jurisdictions does carry some merit, owing to certain inherent problems in the concept of legal transplant itself,[113] but the problems associated with transplant can easily be overcome through undertaking of necessary alterations during the actual implementation of law. Evolution as a process entails making mistakes and subsequently learning from them, however in this process, interests of innocent parties are highly likely to be prejudiced. Therefore, rather than making the same mistake, it is more prudent to learn from the mistakes already made in mature jurisdictions and transplant the laws after making essential alteration for its effective implementation in the Indian context. Not only will this save the time and resources of the regulator but also protect innocent parties from unnecessary prejudice, and facilitate the ease of doing business in the country.

In conclusion, it is reiterated that the current law provides for a broad principle governing the control regime and as per a widely accepted belief precise rules more consistently regulate transactions than broad principles.[114]Broad principles merely promote vagueness, which in effect

[112]*Lorgan Lifestyle Limited*, CCI order no. WTM/PS/43/CFD/OCT/2014, dated 30th October, 2014; available at http://www.sebi.gov.in/cms/sebi_data/attachdocs/1414666366596.pdf.
[113] A. Watson, Legal Transplants and European Private Law, 4 ELECTRONIC JOURNAL OF COMPARATIVE LAW, (December 2000).
[114] Braithwaite, John Bradford, *Rules and Principles: A Theory of Legal Certainty*, AUSTRALIAN JOURNAL OF LEGAL PHILOSOPHY,Vol. 27, 47-82 (2002).

hinders predictability and certainty, and serves a great injustice to investors. Redressing these thus becomes need of the hour in order to make the regime more investor friendly.

REVERSE PAYMENT PATENT SETTLEMENTS: NAVIGATING THE ANTITRUST LIABILITY IN THE PHARMACEUTICAL INDUSTRY

- *Neelasha Nemani & Anmol Awasthi*[*]

Affordable healthcare is the foremost policy objective of states and it is generally determined by the quality of drugs available in the market and the reasonableness with which they are priced. In turn, the success of this objective principally depends on the factors which govern a pharmaceutical industry such as, the costs incurred in research and development of new drugs, the validity of patents on new drugs and the revenue generated from their exclusive exploitation. These factors often prompt the innovator drug companies to pay off their generic counterparts to avoid stiff competition from them in the drug market and maintain market exclusivity beyond what the term of their patents permits.Given the constant interaction of Intellectual Property Rights and Competition law in the pharmaceutical sphere, such pay offs or rather settlements have drawn the attention of the competition authorities from across the globe which are now vehemently scrutinizing the behavioral abuse by drug companies and the anti-competitive nature of the pay for delay settlements agreed between them. A quick glance makes it sufficiently apparent that when the healthcare of consumers at large is concerned, the exclusivity offered by patented drugs cannot be unreasonably stretched for unilateral profit motives of drug companies.

I. INTRODUCTION

Have you ever wondered the repercussions that would follow if all the medicines and drugs available in the market were excessively priced? Regardless of policy differences, 'affordable healthcare' is often regarded as a primary objective by all States alike and the same is evident from the significant percentage of their budgets that is allocated to the healthcare sector year on year. However, in an industry where medicines and innovations are concerned, the factors that actually assist in achieving this objective are heavily influenced by the nature and dynamics of the said industry. Given the costs involved in the research and innovation required in developing new drugs, pharmaceutical companies have to ensure that their inventions are successfully patented so that they can recoup the

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costs and generate revenue by exercising the exclusive right to manufacture, market and sell the patented drug until the patent expires.

Broadly speaking, the domain of pharmaceutical drugs consists of a brand drug, which is the high-priced patented invention of the innovator drug company, and a generic drug which chemically resembles the brand drug in dosage and strength but is low-priced and does not enjoy patent protection. A drug market is characterized as one which encompasses both the brand and the generic variations of a drug where both majorly compete on the factor of price, and the availability of generic drugs immensely assists in providing affordable healthcare to the consumers at large.

A peculiar trend typically associated with the pharmaceutical industry is the rise in *pay for delay* agreements where essentially the brand drug company or originator company (patentee) pays off a significant sum to the generic drug company (potential competitor/possible patent infringer) to delay the entry of the low-priced generic drug in the market, thereby prolonging the exclusivity period enjoyed by the brand drug in the drug market. These agreements commonly arise in the form of out-of-court settlements resulting from patent infringement lawsuits between the brand and generic drug companies and are frequently referred to as reverse payment agreements, as they signify a total spin of payments where money flows in the opposite direction, as opposed to the ordinary course where a patent infringer compensates the patentee.

Needless to say, such payments not only contribute to the trend of ever-greening of patents by virtually extending the legal validity period of a patented drug, but also adversely affect the drug competition by creating market-exclusivity, supra-competitive prices and restricting competition from generic competitors. It is this interaction of Intellectual Property Rights ("**IPRs**") and Competition Law, a persistent conundrum of patent exceptionalism and antitrust scrutiny that has raised the fundamental question of the legality of reverse payment agreements in many jurisdictions.

This paper is a comparative study of the regulatory and judicial approach adopted by the United States of America ("**U.S.**"), which has finally settled the law on the legality of reverse payment agreements and the European Union ("**E.U.**"), which has only recently authoritatively addressed the issue by taking a squarely different stance. Given the contrasting approaches on either side of the Atlantic, the authors attempt to address the issue from an Indian perspective..

II. POSITION IN THE U.S.

When one attempts to explore the origin and legality of reverse payment agreements in the pharmaceutical industry of the U.S., there are two crucial aspects which require examination – *first,* the giant size and profit oriented nature of the pharmaceutical industry[1] and *second,* the Drug Price Competition and Patent Term Restoration Act of 1984 ("**Hatch Waxman Act**"). This part seeks to examine the regulatory framework effective in the U.S. that inadvertently fuels reverse payment settlements and will go on to analyze the judicial approach in determining the legality of such settlements.

A. REGULATORY FRAMEWORK: HATCH WAXMAN ACT AND PARAGRAPH IV LITIGATION

While the legislative intent behind enacting the Hatch Waxman Act was to encourage entry of generics into the market and promote medical innovation by directing the cost savings to the development of new drugs, it is often disheartening to discover that reverse payment agreements were stimulated by the drug companies as a response to these very goals.[2]

In essence, the Hatch Waxman Act created an abbreviated passage for the approval and marketing of generic drugs wherein generic companies were required to file an Abbreviated New Drug Application ("**ANDA**") to the Food and Drug Administration ("**FDA**") detailing that the generic drug manufactured by them was the bioequivalent of its brand name drug counterpart and consisted of the same active ingredients which had already been approved by the FDA.[3]Inferably, the rationale behind the ANDA procedure was to save costs and avoid engaging in the time consuming testing and approval of generic drugs to help pace up their entry into the market, thereby ensuring drug competition and availability of low cost generic drugs to the consumers.[4]

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[1] Chris Lo, *Drug Prices: Profits Before Patients?*,PHARMACEUTICAL-TECHNOLOGY.COM, (June 9, 2014), http://www.pharmaceutical-technology.com/features/featuredrug-prices-profits-before-patients-4285101/.

[2] *A CBO Study: How Increased Competition From Generic Drugs Has Affected Prices and Returns in the Pharmaceutical Industry*, THE CONGRESS OF THE UNITED STATES CONGRESSIONAL BUDGET OFFICE, 14 (July, 1998), https://www.cbo.gov/sites/default/files/pharm.pdf.

[3] *Abbreviated New Drug Application (ANDA): Generics*, U.S. FOOD AND DRUG ADMINISTRATION, http://www.fda.gov/Drugs/DevelopmentApprovalProcess/HowDrugsareDevelopedandApproved/ApprovalApplications/AbbreviatedNewDrugApplicationANDAGenerics (last updated April 8, 2016).

[4] *Generic Drugs: Questions and Answers*, U.S. FOOD AND DRUG ADMINISTRATION, http://www.fda.gov/Drugs/ResourcesForYou/Consumers/QuestionsAnswers/ucm100100.htm (last updated July 1, 2015).

B. LEGALITY OF REVERSE PAYMENTS: THE U.S. WAY

As wise as the objects of the Hatch Waxman Act may have been, the pharmaceutical industry in the U.S. was even wiser to quickly apprehend the downside of a patent infringement litigation which included exorbitant litigation expenses, delayed proceedings and related costs, which cumulatively had the potential to significantly diminish the investments otherwise meant for new drug research.[5] In addition, in the likelihood of the challenged patent's being declared invalid, it would open the floodgates for generic drug companies to enter the market and bring down the revenues of the brand drug company.[6] The potential loss of revenue is even more potent when the drug in question isa significant one or a runaway success.[7] Thus, as a response to what the Hatch Waxman Act sought to achieve, the parties involved in litigation resorted to patent infringement settlement agreements, now generally referred to as reverse payment agreements, where the brand drug company would not only drop the lawsuit, but would also pay the generic drug company to delay its entry into the market.[8]

It did not take the Federal Trade Commission ("**FTC**") very long to ascertain how the terms of such settlements were not only anti-competitive but were also undermining the broad objective of affordable healthcare.[9] The FTC investigations into these settlements quickly opened the Pandora's Box for antitrust litigation where drug companies now found themselves in violation of antitrust laws, struggling to address the very legality of reverse payment agreements which they had entered into in the first place.[10] The Sherman Antitrust Act of 1890 ("**Sherman Act**") aims to prevent anticompetitive practices and protect competition as the rule of trade.[11] It contemplates two kinds of breaches – a *per se* breach,[12] which does not require any inquiry into the effect or intention behind

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[5] Mark G. Schildkraut, *Patent-Splitting Settlements and the Reverse Payment Fallacy*, 71 ANTITRUST L.J. 3, 1039-1040 (2004).
[6] Steven Seidenberg, *The Flip Side of 'Reverse Payments': Can Patent Holders Buy Off Infringers? Courts Take Another Look*, 96 ABA Journal 2, 17-18 (2010).
[7] *Id.* at 18.
[8] James Langenfeld and Wenqing Li, *Intellectual Property and Agreements to Settle Patent Disputes: The Case of Settlement Agreements with Payments from Branded to Generic Drug Manufacturers*, 70 ANTITRUST L.J. 3, 800-801 (2003).
[9] *Id.* at 806.
[10] Lars Noah, *Adding Insult to Injury: Paying For Harms Caused by a Competitor's Copycat Product*, 45 TORT TRIAL AND INSURANCE PRACTICE L.J. 3/4, 683-684 (2010).
[11] Legal Information Institute, *Antitrust: An Overview*, CORNELL UNIVERSITY LAW SCHOOL, https://www.law.cornell.edu/wex/antitrust.
[12] The Sherman Antitrust Act, 15 U.S.C.A. § 1.

the alleged conduct, and a *rule of reason* breach,[13] which requires a thorough inquiry into all the relevant circumstances to establish an anti-competitive conduct.

Until 2013, the U.S. witnessed a sharp split amongst its Circuit Courts with respect to the legality of reverse payment agreements and the kind of inquiry to be made into such agreements.[14] While some propagated the *illegal per se* test,[15] holding such agreements to be *prima facie* illegal without requiring any further inquiry, others advocated the '*scope of the patent*' test,[16] observing that as long as the settlement was made within the scope of the patent, such reverse payment agreements were lawful, provided that the patent was not obtained by fraud.[17] Adding to this, the 3rd Circuit Court applied the '*quick look rule of reason*' test which resembled a rule of reason analysis but required a less detailed inquiry.[18]

i. The Case of FTC v. Actavis Inc.[19]: Emergence of the Principle of Rule of Reason

In 2013, the Supreme Court of the U.S. ("**Supreme Court**") settled the position by holding that reverse payment agreements were subject to the traditional *rule of reason* analysis and the fact that such settlements were entered into during the term of the patent was irrelevant, as the unexplained large payment itself reflected the patentee's doubt regarding the weakness of its patent.[20]The case of *FTC v. Actavis Inc.*[21] ("**Actavis**") involved Solvay's *AndroGel* (brand drug)and related Paragraph IV Certification litigation with three generic companies including Actavis. The terms of the settlement included Solvay's paying approximately 100 million USD to the three generics for nine years, an undertaking by Actavis that it would not enter the market until 2015, which was 65months prior to Solvay's patent expiry unless someone else marketed a generic before that, and the promotion of *Andro Gel* to urologists by Actavis.[22]

[13] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).
[14] Jessie Cheng, *An Antitrust Analysis of Product Hopping in the Pharmaceutical Industry*, 108 COLUMBIA L. REV. 6, 1481-1482 (2008).
[15] In ReCardizem, 105 F. Supp. 2d 682, 705 (2000).
[16] In ReCiprofloxacin Hydrochloride 363 F. Supp. 2d 514 (2005).
[17] Flex-Foot, Inc. v. CRP Inc., 238 F.3d 1362, 1368 (Fed. Cir. 2001).
[18] In ReK-Dur Antitrust Litigation, 686 F.3d 197, 218 (3d Cir. 2012).
[19] FTC v. Actavis, Inc., 570 U.S. 756 (2013).
[20] *Id* at 18.
[21] *Id.*.
[22] *Id.* at 5,6.

Observing the repercussions of the delayed market entry of generics and how it significantly contributed to increasing the cost of health care for the consumers, the Supreme Court reasoned on five important considerations which are as follows:[23]

1. *First,* since reverse payments were actually a purchase by the patentee of its already existing exclusive rights, a monopoly which could be lost if the patent was declared invalid or not infringed by the generic, such payments adversely affected the market and would be subject to antitrust scrutiny.[24]
2. *Second,* the anticompetitive consequences of reverse payments were capable of justification if the defendant could provide legitimate explanations for the challenged payment such as fair value for services offered by the generic drug company or saved litigation expenses.[25]
3. *Third,* whenever a reverse payment caused unreasonable anticompetitive damage, it could be inferred that the patentee possessed a dominant market power and was capable of maximizing its profits from the reverse payment than from facing actual competition in the market.[26]
4. *Fourth,* the size of the payment, its scale in relation to the payer's anticipated future litigation costs, its independence from other services for which it might represent payment, and the lack of other convincing justifications were the crucial factors which required assessment to ascertain antitrust liability.[27]
5. *Fifth,* the litigating parties were free to enter into settlements but without any unjustified reverse payment.[28]

ii. Developments Post Actavis

Although *Actavis* settled on the rule of reason analysis and an overall reduction in the number of pay for delay agreements after the ruling,[29] it left the lower courts in unsettled waters by failing to lay

[23] Joshua D. Wright, Commissioner, Federal Trade Commission, *Remarks at the Antitrust Master Course VII*, (Oct. 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/591131/141010actavisspeech.pdf.
[24]Actavis, *supra* note 19at 2234.
[25]*Id.* at 17.
[26]*Id.* at 19.
[27]*Id.* at 18.
[28]*Id.* at 19.
[29] Bureau of Competition, *Agreements Filed with the Federal Trade Commission under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003*, 1 (2014), https://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/160113mmafy14rpt.pdf.

down a detailed and structured standard of review to assess the legality of reverse payments.[30] Thus, in an attempt to address the divergent views of the courts that existed earlier, *Actavis*inadvertently brought these courts back to square one by leaving un answered questions in respect of two critical issues: *First,* what exactly constitutes 'payments' under *Actavis*and whether reverse payments encompass non-monetary consideration, and *second,* whether any payment over and above the estimated litigation cost threshold would amount to 'large and unjustified' payment, thereby attracting antitrust liability.[31]

Addressing the first issue as to what constitutes 'payments' under *Actavis*, the courts have been struggling with multi-faceted and complex settlement terms to give shape to the wide contours of the *Actavis* ruling.[32]An overview of the settlement agreements filed with the FTC in 2014 shows that out of the 21 potential pay for delay agreements, 6 of them had compensation styled in non-cash form.[33]Ranging from the legality of 'no-Authorized Generic ("**AG**") clauses'[34] according to which the innovator agrees to not launch its AG until a fixed date, thereby amounting to 'payment', to intricately designed 'acceleration clauses'[35] which allow market entry to a generic if other generic drug companies launch their drugs before a compromise date, the District and Circuit Courts in the U.S. have been steering in the post-Actavis sea without any certainty.[36]

Although the 1st and 3rd Circuit Courts have cleared some haze by ruling that *Actavis* extends to non-monetary payments[37] including settlement terms such as no-AG clauses,[38] the post-*Actavis* environment in the U.S. is still fraught with the absence of a uniform standard of review to adjudge the anticompetitive nature of reverse payment agreements.[39] The authors are of the opinion that as more and more number of settlements are challenged, the courts, in the absence of a uniform standard should adopt the '*substance over form*' approach and give a broader interpretation to 'payments' when applying the *rule of reason* analysis to the settlement terms of a case. That is, instead

[30] Lauren E. Battaglia, *Defining"Payments": The First Post-Actavis Battleground in Pharmaceutical Reverse Payments*, 2 COMPETITION POLICY INTERNATIONAL ANTITRUST CHRONICLE, 2 (2014).
[31] Wright, *supra* note 23, at 2.
[32] In Re Nexium (Esomeprazole) Antitrust Litigation, No. 12-md-2409 (D. Mass. July 30, 2015).
[33] Bureau of Competition, *supra* note 29.
[34] In re Effexor XR Antitrust Litigation, No. 3:11-cv-05479, 35 (D.N.J. Oct. 6, 2014).
[35] Antitrust Litigation, *supra* note 32.
[36] Brian Sodikoff, Thomas J. Maas and Patrick Abbott, *Reverse Payments After Actavis: Fifteen Cases to Follow*, 12 PHARMACEUTICAL LAW AND INDUSTRY REP., 999 (2014).
[37] In Re Lamictal Antitrust Litigation, No. 14-1243 (3d Cir. June 26, 2015).
[38] In Re Lipitor Antitrust Litigation, No. 14-4202, 2 (3d. Cir. July 8, 2015).
[39] Battaglia, *supra*note 30, at 2.

of relying on the 'form' of payment, focus must be given to whether, after ascertainment of all the pro-competitive and anti-competitive factors, any of such forms is unexplained and unjustified. Given the complexity with which such settlements are styled, it goes without saying that the 'type of payment' should have no bearing on the adverse anticompetitive effects which may directly flow from such non-cash settlements.

Similarly, in addressing the second issue, the authors opine that an estimated litigation cost benchmark will only narrow down the depth of an analysis that the *rule of reason* test envisages. Therefore, instead of assessing 'large and unjustified payments' from an estimated litigation threshold,[40] the Courts should adopt a comprehensive *rule of reason* analysis which weighs out all the anticompetitive and pro-competitive effects of a reverse payment agreement.

III. POSITION IN THE E.U.

Historically speaking, the member states of the E.U. have always played a very proactive role in the regulation of the pharmaceutical industry, given that the development of this sector is quintessential for economic growth and development. The regulation of this industry is also fundamental to the policy objective of protection and promotion of health care, the importance given to which is reflected in their ever increasing budgetary expenditure, year on year, to provide access to their consumers to innovative, safe and affordable medication. Needless to say, the European Commission ("**E.C.**")'s toughest fight is to create an environment which is conducive to an increasing entry of competitors into the market without compromising on the quality and affordability of services to its consumers.

The E.C. was faced with several hurdles when it observed that there was a sharp increase in State expenditure towards pharmaceuticals with disproportionate benefits to consumers. It observed that this resulted from a massive delay in the entry of generic drug companies into the market, leading to exorbitant prices of such drugs. To probe into the reasons as to why there was a market restriction of this nature, the E.C. launched a sectoral inquiry in 2008, the findings of which are discussed under Part A followed by the its judicial approach to tackling the said findings under Part B below.

[40] Wright, *supra* note 23 at 12.

A. PHARMACEUTICAL SECTOR INQUIRY: FOCUS AND FINDINGS

The E.C.'s pharmaceutical sector inquiry was initiated on January 15, 2008. Its purpose was to investigate into the reasons for the delay of generic companies into the market for prescription drugs meant for human consumption, between 2000 and 2007, and the geographic scope of this inquiry was limited to the then existing 27 member states of the E.U.[41]

i. Reasons for Generic Delay

Statistically, it has been reported that there could have been an approximate saving of 14 Billion Euros in a situation wherein generic entry is delayed only by 7 months from the date of expiry of the originator's patent exclusivity and a potential saving of an additional 3 Billion Euros if generic entry were immediate.[42]These figures triggered an inquiry into the plausible reasons for such delay. Through this inquiry, the E.C. established that the delay in entry was broadly due to the uncertainty present in the market which could be attributed to the following two reasons:

1. ***Conduct of Originator Companies*:** It was observed that originator companies often resorted to practices that would extend the exclusivity period of the patents that they held. This could be in the form of filing numerous patent applications for the same drug (known as *patent clusters* or *patent thickets*), creating an uncertainty for generic companies as to the exact period of patent exclusivity held by the originator companies, thereby affecting their market entry.[43]

   It was found that originator companies also resorted to the filing of divisional patent applications to extend the life of their patents. While this is a legitimate practice permitted by patent laws across the globe, it has the effect of creating the same uncertainty as to the patent exclusivity period because practically speaking, the examination of the said patent applications by the European Patent Office ("**EPO**") is a time-consuming procedure, consequently affecting the approximate period of exclusivity.[44]

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[41] *Final Report, Pharmaceutical Sector Inquiry*, THE EUROPEAN COMMISSION (July 8, 2009), ec.europa.eu/.../sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf.

[42] DominikSchnichels and Philipp Gasparon, Pharma Task Force*, Pharmaceutical Sector Inquiry: Presentation of the Preliminary Report*, THE EUROPEAN COMMISSION (Nov. 28, 2008), http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/si.pdf.

[43] *Executive Summary of the Pharmaceutical Sector Inquiry Report*, THE EUROPEAN COMMISSION, ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf.

[44] Commission Communication, *Executive Summary of the Pharmaceutical Sector Inquiry Report* (July 8, 2009), http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/communication_en.pdf; *Commission Staff Working*

2. ***Possibility of Litigation:*** The E.C. in its inquiry also observed that originator companies tend to file patent infringement suits against the incoming generics, and even the possibility of the same deters generics from actually entering the market due to the heavy time and monetary expenditure required to pursue such litigation.[45]

That the average time that a case takes to reach its final outcome is approximately 2.8 years, has been the biggest driving factor behind the entering into of settlement agreements between the originator and generic companies.[46] Neither party would want to run the risk of investing such time and money into litigation when neither of them is sure as to which way the decision of the court would swing.

Further, interim injunctions, since they are within the discretionary power of the court, are not granted in all cases. Absent a settlement agreement, if an interim order restraining generic entry is not passed, the originator would suffer huge losses as it would be required to considerably lower down its prices to compete against the generics in the market. In such a situation, even if the case is eventually decided in the originator's favor, it has already suffered financial loss that it might not be able to recover in future.[47] Similarly, generic companies, which are significantly smaller companies in terms of their net worth, would not be able to withstand the penalty imposed in case the court finds that it is liable for patent infringement. This anticipation causes the two parties to enter into a settlement agreement to create a win-win situation for both.[48]

While settlements are often encouraged by courts, the E.C. took note that some of these agreements appeared to have severely anticompetitive effects on the market. It was such settlement agreements that the E.C. went on to further probe into.

Document, Technical Annex to the Commission Communication Part 1, THE EUROPEAN COMMISSION (July 8, 2009), http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/staff_working_paper_part1.pdf.

[45] Pharmaceutical Sector Inquiry, *supra* note 41.

[46] Pharma Task Force, *supra* note 42.

[47] Lukas Simas, *U.S. v. E.U.: Pay for Delay Settlements*, BERKELEY TECHNOLOGY L.J., (Nov. 12, 2015), http://btlj.org/2015/11/us-v-eu-pay-for-delay-settlements.

[48] Damien Geradin, Douglas H. Ginsburg, Graham Safty, *Reverse Payment Patent Settlements in the European Union and the United States*, GEORGE MASON UNIVERSITY LEGAL STUDIES RESEARCH PAPER SERIES, (2015), http://www.law.gmu.edu/assets/files/publications/working_papers/LS1522.pdf.

ii. Categories of Settlement Agreements: Effect on Market Competition

For the purpose of analyzing the impact of an agreement, the E.C., in its inquiry, divided all settlement agreements into two broad categories:

Category A: No limitation on generic entry – This envisages agreements wherein both parties agree to withdraw their claim and counter-claim respectively and there is no restriction on the entry and exit of the generic company. Since such agreements do not have anticompetitive effects on the market, the E.C. has not conducted further inquiry.

Category B: Limitation on generic entry – These agreements impose restrictions on the generics from marketing their own products, either wholly or partly. Such agreements are further classified into:

- **Category B. I.: Limiting generic entry without presence of value transfer –** Agreements of this nature have a high chance of being subjected to antitrust scrutiny. These agreements envisage clauses that stipulate that the generic company recognizes the validity of the originator's patent and will therefore not enter the market until expiry.[49] In some cases, agreements may also contain a non-challenge clause which prohibits the generic from challenging the validity of the patent in court. Such a clause, under certain circumstances, transcends beyond the specific subject-matter of the patent right and therefore, its subsequent effect of restraining competition will immediately infringe Article 101 (1) of The Functioning of the European Union ("**TFEU**").[50]

  Agreements entered into by the originator with the generic company are not by themselves invalid, so long as they are in pursuance of the *normal exercise* of its IPR, which would include all such clauses which are necessary to realize the essential function for which the right has been conferred.[51] The moment the agreement confers upon the originator, a right in excess of that given to it by virtue of its holding the

[49] Geradin, *supra* note 48.
[50] Communication from the Commission, *Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements*, OFFICIAL JOURNAL OF THE EUROPEAN UNION,(Mar. 28, 2014),http://eur-lex.europa.eu/legal-content/en/TXT/PDF/?uri=CELEX:52014XC0328(01)&rid=2.
[51] Sirena SRL v. EDA SRL and Others, C-40/70 (1971).

patent, thereby imposing additional restrictive effects on competition to that already inherent to the IPR, such an agreement is automatically subject to antitrust scrutiny.[52] The idea here is that the settlement agreement should be for the pursuance of the existing right and should not be the means of creating a non-existing right.

- **Category B.II. : Limiting generic entry through value transfer** – Agreements involving a value transfer are considered to be the most dangerous form of agreements, insofar as the health of the market's competition is concerned.[53] It is this category of settlement agreements that the E.C. laid its primary focus on, in this inquiry.

  This type of agreement may either involve a direct monetary transfer from the originator to the generic company or may involve the purchase of an asset. Either way, this consideration flows with the object of restricting the generic's entry into the market. The E.C. took cognizance of all such reverse payments that potentially threatened market competition, the outcome of which is discussed in the subsequent section.

B. LEGALITY OF REVERSE PAYMENTS: THE E.U. WAY

At the conclusion of its sectoral inquiry, the E.C. investigated into three instances of reverse payment settlement agreements – namely, the cases of *Lundbeck v. Commission*[54], *Johnson & Johnson and Novartis*[55] *and* the case of *Servier-Perindropil*[56]. Despite there being a tried-and-tested *rule of reason* principle established by the FTC in the U.S., the E.C. interestingly took a very contrasting approach in resolving the cases before it.

This section first seeks to explain the theoretical concept of the *Per Se* or *By Object* reasoning that the E.C. resorted to in resolving the first ever case of reverse payments before it, which has only recently been affirmed by the General Court of Appeal. Subsequently, a detailed analysis of the three important cases is made.

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[52] Claudia Desogus, *Competition and Innovation in the EU Regulation of Pharmaceuticals*, 34 EUROPEAN JOURNAL OF LAW AND ECONOMICS 2, 94 (2012).
[53] Geradin, *supra* note 48.
[54] Lundbeck v. Commission, Case T-472/13 (2016).
[55] Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer, 129 F. Supp. 2d 351 (2000).
[56] Perindopril (Servier), COMP/AT.39612 (July 9, 2014).

i. 'Per Se' or 'By Object': The Concept

According to Article 101 (1)[57] of the TFEU, all agreements that disrupt free competition in the European Economic Area ("EEA")'s internal market either *by object* or *by effect* are prohibited, the two of which are alternative requirements and are to be read disjunctively.[58]

Restrictions *by object* are those that have such a high potential of causing a negative effect on market-competition that it is unnecessary to demonstrate any actual effects of such anti-competitiveness for such restrictions to be brought within the ambit of Article 101(1).[59] This presumption is based on the serious nature of the restriction, in that they are highly likely to produce such anticompetitive effects on the market and jeopardize community competition rules.[60]However, for a restriction to be considered anticompetitive *by effect*, the E.C. is required to actually establish the anti-competitive effect of such an agreement, taking into consideration the factual as well as legal circumstances of the case it seeks to prove.[61]

ii. The Case of Lundbeck[62]: Findings of the Commission, Reaffirmation by the General Court and Analysis

Lundbeck was the manufacturer of the anti-depressant Citalopram and held a product as well as a process patent in relation to the molecule. As the expiry of its patent exclusivity period was fast approaching, six other manufacturers were preparing to enter the market and launch their own generic versions of the drug. *Lundbeck* initiated patent infringement suits against each of the generics alleging that they would infringe the patents held by it. However, without actually pursuing the litigation, *Lundbeck* entered into settlements with them.

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[57] Article 101(1), TFEU: The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[58] Société Technique Minière v. Maschinenbau Ulm GmbH, Case 56/65, ECR 337, 249 (1966).

[59] Mark van der Woude, *Patent Settlements and Reverse Payments Under EU Law*, 5 COMPETITION POLICY INTERNATIONAL, 182 (2009).

[60] Competition Authority v. Beef Industry Development Society Ltd., Case 209/07, ECR I-8637, 17 (2008).

[61]RICHARD WHISH& DAVID BAILEY, COMPETITION LAW 120 (7th ed. 2012).

[62] Supra, note 54.

The E.C. established a three-prong test, upon the fulfillment of which such agreements would be considered to be anticompetitive *by object* under Article 101 (1) of the TFEU[63]:

1. The originator and the generics are at least *potential* competitors when the agreements are concluded;
2. The generics commit themselves to limit, for the duration of the agreement, their independent efforts to enter one or several markets with their generic products; and
3. The agreement provided for a transfer of value from the originator, which substantially reduces the incentives of the generics to independently pursue their efforts to enter the market;

The E.C. established that the settlement agreements between the parties were well within the ambit of the test and consequently slapped the parties with a hefty fine. The parties then appealed to the General Court ("**G.C.**"), which reaffirmed the findings of the E.C. in its final decision, in the following manner:

1. As regards the *first* limb of the test, the parties argued that since *Lundbeck* held two valid patents, the question of their being considered potential competitors does not arise as the nature of the patent right automatically excludes competitors from the market.[64]

   The E.C. relied upon some internal documents to establish that the exclusivity period of the product patent had expired before the parties entered into the settlement and therefore, the exclusionary right being contended by the parties would not hold water. Further, the E.C. also identified eight possible routes to entry into the market without infringing *Lundbeck's* process patent and one of them, is litigation itself.[65] The exclusionary nature of an IPR does not go so far as to 'exclude' another from the market, but only to 'try and exclude' by pursuing litigation.[66] The fact that the parties did not take to litigation at all was reflective of *Lundbeck*'s knowledge that its patent was weak and that the parties in fact were potential competitors for the purpose of this test.

[63] Pharma Task Force, *supra* note 42.
[64] Andrea Zulliet al.,*The Commission's Lundbeck Decision: A Compass to Navigate Between Scylla and Charybdis?*, (2015), https://www.cov.com/~/media/files/corporate/publications/2015/03/*Lundbeck*_decision_030215.pdf.
[65] David Gregory and Imogen Proud, *First Pharma Pay-for-Delay Cases: General Court Upholds the Commission's Lundbeck Decision*, http://1exagu1grkmq3k572418odoooym-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/DG-IP-Pay-for-Delay-Case-Note.pdf.
[66] Mark A. Lemley, Carl Shapiro, *Probabilistic Patents*, Stanford Law School John M. Olin Program in Law and Economics Working Paper 288 (Aug. 2004), https://www.researchgate.net/publication/4902244_Probabilistic_Patents.

While the E.C.'s decision in this regard is mostly well-founded, what is absurd is that the E.C. finds that even in a situation wherein the generic is blocked by the patent, the parties would be considered to be potential competitors if the generics could enter the market by working around the patent.[67] However, it would be pertinent to mention here that the G.C., in the case of *Visa Europe Ltd. and Visa International Service v. E.C.*[68], held that, in order for two parties to be considered potential competitors of one another, there must be a *real and concrete* possibility of entry into the market in the *near, foreseeable* future.[69] This means that so long as a party is a patent holder, establishing that another is a potential competitor would ideally not be a child's play, since the standard laid down by the G.C. is quite a strict one. Nonetheless, the E.C. seems to have made a departure from an established understanding.

Secondly, the E.C. seems to have ignored that in majority of the cases the parties do not resort to litigation due to the fact that it is very time-consuming, expensive and in most cases, too uncertain for the parties to be willing to run the risk. So the parties' reluctance to engage in litigation should not be construed for their being potential competitors.

2. As far as the *second* limb is concerned, the G.C. affirmed the E.C.'s opinion in that the generics went far beyond the possible outcome of litigation by committing themselves to complete restriction from the market.[70] Absent the settlement, the litigation would have at best resulted in prohibiting the generics from utilizing the process over which the patent is held, but would not have restricted the generics from entering the market, in order to maintain market competition.

   What the E.C. has not left room for is that in cases where parties do enter into settlements to avoid engaging in litigation, it is a normal occurrence that generics are willing to keep out of the market for a specified period if compensated for the same, when it is anticipated that their entry would result in patent infringement. This is not to say that the E.C. has erred in its decision *per se* in this case, but that this limb of the test should be considered in such a restrictive context.

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[67] Beef Industry, *supra* note 60.

[68] *Visa Europe Ltd. and Visa International Service v. E.C.,* T-461/07.

[69] Eduardo MartínezRivero and Guillaume Schwall, *Commission fines Visa International and Visa Europe for not admitting Morgan Stanley Bank as a Member*, Competition Policy Newsletter 1, (2008), ec.europa.eu/competition/publications/cpn/2008_1_41.pdf.

[70] Enrico Di Tomaso, *Reverse Payment Settlements Under Competition Law*, THESIS, TILBURG UNIVERSITY, (2013-2014), arno.uvt.nl/show.cgi?fid=134125.

3. As regards the *third* limb of the test, the G.C. reaffirmed that the value of consideration flowing from *Lundbeck* was a sum that roughly corresponded to the profit that the generics expected to make through successful entry into the market, in addition to which *Lundbeck* also purchased their stock, with the intention to destroy it.[71]

   What the E.C. has blatantly ignored here is perhaps defining the threshold of value transfer beyond which a settlement agreement would be categorized as anticompetitive. A monetary transfer is a form of consideration and is usually the most demanded consideration in a settlement and therefore the fact that there is a flow of money *per se* cannot signify anti-competitiveness.[72] Further, what the E.C. also seems to conveniently ignore is that these are not ordinary settlements but are *patent* settlements – predicated upon an intellectual property right that confers a certain kind of exclusivity. Due to this, the value of settlement is usually significantly higher as compared to ordinary settlements.[73]

While the three-prong test may have its fair share of loopholes, it would be incorrect to say that this test cannot be successfully applied at all. What should not be done, however, is to consider this test as a conclusive mechanism to establish anti-competitiveness, as the E.C. and G.C. have done. The real issue here is not the test, but the approach that has been taken on the basis of this test, that is, declaring the agreements anti-competitive *by object*.

While the E.C. in its sector inquiry report categorically stated that "*any assessment of whether a certain settlement could be deemed compatible or incompatible with the E.C. competition law would require a full blown analysis of the individual agreement, by taking into account the factual, economic and legal background of each case*"[74], it has nonetheless ignored its own suggestion.

Further, the E.C.'s task of defending its reasoning for resorting to the *by object* approach will undoubtedly be very difficult, in light of the European Court of Justice's judgment in the *Cartes Bancairs* case wherein it held that *"only conduct whose harmful nature is proven and easily identifiable, in light of experience and economics, should therefore be regarded as a restriction of competition by object, and not agreements*

[71] Sven Gallasch, *European Pharmaceutical Antitrust after Groupment des CartesBancaires – Time to Rethink the Approach to Pay For Delay Settlements?*, COMPETITION POLICY BLOG, UNIVERSITY OF EAST ANGLIA, https://competitionpolicy.wordpress.com/2014/10/20/european-pharmaceutical-antitrust-after-groupment-des-cartes-bancaires-time-to-rethink-the-approach-to-pay-for-delay-settlements/.
[72] Whish, *supra* note 61.
[73] James Killick, JérémieJourdan and Jerome Dickinson, *The Commission's Lundbeck Decision: A Critical Review of the Commission's Test for Patent Settlement Agreements*, COMPETITION POLICY INTERNATIONAL, (Feb. 24, 2015).
[74] Pharmaceutical Sector Inquiry, *supra* note 42, at 1530.

which, having regard to their context, have ambivalent effects on the market or which produce ancillary restrictive effects necessary for the pursuit of a main object which does not restrict competition"[75]

This leads us to question the E.C.'s decision as to whether the same was driven by strategic reasons[76] – in that it is much easier to close a case when no such 'full blown' analysis is required to be made, or no anticompetitive effects of the agreements in question have to be established.

iii. Other instances of Reverse Payments

There have been two other prominent cases of reverse payments before the E.C. – the first of them being the case of *Johnson & Johnson and Novartis*[77] wherein the E.C. found that the co-promotion agreement entered into by Johnson & Johnson and Novartis, stipulating that Novartis would jointly promote Johnson & Johnson's drug *Fenantyl*, in consideration of a monthly value transfer for the same was anticompetitive *by object* as it qualified the three limbs of the three-prong test. No appeal was filed by either party against the decision of the E.C.[78]

The other notable instance of reverse payments was the *Servier-Perindropil*[79]case which is a rather interesting one, for the fact that even though the approach ultimately followed by the E.C. was identical to the preceding cases, its approach also contains a novelty. That even though the settlement agreements were deductively a *by object* infringement of Article 101 (1) of the TFEU due to being caught by the three-prong test, the E.C. thought it necessary to specifically establish the anticompetitive effects of the settlement agreements on the market, for the "sake of completeness".[80] This perhaps came in light of the sharp criticism against its un-reasoned *by object* approach taken in its previous two cases. While this third case was also ultimately decided in the same manner as its predecessors, is this reflective of a plausible convergence of the E.U.'s approach with the U.S.'s *rule of reason*?

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[75] Groupement Des CartesBancaires v. European Commission, Case67/13 P (2014).
[76] Sven Gallasch, *Activating Actavisin Europe – The Proposal of a "Structured Effects Based" Analysis for Pay for Delay Settlements*, UNIVERSITY OF EAST ANGLIA LAW SCHOOL, CENTRE FOR COMPETITION POLICY WORKING PAPER 15-3,(2016),http://competitionpolicy.ac.uk/documents/8158338/8368036/CCP+Working+Paper+15-3.pdf/8226205f-c0e2-4157-aed5-87dbfbeabacc.
[77] Novartis, *supra* note 55.
[78] Christos Malamataris, *Johnson & Johnson / Novartis: Another Pay-For-Delay Down for the European Commission*, INSIDE EU LIFE SCIENCES, (Dec. 13, 2013), https://www.insideeulifesciences.com/2013/12/13/johnson-johnson-novartis-another-pay-for-delay-down-for-the-european-commission/.
[79] Servier, *supra* note 56.
[80] Miranda Coleet al., *European Commission Published Non-Confidential Version of Servier Decision*, INSIDE EU LIFE SCIENCES, (July 17, 2015), https://www.insideeulifesciences.com/2015/07/17/european-commission-published-non-confidential-version-of-servier-decision/.

IV. COMPARISON BETWEEN U.S. AND E.U.

In this section, the authors seek to draw a comparison between the contrasting approaches taken by the U.S. and E.U. in tackling the instances of reverse payment patent settlement agreements that arose in their respective jurisdictions. While the principle developed by the FTC is a settled one, the approach resorted to by the E.C. has drawn flak from critics all over the world for reasons delineated below. The ultimate question left to be answered now is, is it more desirable that the E.U. soften its stand and employ a well-reasoned approach like the U.S.?

A. POSITION IN THE U.S.

While exploring the legality of reverse payment agreements in the hands of the U.S. Judiciary, it was observed and explained in Part II of the paper that the Supreme Court of the U.S. in *Actavis* upheld the *rule of reason* analysis over the *illegal per se* test. Thus, ascertainment of the anticompetitive nature of reverse payment agreements requires a comprehensive analysis of all the relevant factors on a case by case basis, as the terms of the settlement are multi-faceted.

In addition, we also observed that the regulatory framework under the Hatch Waxman Act is such that it allows the generics to enter the market before the expiry of the patent exclusivity period. However, such generic company would be required to file an ANDA as well as a Paragraph IV Certification with the FDA, mentioning every related patent filed by the originator company in the market it seeks to enter.[81] The FDA would only approve the generic's application if it finds that its entry will not infringe the originator's patent rights and this is called a *patent linkage*.[82]The idea here is to ensure that only such originator companies that still hold valid patents should be allowed to enjoy the monopolistic benefits that flow from an IP. However, the originator company still has the opportunity to file a patent infringement suit against such generic.

Further, the Hatch Waxman Act essentially seeks to incentivize generics to enter the market by allowing the first filer a 180-day exclusivity period during which no one generic company will be allowed to enter and market its own version of the drug.[83] The consequence of this is that the originator company has the power to foreclose the entire market by entering into a settlement with the first filer generic company. What the U.S. lawmakers perhaps overlooked is that this 180-day

[81] Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 355 (j)(2)(A)(vii) (2010).
[82] Gallasch,*supra* note 76.
[83] *Id.* at § 355 (j)(5)(B)(iv).

period would continue to subsist even in a situation where the two companies enter into such reverse payment settlement agreements.

Nonetheless, when the *Actavis*-advocated rule of reason analysis is placed in this regulatory context, it flows that despite the high possibility of an anticompetitive effect resulting from a settlement agreement of such nature, a full blown analysis of the cumulative pro-competitive and anticompetitive effects of the same will have to be demonstrated to determine the legality of such payments. This is because the FTC recognizes that such agreements are not just ordinary settlements but involve patents as its subject matter and therefore the terms of settlement, although may appear to be anticompetitive, may not actually have such a negative effect on competition in the market.[84]

B. POSITION IN THE E.U.

The E.U. lacks a regulatory framework on the lines of the Hatch Waxman Act, with particular reference to the first-filer advantage given to generic companies. Additionally, the E.U. also does not recognize the concept of *patent linkage*.[85] In other words, when the European drug safety regulators approve the entry of drug companies into the market, the only consideration on which such approval is granted is the quality, safety and efficacy of the drug, and factors such as economic and other considerations, including the existence of patent holders in the market are immaterial. Therefore, the regulator is not limited in the number of genetic drug applications it can approve, so long as they are compliant with the necessary health and safety standards.[86]

As a consequence, the originator company does not have the same power of foreclosure as it would have had in the U.S. For the originator to actually foreclose the market, it would have to enter into separate settlements with each of the generics entering the market. Therefore, it is clear that even if the originator company entered into a settlement agreement with one generic company, it would not necessarily have an anticompetitive effect on the market, the likelihood of which is much higher in the U.S.

If we were to now read the E.U.'s approach of categorizing reverse payment settlement agreements in this background of an absence of such regulatory framework, it appears that the approach resorted to by the E.U. is extremely harsh. The E.C. in its decisions seems to have overlooked that

[84]Actavis, *supra* note 19.
[85] Gallasch, *supra* note 76.
[86]*Id.*

there could be several reasons for a brand company and a generic company to enter into a settlement agreement, other than just to create entry restrictions in the market.[87]One such reason is essentially to avoid running the risk of the uncertain outcome of litigation coupled with the exorbitant costs and time involved. Further, owing to the fact that it is a patent settlement agreement and not just an ordinary one, a higher flow of consideration is understandable.[88] And therefore, to hold such agreements on account of their high value transfer as anticompetitive *per se* would not be well-founded. This could be traced down to a fundamental concept of contract law that the value of consideration is immaterial in an agreement and is valid so long as it is acceptable to both parties. Here, the E.C. also seems to have ignored the possibility that the originator companies could be compensating for several other costs in addition to the estimated legal costs, which, without the creation of an adverse effect on competition, should not be of concern to the competition authorities. Interestingly, the E.C. in its decision has not prescribed any threshold for the value of the consideration flowing in such agreements beyond which they would be considered illegal, further creating more uncertainty.[89]

It is argued that while the quantum of value transfer may be an *indication* of the existence of an anticompetitive agreement, it nonetheless cannot be used as *conclusive* proof. This understanding has also been reiterated by European courts time and again, particularly in the case of *Delimitis v. HenningerBrau*,[90] wherein the court held that agreements which appear anticompetitive are not necessarily so, as such agreements may result in significant precompetitive effects, with the anticompetitive effects being only an ancillary part of the same. However, the E.C. seems to have overlooked this understanding in its decisions.[91]

Having regard to the existing patent law and regulatory system along with the E.C. competition principles, we think it desirable for the E.U. to take a more analysis-based approach, taking into consideration the specific nature of patent settlement agreements. To reiterate, while the quantum of a value transfer may be a possible indication of an adverse effect on competition, the E.C. should lay

[87] Anita Esslinger, *A Wolf in Sheep's Clothing – Is Your Litigation Settlement Anti-Competitive?*, EU AND COMPETITION LAW, (Dec. 17, 2014), http://eu-competitionlaw.com/a-wolf-in-sheeps-clothing-is-your-litigation-settlement-anti-competitive/.
[88] Gregory, *supra* note 65.
[89] Executive Summary, *supra* note 44.
[90] Stergios Delimitis v. Henninger Bräu AG., Case C-234/89, ECR 1991 I-00935 (1991).
[91] Paul Bridgeland, *Court of First Instance Upholds Three Commission Decisions Relating to Beer Ties*, COMPETITION POLICY NEWSLETTER 2, (June 2002), http://ec.europa.eu/competition/publications/cpn/2002_2_45.pdf.

greater emphasis on the nature of the market – particularly the number and size of each player, to assess the actual impact of a settlement agreement. A well-reasoned approach of this nature could go a long way in improving the level of certainty in the E.U. market.

V. POSITION IN INDIA

Anticompetitive scrutiny of reverse payments is still at a budding stage in India due to lack of any authoritative ruling. Therefore, this section seeks to explore the contours of the Indian pharmaceutical industry after which the authors comment on the approach likely to be adopted by the Competition Commission and the judiciary, between the two contrasting approaches followed by the U.S. and the E.U., available to them.

A. THE INDIAN PHARMACEUTICAL INDUSTRY

Until 2005, product patents were not recognized in India thereby immensely assisting the Indian pharmaceutical companies in mastering the art of reverse engineering brand drugs innovated by foreign pharmaceutical companies.[92] Very soon, the Indian pharmaceutical industry, which largely comprised of generic and bulk drug manufacturers,[93] came to be regarded as the *pharmacy of the poor* across the globe.[94] However, under an obligation to align its IPR laws with the commitments made under Trade Related Intellectual Property Rights ("**TRIPS**"),[95] the Indian Patents Act of 1970 underwent substantial amendments in 2005,[96] one of which was the recognition of product patents in India for food, chemicals and pharmaceuticals.[97] As a result, the Indian generic manufacturers were prohibited from reverse engineering brand drugs and had to wait until the expiry of an existing patent to manufacture a generic variant of the brand drug.

Needless to say, a change in the pharmaceutical market-dynamics will necessarily ensue from a change in the position of law. Thus, with the recognition of product patents, not only will foreign innovators re-enter the Indian drug market and enjoy patent protection over their brand drugs, but

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[92] Dr. Muralikallumal, *Trends in India's Trade in the Pharmaceutical Sector: Some Insights*, WTO REPORT, (Aug. 2012), http://wtocentre.iift.ac.in/workingpaper/Working%20Paper2.pdf.
[93] Pandey Shivanand, *India's Pharmaceutical Industry on Course for Globalization: A Review,* 1 INTERNATIONAL JOURNAL OF PHARMACY AND LIFE SCIENCES 3, 137-138 (2010).
[94] Sreelekshmi Rajeswari, *India – No Longer The Pharmacy of The Developing World?*,CAMBRIDGE GLOBALIST, (Oct. 15, 2016), http://cambridgeglobalist.org/2016/01/30/india-no-longer-the-pharmacy-of-the-developing-world/.
[95] Dr. V. Manickavasagam, *Intellectual Property Rights and The Impact of Trips Agreement With Reference To Indian Patent Law*, PLANNING COMMISION (SER DIVISION) GOVERNMENT OF INDIA, (Dec. 2007), http://planningcommission.gov.in/reports/sereport/ser/ser_alla.pdf.
[96] The Patents (Amendment) Act, 2005.
[97] *Id.*at 3.

the swift expansion of the Indian pharmaceutical industry will also see an increase in patent infringement litigation between multinational innovators and domestic generics.[98] Consequently, the inducement to capture the market and restrict entry of low-priced generics will only be aggravated with time, and similar to the U.S. and the E.U. markets, India may witness reverse payment agreements disguised as genuine patent infringement settlements. This is further substantiated by the fact that Indian generic manufacturers have already left a mark abroad by entering into reverse payment agreements with foreign drug innovators.[99]

B. REGULATORY FRAMEWORK

Till date, there has been no authoritative ruling by any Indian court on the legality of reverse payment agreements in India but in light of the recent penalties imposed on the Indian generics by the E.C. for effecting reverse payment deals,[100] the Competition Commission of India ("**CCI**") has been strictly monitoring the behavioral abuse in the Indian pharmaceutical industry.[101] Additionally, the CCI has entered into a Memorandum of Understanding with the U.S. Department of Justice and the FTC to observe increased cooperation and exchange of information in important competition policies and enforcement developments.[102] This only makes it more apparent that India may trail on the footsteps of the FTC in vigorously supervising and investigating any out-of-court patent infringement settlements which have or may have an appreciable adverse effect on competition ("**AAEC**")[103] in the Indian drug market.

The Indian Competition Act of 2002 ("**Competition Act**") aims to prevent practices which have an adverse effect on competition and strives to promote and sustain competition in the markets and protect consumer interests.[104] In the pharmaceutical sphere, any agreement between the innovators and the generics to delay the generic drug's market entry or to foreclose the market may come under

[98] Ravinder Jha, *Options for Indian Pharmaceutical Industry in the Changing Environment*, 42 ECONOMIC AND POLITICAL WEEKLY 39 (2007).
[99] Lundbeck, *supra* note 54.
[100] Servier, *supra* note 56, at 806-809.
[101] Vaibhav Choukse, *Sweetheart Deals That Hurt Consumers*, BUSINESS STANDARD, September 15, 2014, http://www.business-standard.com/article/opinion/vaibhav-choukse-sweetheart-deals-that-hurt-consumers-114091501332_1.html.
[102] U.S.-India Memorandum of Understanding, (Sept. 2012), https://www.ftc.gov/system/files/1209indiamou.pdf.
[103] Section 19(3), The Competition Act, 2002.
[104] Preamble, The Competition Act, 2002.

the radar of Competition Act if it causes or is likely to cause an AAEC on the Indian drug market.[105] Particularly such agreements may be declared as anticompetitive under Section 3(1), which is the general provision prohibiting anticompetitive agreements in India and requires a *rule of reason* analysis to establish AAEC in the relevant market, or under Section 3(3), which specifically prohibits horizontal agreements between parties engaged in identical or similar trade of goods or provision of services. It codifies a *per se illegal* analysis without any further requirement to establish AAEC and therefore a reverse payment agreement which directly or indirectly determines the drug prices, or limits or controls production, supply and markets for drugs will prima facie be declared anti-competitive.

Such agreements, if they result in foreclosure of effective competition in the relevant drug market may also be investigated under Section 4 of the Competition Act which prohibits abuse of dominant position.[106] However, given the constant interaction of IPRs with Competition Law, the catch here is Section 3(5) of the Competition Act which gives an umbrella protection to IPRs from the rigors of antitrust scrutiny.[107] Statutorily, it would mean that the innovator drug company could impose reasonable conditions to restrain any infringement of its patented drug by the generics but whether or not the same can be extended to cover reverse payment agreements entered during the term of the patent is questionable. The authors are of the opinion that since it is well settled that IPRs cannot transgress antitrust scrutiny beyond the scope of exclusivity that they offer, Section 3(5) of the Competition Act can hence not be interpreted in a manner which ultimately perpetuates the ever-greening of patents. This is further substantiated by the negative impact that such reverse payments may have on patients and the healthcare sector at large and the reasoning of the U.S. Supreme Court in *Actavis,*[108]that a valid patent does not automatically shield a reverse payment agreement from antitrust scrutiny.

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[105] Dr. Geeta Gouri, *Competition Issues in the Generic Pharmaceuticals Industry in India*, http://www.cci.gov.in/images/media/presentations/ComIssGenPharmIndusIndia_20100401142346.pdf (last updated on October 9, 2014).

[106] *Competition Issues in The Pharmaceutical Industry*, INDIA COMPETITION AND REGULATION REP., 5 (2007), http://www.cuts-international.org/pdf/ICRR07_%20Pharma.pdf.

[107] *Id.* at 39.

[108] Actavis, *supra* note 19.

C. POSSIBLE JUDICIAL APPROACH

Although the legality of reverse payment agreements is still unaddressed in India, a case which did spur the need to address the issue was a Delhi High Court directed mediation[109] between *Hoffman-La Roche*, a Swiss innovator and *Cipla*, an Indian generic to reach a settlement over the alleged patent infringement by *Cipla* of *Roche'sTarceva*tablets, by manufacturing its generic version. Interestingly, the Court had upheld the validity of *Roche's* and *Cipla* was not found to infringe it. Although the mediation failed, if the terms of the settlement had resulted in *Cipla's* not marketing its generic drug, the CCI would have had the *suomotu* power to inspect the terms of the settlement under the above-mentioned provisions of the Competition Act. An analysis of pharmaceutical cases shows that foreign innovators majorly resort to permanent injunctions and ever greening of patents (patent clusters) to defend the exclusive sale of their brand drugs in the Indian market.[110]

However, as and when it comes for consideration, the authors are of the opinion that the Indian Judiciary will adopt a *rule of reason* approach similar to *Actavis*,[111] over the E.U.'s *per se illegal* approach in determining the anti-competitive nature of reverse payment agreements.

VI. CONCLUSION

Having explored the legality of reverse payment patent settlements on both sides of the Atlantic, we understand that the U.S. has taken an approach that seems to be considered as the most acceptable way to treat such agreements. The FTC has recognized the peculiar nature of patent settlements and has therefore suggested that a full-blown case by case analysis should be done. Consequently, a comparison between the cumulative pro-competitive and anticompetitive effects of an agreement on the market is required to be established to adjudge the legality of a reverse payment agreements. Further, although FTC's scrutiny of patent settlements has strengthened over the years, the current practice of large monetary remedies, spiking up to 1.2 billion dollars, may have to give way to less stringent enforcement tools resulting in use of disgorgement only in rare cases.

The E.U.'s approach, on the other hand, has drawn considerable flak from critics across the globe for being too harsh and inconsiderate. Laying most of its focus on the quantum of payment in the

[109] F. Hoffmann-LA Rochee Limited and Another v. Cipla Limited, 202 (2013) DLT 603.
[110] C.H. Unnikrishnan, *CCI to Scan Drug Patent Settlements*, LIVEMINT, August 3, 2014, http://www.livemint.com/Companies/RVVDhRh7oTfpqlIphkb6jM/CCI-to-scan-drug-patent-settlements.html.
[111] Actavis, *supra* note 19.

settlement agreement, what is apparent is that the E.U. has most certainly overlooked the peculiar nature of patent settlements, creating an *elephant in the room* situation.

Further, given the nature of the E.U.'s regulatory framework, the possibility of a reverse payment agreement having an adverse effect on market competition is substantially lower than in its U.S. counterpart. The E.C. has taken note of the loopholes in the E.U. regulatory framework, with particular reference to the lack of a community patent resulting in exorbitant cost of patent filing and the lack of efficient procedures for faster approval of patent applications. Acknowledging that it is these shortcomings that cause parties to resort to settlement agreements of this nature, the E.C. has even suggested member states to cooperate towards overcoming these impending hurdles. However, despite this, the E.C. continues to take a strict stand on the matter.

We understand that the E.C.'s stringent approach is reflective of the ultimate importance that it gives to ensuring that it is able to provide safe, efficacious and affordable healthcare to its consumers. We also acknowledge that the same could be a consequence of the fact that historically the member states of the E.U. have played a more significant role in the protection of the health industry than the U.S. However, we feel that an approach as restrictive as that taken by the E.C. could eventually become counter-productive, as it may dis-incentivize generics from even entering the market in the first place, due to the amount of legal uncertainty that currently exists.

It is therefore suggested that the E.C. should take into consideration the nature of the market in addition to the factors it already looks into, to create a more conclusive mechanism to decide the adverse effects of a patent settlement agreement on the market. By progressing from a *by object* approach to a *by effects* approach, the E.C. could go a long way in creating that legal certainty, which would be somewhere on the lines of the *rule of reason* mechanism followed by the U.S. Since the TFEU already envisages such a mechanism, legislative interference is not even required.

So far as the question of convergence of the two approaches is concerned, it is pertinent to understand that what lies at the heart of such convergence is the ultimate policy objective of the U.S. and E.U. respectively. It appears to us that the U.S.'s policy is to try and create a perfect balance between catering to consumers but to also respect the profit-making motive of capitalistic players in the market. On the other hand, the E.U. seems to lay greater importance on the protection of its consumers in the health industry. Therefore, as much as we are hopeful that the two approaches will eventually converge, whether the same will actually happen, only time will tell.

In conclusion, from an Indian perspective, although the lack of an authoritative ruling leaves the legality of reverse payment settlements unaddressed, we strongly believe that India will most likely adopt a *rule of reason* analysis, similar to the U.S. to adjudge the anti-competitive nature of such settlements.

LEGAL FRAMEWORK OF COPYRIGHT SOCIETIES AND COMPETITION LAW IN INDIA

- *Sunaina Mishra & Deepankar Mishra*[*]

Copyright societies in India have been accorded a monopoly status by the Indian copyright Act. Copyright Societies are important institutions that bridge the gap between the copyright holders and users of the works protected by copyright. Initially copyright societies came into existence as not-for-profit organizations but with the growth of business, they took shape of big business house that are interested only in profit-making and not copyright management. Moreover these societies are acting in violation of the copyright Act. Time and again it has been complained by the users and copyright holders that these societies are abusing their dominant position which is harming the competition in the market. The 2012 Amendment introduced many safeguards in the interest of copyright holders but due to lack of proper implementation machinery they have not been of much use. The present research paper looks into the functioning of copyright societies and their anti-competitive practice in relation to copyright licensing.

I. INTRODUCTION

In India, copyright law is governed by the Copyright Act, 1957. It provides protection to the rights of creators of different types of work like literary works, dramatic works, graphical works, musical works and artistic works.[1] The present Copyright Act has been amended several times; most recently it was amended in 2012.[2]

As per the Copyright Act, it is necessary to obtain permission from the right holders for using any copyrighted work, unless the act in question falls under one of the specific exceptions provided under the Act.[3] Infringement of the rights provided under the Copyright Act can lead to civil and criminal proceedings against the infringer.[4] So it becomes necessary for a user to obtain a license from the copyright owner before a work is used in public for avoiding the penalty under Section 63

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[1] The Copyright Act, 1957, Section 13
[2] Copyright (Amendment) Act, 2012.
[3] For the list of exceptions provided under Indian copyright law, see Sec. 52 of the Copyright Act, 1957.
[4] The Copyright Act ,1957, Section 51

of the Act.[5] It is not easy for a user to approach every right owner to get a license and for an owner to entertain each and every request for obtaining such a license.[6] The Copyright Act provides a solution to this problem by incorporating detailed provisions regarding copyright societies under Chapter VII of the Copyright Act, 1957.

II. LEGAL FRAMEWORK OF COPYRIGHT SOCIETIES IN INDIA

There was no provision in the Copyright Act (hereinafter referred as "the Act") for the collective administration of copyright by copyright societies before 1994.[7] Recognizing the importance of collective management of copyright, the Indian parliament incorporated the provision of copyright societies under chapter VII of the Act by the amendment of 1994.[8] By this amendment performing rights societies were replaced by the copyright societies.[9] The working of performing rights societies was limited to granting of the performance rights whereas copyright societies extends license for all classes of work.[10] Copyright society has been defined under the Act as a society registered under sub section (3) of section 33 of the Act.[11] Section 33(1) of the Act provides that after the Amendment Act of 1994 the business of issuing or granting license in respect of all the works in which copyright subsists shall be carried out only by a Society registered under the Act.[12]

As per the Act there should be at least seven members to form a copyright society.[13] In India, it is the Central Government that has the power to register these societies keeping in view the right of the authors and owners and convenience of the public.[14] According to the Act, the Central Government is generally allowed to establish only one copyright society in respect of one class of work.[15] A copyright society shall be granted registration for a period of five years which can be renewed from time to time.[16]

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[5] The Copyright Act, 1957, Section 63

[6] Mihaly Ficsor, *Collective Management of Copyright and Related Rights,* CTR ON WIPO, 3 (2002) http://www.wipo.int/edocs/pubdocs/en/copyright/450/wipo_pub_l450cm.pdf

[7]Divya Subramanium, *Legislative Comment Protection Of Performers' Rights - Evolution And Administration In India,* Ent. L.R. 139, 143(2009).

[8]V.K AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS 25 (2nd ed., 2015)

[9] Divya Subramanium, *supra* note 7, at 143

[10]*Id.*.

[11] The Copyright Act, 1957, Section 2(ffd).

[12] The Copyright Act, 1957, Section 33(1).

[13] The Copyright Rules, 2013, Rule 44(1).

[14] The Copyright Act, 1957, Section 33(3)

[15] The Copyright Act,1957, proviso to Section 33(3)

[16] The Copyright Act, 1957, Sec 33(3A)

Power of copyright societies relating to the administration of the rights of owners has been provided under section 34 of the Act. Subject to certain conditions a copyright society may accept from the owners and authors an exclusive authority to administer any right by way of issuing license and collection of fee.[17] This section also empowers the copyright societies, the authority to enter into reciprocal agreements with the collecting societies working overseas.[18] For the purpose of carrying out the administration of copyright, a copyright society is allowed to perform following functions:[19]

- Issuing of license under section 30 of the Act
- Collection of fee in consideration of such license
- Distribution of royalties collected in the form of license fee to the owner and author of copyright.
- Any other function in line with other provision of section 35.[20]

According to the Act, copyright societies in India shall be under the collective control of authors and other owners of the rights who are its members.[21] Before devising any procedure for the collection and distribution of fee collected from the users, copyright societies are required to take approval of its members.[22] Collecting societies are also bound to provide detailed information regarding their functionality in the administration of copyright to its members.[23] A copyright society is not allowed to discriminate among its members at the time of payment of royalties. Copyright societies are required to obtain an approval of the authors and other owners of rights regarding procedure devised for the collection and distribution of fee and utilization of the revenue collected apart from the payment of royalties.[24] The royalties to be distributed by the copyright society among authors and owners shall be in proportion to the use of their work.[25] The Act also provides that all the members of the society will be having equal status; there can be no discrimination between the members.[26]

[17] The Copyright Act, 1957, Section 34(1)(a).
[18] The Copyright Act,1957,Section 34(2).
[19] The Copyright Act, 1957, Section 34(3).
[20] *Id.*
[21] The Copyright Act, 1957, Section 35
[22] The Copyright Act, 1957, Section 35(1)(a).
[23] The Copyright Act,1957, Section 35(1)(c).
[24] The Copyright Act,1957,Section 35(1)(b).
[25] The Copyright Act,1957,Section 35(2).
[26] The Copyright Act,1957, Section 35(4).

III. COPYRIGHT (AMENDMENT) ACT, 2012 AND COPYRIGHT SOCIETIES

The Copyright (Amendment) Act of 2012 (hereinafter "the 2012 Amendment") made significant changes in the working of copyright societies. Before the 2012 Amendment, copyright owners were allowed to grant license in respect of their work individually in respect of all categories of work under proviso to Sec 33.[27] But the 2012 Amendment provides that copyright societies shall have the exclusive right to carry out the business of issuing or granting license in respect of literary, dramatic musical and artistic work incorporated in a cinematographic film.[28]

The 2012 Amendment also provided that all the copyright societies already existing in India before the Amendment shall get themselves re-registered within a period of one year from the date of Amendment.[29]

Another important amendment in this area was the insertion of Section 33A.[30] This section imposes a mandate on every copyright society to publish its tariff scheme.[31] It also provides for an appeal to the Copyright Board by a person who is aggrieved by such tariff scheme.[32] According to the 2012 Amendment, Copyright Board will have the power to remove any unreasonable inconsistency.[33] Copyright Board may fix an interim tariff to be paid by the parties after hearing both the parties.[34]

Section 34 of the Act which provides for the administration of copyright by the copyright society was also amended.[35] Before the amendment, administration of right of only authors was provided. By way of the 2012 Amendment, 'other owner' was added to the section which implies that copyright societies are also authorized to carry out the task of administration of right of other owners who are composers and lyricists.[36]

The reason for adding the words 'other owner' in section 34 was the amendment made in section 17 and 18 of the Act.[37] After the amendment, authors of musical works who were working under the

[27] The Copyright Act,1957, Proviso to Section 33(1).
[28] *Id.*
[29] The Copyright Act, 1957, Second proviso to Section 33(3A).
[30] The Copyright Act, 1957, Section 33A
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] The Copyright (Amendment)Act, 2012, Section 21
[36] *Id.*
[37] Copyright (Amendment) Act, 2012, Section 7

employment of publishers of cinematographic films are also regarded as owners of the work.[38] Before the amendment, the composer and singer did not have any right to receive royalty from the public performance of their work after synchronization of the work into a film. The amendment introduced a proviso to section 17 which states that even after incorporation of the work in the cinematographic film, right of author and owner will remain unaffected. Further amendment was made in section 18 which provides for the assignment of rights by the owner and author. By way of introducing a different proviso to section 18, the Act now provides that even after the assignment of their work, the authors of the literary or musical work, which is included in a cinematographic film or sound recording shall not lose their right of receiving copyright royalties in share with the assignee of that work.[39]

One of the reasons behind the introduction of the 2012 Amendment was to make the Act in compliance with the international treaties of WIPO such as WIPO Copyright Treaty (WCT), WIPO Performance and Phonographs Treaty (WPPT). The 2012 Amendment also helped in removing the ambiguities created by the judgement of IPRS v. Eastern India Motion Picture Association.[40]

From the very beginning of the Act, there has been very little clarity on the issue of ownership of copyright of a song after it is being synchronized into a movie by a producer.[41] This confusion was further increased with the judgment of the Hon'ble Supreme Court in IPRS v. Eastern India Motion Picture Association.[42] In that case, it was claimed by the producers of movies that only they have right in the songs once they are incorporated in the movies.[43] Singers and composers are just the employees and not the owners so they are not entitled to any royalties from exploitation of the work.[44] The Hon'ble Supreme Court, while relying on section 17 of the Act, decided that the producer of a cinematograph film has all the rights in the work which is created by the composer in return of a consideration paid by the producer of the film. Therefore, the producer has all the right

[38] *Id.*
[39] *Id.*
[40] Indian Performing Right Society v. Eastern Motioan Picture Association, 1977 SCR (3) 206
[41] Prashant Reddy T., *The Background Score to the Copyright (Amendment) Act,* 5, NUJS. L.R.469, 479 (2012)
[42] *Id.*
[43] *Supra* note 40 at 213, 214
[44] *Id*

in his movie, including in the lyrics and composition of the soundtrack.[45] It was laid down by the court that the composer cannot claim any right unless otherwise provided by the contract.[46]

After 2004, payments of royalties to the singers were stopped by the Indian Performing Rights Society and Phonographic Performance Limited.[47] Initially these societies were composed of singers, composers and publishers, but with the passage of time, as business grew, it was taken over by the publishers.[48] Publishers and producers claimed that they were the only ones who were entitled to royalty and that composers and lyricists had no claim in royalty.[49]

Controversies relating to the payment of ringtone royalty also constituted one of the reasons for the 2012 Amendment. In the late 1990s, with the development of technology, ringtone for mobile phones came into existence.[50] Music labels and collecting societies were earning huge royalties from cellular companies by licensing their music for use in the form of ringtone royalties.[51] However, out of huge money earned by the music labels, they were not sharing a single penny with the producer of the movie.[52] Due to the non-payment of royalties, there were conflicts of music publisher with music labels and cellular companies. Music labels were primarily arguing that such technology did not exist the time of assignment of the rights.[53]

All these incidents which were exploiting the composer and singers led the Parliament to amend the Act and provide them with greater protection to their work.

Copyright Societies in India

In the Indian market, for collective administration of copyright in musical works, there are three players IPRS, PPL and ISRA**.** The Indian Performing Rights Society (hereinafter "IPRS") collects royalties on behalf of the composers and lyricists.[54] Whenever there is a live performance of the

[45] *Id*,. 222
[46] *Id.*
[47] Prashant Reddy T., *supra* note 41 at 487
[48] *Id.*
[49] *Id.*
[50] *Id.* at 485
[51] *Id.* at 486
[52] *Id.*
[53] *Id.*
[54] TheIndianPerformingRightSocietyLimited, THE INDIAN PERFORMING RIGHT SOCIETY LIMITEDhttp://www.iprs.org/cms/Home.aspx (last updated March 06, 2017)

work of its members, IPRS has right to claim royalty.[55] Another society is Phonographic Performance Limited. (hereinafter "PPL") which collects royalties for sound recording.[56] Third and the most recently established society is the Indian Singers Right Association (hereinafter "ISRA")[57]. ISRA collects royalties on behalf of singers and it the only society which is registered under the Act.[58]

However, IPRS and PPL are no more copyright societies as they failed to get themselves registered after the 2012 Amendment which mandated every copyright society to get itself re-registered under the Act within one year of the Amendment.

IV. COLLECTING SOCIETIES & COMPETITION LAW

As already mentioned, copyright societies have been accorded a monopoly status by the Act. In India, as already discussed, section 33 of the Act states that the business of issuing or granting license in case of cinematographic film shall be carried out only by a registered collecting society.[59] It is also provided that government shall register only one copyright society in respect of each class of work.[60] The statutory interpretation providing for one copyright society, for one class of work has left sufficient room for monopolizing the market of copyright management

In India, the monopoly conferred on copyright societies makes their activities suspicious of having an effect on competition in the market of collective administration of copyright.[61] Copyright societies are in a dominant position as only they are allowed to issue license for the use of the work of the creator.[62] Copyright societies have been under the scrutiny of competition law in EU and the U.S. Till date India does not have any jurisprudence like U.S. and E.U on regulating the activities of copyright societies by applying the competition rules. In EU, copyright societies are considered to be an efficient system for the collective administration of copyright.[63] However European Court of

[55] *Id.*
[56] License Categories, PHONOGRAPHIC PERFORMANCE LTD., http://www.pplindia.org/licctg.aspx (last updated March 06, 2017)
[57] About ISRA, ISRA COPYRIGHT, http://isracopyright.com/about_isra.php (last updated March 06, 2017)
[58] IndianSingersRight Association, INDIAN SINGERS RIGHT ASSOCIATION http://isracopyright.com/certificate_of_registration.php (last updated March 06, 2017)
[59] *supra* note 27
[60] *supra* note 15
[61] *Special Topic – Response by India Group,* CTR ON APAA COPYRIGHT COMMITTEE,1 (2014) http://www.apaaonline.org/pdf/APAA_63rd_council_meeting/CopyrightCommitteeReports2014/India%20Copyright%20Committee%20Special%20Topic%202014.pdf
[62] *supra* note 27
[63] LIONEL BENTLY AND BRAD SHERMAN,INTELLECTUAL PROPERTY LAW 332(4TH ED., 2014*).*

Justice (hereinafter "ECJ") has ruled many times that copyright societies are subject to competition law.[64] Court of the Justice of the European Union (hereinafter "CJEU" formerly known as ECJ) has decided many cases relating to the activities of collecting societies which were in conflict with the competition laws in Europe.[65] The European Commission has kept a constant check on the activities of collecting societies through the lens of competition laws.[66] In EU, anti-competitive activities of collecting societies are controlled mainly through two provisions of EC competition rules i.e., Article 101 and 102 of Treaty on the functioning of European Union (hereinafter "TFEU").[67] With the passage of time, European Commission and CJEU (formerly ECJ) have developed a practice of testing the anti-competitive activities of copyright societies on the parameters of competition rules under Article 101 and 102 of TFEU.[68]

ASCAP and BMI, two performing rights societies in the U.S., have been subject to prosecution and observance of antitrust law of the U.S. for the last 70 years.[69] Most of the licenses for the non-dramatic public performances in music are granted by ASCAP and BMI.[70] Due to their near monopoly status, many of their actions have been challenged before the antitrust law of the U.S.[71] The U.S. antitrust law has been playing an important role in regulating the activities of Performing Rights Organizations as some of their activities may lead to the concentration of market power and violation of section 1 and 2 of the Sherman Act.[72]

Copyright societies in India also have the potential to affect the competition in the relevant market. Anti-competitive activities of these societies which may lead to abuse of their dominant position toward users and copyright holders can be analyzed under the following heads-

[64] *Id.*
[65] DANIEL GERVAIS, COLLECTIVE MANAGEMENT OF COPYRIGHT AND RELATED RIGHTS, 137 (2ed.2014).
[66] *Id.*
[67] Consolidated version of the Treaty on the Functioning of the European Union (last updated December 13, 2007), http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT
[68] Ehlermann et al., *European Competition Law Annual 2005:Interaction Between Intellectual Property And Competition Law*, 343 (2007)
[69] SUSY FRANKEL, THE EVOLUTION AND EQUILBIRIUM IN THE DIGITAL AGE, 269(2014).
[70] Linda McLeod, *Source Licensing: A Legislative Swan Song to the Blanket License*, 67 Or. L. Rev. 735,739(1988)
[71] Robert Isreal Goodman, *Music Copyright Associations and the Antitrust Laws,* 25Ind. L.J.168, 176-177(1960).
[72] Mary Katherine Kennedy, *Blanket Licensing Of Music Performing Rights: Possible Solutions To The Copyright-Antitrust Conflict,* 37 Vand. L. Rev. 183, 184-185(1984).

V. ABUSE OF DOMINANT POSITION TOWARDS USERS

A. High Rates Of Fee Claimed By Copyright Societies

Dominant position of IPRS, PPL and ISRA for providing license in respect of their categories of work may lead to high rates of royalties charged by them. They may abuse their position by charging exorbitant prices for their services. Royalty rates charged by these companies are accused to be very high and unreasonable.[73] There is no fixed rate of royalty that is charged by them and it varies as per the negotiations that take place between the personnel of IPRS, PPL and ISRA, on one hand and the user of their repertoire, on the other hand.[74]

It was claimed by Telangana Chamber of Event Industry, Hyderabad that in the U.K., fee for a PPL license for a year is just INR 16112/-, while in India this amount goes up to 1 lakh per event.[75] As a common user, one might not be able to know the correct tariff and one does not have any option except to pay these societies the amount asked by them.[76] Even after the mandatory requirement of publishing their tariff, PPL has not published their tariff rate on their website.[77] IPRS is asking for an unreasonable fee even for content which is available in the public domain.[78] For example, in December 2004, Eastern Railway came out with an idea of playing music in the trains for making the journey of passengers a more soothing experience and accordingly, suggestion were taken from the general public.[79] After deliberations, it was decided that Rabindra Sangeet would be played in the trains running in the Eastern Railway. However, IPRS asked a hefty royalty of Rs.16 lakh from the Railway for allowing license of these songs.[80] The question became interesting after it was realized that Rabindra Sangeet might be in public domain.[81] The practice of charging a high license fee even

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[73] Meera Srinivasan, *Caught between music and royalty claims,*THE HINDU, Sep 5, 2012
[74]*Id.*
[75] Dear Santa, Save my industry, SPICYIPhttp://spicyip.com/wp-content/uploads/2015/01/iprs-ppl-santa-claus.pdf (last updated March 06, 2017)
[76]Eventfaqs Bureau, *EEMA lambasts PPL 'propaganda'; says 'music licensing bodies exploiting loopholes',* CTR ON EVENTFAQS.COM (Jan 25, 2010)http://www.eventfaqs.com/news/ef-07930/eema-lambasts-ppl-propaganda-says-music-licensing-bodies-exploiting-loopholes--e4llhipuhw
[77]*Comparative Transparency Review of Collective Management Organisations in India, United Kingdom and the United States,* CTR. ON THE CENTRE OF INTERNET AND SOCIETY(July 15,2015)http://cis-india.org/a2k/blogs/comparative-transparency-review-of-collective-management-organisations-in-india-uk-usa
[78] Swaraj Paul Barooah, *IPRS, Indian Railways, & Rabindrasangeet (!),* CTR ON SPICYIP(Jan 3, 2015)http://spicyip.com/2015/01/guest-post-iprs-indian-railways-rabindrasangeet.html
[79]*Id.*
[80]*Id.*
[81]*Id.*

in cases where the copyright society has no such claim over it is one example of the abusive practices of copyright societies owing to their dominant position.

This practice of charging high license fee may amount to abuse of dominant position under section 4(2)(a)(i) of the Competition Act, 2002.[82] In the case of HT Media Ltd v. Super Cassettes Industries Ltd.[83]HT media Ltd. filed information against super cassettes industries claiming the violation of Section 3 and 4 of the Competition Act.. It was alleged that T. Series is holding a share of 70% Bollywood music and it is using its position abusively by charging high rate of fee for its broadcasting license. It was also claimed that opposite party is also imposing minimum commitment charges to be paid by the licensee irrespective of the use made by them.[84] Super cassette was allowing its license only to those licensees who were abiding by above said terms. It was held by Competition Commission of India (hereinafter "CCI") that if a dominant entity imposes an unreasonable and discriminatory prices while licensing their content it will amount to abuse of dominant position under section 4(2)(a)(i) of the Competition Act. CCI held that super cassettes industries ltd. is abusing its dominant position by imposing such unreasonable condition before the licensee.[85]

In the case of HT media Ltd v. Super cassettes Industries Ltd.[86] It was held by the Competition Commission of India (hereinafter "CCI") that if a dominant entity imposes unreasonable and discriminatory prices while licensing their content it will amount to abuse of dominant position under section 4(2)(a)(i) of the Act. In that case, HT media Ltd filed information against super cassettes Industries claiming the violation of Section 3 and 4 of the Competition act. It was alleged that T. Series is holding a share of 70% Bollywood music and it is using its dominant position abusively by charging high rate of fee for its broadcasting license. It was also claimed that the opposite party is also imposing minimum commitment charges to be paid by the licensee irrespective of the use made by them.[87] Super cassette was allowing its license only to those licensees

[82] The Competition Act, 2002, Section 4: (1)
[83] Case No 40/2011
[84] Ibid., page 2
[85] Ibid., page 90
[86]HT media Ltd v. Super cassettes Industries Ltd Case No 40/2011
[87]*Id.*, at 2

who were abiding by above said terms. CCI held that super cassettes industries ltd. is abusing its dominant position by imposing such unreasonable condition before the licensee.[88]

B. *Behaviour As Cartel*

In many aspects, copyright societies in India may appear to be behaving like a cartel. Cartels are prohibited under section 3(3) of the Competition Act.[89] For example, IPRS initially comprised of composers, authors and publishers but with the passage of time, it is converting into a society of music labels.[90] PPL which is collecting royalties for sound recording has more than 200 music labels as members and they are offering their work together from the window of PPL.[91] The working trend of copyright societies in India resemble a cartel which eliminates the competition between market players.[92]

The price offered by PPL for obtaining its license is irrespective of whose work is in demand. All music labels who have the power to control the affairs of PPL are directing the terms of the license in collusion. Music labels, who would otherwise be competitors, are acting as cartels. They are offering their goods on a single price which often appears to be too high for users to pay as will be elaborated under the next heading.

C. *Unreasonable Conditions On Licenses*

IPRS and PPL impose unreasonable conditions on the users while granting them license for the use of the work which might lead to the offence of abuse of dominant position.[93] IPRS and PPL are claiming a flat fee for the full year for their blanket license without taking into consideration the level of business.[94] Both the societies offer only blanket licenses to the users. While taking a license from these societies, users are required to pay an annual sum for their entire repertoire offered by the societies irrespective of the requirement of the users.[95] Both of these societies are in a practice of claiming royalties for six months or yearly basis. Many times it has been alleged by the business

[88] *Id.*, at 90
[89] The Competition Act, 2002, Sec 3(3)
[90] *supra* note 41 at 487.
[91] Prashant Reddy, *Is there a need to break up the cartels in the radio – music labels negotiations?,* CTR ON SPICY IP(February 7, 2013)http://spicyip.com/2013/02/is-there-need-to-break-up-cartels-in.html
[92] *Id.*
[93] *Id.*
[94] Speak Goa, *IPRS, PPL Agencies Harassing Small Business Men In Goa* (March 28,2013) http://permalink.gmane.org/gmane.culture.region.india.goa/144512
[95] *Id.*

guild of entertainment industries that they are threatened by these societies to have a license on annual basis or on a half yearly basis.[96] Some users such as hotels might not be using the work lying in the repertoire of IPRS and PPL for a full year but they are forced to pay for a year if they want to have a license. Some hotels in India are doing business only for a few months but they are forced to take a license for the full year and they are forced to pay even for a period when they are not using the work at all.[97] This practice of IPRS and PPL may be subject to scrutiny under section 4(2)(a)(i) of the Competition Act.[98]

VI. ABUSE OF DOMINANT POSITION TOWARD COPYRIGHT HOLDERS

Copyright societies may abuse their position towards copyright holders in multiple ways:

A. Refusal To Grant Membership To Small Music Labels

IPRS and PPL do not allow their membership to small music labels or regional music labels because of the low popularity of their music. For example, South India Music Association (SIMCA) was denied membership by the PPL on impractical grounds.[99] One of the grounds for refusal stated by PPL was its eligibility criteria which provides that for becoming an associate member there must be at least 50 music albums and cover version excluding classical and devotional albums.[100] It means that PPL does not recognize devotional music as per its eligibility criteria. But no such condition is being provided in its Memorandum of Association (MOA). Also, as per the registration certificate of PPL, there is no distinction between film and non-film music[101] It may amount to refusal to deal under section 3(4)(d) of the Competition Act[102]

B. Unreasonable Conditions While Granting Membership

Copyright societies may abuse their dominant position by imposing unreasonable conditions while granting membership to copyright holders.[103] For example, they force the copyright holder to make an exclusive assignment of his right in favor of the society and afterwards they claim themselves to

[96] *Id.*
[97] *Id.*.
[98] The Competition Act, 2002, Section 4
[99] Prashant Reddy, *Music labels across India complain against PPL's anti-competitive behaviour,* CTR ON SPICY IP (Dec 29, 2011) http://spicyip.com/2011/12/music-labels-across-india-complain.html
[100] *Id.*
[101] *Id.*
[102] The competition Act, 2002,Section 3(4)(d)
[103] Prashant Reddy*, supra* note at 86

be the owner of the copyright.[104] Copyright holders want to retain some of their rights as rights for individual administration but they are not allowed to do so if they want to have the membership of the copyright society.[105] This practice results in limited choice to copyright holder for choosing the best competitive means for administration of his copyrights.[106] In EU also this practice of copyright societies was held to be an abuse of dominance position in the case of Banghalter & Homen Christo v. SACEM[107]. In that case, the court clearly pointed out that the copyright societies should impose only those conditions while granting its membership which are necessary for carrying out the purpose for which they are created. In the U.S. also consent decree provides that the assignment of rights made by copyright holders to copyright societies must be a non-exclusive one and members must have the right to administer their rights individually.[108]

VII. CONCLUSION

The Act contains some detailed provisions with regard to the working of copyright societies in India.[109] But the system of collective administration of copyright in India still suffers from lack of transparency and this has resulted in many unfair results. Even though many checks and balances were attempted to be included in the Act with regard to the activities of copyright societies, India hasn't been able to evolve an efficient and transparent copyright societies. As discussed earlier, copyright societies in India are engaging in various anti-competitive practices. Jurisdictions like the U.S. and E.U. have a long history of applying the competition law to the collective administration of copyright. They have developed jurisprudence in regulating activities which are leading to abuse of dominant position by copyright societies. Learning from their experiences, the Indian Copyright Act has also incorporated some provisions for the prevention of abuse of dominant position by copyright societies. But it is high time to strictly regulate the activities of these societies also through competition law. Copyright societies in India are abusing their dominant position towards users and copyright holders. India needs considerable reforms in this area, so that we can have an effective system for the collective administration of copyright.

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] Banghalter & Homem Christo v. SACEM [2002] Case COMP/C2/37.219
[108] United States of America v. American Society of Composers, Authors and Publishers (ASCAP) *et al.*, No. 09-0539, 2011 WL 3749292 (2nd Cir., 2011)
[109] *supra* note 27

ENFORCING DUE PROCESS IN COMPETITION LAW - PROACTIVE ROLE OF THE COMPETITION APPELLATE TRIBUNAL

- *Swarnim Shrivastava*[*]

Competition law in India is evolving gradually. While we have come a long way in creating substantive jurisprudence on competition since the past two decades, the Competition Appellate Tribunal has ensured that procedural fairness is also maintained while the legal architecture is developing at its own pace. Through this note, the author focusses on the proactive role of the tribunal in enforcing the principle of natural justice in administration of competition complaints by the Competition Commission of India. The author also discusses two recent judgments by the tribunal that could have laid down substantial jurisprudence for section 3 and section 4 respectively, but rather lay down jurisprudence for procedural issues of the Competition Commission.

I. TOWARDS PROCEDURAL FAIRNESS - A PARADIGM SHIFT IN COMPETITION JURISPRUDENCE

"Natural justice is a great humanizing principle intended to invest law with fairness and to secure justice and over the years it has grown into a widely pervasive rule affecting large areas of administrative action….. The inquiry must, therefore, always be: does fairness in action demand that an opportunity to be heard should be given to the person affect?"[1]

The appellate court for regulating competition in India, Competition Appellate Tribunal ('COMPAT') is playing a proactive role in enforcement of the principle of natural justice which is an essential facet of the Indian legal system. Over the past couple of years, the orders passed by the COMPAT have vouched for procedural fairness in the assessment of cases by the Competition Commission of India (herein after CCI/Commission). One recent order by COMPAT overturning the Commission's order finding cement companies guilty of cartelization is a vivid example.[2]

The principle of natural justice is based on two facets of law. First is '*Nemo Judex in Sua Causa*' which means judge should be free from every type of bias and he must not have any kind of interest

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[1] Maneka Gandhi v. Union of India, (1978) 1 SCC 248.

[2] Lafarge India &Ors. v. CCI &Ors. (2016) CompLR 23 (CompAT).

in a particular case; and the second principle is '*Audi Alteram Partem'* which means a person affected by a decision has a right to be heard. The act in violation of the principles of natural justice or a quasi-judicial act in violation of the principles of natural justice is void or of no value.[3]

A plain reading of section 26(1) of the Competition Act, 2002 ("Act") implies that CCI is an inquisitorial body, which primarily deals with the economic issues and have no judicially manageable standards. However, 26(1) of the Act cannot be read in isolation to 36(1) of the Act, barring based on total misunderstanding of the scheme of the Act. The SAIL judgement also presses upon the inquisitorial nature of 26(1).[4]This implies that a quasi-judicial authority like the CCI is also bound by the natural justice principle. T he principle is envisaged under Section 36 (1) of the Act which states that in discharge of its functions, CCI shall be guided by the "principles of natural justice". The term "natural justice" is not defined or explained but left for the authorities to interpret.

The COMPAT has enforced the principle of natural justice in various cases[5] citing its importance quoted by the Hon'ble Supreme Court as an integral part of the procedural safeguard evolved by the Courts against arbitrary exercise of power by judicial, quasi-judicial and administrative bodies/authorities and any violation of the rule of hearing and the rule of bias/ predetermination has the effect of vitiating the final decision/ order.[6]

However, the Tribunal does not stretch the principle of natural justice to every case and decides this issue on a case to case basis. In a case where issue on bid rigging by companies in an auction held by Coal India Limited was brought before COMPAT, the Tribunal did not accept the plea by companies on violation of principle of natural justice by CCI. It held that principle of natural justice is trite and cannot be put in a straightjacket formula. In a given case the party should not only be required to show that he did not have a proper notice resulting in violation of principles of natural justice but also to show that he was seriously prejudiced thereby.[7]

II. PROCEDURE BEFORE SUBSTANCE

[3] H.W.R. Wade, Administrative Law, 310-311(5th Ed, 2014).
[4] Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744.
[5] BCCI &Ors. v. CCI, (2015) CompLR 548 (CompAT);All India Organization of Chemists & Druggists &Ors. v. CCI, III(2015)CPJ4(TA); Dr. L.H.Hiranandani Hospital v. CCI &Anr., 2016 CompLR 129 (CompAT).
[6] A. K. Kripak&Ors. v. Union of India, (1969) 2 SCC 262; Mahipal Singh Tomar v. State of UP, (2013) 16 SCC 771; Manohar v. State of Maharashtra, (2012) 13 SCC 14; Bharat SewakSamaj v. Lt. Governor, (2012) 12 SCC 675; Swadeshi Cotton Mill v. Union of India, (1981) 1 SCC 664.
[7] Gulf Oil Corporation Ltd. CCI, 2013 CompLR 409 (CompAT).

In the Order dated 11th December, 2015, the Hon'ble COMPAT held, "...the law on the issue can be summarized to the effect that the very person/ officer, who accords the hearing to the objector must also submit the report/ take decision on the objection and in case his successor decides the case without giving a fresh hearing, the order would stand vitiated having been passed in violation of the principles of natural justice".[8] The tribunal found that actual prejudice had been caused by this lapse as the Chairperson had lent his signature to the final order without having heard the various substantive arguments raised by the parties during oral hearing. The order highlighted a third facet to principle if natural justice that is quasi-judicial enquiries must be held in good faith, without bias and not arbitrarily or unreasonably.[9]

As an appeal court, the COMPAT would be reluctant to re-try matters of fact which had already been properly resolved by the regulators. The Tribunal is not concerned with *de novo* hearings and is likely to focus on the potential errors of law and fact, including those within the sphere of regulatory judgment. The same was emphasized in the order, "It should be realized that much of the appellate litigation would be obviated if a just and fair procedure is adopted for conducting investigation and inquiry and passing of orders under the …(Competition) Act."[10]

III. BCCI ORDER: OLD WINE IN A NEW BOTTLE

Deciding on procedural grounds before substance is not a novice practice established by the Tribunal. In an older case, the CCI had found that BCCI, India's governing body for cricket had abused its dominance, but the Competition Appellate Tribunal reversed on the ground that the Commission had not made available to the respondent all the evidence that was used against it in coming to a decision.[11] Tribunal held that the exercise required to be undertaken by the Commission under Sections 26(7) or 26(8) read with the relevant regulations[12] and an order passed under Section 27 which visits the concerned person with civil consequences makes the functions of the Commission adjudicatory/quasi-judicial.[13]Therefore, before recording an adverse finding against a person and holding him guilty of violating Section 3 or 4 of the Act, the Commission is obliged to comply with various facets of the principle of natural justice.

[8] Supra note 266.
[9] *In re* H.K. (An Infant),[(1967) 2 QB 617]; 1969 SCR (1) 317.
[10] Supra note 2102.
[11] BCCI &Ors. v. CCI, (2015) CompLR 548 (CompAT)
[12] The Competition Commission of India (General) Regulations, 2009, Regulation 18, 19 & 20.
[13] BCCI supra note at *11* .

This necessarily implies that while holding an inquiry under Section 26(7) or Section 26(8) the Commission is required to comply with the rule of *audi alteram partem* and give an effective opportunity of hearing to the person against whom a finding is likely to be recorded on the issue of contravention of Section 3 or Section 4 of the Act not only to controvert the allegation made against him as also the evidence/material proposed to be used in support of such allegation but also produced evidence to show that he/she/it has not violated any provision of the Act.[14] The merits of the matter were not considered by COMPAT and the importance of abiding by procedure and principles of natural justice have been upheld by the tribunal. The tribunal order indicates that all future orders by the Commission would need to undergo the filter of procedural law before coming on to the merits of the case.

IV. OPENING UP PANDORA'S BOX

Another case[15] that could have laid down substantial jurisprudence on abuse of dominance under the Competition Act was remanded back by the appellate Tribunal due to natural justice violation. Finding Coal India violating fair trade norms with regard to fuel supply pacts, CCI had penalized the company in December 2013. Following an appeal by Coal India, the tribunal had stayed implementation of the regulator's order in February 2014.[16]

Coal India issued a Letter of Assurance[17], to the Informant, who required coal for running its captive power plant, calling upon it to fulfil various conditions precedent to enter into a Fuel Supply Agreement (hereinafter referred to as 'FSA') for supply of coal. As per the prevailing Coal Distribution Policy, 2007, the FSA was mandatory for commencing supply of coal. Informant was required to execute a Memorandum of Understanding along with the FSA. The terms and conditions of FSA were non-negotiable and any delay or failure to execute the FSA within the stipulated time period would result in the invocation of the bank guarantee issued by the Informant. The Informant was required to furnish a Commitment Guarantee (CG) in the form of a bank guarantee of INR 1, 00, 38,900, equivalent to 10% of the base price of indigenous coal as on the date of application for issue of LoA. Nevertheless, the terms and conditions of FSA has been drafted by the Coal India unilaterally and there is no consultation process with the other parties

[14] *Id.* at 10

15 Coal India &Ors. v. CCI &Ors. 2016 CompLR 716 (CompAT).

[16] Sponge Iron Manufacturer's Association v. Coal India &Ors., 2014 CompLR 68 (CCI).

[17] See GHCL v. CCI, 2015 CompLR 357(CCI).

either at the time of drafting of the FSA or at the time of modifications. The following terms and conditions have been found to be unfair or discriminatory, as per section 4(2)(a).

(i) The sampling and testing procedure in clause 5.7 of FSA are found to be unfair and discriminatory.

(ii) Provisions in clause 5.2 of FSA relating to charging the transportation and other expenses from the buyers on supply of ungraded coal have been found to be unfair.

(iii) Coal India and other opposite parties have been found to impose unfair and discriminatory conditions regarding putting capping on compensation for stones in clause 4.6.3(e) of the FSA for new Power Producers.

(iv) The provisions relating to review and termination of the agreement in clause 2.5 to 2.6 of the FSA have been found to be unfair and discriminatory.

(v) The provisions relating to waiver of sellers Condition precedents in clause 2.8.3 have been found to be unfair.

(vi) Discriminatory provisions for new PPs by removing the provisions for review of grade in case of consisting grade slippage for 3 months. Later on during the pendency of investigation these provisions have been re-inserted in clause 5.5 of the FSA.

(vii) Incorporating the conditions in force majeure clause which are not normally treated as force majeure in clause 17.1 of FSA for new Power producers have been found to be unfair and discriminatory. These conditions have been modified during the pendency of investigation.

The natural justice violation argument was promptly made by Coal India before the Tribunal as reliance could be placed upon the cement cartel judgement of COMPAT[18]. Thus, It was alleged that then Chairperson of CCI, Mr. Ashok Chawla and three other Members namely, Dr. Geeta Gouri, Mr. S.N. Dhingra and Mr. S.L. Bunker heard the arguments on 16th and 17th July, 2013. However, the final order was passed on 09.12.2013 by the CCI comprising of five Members namely; Dr. Geeta Gouri, Mr. Anurag Goel, Mr. M.L. Tayal, Mr. S.N. Dhingra and Mr. S.L. Bunker along with the Chairperson. The other two members, Mr. Anurag Goel and Mr. M.L. Tayal were not party to the hearing held on 16th and 17th July, 2013, whereby penalty @ 3% of the average turnover of preceding three years total amounting to INR 1773.05 crores was imposed on Coal India Limited.

[18] Lafarge India &Ors. v. CCI &Ors. MANU/TA/0067/2015.

The Commission rebutted stating that the CCI functions as an executive/administrative body and is thus not bound by the principles of natural justice and fairness. COMPAT out rightly rejected the argument reiterating Supreme Court's position that the functions performed by the bodies like the CCI which are clothed with the power to decide the rights of the parties or pass order adversely affecting a person are quasi-judicial in nature and are bound to comply with different facets of the principles of natural justice.[19] The Tribunal stated that it would be 'wholly misconceived' to find that CCI is not bound by the principles of natural justice and procedural fairness.

V. NEED FOR REFORMATION IN THE LAW

With respect to natural justice, there also exists a lack of an established procedure for the Director General Competition (DG) to conduct the investigation, as directed by the Commission, under the Competition Act, 2002 and the Competition Commission of India (General) Regulations, 2009. The DG starts an investigation after the CCI is of the opinion that there exists a prima-facie case of violation of the provisions of the Act.[20] This implies that a direction of investigation by the CCI to the DG is deemed to be the commencement of an enquiry under the Act.[21]

The DG as soon as it receives the prima-facie order along with other relevant document from the CCI, issues a notice[22] to the opposite parties without forwarding a copy of the *prima facie* order passed by the CCI along with other relevant documents. Also, the DG does not supply the copies of additional information collected during investigation from the informant or a third party to the opposite parties against whom the information is being used in the DG Report. Furthermore, no opportunity for cross examination of the informant and/or third party is given to opposite parties by the DG.

Conclusion - The evidence upon which a particular case is built must be transparent in order for the accused to have a meaningful opportunity to rebut that evidence or to contest the inferences the

[19] Manak Lal, Advocate v. Dr. Prem Chand Singhvi&Ors. , AIR 1957 SC 425; Khemchand v. Union of India, AIR 1958 SC 300; Jagdish Prasad Saxena v. The state of Madhya Bharat, AIR 1961 SC 1070; State of Orissa v. Dr.(Miss) Binapani Dei, AIR 1967 SC 1269; Maneka Gandhi v. Union of India, AIR 1978 SC 597; S.L.Kapoor v. Jagmohan, AIR 1981 SC 136; Swadeshi Cotton Mills v. Union of India, AIR 1981 SC 818); Olga Tellis v. Bombay Municipal Corporation, AIR 1986 SC 180; Institute of Chartered Accountants of India v. L.K.Ratna , AIR 1987 SC 71; Baldev Singh v. State of Himachal Pradesh, AIR 1987 SC 1239; Gokak Patel v. Collector of Central Excise, AIR 1987 SC 1161; State of Haryana v. Ramlakhan, AIR 1988 SC 1301; Dipti Prakash Banerjee v. SNB National Centre for Basic Sciences, AIR 1999 SC 983; V P Ahuja v. State of Punjab, AIR 2000 SC 1080; Rajesh Kumar &Ors. v. D. Income Tax Commissioner &Ors., AIR 2007 SC 181.

[20] The Competition Act, 2002, Section 26(1).

[21] Supra note 12 at18(2).

[22] Harmonious reading of Section 41(2) , Section. 36(2) and Regulation 18 of CCI General Regulations, 2009.

agency might draw from it. The COMPAT order observed that "the time has come for the Commission (CCI) to evolve a comprehensive protocol and lay down guidelines for conducting investigation/inquiry in consonance with the rules of natural justice".[23] The Tribunal clearly implied that while it is not mandatory to grant an oral hearing in proceedings before the CCI, once granted, such an oral hearing must conform to the rules of natural justice.

It may be concluded that COMPAT is examining the procedural loopholes in the law and rectifying the Commission's failure to comply with the principles of natural justice. Consequently, one can hope that the appellate Tribunal will reposition the procedural fairness in the competition law regime of India through enforcement of principle of natural justice as and when the need arises.

[23] Supra note 2102.

MOVE TO REGULATE BIG DATA COMPETITION: EU READY TO TAKE THE FIRST STEP

- *Geetanjali Sharma*[*]

This article attempts to identify the new direction in which the European competition regulators are headed. The German cartel office, 'Bundeskartellamt's' scrutiny of the Facebook privacy policy and their earlier collaboration with the French antitrust authority to issue a joint report on Big Data signals a new initiative. At the EU level, collaboration with the European Data Protection Officers is being witnessed to regulate the Big Data players in a better manner. While it is still not feasible to say that the EU Competition Commission is going to begin enforcing data protection laws, it is moving in a direction to ensure that in its decisions it will not turn a blind eye to the objectives of ensuring privacy while pursuing its main objective of enforcing European Competition Law. The article capitulates the recent developments in this regard by the National Competition Authorities in the European Union, hereinafter "EU" and the signaling of new EU rules which may facilitate the Competition Authorities to regulate the companies which collect and hold consumer data.

I. INTRODUCTION

Consumers worldwide are concerned with the data that is being collected by companies like Facebook and Google whether it is through user searches on Google or personal data profiles which are fed into big databases on Facebook. While legislators and data protection officers may have looked at these concerns and identified privacy issues, the competition authorities in EU have decided to arm themselves with new ammunition to address Big Data players' behaviour which impacts competition as well. Not only that, in a trendsetting move, the Competition Commission, hereinafter, "Commission" has joined hands with the data protection officers to develop a holistic understanding of the nascent Big Data and the way it impacts individuals and competitors. The proactive approach of EU regulators to prepare themselves for Big Data is an inspiring move which promises a shift in EU competition policy in the coming years.

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II. WHAT IS BIG DATA?

Big Data may be defined as large amounts of different types of data, produced at high speed from multiple sources whose handling and analysis require new and more powerful processors and algorithms.[1] However, it is difficult to define data without placing it in the manner and scale at which it is collected. While at a small scale, data collection may seem harmless and difficult to monetize, we are now witnessing humongous databases of consumer information resultant from the network effects leading to repositories with humongous collections which are of immense commercial value. The data in isolation is not of concern, but the information it provides about individuals, such as their behaviour, preferences, age, geographic location, social status, political views or turnover achieved by a business entity. Currently, the focus of regulation is 'personal data' which defined according to Article 2 of Directive 95/46/EC of the European Parliament and of the Council is any information pertaining to an identifiable natural person by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity which is extensively regulated therein.

III. BIG DATA AND ITS NEXUS WITH COMPETITION LAW

Going by the recent developments, the power arising out of such accumulation of data is also a matter of concern for the EU Competition Authorities. The behaviour however, is to be looked at in a different way than the data protection officer would. The Commission is concerned with behaviour of undertakings which collect or hold big data and the manner in which they are capable of affecting competition. Such behaviour may include merging with smaller entities for the data they hold, or driving out competitors which do not hold or are incapable of collecting such data, alluding to a new source of market power.[2] Concomitantly, the European Data Protection agencies have been looking into the interplay of data protection and competition law to achieve aims of consumer protection, an example of which is the preliminary opinion of the European Data Protection Supervisor which examines the interplay between the issues of privacy and competition in the digital economy.

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[1] European Union 2014, Preliminary Opinion of the European Data Protection Supervisor, *Privacy and competitiveness in the age of big data: The interplay between data protection, competition law and consumer protection in the Digital Economy*, viewed on 7 March 2017, [https://secure.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Opinions/2014/14-03-26_competitition_law_big_data_EN.pdf] at 6.

[2] *Autorité de la concurrence* and *Bundeskartellamt*, "Competition law and data", 2016 viewed on 7 March 2017, [http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf].

IV. LEGAL BASIS FOR ENFORCING PRIVACY OBJECTIVES THROUGH COMMISSION

While some may question the legal basis for the competition authorities looking into data protection issues, Article 16 of the Treaty on Functioning of the European Union, hereinafter, "TFEU") which recognises everyone's right to protection of personal data, when read with Article 7 TFEU which identifies the Commission's obligation to ensure that that the laws and policies are applied in a consistent manner, allows for a concerted enforcement through data protection agencies and the Commission. In addition to that, all EU agencies including the Commission are bound to protect and promote rights set out in the European Charter of Fundamental Rights, Article 8 of which provides for the right to data protection. While it is not the objectives of data protection that the Commission is seeking to enforce, but data related power might result into market power which might result in agreements precluding competitors or mergers which are not adequately addressed by the turnover thresholds. As we see below, the Commission and the national regulators have begun examining these aspects of data related power.

What is the Commission doing about it?

It appears that presently, the Commission is observing the national competition agencies' initiatives in this direction as test cases for future intervention. The *Bundeskartellamt* is currently investigating Facebook's potential abuse of dominance by imposing unfair privacy terms which may violate German law.[3] Concurrently, the French antitrust authorities published a report in collaboration with the *Bundeskartellamt* on Big Data's impact on antitrust law.[4] Last year in June, the UK Competition and Markets Authority also highlighted potential anticompetitive effects of Big Data collection, and a potential to exclude competitors.[5]

These competition concerns have reverberated through to the EU competition commission as well. Earlier this year, EU Commissioner Margarethe Vestager announced that EU plans to scrutinise competition concerns related to big internet companies building coffers with consumer data.[6] She

[3]Press Statement Bundeskartellamt, (2016), [online] available at:https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html.

[4] Supra note 2.

[5]Press Statement by Competition and Markets Authority, (2015), [online] available at:https://www.gov.uk/government/news/cma-publishes-findings-on-the-commercial-use-of-consumer-data

[6]Auchard, E., (2016), *EU competition chief to eye 'big data' concerns in merger probes*, REUTERS, available at: http://www.reuters.com/article/us-europe-data-competition-idUSKCN0UV0ZG [Accessed 6 March 2017].

raised several reasons for why the Competition commission is taking a closer look at the mergers involving big data companies. According to her, if a company uses consumer data in a way that outweighs benefits for consumers or disregards their privacy, the commission will not hesitate from stepping in. She also suggested, that the new issues associated with Big Data may warrant the Commission empowering itself with new rules to regulate these companies better. What kind of new rules can be expected to come into force may become clearer after the Commission finishes its impact assessment.[7]

It is also to be mentioned that soon after, in a Big Data and Competition conference organised in September 2016, the commission appeared to have joined hands with the Data Protection Agency to address these concerns together.[8] While the Commissioner noted advantages which Big Data provides such as accurate personalised recommendations, she signalled that companies need to factor privacy at the time of collecting data and not merely as an afterthought and ensure that such data is used in a way that does not hamper competition.[9]

V. COMPETITION COMMISSION & TREATMENT OF DATA HOLDING MERGER CASES

There are certain examples of merger cases involving data holding companies which were presented for approval before the EU Commission and secured merger approvals. For instance in 2008, the Google/DoubleClick merger met with opposition because of concerns like Google would be able to track online consumer behaviour in a better manner once it is merged with DoubleClick, an "ad-serving" technology provider was nonetheless approved considering there were other competitors who would still exert significant competitive pressure[10]. Moreover, in the 2014 Facebook/Whatsapp merger case, the commission looked deeper into the privacy concerns when Facebook sought to merge with Whatsapp and took note of the privacy concerns such as Facebook's ability to use Whatsapp data to improve its online advertising or concerns regarding change in the end to end

[7]Out-Law (2016), *Competition authorities could get greater powers to tackle 'big data issues' through new EU laws*, *Out-Law*[Online], 3 Oct, available from:https://www.out-law.com/en/articles/2016/september/competition-authorities-could-get-greater-powers-to-tackle-big-data-issues-through-new-eu-laws/ [Accessed 6 March 2017].

[8]Vestiges, M (2016), *Big Data and Competition*, transcript, *Europa.eu,* 29 September, viewed 6 March 2017, https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/big-data-and-competition_en at 1-2.

[9]*Id* at 12.

[10]Loughran M and Gatti J, (2008), *Mergers: Main developments between 1 January and 30 April 2008*, Competition merger brief no. 2, accessed 6 March 2017, [http://ec.europa.eu/competition/publications/cpn/2008_2_37.pdf] at 40-41.

encryption but approved the merger for there were adequate competitors to exert competitive pressure[11]

However, in future there maybe cases wherein a company buys out another company just because of the data it holds, before it has even turned that into profits warranting a closer scrutiny for mergers involving some data element. However it is unlikely that companies will be targeted for merely possessing such data, but it is the manner in which they use and share this data which might be scrutinised. Therefore, it may be reasonably expected that Big Data players including retailers, insurers, car manufacturers and software companies should expect increased scrutiny regarding their use and sharing of the unique data which they possess. They should be wary of shutting competitors out from data use altogether, or allowing it to be used on discriminatory terms or imposing excessive conditions on the use of data.

The Commission has suggested ways to share data such as data pooling, which will allow companies to share the data in a fashion which will enhance competition and wouldn't hurt consumer interests.[12] In addition, the Commission has issued a communication on the applicability of Article 101 TFEU in relation to horizontal co-operation agreements which provides guidance on cooperation without being ascertained under article 101 TFEU which relates to anti-competitive agreements.

VI. INDIAN REGULATORY AUTHORITIES & BIG DATA

While concerns about competitiveness associated with net neutrality are still fresh from the Telecom Regulatory Authority's decision against discriminatory access to data services[13], Big Data has not come under specific competition scrutiny in India. There were reports which indicated that the Facebook-Whatsapp merger might be looked into[14]but there were no follow-up reports as to whether an application of approval was made or not and whether an approval came through. There has been an attempt to make out a case for the Competition Commission examining the Facebook/

[11] Ocello O, Sjödin C and Subočs A, (2015), *What's Up with Merger Control in the Digital Sector? Lessons from the Facebook/WhatsApp EU merger case*, COMPETITION MERGER BRIEF no.1, accessed 6 March 2017, [http://ec.europa.eu/competition/publications/cmb/2015/cmb2015_001_en.pdf, at 5-7.

[12] Supra note 8.

[13] Ghoshal D (2016), *Why TRAI backed net neutrality- and killed Facebook's Free basics in India,* QUARTZ INDIA, Accessed 6 March 2017, [https://qz.com/612159/why-trai-backed-net-neutrality-and-killed-facebooks-free-basics-in-india/].

[14]SPN Staff Writers 2014, *Facebook-WhatsApp Deal needs approval of India's fair trade regulator*, SiteProNews, Accessed 6 March 2017, [http://www.sitepronews.com/2014/03/10/facebook-whatsapp-deal-needs-approval-indias-fair-trade-regulator/].

Whatsapp merger too.[15] While the Competition Commission of India is yet to examine Big Data and its impact on competition, it is noteworthy to mention opinion 83/2015 issued by the Competition Commission of India, wherein dominant position of Whatsapp and Google was alleged by the Informant.[16] The Commission however observed that the informant had failed to make out a case under section 4 of the Competition Act 2002, under which, imposition of unfair or discriminatory terms has to be shown in sale of goods or service or price in purchase or sale of goods or services

VII. CONCLUSION

The developments mentioned above suggest a new development in the offing. Data, which has not been ascertained as a competitive concern, is a major source of power today. The regulators in the EU are keeping a close eye on how Big Data companies are making use of such data. It will therefore not be surprising to see new rules modifying the turnover thresholds in the merger regulation or additional guidelines on article 102 TFEU specifically in relation to data holding companies. The EU competition commission's indication to adapt new rules signals a significant policy change in its approach to handle Big Data.[17]If such indications materialize, the EU Commission will have empowered itself enough to deal with Big Data entities like Facebook and Google which have traditionally been dealt with in the sphere of data protection alone.

[15]Bose, A (2014), *A Review Is Needed : Why India's Antitrust Regulator Should Scrutinize the Facebook-WhatsApp Merger*, COMPETITION LAW INSIGHT, accessed 6 June 2017, https://ssrn.com/abstract=2534732, at 3-7.
[16] Taj Pharmaceuticals Ltd. and others v. Facebook and others (case No. 83 of 2015).
[17] Supra note 8.

EFFECT OF BREXIT ON UNITED KINGDOM'S COMPETITION LAW

- *Shilpa Bhide-Sahasrabudhe*[*]

The historical Brexit poll was taken in United Kingdom on June 23, 2016 to decide whether United Kingdom should 'Remain' or 'Leave' the European Union. 'Leave' won the poll and now it is clear that United Kingdom will leave European Union. After the commencement of withdrawal procedure, United Kingdom will negotiate to decide its future relationship with European Union. This exit is going to bring major changes in political, economic and legal structure of United Kingdom. In this article the author will analyze the effect of Brexit on United Kingdom's competition law. Competition law and policy has potential to influence economic growth. Therefore, it is important to find out the effects of Brexit on United Kingdom's competition law. Currently United Kingdom's competition law is vastly based on European Union's competition law therefore after Brexit whether this legal regime will remain same or change partially or completely would depend on the possible option United Kingdom chooses after withdrawal. However one thing is clear that the European Union will be United Kingdom's largest business partner, and therefore it becomes imperative to observe what will be United Kingdom's choice outside European Union.

I. INTRODUCTION

This is not the first time that United Kingdom (hereinafter referred as "UK")is anxious about its sovereignty. On March 25, 1957, France West Germany, Italy, the Netherlands, Belgium and Luxemburg signed a treaty in Rome for establishing European Economic Community (hereinafter referred as "EEC") also known as common market[375]. This was the first step taken by the above named European countries to eliminate trade barriers with the aim of economic prosperity. During that period Britain and other European countries i.e. Austria, Denmark, Norway, Portugal, Sweden and Switzerland founded European Free Trade Association (hereinafter referred as "EFTA") by Stockholm Convention in 1960[376]. Indeed the aim of founding EFTA was to promote economic cooperation among member states but at the same

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[375] Treaty Establishing the European Economic Community, available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3Axy0023.

[376]The European Free Trade Association, http://www.efta.int/

time it was established as an economic counterbalance to EEC. . In 1973, Britain left EFTA and joined 'European Economic Community' (hereinafter referred as "EEC") under the Conservative government of Edward Heath. This is how UK became member of the common market. However, during elections in 1974, the Labour party in its manifesto declared that their government will take a public poll on the continued membership of UK with EEC. As promised in the manifesto under the Labour Prime Minister, Harold Wilson, there was first ever UK referendum on continued membership of the EEC in 1975. The electorate voted 'Yes' by 67.2% to 32.8% to stay in Europe[377]

Brexit poll was the second referendum in the history of UK. Brexit- a referendum in which everyone of voting age can take part was held on 23rd June 2016, to decide whether UK should leave or remain in the European Union(EU).[378] In this referendum popularly known as Brexit, UK voted in favor of 'leaving the EU', as the 'Leave' won 51.9% votes whereas Remain' won 48.1%of votes across the UK.[379]Immediate effect of this historical referendum was turbulence and uncertainty in almost all stock markets in the world. Perhaps the stock markets are now more stable after the turbulence but what next? Brexit will bring major changes in the legal, political and economic structure of UK. After joining EU in 1973, UK has enacted various laws in order to be consistent with EU laws. One such law was Competition Act, 1998. Competition is an influential factor affecting the businesses and consumers which forms biggest section of the society, thus it is very important to scrutinize what will be the effect of Brexit on competition law in UK.

Two major laws governing competition in UK i.e. The Competition Act, 1998 and the Enterprise Act, 2002 replicate the major provisions of EU competition law. The Competition Act, 1998 mocks up antitrust provisions of EU competition law and the Enterprise Act, 2002 replicate the merger control and market investigation provisions of the EU competition law. Therefore, it is important to observe that whether this law regime which is largely based on EU law will be the same or change partially or completely after Brexit. For all those companies carrying out business both in UK and other EU Member States, it becomes very important to

[377] UK Parliament, http://www.parliament.uk/about/living-heritage/evolutionofparliament/legislativescrutiny/parliament-and-europe/overview/britain-and-eec-to-single-european-act/(last visited on 7September 2016) (UK Parliament).

[378]Wheeler Brian, Alex Hunt, *Brexit: All you need to know about the UK leaving the EU*, BBC NEWS(September 1, 2016), http://www.bbc.com/news/uk-politics-32810887.

[379]*Brexit: What happens next?* UK PARLIAMENT(June 30, 2016) http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7632 (last visited 8September 2016) (UK Parliament).

know what will be UK's competition policy after Brexit? Whether they will have to comply with different laws at same time for the same issues or not?

II. EFFECTS OF BREXIT POLL

First major political outcome of Brexit in UK was that Prime Minister David Cameron announced that he will not lead the withdrawal negotiations envisaged under the EU treaties. Immediately after the result of this referendum the European Council met on June 28 and heard a presentation from David Cameron in his last appearance as Prime Minister. On the following day, 29 June, 2016the heads of State or Government of 27 EU Member States met in an informal session to consider UK's decision. They issued a joint statement which recounted their regret for the outcome of the decision, and their desire for negotiations to begin as soon as possible:

"*There is a need to organize the withdrawal of the UK from European Union in an orderly fashion. Article 50 of Treaty on EU provides the legal basis for this process. It is up to the British government to notify the European Council of the UK's intention to withdraw from the union. This should be done as quickly as possible. There can be no negotiations of any kind before this notification has taken place.*"[380]

Hitherto, UK has simply voted in favor of 'Leave' however the actual process (as per the Lisbon treaty) of leaving EU is yet to start. Leaving the European Union would not mean that the UK could wash its hand of dealing with rest of the Europe. As Prime Minister David Cameron noted in his 2013 Bloomberg speech committing the Conservative Party to holding referendum,

"If we leave the EU, we cannot of course leave Europe. It will remain for many years our biggest market, and forever our geographical neighborhood. Even if we pulled out completely, decision made in the EU would continue to have a profound effect on our country. But we would have lost all our remaining vetoes and our voice in those decisions".[381]

It is very clear from the statement of Prime Minister David Cameron that leaving Europe is not going to be an easy task because it will still be business partners with EU Member States and rest of the world. Leaving European Union would bring fundamental changes in UK's legal and

[380]*Brexit Brief Issue*, IIEA(10:August 2016)http://www.iiea.com/ftp/Publications/BrexitBrief%20Issue%2010_03-08-16.pdf.
[381]Prime Minister David Cameron's Speech at Bloomberg, delivered on 23 January, 2013, available at: www.gov.uk/government/speeches/eu-speech-at-bloomberg.

economic system. Under Article 50(3) of Lisbon treaty[382], the legal consequences of a withdrawal from the EU is the end of the application of the EU Treaties and the protocols thereto in the state concerned from the date of entry into force of the withdrawal agreement. So far UK has not given notification to the EU about its withdrawal from EU, until then all the treaties and protocols are applicable to UK.

III. BRIEF OVERVIEW OF COMPETITION LAW IN UK

Competition is the flesh and blood of any market. In order to maintain fair competition in the market and to protect small businesses as well as consumers against the established business giants, competition law has to be framed painstakingly. Mere existence of competition law is not sufficient but the government should come up with effective implementation machinery. After globalization, competition law has gained much more importance and many countries in the world have recently drafted an exclusive competition law. Ireland very recently in 2014 amended its previous competition act[383] and consumer protection act[384]by passing the new enactment i.e. Competition and Consumer Protection Act, 2014. India during 8th five year plan i.e. 1992-1997 adopted liberalization and globalization strategy however it 10 more year to enact concrete statute on competition law which was passed only in 2002[385] which is subsequently amended by the Competition (Amendment) Act, 2007. UK is one of such country which has quiet recently enacted two major statutes[386] to govern the competition. Both the statutes are more or less a replica of EU competition law. Before passing of these two acts, series of laws were passed in UK in order to regulate the competition and prevent the use of dominant position. The Office of Fair Trading (hereinafter referred as "OFT")[387] - a non-ministerial department was responsible for protecting consumer interest throughout the UK[388]. Before joining EU and even after joining EU, UK has enacted various legislations to govern fair competition in the market.

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382 Lisbon treaty is divided into two parts: the Treaty on European Union and the Treaty on the Functioning of European Union.. And Article 50 is part of Treaty on European Union..

383 Competition Act, 2002 No. 14 of 2002, available at: http://www.irishstatutebook.ie/eli/2002/act/14/enacted/en/html.

384 Consumer Protection Act, 2007, No. 19 of 2007, available at: http://www.irishstatutebook.ie/eli/2007/act/19/enacted/en/html.

385 The Competition Act, 2002 12 of 2003,available at: http://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf.

386 Competition Act, 1998 and Enterprise Act, 2002.

387 Office of Fair Trading existed from 1973 to 1 April 2014.

388 UK government website https://www.gov.uk/government/organisations/office-of-fair-trading.

A. EVOLUTION OF COMPETITION LAW IN UK BEFORE JOINING EU

The doctrine of 'restraint of trade' is of early vintage in English law, with Dyer's Case(1414) often identified as a founding precedent. The doctrine holds that contractual limitations on party's wider behavior are prima facie void unless justified as reasonable. A restraint is identified where the parties agree that one party will "restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses"[389] Hence, not in as enacted statue but the principle of fair trade in the form of precedent was present in UK since 15th century. However, the process of legislation to maintain fair trade started by mid twentieth century i.e. in 1948 by passing of Monopolies and Restrictive Trade Practices(Inquiry and Control) Act, 1948 (hereinafter referred as "the 1948 act"). The primary aim of the 1948 act was to flesh out the intuition that monopoly and agreements while profitable for the firms involved were in some circumstances damaging to the wider public interest(viz. workers and small businesses)[390]. The legislation provided only limited coercive machinery. After the passing of the 1948 act shortly after that came the Restrictive Trade Practices Act, 1956. It appeared to curb restrictive practices, but the legislation had important loopholes. In particular, the act had provision of merely ensuring registration of potentially anticompetitive agreements rather than preventing them. After that came the series of legislations i.e. Resale Prices Act, 1964, Monopolies and Mergers Act, 1965 and Restrictive Trade Practices Act, 1968.Even after passing of series of acts and constituting various regulatory authorities under these acts such as Registrar under the Restrictive Trade Practices Act 1955, to regulate the market, they were found less effective.

B. LEGISLATIVE DEVELOPMENTS IN UK'S COMPETITION LAW AFTER JOINING EU

Soon after joining EU, the Fair Trading Act1973 was passed which in introductory part clarified that, " *An act to provide for the appointment of a Director General of Fair Trading and of a Consumer Protection Advisory Committee...*"[391]This Act also focused on making substitute provisions for laws passed earlier in this context such as Monopolies and Mergers Act, 1965.After that the Restrictive Trade Practices Act,1976was passed to consolidate the earlier enactments relating to restrictive trade practices[392].After those enactments, two major acts i.e. the Competition Act,

[389]Scott Andrew, *The evolution of competition law and policy in the United Kingdom*, LSE https://www.lse.ac.uk/collections/law/wps/WPS2009-09_Scott.pdf.
[390] *ibid*
[391]Fair Trading Act 1973,1973 Chapter 41 available at: http://www.legislation.gov.uk/ukpga/1973/41/contents.
[392] Restrictive Trade Practices Act, 1976, 1976 Chapter 34, Introduction, available at:http://www.legislation.gov.uk/ukpga/1976/34/introduction/enacted.

1998 and the Enterprise Act, 2002 were passed which were enacted to be consistent with EU competition law.

IV. COMPETITION LAW REGIME IN UK AND ITS CO-RELATION WITH EU COMPETITION POLICY

1. The Competition Act, 1998is the governing law in UK and Competition and Markets Authority (hereinafter referred as "CMA") is the machinery which is responsible for effective implementation of Competition Act, 1998(hereinafter referred as "the act of 1998:).The Act of 1998, at outset clarifies that "*this is an Act to make provision about competition and the abuse of a dominant position in the market; to confer powers in relation to investigations conducted in connection with Article 85 or 86 of the treaty establishing the European community*"[393]. When the Act of 1998 as well as the Enterprise act, 2002 were passed, OFT a non-ministerial department was responsible to maintain fair competition in UK. However from 1 April 2014 CMA took over many functions of the OFT. Today CMA work to promote competition within UK. CMA works closely with European competition network, International competition network and Organization for economic cooperation and development, to promote enforcement co-operation and the convergence of rules and standards[394].

2. The Competition Act comprises of four parts along with 14 Schedules;

2.1 Part one deals with competition provisions. It is further divided into five chapters. Chapter one deals with prohibitions which are largely based on Article 101 of Treaty on Functioning of European Union. Chapter two deals with prohibition on abuse of dominant position, such an abuse may also infringe Article 102 of Treaty on Functioning of European Union so far as it affects EU member states. Chapter three deals with investigation and enforcement, chapter four deals with the competition commission and appeals and miscellaneous provisions are included in chapter five.

2.2 Part two deals with investigations in relation to Article 85 and 86, part three deals with monopoly provisions and supplementary provisions are given in part four. Merger control is regulated through Schedule 1 of this act as well as the Enterprise Act 2002. The Enterprise Act[395] also gives CMA wide powers (previously OFT was the responsible

[393]Competition Act 1998, 1998 Chapter 41 Introduction, available at: http://www.legislation.gov.uk/ukpga/1998/41/introduction.

[394] Government of UK, https://www.gov.uk/government/organisations/competition-and-markets-authority/about.

[395] The Enterprise Act 2002 (Protection of Legitimate Interests) (Amendment) Order 2014 came into force on 1st April 2014. available at: http://www.legislation.gov.uk/ukdsi/2014/9780111110690?view=plain.

to maintain competition) to investigate markets where there concerns about the fair competition and it also has provisions for those merger cases which do not fall within the exclusive competence of European Commission. Hence it can be seen that the Act of 1998 and the Enterprise Act, 2002and exercise of the principles are immensely based on EU competition policies.

3. The Enterprise Act, 2002 seeks to establish Office of Fair Trading which shall enforce competition laws in UK. By the amendment order 2014[396] CMA took over various responsibilities of OFT which were prescribed under the Enterprise act, 2002.
4. Besides that CMA closely deals with European Competition Network (hereinafter referred as "ECN") in order to restrain cross border practices restricting competition. The investigation of any infringement of competition law cases is made easy as the European Commission and the national competition authorities in all EU Member States cooperate with each other through the ECN. In addition to ECN, the EU Merger Working Group, established in Brussels in 2010, consists of representatives of the European Commission, National Competition Authorities of EU Member States and National Competition Authorities of European Economic Area. By and large UK competition law and its implementation mechanism is largely interlinked with EU competition policy and European Commission.

Various provisions of the Act of 1998like the chapter of prohibitions or section 60 are all in consonance with EU competition laws. Section 60 of the act of 1998 incorporates certain principles such as UK law should not differ from EU law; the national courts must have regard to the decisions of European Court. By way of Section 60 (2) there is a positive obligation on national courts to keep consistency with European courts i.e. Court of Justice of European Communities. It is apparent that UK competition laws are harmonized with EU competition law to a greater extent. Yet it will not be wrong to say that in few areas of competition, UK laws are dormant.

V. COMPETITION LAW IN EU

Now let's discuss how European competition policy and European Commission helps the Member States (for here UK) to maintain fair competition in the country;

1. Council regulation (EC) No. 1/2003 of 16 December, 2002 was adopted in order to implement the EU competition rules laid down by Article 101 (i.e. concerted practices

[396] *ibid.*

that restrict competition) and Article 102 (i.e. abuse of dominant position) of the Treaty on Functioning of European Union(formerly articles 81 and 82 of the Treaty establishing the European Community[397]). It introduced rules that changed the enforcement aspects of the European Union competition policy. It allows for competition rules previously applied by the European Commission to be enforced on a decentralized basis by European Union Member States competition authorities. It thus enhanced the role of national antitrust authorities and courts in implementing European Union competition law. This allows the commission to focus its resources on enforcing the most serious competition infringements with a cross border dimensions.[398]

2. The European Union commission and competition authorities of the European Union Member States cooperate with each other through the ECN by coordinating investigations, exchanging evidence and other necessary information, informing each other of new cases, discussing various competition issues which are of common interest. The objective of the ECN is to build an effective legal framework to enforce European Commission competition law against companies who are engaged in cross border business practices which restrict competition.[399]
3. Antitrust rules are contained in various legal instruments adopted by the European Union. The basic European antitrust policy is developed from two Articles i.e. 101 and 102 of the Treaty on Functioning of European Union[400]. The commission is committed to assisting national courts in application and enforcement of Article 101 and 102 of the Treaty on Functioning of European Union. Moreover, if national courts apply national competition law, they also have to apply European Union competition law where there is effect on trade between Member States[401].Action against Cartel is one of the important type of antitrust enforcement. The commission has been engaged in leniency policy[402] in order to curb the Cartels. Leniency policy offers companies involved in a cartel and act as whistleblower and hand over evidence either complete immunity from fine or a

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397 Treaty Establishing European Community, available at http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12002E%2FTXT.

398Treaty on Functioning of European Union, Implementing EU competition rules: application of articles 101 and 102 , available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Al26092.

399 European Commission, http://ec.europa.eu/competition/ecn/more_details.html.

400 Treaty On Functioning Of European Union, Article 101 and 102, available at: http://ec.europa.eu/competition/antitrust/overview_en.html.

401 Council Regulation (EC) No. 1/2003 of 16 December 2002, available at: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:32003R0001.

402 2006 Commission notice on immunity from fines and reduction of fines in cartel cases, available at: http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52006XC1208(04).

reduction of fines which the commission would have otherwise imposed on them. Leniency policy has proved very effective to curtail cartels.[403]

4. One stop shop merger control - The council regulation of 2014[404] provides that the provisions to be adopted in this regulation should apply to significant structural changes, the impact of which on the market goes beyond the national borders of any one member state. Such concentrations should, as a general rule, be reviewed exclusively at Community level, in application of 'one stop shop" system and in compliance with the principle of subsidiarity.[405]. This reduces the burden of multiple notifications, especially for international businesses, which could otherwise in principle face up to 31 separate procedures.[406]
5. State aid is one of the area over which European Commission has control. State aid is nothing but an advantage in any form whatsoever conferred on a selective basis to undertakings by national public authorities[407]. To maintain fair competition in the market it becomes very important to control state aid, as the company which receives government support gains an advantage over its competitors. Article 107 of the Treaty on Functioning of European Union prohibits state aid unless it is in furtherance of economic development. To ensure that this prohibition under Article 107 is respected and exemptions are applied equally across the European Union, the European Commission is in charge of ensuring that state aid complies with European Union rules. Article 107 of the Treaty on Functioning of European Union[408] ensures that aid granted by Member State or through state resources does not distort competition and trade within the European Union by favoring certain companies or the production of certain goods.[409]

This is how through various competition control measures European Commission maintain fair competition in all its Member States. UK being one of the Member States of EU, its competition policy is largely based and governed by EU. This being the current status of UK competition law and policies, how UK competition law will survive after Brexit? How will be the future

[403]European Commission,http://ec.europa.eu/competition/cartels/overview/index_en.html.
[404] Council Relation(EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings(the EC Merger Regulation) available at:http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004R0139.
[405]Council Relation(EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, para 8
[406] Lindsey Alistair, Berridge Alison, *Brexit, merger control and "one stop shop"*, MONCKTON(July8,2016), https://www.monckton.com/brexit-merger-control-one-stop-shop/.
[407] European Commission, http://ec.europa.eu/competition/state_aid/overview/index_en.html.
[408] Treaty of Functioning of the European Union, 2012/C 326/01, Article 107.
[409] European Commission, http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html.

relationship of UK and EU? As EU competition law is of critical importance to the interpretation and application of UK competition law, will it be changed completely? How the changes in laws and the changed status of UK in EU will affect Businesses? Indeed citizens have opted for political sovereignty but will businesses accept this political sovereignty at the cost of their economic loss and depreciation in investment? These issues need to be addressed while negotiating the future relationship of UK with EU.

VI. POSSIBLE OPTIONS FOR UK AFTER BREXIT

After Brexit, UK competition law depends on the nature of UK's post-Brexit relationship with EU. Following are the few possible options for UK post-Brexit:

Option1. *JOINING EUROPEAN ECONOMIC AREA*

The European Economic Area (hereinafter referred as "EEA") was established in 1994, with the objective to promote a continuous and balanced strengthening of trade and economic relations between the contracting parties[410]. The EEA comprises all members of the EU together with three non-EU countries i.e. Iceland, Liechtenstein and Norway[411]. Members of the EEA are part of the Single Market and there is free movement of goods, services, people and capital within the EEA along with these four freedoms it covers competition. EEA also covers the horizontal policies such as research and development, environment, education and social policy,[412]. Through Article 6 of the EEA agreement, the case law of the Court of the EU is also of the relevance to the EEA agreement, as the provisions of the EEA agreement shall be interpreted in conformity with the rulings of the Court given prior to the date of signature i.e. 2 May 1992.[413]

EEA membership would mean that EU competition rules will still be applicable to UK and many companies carrying out business in UK as well as in other EU countries would not be affected to a great extent. It might not face dual investigations in trans EU cases of illegal

410 Agreement On The European Economic Area, Article 1, available at: http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf.
411 The European Free Trade Association website , http://www.efta.int/eea/eea-agreement.
412 Supra note 37.
413 The European Free Trade Association, http://www.efta.int/eea/eea-agreement/eea-basic-features#4 (last visited on 8september 2016) (EFTA website).

behavior which causes unfair competition in the market. Also being EEA member it might have access to ECN and one stop shop for merger control provided it meet turnover threshold[414].

Membership of EEA would mean that UK would get an entry into Single Market however for being an EEA member it has to pay fee to be part of the Single Market. EEA members do this by contributing to EU's regional development funds[415].Therefore becoming an EEA member would not generate substantial fiscal savings for UK. Apart from financial drawback of adopting this option there is one more important drawback and that is political. Non-EU members of the EEA must accept and implement EU legislation governing the Single Market, however the rules governing single market are set by EU and not by EEA[416]. This means giving up more sovereignty than earlier. And apparently to keep its sovereignty UK has reached to the result of leaving EU.

Option 2. ***JOINING EUROPEAN FREE TRADE ASSOCIATION***

EFTA") was founded by a Convention agreed in Stockholm in November 1959, and entered into force on 3rd May 1960. EFTA was founded on the premise of free trade as a means of achieving growth and prosperity among its Member States by providing a framework for liberalization of trade in goods amongst its members. As well as promoting closer economic co-operation between the western European countries.

The Stockholm convention established a framework with certain guiding principles and a set of minimum rules and procedures to be applied, with details focused on provisions for tariff reductions and the elimination of quantitative restrictions as well as rules of origin. In 1999, the EFTA Ministers decided to initiate an updating of the Stockholm Convention to reflect the increasing importance in the global economy of trade in services, foreign direct investment and intellectual property rights. The agreement amending the EFTA Convention, the Vaduz Convention, was adopted in 2001[417]

EFTA was established as an economic counterbalance to the more politically driven European Economic Community(EEC) which later known as European Community(EC) and now known

[414]Agreement on European Economic Area, Article 56 and 57 available at: http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf.

[415]Legal basis for the regional development funds is given in Article 174 to 178 of Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01. also see Article 115 and 116 of the Agreement on European Economic area.

[416] Agreement on European Economic Area , Article 105 to 111 http://www.efta.int/media/documents/legal-texts/eea/the-eea-agreement/Main%20Text%20of%20the%20Agreement/EEAagreement.pdf.

[417]The European Free Trade Association, http://www.efta.int/sites/default/files/publications/fact-sheets/General-EFTA-fact-sheets/efta-50-years.pdf.

as European Union(EU). In 1970s EFTA concluded various free trade agreements with the EC[418].However, UK left EFTA in 1973 to join EC[419].At present EFTA has four members i.e. Iceland, Liechtenstein, Norway and Switzerland.

If UK opts for this option it can have opportunity to access all free trade agreements which EFTA has already concluded with EU and many other countries. Currently, the EFTA states have 27 free trade agreements covering 38 countries which include countries such as Canada, Republic of Korea, Mexico, and Singapore etc.[420].

If UK opts for this it need not join EEA as is the case of Switzerland. In addition to that if it is only EFTA member it need not adopt EU legislation governing the Single Market and in this way UK will not lose its political sovereignty. Also it would have access to ECN through EFTA Surveillance Authority[421].

However, with this option, UK will have to negotiate many agreements with European countries as well as rest of the world those are not covered by EFTA free trade agreements. Hence UK's competition policy would largely depend on the particular agreements it concludes with EU and rest of the world. To add to that unless UK wishes to opt out of all forms of economic integration except tariff removal, rejoining EFTA is not a standalone solution to the problem of what should follow Brexit.[422]

Option 3. ***SWISS MODEL***

Switzerland is member of EFTA but it is not the member of EEA[423]. Switzerland's economic and trade relations with the EU are mainly governed through a series of bilateral agreements where Switzerland has agreed to take on certain aspects of EU legislation in exchange for accessing the EU's single market. In overall, around 100 bilateral agreements currently exist between the EU and Switzerland. These bilateral agreements between the EU and Switzerland are currently managed through a structure of more than 15 joint committees.[424]

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[418] Centre Virtuel de la Connaissance sur l'Europe (CVCE) http://www.cvce.eu/content/publication/2005/6/7/5daf365f-aa88-4f5b-a2ef-f0a2bae8a7b8/publishable_en.pdf.
[419]The European Free Trade Association, http://www.efta.int/about-efta/european-free-trade-association,.
[420] The European Free Trade Association, http://www.efta.int/free-trade/free-trade-agreements.
[421] ECN brief special issue December 2010, A look inside ECN: its members and its work, http://ec.europa.eu/competition/ecn/brief/05_2010/brief_special.pdf.
[422]Dhingra Swati, Sampson Thomas, *Life after Brexit: What are the UK's options outside the European Union*, CEP.LSE http://cep.lse.ac.uk/pubs/download/brexit01.pdf.
[423] The European Free Trade Association, http://www.efta.int/about-efta/the-efta-states.
[424] European Commission, http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/.

The European Commission has engaged actively in co-operation with competition authorities of many countries outside EU so is with Switzerland too[425].Cooperation with some of the countries including Switzerland is based on bilateral agreements dedicated entirely to competition.[426]EU has entered into such dedicated agreements with Switzerland, China, India, Republic of Korea, etc. In some other cases, competition provisions are included as part of wider general agreements such as Free Trade Agreements, Partnership and Cooperation Agreement, Association Agreements, etc. such agreements are entered between EU and Brazil, Faroe Island, Switzerland, Ukraine, etc.[427]

If UK prefers the Swiss model it has choice to decide whether to enter into dedicated agreement as far as competition law is concerned or to enter into general agreements[428] and have competition provisions as a part of it.In addition to these benefits all other benefits as available with EFTA option discussed above in this article.

However drawback of this model is if UK prefers this option and enter into bilateral agreements and may have to change its statute as per the terms decided vide such agreement. Secondly, if such an agreement is not comprehensive enough to cover all the areas of free trade then the council of EU may limit the access to single market. Unlike the comprehensive agreements like EEA , the nature of bilateral agreements with Switzerland is static, given that there are no proper mechanisms to adapt the agreements to evolving EU legislation, nor are there any surveillance or efficient dispute settlement mechanisms. In order to resolve these problems, EU-Swiss negotiations for a framework institutional agreement were launched on 22 May 2014. The negotiations are aimed at settling the problems stemming from the evolving nature of the EU acquis related to the internal market and at introducing a dispute-settlement mechanism into the current bilateral treaty network. The institutional framework negotiations are crucial, because the council of the EU is determined not to allow Switzerland any further single market access e.g. as regards electricity, without this framework agreement[429]. Therefore such an agreement will be more subjective.

[425] European Commission, http://ec.europa.eu/competition/international/bilateral/.
[426] European Commission, http://ec.europa.eu/competition/international/bilateral/.
[427] *Ibid.*
[428] General agreements includes Free Trade Agreements, Partnership and Cooperation Agreements, etc.
[429] European Parliament, http://www.europarl.europa.eu/atyourservice/en/displayFtu.html?ftuId=FTU_6.5.3.html.

Option 4. ***WORLD TRADE ORGANIZATION (WTO) OPTION/ COMPLETE BREXIT***

If none of the above mentioned options are preferred by UK, its trade with EU and rest of the world will be governed by WTO of which UK is a member. As per Article 50 Two years after notification to leave EU is given by UK if no alternative arrangements are concluded between UK and EU or the period of two years is not extended with mutual consent, the treaties shall cease to apply to the withdrawing state[430].Therefore if UK fails to negotiate and conclude the agreement, with EU to set out its future relationship with EU then WTO rules will be applicable to trade dealings of UK. If so happens UK would no longer be obliged to follow EU treaties and it may change its approach in application of competition law. There will not only be change in application of competition law but there could be major changes in law provisions too. Currently UK's competition policy is largely based on EU competition policy be it application of Article, 101 and 102 of Trade on Functioning of European Union or be it principle of consistency of interpretation or the modernization regulation. Therefore after complete Brexit- with this option, would mean that application of competition policy in UK will be the sole responsibility of the CMA and adherence only to UK laws. Now WTO authorizes the ever-growing regional trade agreements and preferential trade arrangements, therefore with WTO option UK can enter into such reciprocal preferential trade agreements with two of more business partners. This type of agreements includes free trade agreements and customs unions etc.[431].With this as the only option and no other exclusive competition related arrangements with EUUK would no longer be able to implement One Stop Shop or would have no access to ECN. In absence of One Stop Shop principle companies which are operating in UK as well as in one or more EU Member States has to face investigation simultaneously from CMA as well as European Commission. This kind of simultaneous investigation would lead to unnecessary monetary loss also the investigation process will be longer and last but not the least result of both the investigations could be inconsistent[432]. This will create huge monetary burden on the businesses.

In addition to that some offenders have to pay fines twice while operating and following two different competition rules. With these kind of problems, Brexit without negotiating trade and trade related(such as for competition issues, movement of laborers, etc.) agreements may have bad effects on the businesses operating in both UK and EU. After Brexit, if UK chooses to opt

[430] Supra note 7.
[431] World Trade Organization https://www.wto.org/english/tratop_e/region_e/region_e.htm.
[432] Marco Hickey,*The Implications of brexit for Competition Law*, LKSHIELDSL(June24, 2016), https://www.lkshields.ie/?ACT=24&path=pdf%2Fpublication%2Fthe-implications-of-brexit-for-competition-law&size=a4&orientation=portrait&key=&attachment=1&compress=1&filename=lkshields-the-implications-of-brexit-for-competition-law.pdf.

for WTO option then in cases of cartel, merger investigations or in any other competition law infringement cases companies have to face dual investigations if they are carrying a business in UK and EU too. Also in cartel cases cartel members who carry business in UK will not be able to protect themselves under commission's leniency policy. As the provisions to deal with the whistleblower may vary in UK and EU therefore the whistleblower may get protection under EU laws however UK might prosecute the whistleblower company. Further with this option UK will not have access to ECN which is a very helpful instrument of coordination among the European Commission and the National Competition Authorities i.e. CMA as far as UK is concerned. Complete detachment from EU would also mean that all EU legislations will cease to apply to UK. Hence UK will not be able to get benefit of 'One Stop Shop' perhaps UK could, like Norway, allow the Commission in Brussels to adjudicate on its merger cases but this may create the cardinal question of UK's sovereignty as UK will not have any voice to sway Commission.

The only benefit of this option is UK will not lose its political sovereignty however it will come at the cost of economic turbulence. As the Pound has collapsed to its lowest level in over 30 years, it was dropped 7% to about €1.2085, immediately after referendum. Banks were hard hit, with Barclays and RBS falling about 30%.[433]

Table 1: AFTER BREXIT WHAT WILL BE THE FUTURE OF UK COMPETITION LAW

Sr. No.	Possible Options	Status of UK Competition Law
1.	Joining European Economic Area	Current law will remain unchanged. However UK will lose its voice to influence EU Competition policy[434]
2.	Joining EFTA	Few changes in current law are possible. Need not follow EU competition policy, still access ECN and through EFTA Surveillance Authority.
3.	Swiss Model	Changes in current law depend on the type of agreement will be entered between EU and UK. A good a' la carte option for framing competition policy.
4.	WTO Option	Current law could be changed as no need to interpret and follow EU legislation.

[433] *Pound plunges after leave vote*, June24, 2016, BBC NEWS, http://www.bbc.com/news/business-36611512.
[434] Georgeos Petropoulos, *Brexit and Competition Policy in Europe*, BRUEGEL (July16, 2016) http://bruegel.org/2016/07/brexit-and-competition-policy-in-europe/.

Table 2: COMPETITION LAW PILLARS PRE AND POST BREXIT

Competition Law Pillars	Pre-Brexit	Post-Brexit
Antitrust	The Competition Act 1998 which is largely based on Article 101 and 102 of the Treaty on Functioning of European Union is the governing law. National Courts are positively obliged to maintain consistency between its decisions and the decisions given by European courts in the similar case[435].	In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depend on the kind of agreement entered between UK and EU. In case of option 4 UK can completely change its current competition law and need not to be consistent with the decisions and the interpretation of European courts.
Merger	Mergers that meet EU threshold are controlled by commission.	In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depends on the kind of agreement entered between UK and EU and in case of option 4 mergers might be investigated on the set of recommendations issued by Organization for Economic cooperation and Development (OECD). International Competition Network(ICN) may play important role.
Cartels	Heavy fines are imposed on companies involved in cartels in member state. Leniency policy is one of the strongest tool used by commission to curb cartels[436].	In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depends on the kind of agreement entered between UK and EU. In case of option 4 businesses operating in UK may not access EU's leniency policy. UK's CMA play important role in controlling cartels and it

[435] Competition Act, 1998 1998 chapter 41, Section 60, available at: http://www.legislation.gov.uk/ukpga/1998/41.
[436]European Commission, http://ec.europa.eu/competition/cartels/leniency/leniency.html.

		can follow 1998 recommendation on hard-core cartels issued by OECD[437].
State -aid	The European Commission has vast powers of investigation and decision making. State aid can be implemented after approval of Commission. Commission may recover incompatible state aid in case of final negative decision.[438].	In case of option 1 and 2 pre-Brexit system will be retained whereas in case of option 3 depend on the kind of agreement entered between UK and EU. In case of option 4 UK will have follow WTO Agreement on Subsidies and Countervailing Measures which disciplines the use of subsidies and also provide measures to minimize the adverse effects of subsidies.

VII. SUITABLE OPTIONS FOR UK AFTER BREXIT

As mentioned above, UK has few options available after Brexit. Also there is time to choose more suitable option after Brexit as it has not yet started the withdrawal procedures. To maintain its political sovereignty but not at the cost of loss in investments is the biggest challenges before UK while choosing its option after Brexit. EU was and will be the nearest international market for UK therefore it has conclude some kind of trade agreements with EU. Considering all these factors this rejoining EFTA seems to be a good option for UK after Brexit.

UK was once upon a time member of EFTA therefore it is aware of the possible benefits as well as drawbacks of being an EFTA member. This option would help UK to maintain its political sovereignty as it need not follow EU legislation. At the same it need to negotiate multiple trade agreements with EU as well as non EU countries as such trade agreements already exist. Further considering the about the other benefits of this option, access to ECN would be possible through EFTA surveillance Authority[439]. Also as per the requirement UK can enter into reciprocal preferential trade agreements with two or more business partners as permitted by

[437] Recommendation of the council concerning effective action against hard core cartels (adopted by the council at its 921st session on 25 march 1998[C/M(98)7/PROV]), available at: https://www.oecd.org/daf/competition/2350130.pdf.
[438] European Commission , http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html.
[439] Supra note 49.

WTO[440]. Also with this option UK is not be obliged to be member of EEA and incidentally member of EU.

If UK chooses to rejoin EFTA, the procedure for same is prescribed under the Article 56[441] which states that,

"*Any state may accede to this convention, provided that the council decides to approve its accession, on such terms and conditions as set out in the decision. The instrument of accession shall be deposited with the Depository, which shall notify all other member states. This convention shall enter into force in relation to an acceding state on the date indicated on that decision*"

UK may rejoin EFTA after invoking this article.

VIII. PRACTICAL IMPLICATIONS OF BREXIT ON COMPETITION LAW REGIME IN UK

Till today, competition laws for EU and UK have gone hand in hand and succeeded in implementing effective competition policy both in UK as well as in Member States. Indeed EU competition law supersedes UK competition law in certain policy areas such as merger control where it meets threshold[442].Also EU has exclusive competence in certain areas such as customs union, establishing of competition rules necessary for functioning of internal market, etc.[443]. Whether the Current competition law will remain same or it will change completely depends on the possible option UK prefers. In case of complete detachment from EU Section 60 of the act of 1998 has to be changed thoroughly as the national courts need not maintain consistency with the decisions of the European Court. All companies working in UK as well as EU Member States will be obliged to follow competition law of both the jurisdictions irrespective of Brexit. However, while dealing with trans- border competition law, infringement cases what kind of cooperation will exist between UK and EU that completely depend on the post Brexit agreement between UK and EU. Indeed some of the economic and political effects are coming out since the result of Brexit referendum. As the European Commission enforces the EU competition rules with the national competition authority of the member states[444] and CMA being a national competition authority in UK closely coordinate with European Commission and this could be

[440] Supra note 59.
[441] Convention Establishing the European Free Trade Association(last amended on 20 September 2010), Article 56, available at: http://www.wipo.int/edocs/lexdocs/treaties/en/efta/trt_efta.pdf.
[442] Supra note 31.
[443] Treaty on Functioning of European Union 2012/C326/01, Article 3, available at: http://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:12012E/TXT.
[444] European Commission Website http://ec.europa.eu/competition/general/overview_en.html.

diluted after Brexit. As the European Commission is very keen on cooperation on competition with many other countries outside EU, it will enter into cooperation agreement with UK after Brexit but still such cooperation may not be as concrete as current cooperation between EU and UK competition provisions.

Any country's competition policy has the potential to influence its economic growth; therefore, while adopting new competition policy it is very important to foresee whether it will be beneficial or harmful to the economy. All the drawbacks of above mentioned possible options may lead to some economic loss. As the businesses are going to be hampered to great extent even if UK opts for any of the above possible options, as the current status of being EU member gives far more benefits to businesses than Being EEA or EFTA member. Any change in arrangements of competition policy itself has potential to affect UK's economy if UK chooses wrong option regarding competition policy. Therefore, while deciding on the future policy, UK has to examine other related factors too which may affect country's economy. Currently, UK's businesses are benefited by EU's common trade policies by virtue of being EU member. One of such benefits is UK's representation in global markets by EU. This gives good bargaining power to deal in all international trade. However, complete separation of UK from EU, may lead to changed import and export tariffs on UK. Perhaps, UK could choose to reduce its import tariffs as compared to EU import tariffs and import tariffs of other non-EU countries. This may help the consumers and the businesses in UK, due to increased competition in the businesses and possibly solve the issue of unemployment.

Post Brexit, if UK opts for option 2, 3 or 4 it has to enter into dedicated competition agreements with EU and rest of the world which is quite a time taking process. However, UK will have the opportunity to deal only with those countries which are its close business partners and need not to deal with EU as a whole. At this point of time it is very difficult to predict what will affect UK's economy more, will it be a greater autonomy to choose its business partner or lesser bargaining power in international trade.

If UK chooses complete sovereignty in competition law regime by opting option 3 or 4 then CMA - its competition authority will be over-burdened to deal with various competition related cases. Working parallel with European Commission (in case of selection of option 1) or with EFTA surveillance authority (in case of selection of option 2) burden on CMA will be less as the transnational cases will be investigated either by European Commission or the EFTA Surveillance Authority. Currently CMA works very closely with European Commission and

being a member of ECN it gets completion information and can share its experience with competition authorities of member states, However the case complete separation will deprive CMA from the privilege of being part of ECN, in short term perhaps it will impede smooth and well-timed working of CMA.

IX. CONCLUSION

The vote to 'Leave' has already caught fire and now it is up to UK to get benefitted from this fire or get burnt. The new competition policy will be framed in these two years of negotiations. However these two years are going to be uncertain for the businesses, investors, share market, EU citizens staying in UK as well as UK citizens staying in EU Member States[445].If UK chooses right option and try to find out more business partners outside Europe then the negative impact on economy after Brexit will be lessen. Competition plays a key role in stimulating economic growth. A well framed competition policy is always beneficial for consumers, new businesses as well as old businesses, theses all together strengthen the economy of nation. To maintain fair competition in the market was and is always the fundamental component in order to strengthen the economy. In today's world of globalization it is vital to have strong competition policy and effective mechanism for its implementation as it encourages businesses to improve its quality and helps to buy goods and services at appropriate prices. Therefore, after Brexit, UK has to carefully decide its competition policy and it should try to maintain close cooperation with EU and rest of the world.

[445] James Blitz, *Brexit Briefing: An Uncertain future for EU nationals in the* UKFINANCIAL TIMES, July15, 2016, available at: https://www.ft.com/content/43e9c2ee-4a67-11e6-b387-64ab0a67014c.