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CRITICAL EXAMINATION OF THE USE OF AGGRAVATING AND MITIGATING FACTORS IN CARTEL CASES IN INDIA

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ABSTRACT

*Cartels are considered as one of the most egregious violation of competition law. In order to deter cartel conduct, the penalty should be 'optimal' and the scheme of fining should be clear and consistent. Moreover, the computation of penalty has to be guided by sound legal reasons. There has to be a scientific connection between the reasons provided and the final computed penalty. Lack of transparency in the adjudication of penalty leads to multiple court litigations and loss of credibility of the competition authority. The present article assesses the factors that have been employed by the Competition Commission of India ["**CCI**" or "**Commission**"] in the computation of penalty for cartelization and examines if the Commission has been consistent in the application of these factors.*

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I. INTRODUCTION: 'CARTELS'

'Cartel', in the simplest terms, means an arrangement or understanding between similarly placed firms in the market to 'not compete'.[1] This, in turn, robs the market of the very benefits competition is said to provide in the form of low prices, better and innovated products, and increased choices. Oligopolistic firms may choose to enter into a cartel arrangement to increase their market power. The profit maximizing decision of the cartel is akin to that of a monopolist and leads to similar negative effects including allocative inefficiency, productive inefficiency and dynamic inefficiency.[2] Cartels have the most direct impact on consumers as they face increased prices and reduced supply of products or services.[3] The impact of cartels becomes multifold when the same is considered in developing economies,[4] and especially with respect to small and medium enterprises. Since, the objective of a cartel is to limit or eliminate competition between competing firms and increase profits of the constituent members, without *"producing any objective countervailing benefits"*,[5] many jurisdictions of the world consider cartels as *per se* illegal. As per Section 3(3) of the Indian Competition Act, 2002 ["**ICA**"], cartels are presumed to have appreciable adverse effect on competition ["**AAEC**"] and therefore, the Commission is not required to

[1]As per Section 2(c) of Indian Competition Act 2002, 'cartel' *"includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services."*

[2]H. Leibenstein, 'Allocative Efficiency v. X-efficiency' (1966) 56 American Economic Review 392.

[3]The average increase of sale price due to price fixing cartels has been estimated to be around 10% and the average decrease in output to be close to 20%. See OECD 'Hard Core Cartels' (2000) <https://www.oecd.org/competition/cartels/2752129.pdf> accessed 30 September 2020. Cartels have been proven to cause great harm especially in poor and developing economies as it restricts access to essential goods and services. See also World Bank, 'Global economic prospects and the developing countries 2003 – investing to unlock global opportunities : Global economic prospects and the developing countries 2003 : investing to unlock global opportunities' (2003) <https://documents.worldbank.org/en/publication/documents-reports/documentdetail/867491468124755492/global-economic-prospects-and-the-developing-countries-2003-investing-to-unlock-global-opportunities> accessed 31 August 2020; UNCTAD, 'Impact of Cartels on the Poor' (2013) <https://unctad.org/meetings/en/SessionalDocuments/ciclpd24rev1_en.pdf> accessed 30 September 2020.

[4]M. Ivaldi and others, *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects* (Springer 2016).

[5]Commission, 'Glossary of Terms used in EU Competition Policy' (2002) <https://op.europa.eu/en/publication-detail/-/publication/100e1bc8-cee3-4f65-9b30-e232ec3064d6> accessed 30 September 2020.

prove the anti-competitive effects of a cartel arrangement. The burden of proof shifts to the opposite parties to rebut the presumption of AAEC.[6]

The criticism for cartels stems not only from the economic front but also from the point of view of 'morality'. Cartels are said to involve an element of cheating. This can be evinced from the observations of the US Supreme Court, which termed it as *"deceptive, fraud, oppressive and opposed to public policy"*.[7] *Crowe and Jedličkova* try to offer a model to integrate economic and moral considerations to provide a justification for both, civil and criminal sanctions.[8] They see cartels as something that undermines the free forces of a competitive market and threaten consumer welfare leading to inefficiency.[9] The significant impact of cartels on the market economy coupled with low detection rate advocates for a more comprehensive enforcement regime.[10] It has been argued that the harm that is avoided from anti-cartel enforcement is only a fraction of total potential harm and therefore, deterrence is a much more effective way of removing harm than detection.[11]

II. SANCTIONING CARTELS

The imposition of fine is envisaged to act not only as a punishment for the offence committed but also to create enough deterrence to prevent both, the offenders and outsiders, from repeating the offence. To achieve deterrence, it is not just essential that the fine is high enough but it is equally important that the chances of detection are increased. Optimal fine has two reference points; harm caused to the society from the offence committed and the illicit profits made by the offender. Cost of enforcement is added in the cost to society. Imposition of fines in cartel cases can follow two approaches. As per the *Becker-Landes* approach, which follows the idea of restitution, fines should be *"equal to the harm that criminal activities have caused to society"* plus the enforcement costs divided by the

[6] *Rajasthan Cylinders and Containers Ltd. v Union of India* [2018] AC 3546/2014 (SC).

[7] *Federal Trade Commission v Sperry & Hutchinson Co.* [1972] 405 US 233, 241.

[8] Jonathan Crowe and Barbora Jedličkova, 'What's Wrong with Cartels?' (2016) 44(3) Federal Law Review 401.

[9] ibid.

[10] Ivaldi and others (n 4).

[11] Stephen Davies and Peter L. Ormosi, 'The Economic Impact of Cartels and Anti-Cartel Enforcement' (2014) Centre for Competition Policy, University of East Anglia Working Paper 13-7 v2 <http://competitionpolicy.ac.uk/documents/8158338/8235397/CCP+Working+Paper+13-7+v2+%282014%29.pdf/75e1ba67-d52f-4bf5-ac39-11c687a8ed83> accessed 30 June 2020.

probability of detection and conviction.[12] The second approach is dissuasive in nature rather than restitutive. Restitution fine, which seeks to recover the ill-gotten profits, may not be enough in aggregate because some cartels might go undetected or they might have already broken down. The dissuasive fine disincentives the very participation in cartel. If the firms come to realize that the net profit on account of cartel participation is negative, they will not participate or continue to participate in the cartel. Therefore, as per the second approach fines should be high enough to deter participation. Harm based penalties are generally preferred as the harm caused by cartels is greater than the benefits and therefore, has a higher likelihood to cause deterrence. Harm based penalty forces the cartel firms to *"internalize harm rather than simply taking away the gains made"* thereby, pushing the firms to invest in compliance, monitoring and prevention.[13]

Calculation of an optimal fine on the basis of the harm caused however, becomes difficult in light of the lack of precise data on overcharge, enforcement costs, and the rate of detection. While there have been some studies which estimate cartel overcharge,[14] and costs of enforcement, it is exceptionally difficult to correctly assess dead weight loss or "probability of detection and punishment".[15] Further, the formula ignores other effects of cartel like innovation costs or the 'umbrella effect' which adds to the social costs.

[12]Gary S. Becker, 'Crime and Punishment: An Economic Approach' (1968) 76 Journal of Political Economy 180; See also William M. Landes, 'Optimal Sanctions for Antitrust Violations' (1983) 50 UCLR 652.

[13]Bruce H. Kobayashi, 'Antitrust Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations' (2001) 69 George Washington Law Review 715, 736.

[14]Cartel overcharge is the difference between the collusion price and an artificial competitive benchmark price and capture the mark-up for purchasers due to cartelization. See F. Smuda, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law' (2012), ZEW Centre for European Economic Research Discussion Paper No. 12-050 <http://ftp.zew.de/pub/zew-docs/dp/dp12050.pdf> accessed 25 November 2020.

[15]Some studies have estimated the cartel overcharge in the range of 20-25% and detection rate in the range of 15-20%. See Y. Bolotova, J. Connor and D. Miller, 'Factors influencing the magnitude of cartel overcharges: An empirical analysis of the U.S. Market' (2008) 5(2) Journal of Competition Law & Economics 361; See also S. Davies and P. Ormosi, 'Assessing Competition Policy: Methodologies, Gaps and Agenda for Future Research' (2010) Centre for Competition Policy, University of East Anglia Working Paper 10-19 <http://competitionpolicy.ac.uk/documents/8158338/8256105/CCP+Working+Paper+10-19.pdf/75b547e1-3c6b-4c08-bc55-79b2a7f3ca46> accessed 30 September 2020.

The inability of the formula for optimal fine to account for these factors makes the final quantified fine as less than optimal.[16] Further, application of the principles of proportionality,[17] and the fear of social costs on account of firm's inability to pay (multiplier is inverse of probability of detection) reduces the fine even further. Multiple studies have been done on the issue of adequacy of fine to cause optimal deterrence and they all conclude that the cartel fines are too low.[18] Cartel fines, sometimes, have also been reported to be less than cartel overcharge.

The debate on the correct methodology, be it 'harm based' or 'gain based', to calculate the optimal fine is continuous and therefore, the issue of quantification of fine for cartel conduct remains unresolved. *Huschelrath,*[19] argues that even though practical fines are lower than theoretical fines, they are still able to create deterrence and benefit the consumers and the economy. What is important is not the quantum of fine but the efficiency of fines.[20] Countries like the United States of America ["**US**"] and the United Kingdom ["**UK**"] have framed penalty guidelines for imposition of penalties. These guidelines, on the basis of experiential data, uniformly assume certain figures to fit in the formula of optimal fine.[21] There are some

[16]John M. Connor and Robert H. Lande, 'Cartel Overcharges and Optimal Cartel Fines' (2008) 3 Issues in Competition Law and Policy 2203 <https://scholarworks.law.ubalt.edu/cgi/viewcontent.cgi?article=1719&context=all_fac> accessed 30 June 2020.

[17]Given that the average detection rate of cartels is less than 25%, the optimal fine should be four times the overcharges of cartel and the dead weight loss. In light of multiple studies that predict cartel detection rate to be somewhere around 20-30%, an average rate of 25% is taken. See E. Combe, C. Monnier and R. Legal, 'Cartels: The Probability of Getting 360 Caught in the European Union' (2008) 12 Bruges European Economic Research Papers No. 12 <https://www.coleurope.eu/system/files_force/research-paper/beer12.pdf?download=1> accessed 31 July 2020.

[18]John M. Connor and Robert H. Lande, 'Cartels as Rational Business Strategy: Crime Pays' (2012) 34 Cardozo Law Review 427, 479; OECD, 'Sanctions in Antitrust Cases' (2018) Global Forum on Competition <https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf> accessed 30 September 2020.

[19]K. Huschelrath, 'Detection of Anticompetitive Horizontal Mergers' (2009) 5(4) Competition Law & Economics 683.

[20]Jurgita Bruneckiene and Irena Pekarskiene, 'Economic Efficiency of Fines Imposed on Cartels' (2015) 26(1) Inzinerine Ekonomika-Engineering Economics 49 <https://inzeko.ktu.lt/index.php/EE/article/view/7763> accessed 30 September 2020.

[21]The US Federal Sentencing Guidelines, for instance, fix a base fine equal to 20% if the volume of commerce (Sales) affected by cartel decisions. The base fine assumes cartel overcharge proxy to be around "10% of the selling price". The base fine is twice as big as the average gain, because *"…among other things, injury is inflicted upon consumers who are unable or for other reasons do not buy the product at the higher prices"* as

scholars however, who argue that a fixed methodology to calculate fines makes it predictable in nature which reduces its deterrence value. The predictability of fine when added to the below optimal level quantum may tempt undertakings who are otherwise law abiding to see the benefit of infringement. However, it has been countered that if the fines are high enough, it can aid to the leniency regime of the jurisdiction.[22]

The mechanism of civil penalties lies somewhere between the traditional systems of criminal fines & imprisonment and civil damages. Civil penalties may be used for disgorgement, restitution or forfeiture of assets which are used to facilitate illegal acts. Although the nature of such action resembles the criminal judicial system, the usage of the term 'civil' changes the dynamics of its enforcement. The thresholds of standard and burden of proof, requirement of mental element, double jeopardy, which are required for criminal cases, get relaxed. Civil penalties are "in the form of monetary fines" which are imposed by the administrative agency through the application of civil procedure norms.[23] The idea of deterrence remains behind the imposition of civil penalties. The public enforcement of competition law with an idea of deterrence runs parallel to private enforcement of competition laws which aims to compensate victims of competition law violations. While the idea of civil penalties aims at penalizing anti-competitive behaviour because of its economic effect through the imposition of fines, in order to improve the overall compliance of competition laws, regulators tend to adjust penalties based on parameters like intent, cooperation, aggravating and mitigating circumstances, which takes it slowly within the domain of criminal procedure.[24]

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per Section 2R1.1 Application notes. The difference between the base fine and cartel overcharge makes up for the dead weight loss and enforcement costs.

[22]OECD, 'Sanctions in Antitrust Cases' (2018) Global Forum on Competition <https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf> accessed 30 September 2020.

[23]The European Regulations provide for "civil fines in cases of infringement of Article 101 or Article 102 (Regulation 1/2003)". The quantum of penalty will depend on the duration and gravity of infringement. However, the upper ceiling of the penalty is fixed at 10% of the company's turnover of the previous year. The Regulation clearly categorizes the fines as of civil nature. See Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) OJ C 210.

[24]Harry First, 'The Case for Antitrust Civil Penalties' (2009) 76(1) Antitrust Law Journal 127.

III. IMPOSITION OF PENALTY

The scheme of fining should be clear and consistent and its determination has to be guided by sound legal reasons. It cannot be akin to a 'lottery'.[25] Lack of transparency in the adjudication of fine will lead to loss of credibility of the competition authority and multiple court litigations.[26] Fine amount cannot be calculated on an *adhoc* basis and there has to be a scientific connection between the reasons provided and the final computed fine. The conversion of factors like territorial extent, success of cartel (duration), method of operation, sector affected, importance of product or service in question, level of individual participation, in to numbers to increase or decrease the final amount, if vague and incoherent, would lead to numerous appeals thus enabling the offenders to both, prolong and delay, the entire enforcement process.[27]

The existing penalty scheme of the CCI for cartel cases seems to be similar to a lottery where random metric whether in terms of percentage of turnover or that of profit appears at the end of the decision. The Commission has rarely given justification for the computation of penalty and it is not particularly clear whether the Commission considered the above-mentioned factors. The appellate forums have at multiple times questioned the rationale of the Commission to reach to a particular penalty and sent the matter back to the Commission for a reasoned order. An absence of guidelines on the aspect of imposition of penalty means that the Commission has no reference point or a definitive set of parameters to impose penalty. Therefore, while the Commission may take a myriad set of factors into consideration, to what extent such factors should influence the imposition of penalty (degree of application) is left to the discretion of the Commission. *"The quantum of penalty imposed must correspond with the gravity of the offence and the same must be determined after having due regard to the*

[25]Similar criticism was made with respect to fining process by European Commission in the initial years. See I. Van Bael, 'The Lottery of EU Competition Law' (1995) 4 ECLR 237. The European Union, however, rectified this later and adopted multiple measures in the form of 1998 Commission Guidelines on Fines (revised in 2006), 1998 leniency scheme (revised in 2002 and 2006) and 2008 Settlement Procedure.

[26]Prof. Damien Geradin and David Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community's Court Judgments' (2005) GCLC Working Paper 03/05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=671794> accessed 31 March 2020.

[27]ibid; R. Richardson, 'Guidance without Guidance – A European Revolution in Fining Policy? The Commission's new Guidelines on Fines' (1999) 20 ECLR 361.

mitigating and aggravating circumstances of the case."[28] N.V. Ramana, J., in *Excel Crop. Care Limited*,[29] outlined the factors to be considered while calculating penalties. The question however is, whether the Commission has given due weightage to the factors underlined above, in its decisions in the last ten years of anti-cartel enforcement.

IV. USE OF AGGRAVATING AND MITIGATING FACTORS BY THE CCI

The initial years of anti-cartel enforcement in India did not really go in to the question of aggravating and mitigating circumstances and therefore, their influence on the computation of penalty was minimal. A list of factors that have been considered by the Commission in the later years of cartel enforcement are as follows –

A. Use of aggravating factors

i. *Leadership role*

Identification of a ringleader may help in making a distinction in the award of penalty amongst various cartel members. It also sends a clear signal that the Commission will single out instigators and coordinators and deal with them in a sterner fashion. The European Union's ["**EU**"] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 ["**Fining Guidelines**"] prescribes a higher penalty for leaders ("*undertaking with a significant driving force*"[30]) and instigators,[31] ("*one who*

[28] *In Re: Builders Association of India and Cement Manufacturers' Association* 2016 SCC Online CCI 46.

[29] *Excel Crop. Care Limited v Competition Commission of India* AIR [2017] SC 2734 [88]. The Apex Court noted, *"commission may consider appropriate percentage, as the case may be, by taking into consideration nature, gravity, extent of the contravention, role played by the infringer (ringleader? Follower?), the duration of participation, the intensity of participation, loss or damage suffered as a result of such contravention, market circumstances in which the contravention took place, nature of the product, market share of the entity, barriers to entry in the market, nature of involvement of the company, bona fides of the company, profit derived from the contravention etc."*

[30] Case T-15/02 *BASF v Commission of the European Communities* [2006] ECLI:EU:T:2006:74; Case T-410/03 *Hoechst v Commission of the European Communities* [2008] ECR II-881. A leader undertakes specific liability for the operation of cartel, coordinates the operation of cartel from within the cartel and sees to the implementation of the cartel. See also Case T-224/00 *Archer Daniels Midland and Archer Daniels Midland Ingredients v Commission of the European Communities* [2003] ECR II-2597. The entity which "plays a central role in the operation of the cartel by organizing meetings or coordinates exchange of information or undertakes the responsibility of other members or formulates proposals for course of action" can be designated as a leader. See also Joined Case 96/82 and others *International Belgium and Ors v Commission of the European Communities* (1983) ECR 3369; *PO Video Games* (Case COMP/35.587), *Nintendo Distribution* (Case

persuades or encourages other business entities to establish or join a cartel") of cartel.[32] In US, benefit of amnesty is not extended to a leader or originator of cartel or if the firm forced another firm to participate in the cartel.[33] While the idea of leadership has been clearly marked as an aggravating circumstance, there is a general lethargy in the identification of leaders in cartel cases in India. This may be also due to lack of an identification framework.[34] Non-identification of ringleaders fails to create 'specific deterrence' for individual undertakings. In *Uniglobe,*[35] while the CCI identified three trade associations among six as taking the lead role and having a higher degree of involvement, it did not reflect in the actual computation of fine. On the contrary, it acted as a mitigating factor for the other three associations who were left without any penalty. In *Nagrik Chetna Manch,*[36] while the managing director of one of the firms admitted to have established and operationalized the bid rigging, the CCI made no distinction in imposing the penalty, either at the individual or at the undertaking level.[37] A uniform penalty at the rate of 10% of average turnover and income was calculated for six firms and five individuals including the ringleader. Interestingly, the Commission also granted leniency of 25% reduction in penalty for the ringleader. Similarly, in *Dry Cell batteries* case,[38] even though the Commission marked that Panasonic played a key role in the cartel and "*was in a position to influence and dictate the terms"* of the anti-

COMP/35.706), *Omega – Nintendo* (Case COMP/36.321) Commission Decision [2002] OJ L 255; *Graphite Electrodes* (Case COMP/E-1/36.490) Commission Decision [2002] OJ L 100/1.

[31]Not all founding members can be categorized as instigators. Instigators are only those undertakings that have taken the initiative "for example by suggesting to the other an opportunity for collusion or by attempting to persuade it to do so." Since, "instigation is concerned with the establishment or enlargement of a cartel, it is possible that several undertakings might simultaneously play a role of instigator within the same cartel". See *Shell Petroleum v Commission of the European Communities* [2012] ECR II-000 [155].

[32]Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) OJ C 210 <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29> accessed 31 March 2020.

[33]'Corporate Leniency Policy' (US Department of Justice, August 10 1993).

[34]Eva van Leur, 'Characteristics of Cartel Ringleaders: An Analysis of EU Commission Decisions' [2013] 6 Research in Business and Economics – MaRBLe Research Papers <https://openjournals.maastrichtuniversity.nl/Marble/article/view/187> accessed 30 June 2020.

[35]*Uniglobe Mod Travels Pvt. Ltd. v Travel Agents Association of India* [2011] CCI Case No. 3 of 2009.

[36]*Nagrik Chetna Manch v Fortified Security Solutions* 2018 SCC OnLine CCI 61.

[37]*Nagrik Chetna Manch v SAAR IT Resources Private Limited* 2019 SCC OnLine CCI 28.

[38]*Anticompetitive conduct in the Dry-Cell Batteries Market in India v Panasonic Corporation* 2019 SCC OnLine CCI 15.

competitive arrangement to Godrej, it was granted a *"100% reduction in penalty in lieu of the leniency application"*. Non-appreciation of the fact that, Panasonic played the role of a ringleader, has made the outcome of the case a bit unfair. 'Leadership' role therefore has neither been taken in to account in leniency matters nor has been effectively used as an aggravating factor in computation of penalty.

ii. *Detrimental to interests of consumers / critical nature of the product or service*

Seriousness of enforcement and strength of sanctions commensurate the detrimental nature of cartels and the harm it causes to the consumers. Therefore, the harm caused to the consumers at large is not used as an aggravating factor. The CCI has however at times, used harm to consumers' as an aggravating circumstance. In the *Cement cartel* case,[39] the Commission noted the detrimental effect on consumers and the economy without clearly categorizing them as aggravating factors.[40] In the bid rigging case concerning *Insurance companies,*[41] the CCI acknowledged the effect of violation on the consumers (poor families in the present case) as an aggravating factor. However, unlike the *Cement cartel* case, a penalty was not imposed on the basis of profits but on the basis of turnover *"at the rate of 2% (of their average turnover of the last three financial years)*".[42] No reason was provided for the exercise of discretion or for the quantification of penalty. Similarly, in *Western Coalfields,*[43] the Commission considered the criticality of services as an aggravating factor to impose a penalty on the firms and executive of the firms *"at the rate of 4% of average relevant turnover and 4% of their average income of the last three financial years respectively."* Criticality of service for public health was also considered in *Delhi Jal Board*,[44] and it formed the basis of penalty imposed at the rate of 8% of average relevant turnover. There is not much difference in the gravity of

[39]*In Re: Builders Association of India* (n 28).

[40]The Commission used the proviso to Section 27(b) to impose penalty. After doing a comparison of penalty on the basis of turnover and profit as mentioned in the provision, the Commission surprisingly chose to impose penalty at the rate of 0.5 times the profit during the period of violation without adducing any reason as how the figure of 0.5 times the profit was reached. The Cement Manufactures Association on the other hand was penalized at the "rate of 10% of total receipts for the two years in terms of Section 27(b)".

[41]*In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna* 2015 SCC OnLine CCI 192.

[42]ibid.

[43]*Western Coalfields Limited v SSV Coal Carriers Private Limited* 2015 SCC OnLine CCI 192.

[44]*Delhi Jal Board v Grasim Industries Ltd.* 2017 SCC OnLine CCI 48.

offence in the *Insurance, Western Coalfields* or *Delhi Jal Board* matter that commanded separate sanctions. Similarly, in *Arora Medical Hall*,[45] the Commission, acknowledging the principles of proportionality imposed a penalty at the rate of 10% of average receipts of Chemist and Druggist Association of Firozabad (CDAF). The Commission considered both, the harm and the risk caused to the lives of the drug consumers as aggravating factors. However, it ended up imposing similar penalties as in cases without aggravating factors. The CCI in *AIMTC,*[46] considered the cascading effect of fixing of freight charges on the goods and services consumed by common man to impose a penalty on AIMTC at *"the rate of 10% of the average turnover of the last three years"*.

iii. *Harm to overall public exchequer / economy*

Although not as a specific aggravating factor, the CCI has considered harm to the exchequer to determine the quantum of penalty. In *Bio-med,*[47] and *Jet Airways,*[48] the CCI took note of the harm caused to the economy to impose a penalty *"at the rate of 3% of average of turnover in the last three preceding years"*. Harm to the economy thus, has been seen as a lesser aggravating factor than criticality of product or service in question.[49]

iv. *Important position of the player*

It is assumed that by virtue of the position of the cartelist, it is able to influence, instigate or force others to either join the cartel or continue with the cartel. Fear of ostracization prevents members of the cartel from defection. The CCI has used this factor only in the case of trade associations. In *Santuka,*[50] the Commission noted that that All India Organization of Chemists and Druggists by virtue of it being the apex body for chemists and druggists in India was able to *"fix trade margins, limit and control the supply and influence the prices of the drugs and pharmaceutical products by insisting upon NOC for appointment of stockiest."* Similar stance was taken by the Commission for *Chemist and Druggist Association,*

[45]*In Re: M/s Arora Medical Hall, Ferozepur* 2014 SCC OnLine CCI 18.

[46]*In Re: Indian Foundation of Transport Research and Training* 2015 SCC OnLine CCI 33.

[47]*In Re: M/s Bio-Med Private Limited* 2015 SCC OnLine CCI 91.

[48]*In Re: Express Industry Council of India* 2018 SCC OnLine CCI 11.

[49]*In Re: Alleged Cartelization in supply of LPG Cylinders procured through tenders by HPCL v Allampally Brothers Ltd.* 2019 SCC OnLine CCI 33.

[50]*M/s Santuka Associates Pvt. Ltd. v All India Organization of Chemists and Druggists* 2013 SCC OnLine CCI 16.

Ferozepur,[51] and *Bengal and Chemist and Druggist Association.*[52] The Commission in both these cases imposed *"a penalty at the rate of 10% of average of receipts of the associations"*. Listing of aggravating factors as is evident did not seem to have any effect on the quantum of penalty. The CCI had previously imposed penalty on the trade associations at the same rate where there were no aggravating factors. Interestingly, in *TG Vinaykumar*,[53] while the Commission did consider the importance and position of the association which contributed to the violation, penalty was imposed at the rate of 5%. It is therefore, difficult to decipher a clear distinguishing feature in the cases listed above.

v. *Non-cooperation*

Similar to that in the EU,[54] and the US,[55] non-cooperation or an attempt to off track an ongoing investigation is seen as a serious aggravating factor.[56] Non-cooperation may include *"late provision of requested information, false or incomplete provision of information, lack of notice, lack of disclosure, obstruction of justice, destruction of evidence, challenging the validity of documents authorizing investigative measures, etc."*[57]

[51]*In Re: M/s Arora Medical Hall, Ferozepur* (n 45).

[52]*In Re: Bengal Chemist and Druggist Association* 2014 SCC OnLine CCI 39.

[53]*Shri T. G. Vinayakumar v Association of Malayalam Movie Artists* 2017 SCC OnLine CCI 13.

[54] Art 23(1) of Regulation 1/2003 provides an alternative route to impose fine for procedural infringements up to 1% of the relevant turnover. This route is unrelated to the gravity of the infringement and is a more preferred route than using non-cooperation as an aggravating circumstance to calculate fine. It has been held that refusal to cooperate cannot be used as both procedural infringement and an aggravating circumstance. See Case T-384/06 *IBP Ltd. and International Building Products France SA v European Commission* [2011] ECLI:EU:T:2011:113.

[55]Three points to the organization's culpability score is added. This is also applicable where the firm took no steps to remove obstruction even when it knew about it. See United States Sentencing Guidelines s 8C2.5(e).

[56]*M/s Rohit Medical Store v Macleods Pharmaceutical Limited* 2015 SCC OnLine CCI 19; *Reliance Agency v Chemists and Druggists Association of Baroda* [2018] CCI Case No. 97 of 2013.

[57]International Competition Network*, 'Setting of Fines for Cartels in ICN Jurisdictions'* (2008) Report to the 7th ICN Annual Conference Kyoto <https://centrocedec.files.wordpress.com/2015/07/setting-of-fines-for-cartels-in-icn-jurisdictions-2008.pdf> accessed 30 June 2020.

vi. *Recidivism*

Recidivism is considered as one of the most serious aggravating factors. A higher rate of recidivism also raises question on the deterrent effect of a previously imposed fine.[58] Both, the Fining Guidelines,[59] and the United States Sentencing Guidelines ["**Sentencing Guidelines**"],[60] prescribe a substantial increase in fines in cases of recidivism. In India, the Commission has dealt with two types of cases. First, where the same entity indulges in antitrust violation of the same type after being previously penalized for it and second, where the entity indulges in violation similar to that of another entity known to have been penalized for it.[61] There is an abundance of cases of the second nature with the first type not lagging much behind. All these cases have been centered on sector specific trade associations. Recidivism amongst trade associations also indicates that the sanctions imposed by the Commission on the trade associations have been unable to create either specific or general deterrence. This may be either due to the belief of the trade associations of non-detection or the idea that even if they are detected, the resultant penalty will not hurt them much. The Commission has on multiple occasions lamented about the repeated nature of the violation especially among trade association of the pharmaceutical sector. But the irony is that the CCI has not gone beyond penalizing trade associations at a rate which is similar to any ordinary case. In some cases, the Commission has imposed fines on office bearers of the association. For instance, the Commission penalized *Chemist and Druggist Association, Goa (CDAG)* in 2012,[62] *"at the rate of 10% of average receipts"*. In 2014, the Commission while noting its 2012 order stated that, the CDAG continued its anti-competitive behaviour with *"utmost disrespect to the Commission's mandate"* and imposed a penalty at the precious rate of 10%

[58]Case C-322/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (1983) ECR 3461.

[59]Increase of base amount up to 100% for each of such infringement established. See Commission, 'Guidelines on the Method of Setting Fines Imposed Pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) OJ C 210 [28]; See also Case T-141/94, *Thyssen Stahl v Commission of the European Communities* [1999] ECR II-347; See also OECD, 'Sanctions in Antitrust Cases' (2018) Global Forum on Competition <https://one.oecd.org/document/DAF/COMP/GF(2016)14/en/pdf> accessed 30 September 2020.

[60]The US sentencing Guidelines use recidivism in the culpability multiplier. See United States Sentencing Guidelines s 8C2.5(c)(1)-(2).

[61]*Reliance Agency v Chemists and Druggists Association of Baroda* [2018] CCI Case No. 97 of 2013; *M/s Maruti and Company v Karnataka Chemists and Druggists Association* 2016 SCC OnLine CCI 43; *Sudeep P.M. v All Kerala Chemists and Druggists Association* 2017 SCC OnLine CCI 54.

[62]*Varca Druggist and Chemist v Chemists and Druggists Association, Goa* 2012 SCC OnLine CCI 41.

of average of receipts.[63] Similarly, the Commission in its 2015,[64] order against Himachal Pradesh State Chemists & Druggists Association noted the previous orders against the association by MRTPC in 2008. However, the CCI ended up penalizing the association at the same rate of 10%.[65] A similar scenario is seen in the matter of *Indian Foundation of Transport Research & Training*,[66] and *Kerala Film Exhibitors Federation* ["**KFEF**"].[67] Interestingly, the Commission in KFEF, barred two office bearers from engaging with administration, management or governance of the trade association for two years because of their continued indulgence in anti-competitive activities. Such a measure however, was not taken in other cases of recidivism. The Commission has imposed similar penalties even in cases of multiple counts of recidivism. In *Kannada Grahakara Koota,*[68] Karnataka Film Chamber of Commerce (KFCC) was penalized *"at the rate of 10% of average income"* even after the Commission noted the prior sanctions imposed on it on two previous occasions. Since, the CCI has been mostly faced with recidivism cases of trade associations, the contentious issues of change in ownership (or management),[69] time and territory,[70] have not been fleshed out in detail.

[63]*In Re: Collective boycott/refusal to deal by the Chemists & Druggists Association, Goa (CDAG), M/s Glenmark Company and, M/s Wockhardt Ltd.* 2014 SCC OnLine CCI 134.

[64]*Macleods Pharmaceutical* (n 56).

[65]*Mr. P. K. Krishnan v All Kerala Chemists and Druggist Association* [2015] CCI Case No. 28 of 2014; *Madhya Pradesh Chemists and Distributors Federation (MPCDF) v Madhya Pradesh Chemist and Druggist Association (MPCDA)* 2019 SCC OnLine CCI 7.

[66]*In Re: Indian Foundation of Transport Research and Training* 2015 SCC OnLine CCI 33.

[67]*M/s Crown Theatre v Kerala Film Exhibitors Federation (KFEF)* 2015 SCC OnLine CCI 143.

[68]*Kannada Grahakara Koota v Karnataka Film Chamber of Commerce (KFCC)* 2015 SCC OnLine CCI 113.

[69]In US, the involvement and punishment of a subsidiary company for involvement in a particular type of cartel in the previous serious will not make the parent company or a new acquirer, a recidivist if later the parent company is found to be involved in similar cartel. European Commission however has a different stance. See Case T-203/01 *Michelin v Commission of the European Communities* [2003] ECLI:EU:T:2003:250. The General Court endorsed "the parental liability presumption for assessing recidivism and held the subsidiary of the Michelin Group as recidivist because of an earlier indictment of another subsidiary company of the same group. The parent company was not an address in the Commission's decision". See also Case T-558/08 *Eni SpA v Commission of the European Communities* [2014] ECLI:EU:T:2014:1080. The General Court in this case, however, laid out the rights of defence of the parent company. Accordingly, parent companies will be given the opportunity to rebut the parental liability presumption. Even prior knowledge of the parent company about a previous indictment of its wholly owned subsidiary in a case where it was not the party, would not be sufficient

vii. *Other factors*

Apart from the above-mentioned aggravating factors, there are other factors that although are very common in other jurisdictions, have failed to find a place in the Indian decisions.[71] For instance, "retaliatory or threatening measures" taken by the cartel members against one or more entities whether as a disciplining exercise for an insider who refused to toe the line of the leaders or against a cartel outsider, is seen as a serious aggravating factor. While in many cases in India, especially the trade association cases, the principal trade association used its market position to issue diktats to boycott or not to deal with entities refusing to follow their decisions, the behavior although brought under section 3(3)(b) of the ICA, was not used as an aggravating factor to impose higher penalties.

B. Use of mitigating factors

i. *Immediate termination or correction of anti-competitive conduct or very short duration of practice*

Similar to the EC Guidelines, the CCI considers immediate termination or correction of anti-competitive action as a mitigating circumstance. Therefore, where there is no harm that was caused by an anti-competitive clause in the bye-laws of the associations and which the association offered to correct immediately, the Commission chose not to impose any penalty.[72] Similarly, in *PV Basheer,*[73] when the new management of the association showed

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to remedy the absence of a determination in the previous EC decision that the parent company and the subsidiary form a single economic unit, so that the responsibility for the previous infringement is imputed to the parent company. History of cartel punishment is carried forward by the parent company or a new acquirer. See Case T-55/08 *Eni SpA v Commission of the European Communities* ECLI:EU:T:2014:1080; See also *Slovak Telekom* (Case COMP/AT.39523) Commission Decision [2014] OJ C 314/7.

[70]The US Sentencing Guidelines for instance uses a time frame of ten years to check for recidivism. Simultaneous involvement in multiple cartels is taken as repeated offence but not as recidivism. The European Commission Guidelines do not prescribe a time frame for the use of recidivism as an aggravating factor to calculate fine. Therefore, the Commission is in fact free to consider past and historic involvement in cartels as a factor to calculate fines.

[71]Prof. Damien Geradin and David Henry, 'The EC Fining Policy for Violations of Competition Law: An Empirical Review of the Commission Decisional Practice and the Community's Court Judgments' (2005) GCLC Working Paper 03/05 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=671794> accessed 31 March 2020.

[72]*Mr. Vijay Gupta v M/s Paper Merchants Association, Delhi* SCC OnLine CCI 6; *Shri Ghanshyam Dass Vij v M/s Bajaj Corp. Ltd.* 2015 SCC OnLine CCI 174.

compliance to CCI's orders and corrected the anti-competitive conduct by reinstating the informant as a member of the association, it was taken as a mitigating factor in the quantification of fine. The CCI in *Cochin Port Trust,*[74] chose not to impose any penalty considering the short duration of the conduct in question which was terminated even before the investigation started.

ii. *No harm caused due to violation*

In *Shree Cement,*[75] the CCI considered the harm caused in the form of cost to exchequer and time loss. It then went on to make an artificial distinction between two terminologies, 'causes' or 'likely to cause AAEC' and held that, the two need to be seen separately. In light of other factors like the peculiar nature of the bid and the presence of competition compliance program, the Commission imposed a penalty *"at the rate of 0.3 % of their average turnover of the last three financial years"*.[76] The Commission did not need to read a distinction or gradation in Section 3 when the statute does not envisage such a categorization. Cartels have been proved to cause AAEC and 'foreseeability of harm' is enough in such cases even when actual harm is not ascertainable,[77] a position that has now been rightly taken in *Composite Brake Block,*[78] bid rigging cartel.[79]

iii. *Penalized in other case with similar period of investigation*

Multiple cases,[80] have been filed against trade associations in the last ten years for their alleged involvement in anti-competitive practice. Many of such complaints relate to

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[73]*Shri P.V. Basheer Ahamed v M/s Film Distributors Association, Kerala* [2014] CCI Case No. 32 of 2013.

[74]*Cochin Port Trust v Container Trailer Owners Coordination Committee* 2017 SCC OnLine CCI 39.

[75]*Director, Supplies & Disposals, Haryana v Shree Cement Limited* 2017 SCC OnLine CCI 2.

[76]ibid.

[77]*Paper Merchants Association* (n 72).

[78]*In Re: Chief Materials Manager, South Eastern Railway* 2020 SCC OnLine CCI 28.

[79]*In Re: Cartelization in Industrial and Automotive Bearings* 2020 SCC OnLine CCI 19.

[80]*M/s FCM Travel Solutions (India) Ltd., New Delhi v Travel Agents Federation of India* 2011 SCC OnLine CCI 77; *Sunshine Pictures Private Limited and Eros International Media Limited v Central Circuit Cine Association, Indore* 2012 SCC OnLine CCI 9; *Mrs. Manju Tharad v Eastern India Motion Picture Association (EIMPA), Kolkata* [2012] CCI Case No. 17 of 2011; *Mr. Sajjan Khaitan v Eastern India Motion Picture Association* 2012 SCC OnLine CCI 28; *M/s Cinergy Independent Film Services Pvt. Ltd. v Telangana Telugu Film Distribution Association* [2013] CCI Case No. 56 of 2011; *M/s Peeveear Medical Agencies, Kerala v All India Organization of Chemists and Druggists* 2013 SCC OnLine CCI 147; *M/s Sandhya Drug Agency v Assam*

violations of a similar nature in a particular range of time leading to investigations around similar periods of time. Therefore, if the Commission has already penalized for a particular anti-competitive practice, it will not do so again for a violation of a similar nature in the same period of time. These are not cases of recidivism but of parallel violations. The Commission has chosen to not read such situations as different violations but as one common violation. The Commission has erred in a few situations though. In *Gulshan Verma,*[81] the CCI mistook two violations in the same time period having different subject matter as one common violation and chose not to impose a penalty on account of the previous sanction. The Competition Appellate Tribunal later set aside the order as the CCI had also relied on evidences from the previous case.

iv. *Lack of awareness and small size of the players*

Lack of awareness and small size of the defendants has been taken as a reason to reduce or exempt the parties from being penalized.[82] In *Sheth & Co.,*[83] the Commission noted that the defendants were small scale units and therefore, reduced the quantum of penalty. In *Dry Cell Batteries case,*[84] the Commission held that Geep Industries (India) Private Limited was only a dealer of the product with insignificant market share and no negotiating power, while Panasonic was *"in a position to dictate the terms of the anti-competitive agreement to it"*. In light of this, the Commission imposed a penalty at the rate 4% of the turnover for each year of the continuance of the cartel on Geep Industries (India) Private Limited.

v. *Small size of the bid/tender*

Small public procurements are not unimportant. *"The contravention of the competition law cannot be considered non-serious only because the amount of the bid was small. The size of*

Drug Dealers Association 2013 SCC OnLine CCI 84; *The Belgaum District Chemists and Druggists Association v Abbott India Ltd.* 2017 SCC OnLine CCI 20.

[81]*Shri Gulshan Verma v Union of India, through Secretary, Ministry of Health and Family Welfare* 2012 SCC OnLine CCI 30.

[82]*In Re: Shri B P Khare, Principal Chief Engineer, South Eastern Railway* 2013 SCC OnLine CCI 21; *Shri Vipul v All India Film Employee Confederation* 2017 SCC OnLine CCI 53.

[83]*In Re: M/s Sheth and Co.* 2015 SCC OnLine CCI 93.

[84]*In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India* 2018 SCC OnLine CCI 81; *Anticompetitive conduct in the Dry-Cell Batteries Market in India* (n 38).

tender in itself is not a decisive factor for taking a lenient view".[85] The CCI has, however, considered the size of the bid as a factor in many cases related to bid rigging.[86]

vi. *Peculiar or weak position of the sector/industry*

The CCI has been mindful of the fact that certain sectors are in distress. Therefore, even though that in itself does not justify cartelization, the Commission has taken a lenient view while imposing penalties. The CCI for instance in *Indian Sugar Mills*, appreciated the fact that jute industry was going through a rough financial phase and therefore needed support. In light of this, a reduced penalty *"at the rate of 5% of the average turnover of the last three years"* was imposed on Indian Jute Mills Association and Gunny Trade Association.[87] The CCI in the *Insurance matter*, considered the *"peculiarities of the insurance sector"* including the *"importance of insurer's solvency for the consumers as a mitigating circumstance"*.[88] Similar stance was taken by the CCI in the aviation sector.[89] The weak economic position of the enterprise as a mitigating factor, however, is a bit contentious. The European Commission has maintained that to treat weak economic condition of the enterprises as a mitigating factor would be akin to *"conferring an unjustified competitive advantage on an undertaking."*[90] Recently, the CCI in the *Composite Brake Block*,[91] bid rigging cartel case refrained from imposing penalty on account of mitigating factors like small size of the cartelists and the effect of COVID-19 on the prevailing market conditions. Even though the Commission concluded that a cartel existed and operated for eight years, not even a token penalty was imposed. Such lenient treatment sets a wrong precedent for future cases.

[85]*In Re: Alleged cartelization in the matter of supply of spares to Diesel Loco Modernization Works, Indian Railways, Patiala, Punjab* 2014 SCC OnLine CCI 16.

[86]*In Re: M/s Bio-Med Private Limited* (n 47); *In Re: Shri B P Khare, Principal Chief Engineer, South Eastern Railway* (n 82); *In Re: M/s Sheth* (n 83).

[87]*Indian Sugar Mills Association v Indian Jute Mills Association & Gunny Trade Association (GTA)* 2014 SCC OnLine CCI 141.

[88]*In Re: Cartelization by public sector insurance companies in rigging the bids submitted in response to the tenders floated by the Government of Kerala for selecting insurance service provider for Rashtriya Swasthya Bima Yojna* (n 41).

[89]*In Re: Express Industry Council of India* (n 48).

[90]*Carbonless Paper* (Case COMP/E-1/36.212) Commission Decision [2004] OJL 115/1; Joined Case 96/82 and others *NV IAZ International Belgium v Commission of the European Communities* (n 30).

[91]*In Re: Chief Materials Manager, South Eastern Railway* (n 78).

vii. *Co-operation and compliance*

The CCI tends to treat defendants lightly when they cooperate in the proceedings.[92] In *Western Coalfields,*[93] the CCI considered the cooperation by the defendants during the proceedings as a mitigating circumstance. With respect to competition compliance programmes, the CCI only tends to treat it as a mitigating factor if they were undertaken before the investigation began.[94] There is a certain divergence of opinion on whether effective compliance programme,[95] can be used a mitigating circumstance or is it just a 'natural obligation of all firms',[96] geared towards their own self-interest. For instance, the Fining Guidelines do not consider effective compliance programme as a mitigating factor while calculating fine. It is considered that the effectiveness of the compliance programme would have been the prevention of anti-competitive behaviour since the company is always in the best position to do that. The Sentencing Guidelines,[97] on the other hand, is not in favour of penalizing the corporation when certain employees or officers indulge in cartelization despite the corporation taking all the effort for competition law compliance.[98] The principle of 'good faith' underlines the use of compliance programme as a mitigating factor. This means, it has to be shown by the defendant that it diligently enforced the programme and took all actions in good faith and with the intent of complying with competition law.[99] Further, the benefit will not be advanced if a senior executive were involved or if the

[92]*Shri P.V. Basheer Ahamed v M/s Film Distributors Association, Kerala* [2014] CCI Case No. 32 of 2013.

[93]*Western Coalfields Limited v SSV Coal Carriers Private Limited* 2017 SCC OnLine CCI 45.

[94]*Director, Supplies & Disposals, Haryana v Shree Cement Limited* (n 75).

[95]T. Banks and N. Jalabert-Doury, 'Competition Law Compliance Programs and Government Support or Indifference' (2012) 2 Concurrences, Mayer Brown <https://www.mayerbrown.com/en/perspectives-events/publications/2012/05/competition-law-compliance-programs-and-government> accessed 31 March 2020.

[96]J. Murphyand and N. Jalabert-Doury, 'Cartel Prevention and Compliance Regimes: It is time for a smarter Approach' (2013) 82 Business Compliance 03-04 <https://www.mayerbrown.com/-/media/files/news/2013/03/cartel-prevention-and-compliance-regimes-it-is-tim/files/cartel-prevention-and-compliance-regimes/fileattachment/cartel-prevention.pdf> accessed 30 September 2020.

[97]United States Sentencing Guidelines S8C2.5(f) (1-3). Presence of effective compliance program allows reduction of three points from the culpability score. However, in case the company "unnecessarily delays" the reporting of the infringement or "or under specified instances in which high-level or substantial authority personnel participated in, condoned, or were willfully ignorant of the offense".

[98]Douglas H. Ginsburg and Joshua D. Wright, 'Antitrust Sanctions' (2010) 6(2) Competition Policy International 3-39.

[99]*United States v International Paper Co.* [1978] 457 F. Supp. 571 **(**S.D. Tex.).

company took no steps when it got to know about the violation or there was an inordinate delay in reporting the violation. There is a growing trend in favour of using the effective compliance programme as a mitigating factor.[100]

viii. *Peculiarities of the tender*

In cases related to bid rigging, the CCI has sometimes attributed a given conduct of the parties on account of the peculiar terms and conditions of the bids.[101] A tender design that created entry barriers and made collusion amongst the bidders conducive will be taken note of by the Commission.[102] Factors like *"nature of the product procured, total volume of tender, involvement of small scale units, irregular requirement of product, single source of raw material, and revenues generated from the product under consideration",*[103] are considered by the CCI when quantifying penalty.

ix. *Succumbed to pressure of the leader*[104]

It is interesting to note that while the Commission does not generally identify ringleaders in the cartel to penalize them at a higher rate in comparison to others, it has used 'undue influence' as a mitigating factor. Instead of focusing on the coercer, it has given benefit to the coerced entities. In *Kerala Film Exhibitors Federation*,[105] the CCI reduced the penalty for Film Distributors Association (Kerala) as it acted under the pressure of KFEF. KFEF on the other hand, was only penalized at the rate of 7% of average receipts which is lesser than the general penalty at the rate of 10%. In *TG Vinay Kumar*,[106] even though it was noted that FEFKA Director's Union and FEFKA Production Executive's Union followed the diktats of Film Employees Federation of Kerala, they were penalized at the same rate as that of the coercing entity. Acknowledgment of the mitigating factor on account of being 'coerced' did not result in the actual reduction of penalty when compared to that of the 'coercer'. Resultant

[100]Courts in countries like UK, Brazil, Chile, Malaysia, Singapore have used this a factor to reduce fines.

[101]*Director, Supplies & Disposals, Haryana v Shree Cement Limited* (n 75).

[102]*Delhi Jal Board v Grasim Industries Ltd.* (n 44).

[103]*In Re: M/s Sheth* (n 83) [45].

[104]The European Commission treats 'passive role' as a mitigating factor but the threshold to get the benefit under this is a bit onerous. The party claiming this mitigating factor must be able to prove that it was merely a "follower" of the leader in the cartel and it did not participate in any of the meetings.

[105]*In Re: Kerala Cine Exhibitors Association* 2015 SCC OnLine CCI 98.

[106]*Shri T. G. Vinayakumar v Association of Malayalam Movie Artists* (n 53).

penalty for FEFKA Director's Union was, in fact, more than Film Employees Federation of Kerala.

Another anomaly was seen in the *Dry Cell matter*.[107] The Commission acknowledged the fact that Panasonic, "*being the manufacturer of dry-cell batteries and supplier of Geep, was in the position to influence and dictate the terms of the anti-competitive agreement to Geep, and Geep being a very small player having insignificant market share in the market for dry-cell batteries was not in a bargaining or negotiating position vis-a-vis Panasonic."* Ideally, therefore, Geep should have been penalized lesser than Panasonic. However, since the CCI does not make a distinction between cartel leaders and others in terms of culpability and application for leniency, Panasonic was able to claim a 100% reduction in penalty while Geep ended up paying more than nine crores in penalty.

x. *Other factors*

Apart from the above-mentioned mitigating circumstances, the Commission has also considered factors like nature of product,[108] and low amount of revenue generated,[109] as mitigating factors. Clearly, the CCI has used a wide variety of mitigating factors as compared to the aggravating factors. The numbers are more than most of the jurisdictions which have laid out a set of fining guidelines. Although, the lists in these guidelines are not exhaustive, a definitive idea of circumstances that affect the quantum of penalty brings in both transparency and consistency.

V. CONCLUSION

The CCI has, without fail, underlined the objective behind the imposition of penalty as deterrence. The quantum of penalty, as per the Commission must correspond to the gravity of offence after taking in to account aggravating and mitigating circumstances. The CCI, unlike other jurisdictions does not start from a minimum (base) fine, which then gets amplified by the use of 'culpability multipliers'. The CCI does not employ any methodology to compute penalty. In all the cases concerning trade associations, no penalty has been imposed on individual participants and despite the presence of aggravating factors, the penalty has been imposed at a fixed percentage of average receipts. It seems that the Commission finds itself in a difficult position every time it has to impose penalties on trade associations. Since the

[107] *In Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India* (n 84).

[108] *In Re: M/s Sheth* (n 83).

[109] *In Re: M/s Bio-Med Private Limited* (n 47).

penalty cannot exceed beyond the prescribed limit under Section 27(b), the penalties that have been imposed on trade associations are grossly inadequate. The Commission unlike its counterpart in the US or the EU, has not explored the possibility of imposing penalty on the basis of turnover of individual members and then putting the onus on the association to collect the penalty from the members.[110] Imposition of the fine at a flat rate of 10% meant that Commission could not exceed the percentage even in cases where there were one or more aggravating factors.[111] There are also cases wherein despite the non-existence of mitigating factors, the Commission did not impose a penalty at the rate of 10%.[112] Departure from the norm created by the Commission itself has not been explained. This gets even more problematic when the existence of aggravating factors has not yielded in fines up to a mark fixed by the Commission itself.[113] Similar issue exists with respect to mitigating factors. It has not been made clear as to what factor will be counted as a mitigating factor and to what degree will it have an impact on the calculation of the penalty. It is therefore not surprising that the list of mitigating factors consists of a whole range of factors as indicated in the earlier part of the article.

In other cases, while the quantum of penalty itself has oscillated between 0.3% (*Shree cement*[114]*)* to 10% of average of turnover in the preceding three years (*Pune Municipal Corporation*[115]*),* the application of aggravating and mitigating factors has not been consistent. The Commission has neither provided any reason behind imposition of penalty nor used any structured methodology to compute penalty by taking into account the various aggravating and mitigating factors. Therefore, similar factual scenarios have yielded different results.[116]

[110]*In Re: Express Industry Council of India* (n 48).

[111]*M/s Santuka Associates Pvt. Ltd. v All India Organization of Chemists and Druggists* (n 50); *M/s Arora Medical Hall, Ferozepur v Chemists and Druggists Association* (n 45); *Reliance Agency v Chemists and Druggists Association of Baroda (CDAB)* [2018] CCI Case No. 97 of 2013; *In Re: Bengal Chemist and Druggist Association* (n 52).

[112]*M/s Cinemax India Limited (now known as M/s PVR Ltd.) v M/s Film Distributors Association (Kerala)* [2014] CCI Case No. 62 of 2012; *M/s Swastik Stevedores Private Limited v M/s Dumper Owner's Association* 2015 SCC OnLine CCI 13.

[113]*Macleods Pharmaceutical* (n 56).

[114]*Director, Supplies & Disposals, Haryana v Shree Cement Limited & Ors.* (n 75).

[115]*Nagrik Chetna Manch v Fortified Security Solutions* (n 36).

[116]For instance, while the penalty in *In Re: M/s Sheth* (n 83) with six mitigating factors was calculated as 3% of average turnover, penalty at the rate of 0.3% of average turnover was imposed in *Director, Supplies and Disposals, Haryana v Shree Cement Limited* (n 75) which had lesser number of mitigating factors and higher

Needless to say, that had the Commission provided reason to reach to a particular percentage, it would have been more transparent and transparency would have led to consistency.

Ideally, the set of aggravating and mitigating factors should have an effect on the imposition of penalty. One of the ways to go about it is to set the degree of influence these factors will have on the computation of fine. Therefore, a case with aggravating factors must show a greater penalty when compared with cases involving no aggravating factors. Further, a case with a greater number of aggravating factors must reach to a higher quantum of penalty when compared with cases with a lesser number of aggravating factors. The same goes with mitigating factors as well. The imposition of a penalty without consideration of these factors, will lead to a situation where every case of cartelization will be dealt similarly causing a serious dent to the overall deterrence value of such imposition of penalty.

A penalty regime without a reference scale is like shooting in the dark. The Commission has rarely given reasons as to why a particular penalty, whether in term of a certain percentage of turnover or in terms of profit for the duration of cartel or as lump sum amount was imposed. The vague, arbitrary and inconsistent criteria to fix penalties have made the entire system appear '*like a lottery'*.[117] Many jurisdictions of the world today have recognized the issues related to cartel sanctions and in the pursuit of optimal fine have framed penalty guidelines to impose fines taking into account various factors which have been outlined throughout this article. These guidelines have ensured both fairness and transparency in the imposition of fine enabling it to withstand the scrutiny of appellate forums. The Competition Law Review Committee Report,[118] has also recommended that the CCI should come up with a penalty guideline. It is hoped that the CCI comes out with penalty guidelines in order to "*reduce discretion and increase certainty for stakeholders*".[119]

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number of aggravating factors. In *A Foundation for Common Cause and People Awareness v PES Installations Pvt. Ltd.* [2012] CCI Case No. 43/2010 penalty was imposed at the rate of 5% when compared with *In Re: Aluminium Phosphide Tablets Manufacturers* [2012] CCI Suo Moto Case No. 02 of 2011, where penalty was imposed at a rate of 9% despite the fact that PES had one aggravating factor. Other examples are cases of *Delhi Jal Board v Grasim Industries Ltd.* (n 44) and the *LPG cartel (In Re: Suo Moto Case against LPG cylinder manufacturers* [2014] CCI Suo Moto Case No. 03 of 2011. In the *LPG cartel*, absence of any aggravating or mitigating factor led to imposition of fine at the rate of 7% while in the *Delhi Jal Board*, presence of four aggravating factors led to a fine being imposed only at the rate of 8% of average turnover.

[117]I. Van Bael, 'The Lottery of EU Competition Law' (1995) 4 ECLR 237.

[118]'*Report of the Competition Law Review Committee*' (Ministry of Corporate Affairs, July 2019).

[119]ibid 84.

TWO DECADES OF THE COMPETITION ACT

- *MS. CHARANYA LAKSHMIKUMARAN*[*]*, MS. NEELAMBERA SANDEEPAN*[**] *AND MR. SHIKHAR TYAGI*[***]

ABSTRACT

*In its brief 11-year existence, the Competition Commission of India ["**CCI**" or "**Commission**"] has been the sole quasi-judicial/regulatory body tasked with eliminating practices which have an adverse effect on competition, promoting and sustaining competition, protecting the interests of consumers, and ensuring freedom of trade, in markets in India. The CCI performs a two-fold task which includes, first, the regulation of mergers/amalgamations between firms to ensure that market power doesn't get concentrated amongst a few players and, second, the elimination of practices by firms which cause or are likely to cause an appreciable adverse effect on competition ["**AAEC**"].*

*This article will examine the constitution of the CCI as a statutory body and its jurisdiction to regulate anti-competitive practices by firms in India. Further, this article will encompass the jurisdiction of the appellate tribunal, and the scope of the jurisdiction of the office of the Director General of the CCI ["**DG**"] to investigate anti-competitive practices. Lastly, the authors discuss the changes that are planning to be introduced by the Competition (Amendment) Bill, 2020, to the existing competition law regime in India.*

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I. DAWN OF COMPETITION LAW IN INDIA

In the initial years of India's independence, as early as the start of the first five-year plan in 1951, the broad objective of India's industrialization policy was to protect the developing domestic industries. Enacted in 1969, the Monopolies and Restrictive Trade Practices Act ["**MRTP Act**"] established the MRTP Commission ["**MRTPC**"], a quasi-judicial body which was entrusted with the function of breaking up or controlling monopolies and ensuring that India's economic policy did not result in the concentration of economic power in the hands of the few. Provisions of the MRTP Act were in line with the 'License Raj' approach of government policy of the time, which focused on creating a business environment where virtually all elements of economic activity were subject to government intervention and control. In the 1990s however, the rapid changes in the business environment as well as the adoption of liberalization measures which facilitated a free market economy with emphasis on international competitiveness called for amendments to the law in India. Thus, the need was felt to shift the focus from curbing monopolies to promoting competition. Accordingly, the government decided to appoint a committee to examine this range of issues and propose a modern competition law framework suitable for the evolving economy.

It has been two decades since the Raghavan Committee ["**Committee**"] submitted its report recommending the need to overhaul India's rigidly structured MRTP Act. In its report, submitted in May 2000,[1] the Committee proposed a modern competition law framework, which emphasized distinguishing between competition policy and competition law, to facilitate fair competition between businesses and protect the market from any distortion while also protecting the interests of the consumers. The proposed new law would focus on three activities,[2] which would form the contours of competition law akin to mature jurisdictions of the world, namely –

i. Anti-competitive agreements – Amongst competitors or between firms in buying/selling relationships with the likelihood of restricting competition.

ii. Abuse of Dominance – Dominant firms abusing the position of strength they wield in the market that allows them to operate independently of competitive pressure through practices like restriction of quantities, markets, and technical developments.

[1] 'Report of the High Level Committee on Competition Policy and Law' (Government of India, May 2000).

[2] 'Report of the High Level Committee on Competition Policy and Law' (Government of India, May 2000).

iii. Mergers and acquisitions – Regulation of mergers and acquisitions amongst enterprises if they reduce or harm competition.[3]

II. EARLY DAYS OF COMPETITION LAW IN INDIA (2000-2007)

Based on the recommendations made by the Committee and with the inputs of the international antitrust community while taking into account India's prevalent legal and regulatory framework and market conditions, the Competition Act, 2002 ["**Act**"] was enacted by the legislature in January, 2003. The Act established the Commission as the successor to the MRTPC, however, constitutional challenges to the Act and the Rules made thereunder meant that various provisions of the Act remained unnotified and the CCI was constituted with only one permanent member.

The first such challenge was before the Supreme Court of India in the case of *Brahm Dutt v. Union of India*,[4] where the writ petition prayed for the following – (i) striking down Rule 3 of the Competition Commission of India (Selection of Chairperson and Other Members of the Commission) Rules, 2003 ["**Selection Rules**"]; and (ii) direct the Central Government to appoint a former Chief Justice of a High Court or a former senior judge of a High Court to the post of Chairperson of the CCI in terms of the decision of the Supreme Court in *S. P. Sampath Kumar v. Union of India*.[5] Rule 3 of the Selection Rules requires the Central Government to constitute a Committee for selecting the Chairperson and other members of the CCI.[6] In accordance with the provisions of Rule 3 of the Selection Rules, the Committee was constituted by the Central Government and subsequently, a Chairperson and a member were appointed to the CCI. The member took charge of office immediately after being appointed but the appointment of the Chairperson was challenged before the Supreme Court, since the person selected for the position did not belong to a judicial background. The challenge to the appointment of the Chairperson and the Selection Rules was based on the doctrine of separation of powers, since the Act envisaged that the Commission would function as a judicial body with adjudicatory powers, the Chairperson had to necessarily be a

[3]However, at the time of submitting its report, the Committee considered that very few companies were of "international size" and in light of the liberalisation of the economy, only mergers beyond a certain threshold limit in terms of assets would require a "pre-notification".

[4]*Brahm Dutt v Union of India* (2005) 2 SCC 431.

[5]*S.P. Sampath Kumar v Union of India* (1987) 1 SCC 124.

[6]Rule 3, Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules 2003.

person formerly belonging to the judiciary and appointed by either the Chief Justice of India or his nominee. During the pendency of the proceedings, the Union of India submitted that it proposed to introduce amendments to the Act, which would have a clear bearing on the question of separation of powers raised in the present proceedings. Therefore, the Supreme Court dismissed the petition, with the recommendation that if the Central Government sought to create an expert body, it would be appropriate to consider the creation of two separate bodies – (i) one with the expertise to perform advisory and regulatory functions; and (ii) the other which performs the role of an adjudicatory body. The amendments proposed by the Central Government, seeking to make the CCI operational, were introduced in the form of the Competition (Amendment) Bill, 2006, which proposed significant amendments to the Act. The Competition (Amendment) Bill, 2006, was approved by both houses of the parliament and enacted in the form of the Competition (Amendment) Act, 2007 ["**2007 Amendment**"],[7]–

i. The statement of objects and purposes specified that the CCI, which was originally proposed to function as a judicial body, would now act as an expert body with the objective of preventing and regulating anti-competitive practices, as well as acting in an advisory capacity to the Central Government in framing the competition policy.

ii. The statement of objects and purposes also prospectively resolved a future administrative challenge on the absorption of the employees of the MRTPC. The CCI and the COMPAT were responsible for absorbing these employees within a period of two years.

iii. Inserted Sub-Section (ba) to Section 2 and Section 53A, establishing the Competition Appellate Tribunal [**"COMPAT"**] which was empowered to entertain appeals from certain orders or decisions of the CCI.

III. COMPOSITION AND THE NATURE OF FUNCTIONS PERFORMED BY THE CCI

By way of the 2007 Amendment, the Central Government resolved the challenges raised in the *Brahm Dutt* case and paved the way for the notification of all the sections of the Act and the commencement of operations by the CCI. Consequently, Section 3 and Section 4 of the Act were notified, and the Commission commenced operations in May 2009 with Mr. Dhanendra Kumar, a civil servant and former executive director at the World Bank, as its first Chairperson.

[7]The Competition (Amendment) Act 2007 (Act 39 of 2007).

The first big test for the CCI came in the form of a constitutional challenge to the procedure for inquiry prescribed under the Act. Section 26 of the Act lays down the procedure for inquiry into matters initiated by an information,[8] filed before the Commission, for allegations of anti-competitive conduct of enterprises.[9] In the landmark case of *Competition Commission of India v. Steel Authority of India Ltd. & Anr.*,[10] the Supreme Court examined the following – (i) the factors distinguishing the nature of proceedings and the orders passed by the CCI under Section 26(1) and Section 26(2) of the Act; (ii) the power granted to the CCI to pass interim orders under Section 33 of the Act; (iii) the jurisdiction of the appellate tribunal under Section 53A of the Act; and (iv) the right of the Commission to be impleaded as a party in appellate proceedings before COMPAT. With respect to the nature of orders passed by the CCI under Section 26(1) of the Act, the Supreme Court held them to be inquisitorial and regulatory in nature, i.e., it is an administrative power and not an adjudicatory power exercised by the CCI. An order passed by the CCI under Section 26(1) only directs the DG to investigate and collect information/data and it does not involve any determination of guilt or innocence of the opposing party. This was in contrast to an order passed by the CCI under Section 26(2) or Section 27 of the Act, which gives a clear determination with regards to the rights and obligations of the parties and subsequently, closes the proceedings. Therefore, the Supreme Court held that the orders of the Commission under Section 26(1) were not appealable and the CCI was not obliged to grant the opposing parties with a notice or a hearing at a stage where it was merely directing the DG to investigate the allegations. However, the Supreme Court observed that, while the Act did not require the CCI to record any detailed reasoning in an order under Section 26(1) of the Act, it was still required to provide minimum reasons to substantiate its decision to form a *prima facie* opinion with respect to a violation under the Act. While examining the nature of powers granted to the CCI for passing interim orders under Section 33 of the Act, the Supreme Court observed that Section 33 empowered the Commission to issue interim orders only in rare situations wherein

[8]Section 19, The Competition Act 2002 (Act 12 of 2003).

[9]Based on the information received by the CCI under Section 19 of the Act, CCI must form a *prima facie* view whether there exists a case for further investigation or not. If CCI decides that a case exists for further investigation, it must issue a direction under Section 26(1) of the Act, directing the DG to investigate into the matter. However, if the CCI comes to the conclusion that no *prima facie* case is made out, it passes an order under Section 26(2) of the Act for closing the matter.

[10]*Competition Commission of India v Steel Authority of India Ltd.* (2010) 10 SCC 744.

it was required to stop a party from carrying on any such act which was clearly in contravention of the Act. The application of such interim orders is limited to the period till the end of the inquiry and must necessarily be supported by the CCI's reasoning.

With respect to the appellate jurisdiction of the COMPAT under Section 53-A of the Act, the Supreme Court held that, Section 53-A only permitted appeals against certain orders expressly listed in the provision and that the COMPAT could not imply that it had jurisdiction to entertain appeals against orders not listed under Section 53-A, as the same had been consciously omitted by the legislature. This was in line with the legal maxim *Expressum Facit Cessare Tacitum*, which states that "what is expressed makes what is implied silent", i.e., the implied meaning need not be adopted when a clear meaning is expressly provided in a statute or a contract.

Finally, after examining the provisions of the Act, along with the rules framed thereunder,[11] the principles of a necessary and a proper party established under Order 1 Rule 10 of the Civil Procedure Code ["**CPC**"], and the common law principle of *audi alteram partem*, the Supreme Court determined that COMPAT should hear all parties before passing any order adverse to their interest. The CCI as a party to proceedings before the COMPAT would help in the expeditious disposal of cases and in any event, the Commission is entitled as an expert body to participate in such proceedings. Accordingly, the Supreme Court held that, the CCI would be considered a necessary party in any appeals filed before the appellate tribunal in cases where proceedings were initiated by the Commission in exercise of its *suo motu* powers, and a proper party in all other cases.

More recently, the Delhi High Court ["**DHC**"] examined the nature of the functions performed by the CCI and answered questions related to the doctrine of separation of powers in the functioning of the CCI. In *Mahindra Electric Mobility Ltd. & Anr. v. Competition*

[11]In this case, the Court relied on the following provisions – Section 53-B (procedure for entertaining appeals filed before the appellate tribunal); Section 53-T (right of the Central Government, State Government, the Commission, any statutory authority, or any person or enterprise aggrieved by an order of the appellate tribunal to file an appeal before the Supreme Court); Section 19 read with Section 26 (right of the Commission to initiate proceedings suo motu and adopt its own procedure for completing such proceedings); and Regulation 14 and 51 of the Competition Commission of India (General) Regulations, 2009 (right of commission to sue or be sued, including in appeals before the appellate tribunal, and empanelment of special counsels by CCI to assist in proceedings before the appellate tribunal).

Commission of India & Anr.,[12] while determining the nature of the CCI's function, the DHC observed that the initial steps that the CCI takes after receiving an information under Section 19 of the Act are meant to discern whether an investigation and further steps towards adjudication are necessary or not. This initial determination of the need for an investigation is very different from courts/tribunals which are bound to adjudicate upon the dispute presented before it by a litigator. The issuance of notice or summons by the court in exercise of its jurisdiction is a judicial act however the initial stage at which the CCI entertains and directs the DG to conduct an inquiry is merely an administrative function. The DHC took note of the varied specific functions performed by the Commission and relied *inter alia* on the observations made by the Supreme Court in *Steel Authority of India Ltd.* case to conclude that, in addition to its adjudicatory functions, the CCI also performed other functions of a varied nature such as advisory, investigative, administrative, and advocacy. Therefore, the DHC held that the Commission does not exclusively perform adjudicatory functions to be called a tribunal but that did not mean that the orders of the CCI are any less than decisions of a quasi-judicial body.

The DHC also examined whether the composition and the manner of selection of the members of the Commission violated the doctrine of separation of powers by handing judicial powers to an executive body that did not have any members belonging to the judiciary. Based on its deliberation,[13] the DHC concluded that the test to be considered was whether the body in question takes over the essential function of adjudication without being empowered by the statute to do so effectively. However, since the Commission did not solely perform adjudicatory functions, it was not required to be subjected to this test. Though the DHC did note that, the orders passed by the CCI under Section 26(2) and Section 27 of the Act, were quasi-judicial in nature and therefore required adherence to fair procedure and accepted legal principals. Accordingly, it held that whenever adjudicatory orders are made by the CCI (especially final orders), the presence and participation of a judicial member is necessary. Since, no judicial member was appointed to the Commission at the time, the DHC

[12]*Mahindra Electric Mobility Ltd. v Competition Commission of India* 2019 SCC OnLine Del 8032. The matter is currently pending before the Hon'ble Supreme Court in appeal.

[13]The DHC relied upon the recommendations made in the Raghavan Committee report; provisions of Section 8 (composition of commission and selection committee for chairperson) and Section 9 of the Act (members of the commission); the previous decision of the Supreme Court in Brahm Dutt and SAIL; and other leading judgements of the Supreme Court on the doctrine of separation of powers.

directed the Central Government to take expeditious steps to fill the existing vacancy of the CCI within a period of 6 months.

The DHC's decision in the *Mahindra* case gave rise to uncertainty regarding the validity of adjudicatory orders passed by the Commission, in the intervening period until a suitable judicial member was appointed. This issue was resolved by the DHC in *CADD Systems and Services Ltd v. Competition Commission of India,*[14] wherein it was held that, it could not be accepted that through its previous decision in *Mahindra*, the DHC had interdicted the proceedings of the CCI pending the appointment of a judicial member. Further, in accordance with Section 15 of the Act,[15] orders passed by the CCI in the pendency of the appointment could also not be called into question solely on account of the vacancy.

A consolidated reading of the judgments in *Steel Authority of India Ltd., Mahindra and CADD Systems*, establishes the following – (i) the CCI is a quasi-judicial body performing a myriad range of functions including those of advisory, investigative, administrative and advocacy; (ii) the orders passed by the Commission under Section 26(1) of the Act are administrative orders involving no determination of rights of a party and therefore, no appeal lies against the same, and finally; (iii) the CCI must mandatorily have a judicial member present at the time of passing an adjudicatory order under Sections 26(2), 26(6), 26(7) and 27 of the Act, however, vacancy for the post of judicial member would not interdict functioning of the Commission while a suitable candidate is selected and appointed.

IV. PROCEEDINGS BEFORE THE CCI

A. Casting vote by the Chairperson

The DHC also considered other issues in the *Mahindra* case concerning the decision-making process adopted by the members of the CCI. One such issue was the power granted to the Chairperson or the presiding member at the meeting to have a second or a casting vote in case of an equality of votes under Section 22(3) of the Act. The DHC held Section 22(3) to be void as it compromised the collegiality by allowing the Chairperson to cast a second vote to swing the decision in their favour. While Section 22(3) of the Act was struck down as void,

[14] *CADD Systems and Services Ltd. v Competition Commission of India* 2019 SCC OnLine Del 9252.

[15] Section 15, The Competition Act 2002 (Act 12 of 2003).

the validity of the proviso to Section 22(3), which requires that a minimum quorum of 3 members be present for taking any decisions was upheld.

B. Revolving door

Another issue examined by the DHC was the issue of revolving door at the meetings of the CCI. In the *Mahindra* case as well as other notable cases such as the *Cement Manufacturers Association v. The Secretary, CCI & Ors.*,[16] commonly known as the Cement Cartel case, it was alleged by the parties that there was no consistency in the composition of the bench hearing a case and it varied from one hearing to another. Further, certain orders passed by the CCI were signed by members who were not part of the final hearing, and such revolving door mechanism gave rise to the possibility of an abuse of the Act. The DHC relied upon past decisions of the Supreme Court,[17] to hold that a mere possibility of abuse of a statute does not *per se* invalidate the statute and the same would depend on a case-to-case basis. However, the DHC also directed the Commission to frame guidelines ensuring that the principle of "one who hears decides" is embodied in letter and spirit in its functioning. Further, it instructed the CCI that in all final hearings, the quorum should preferably set at either seven or at least, five members. Additionally, there should be no variance in the members constituting the quorum for the hearings in a given case.

C. Scope of the DG's investigation

The last issue considered by the DHC in the *Mahindra* case related to the power of the DG to expand the scope of an investigation. The initial information filed before the CCI was only related to three Original Equipment Manufacturers' ["**OEMs**"], but the DG obtained permission from the CCI to expand the scope of its investigation to 14 OEMs and the division bench held that under Section 26(1) of the Act, the Commission and the DG had the power to expand the scope of the investigation to cover not only conduct that is explicitly alleged in the information but other allied and related conducts as well. This issue had been deliberated upon by a set of past proceedings before the DHC, the first of which was *Grasim Industries v. Competition Commission of India*,[18] wherein a single judge of the DHC held that if the investigation by the DG is based upon information which was not considered by the CCI

[16] *Cement Manufacturers Association v The Secretary, CCI* 2012 SCC OnLine Comp AT 267.

[17] *State of Rajasthan v Union of India* (1977) 3 SCC 592; *Sushil Kumar Sharma v Union of India* (2005) 6 SCC 281.

[18] *Grasim Industries v Competition Commission of India* 2017 SCC OnLine Del 10434.

while forming the *prima facie* opinion, the DG's action would be contrary to the scheme of the Act. The issue came up for consideration once more in *Cadila Healthcare Ltd. & Anr. v. Competition Commission of India &Ors.*,[19] wherein it was contended that, the investigation by the DG and the subsequent report submitted to the Commission were invalid since the petitioner was not named in the information filed, or the *prima facie* order for investigation issued by the CCI. Further, no separate *prima facie* order was against the petitioner as well. Therefore, the DG had proceeded with the investigation against the petitioner without being authorized to do so by the CCI and thus, the Commission's order directing further investigation was required to be recalled. The writ petition was initially filed before a single judge of the DHC, challenging the inclusion of the petitioner in the investigation by the DG, despite there not being any information or *prima facie* opinion recorded against it. The petitioner sought to rely upon the *Grasim Industries* case, however, this was rejected by the single judge of the DHC, on the ground that the CCI would be entitled to treat the part of the DG report as 'information' in line with Section 19 of the Act and proceed to order investigation if the Commission was convinced that there existed a *prima facie* case of contravention.

Subsequently, the dismissal of the writ petition was challenged before a division bench of the DHC, which placed reliance on the judgment of the Supreme Court in the case of *Excel Crop Care Ltd. v. Competition Commission of India.*[20] In the *Excel Crop* case, the Supreme Court examined *inter alia* the question regarding the jurisdiction of the DG to investigate and evaluate acts that took place after the information was filed and held that, *"if other facts also get revealed and are brought to light, revealing that the 'persons' or 'enterprises' had entered into an agreement that is prohibited by Section 3 which had appreciable adverse effect on the competition, the DG would be well within his powers to include those as well in his report. If the investigation process is to be restricted in the manner projected by the Appellants, it would defeat the very purpose of the Act which is to prevent practices having appreciable adverse effect on the competition."*

At the preliminary stage when an information has just been filed, the CCI may not have all the information pertaining to the alleged anti-competitive conduct. The investigation carried out by the DG is meant to gather all the pertinent information that would allow the CCI to

[19]*Cadila Healthcare Ltd. v Competition Commission of India* 2018 SCC OnLine Del 11229.

[20]*Excel Crop Care Ltd. v Competition Commission of India* (2017) 8 SCC 47.

come to a clear understanding of the market and the conduct of the various market participants. In any event, one of the most important factors for the division bench was the open-ended terms of the directions issued to the DG by the Commission to investigate in the *Cadila* case, which were — *"in the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in such contravention".* Therefore, the division bench of the DHC held that, an investigation by the DG in the absence of a *prima facie* order of the CCI against Cadila Healthcare Ltd. was acceptable. Furthermore, the DG's ability to investigate based on a reference made under Section 26(1) of the Act was wide enough and the DG was empowered to investigate any anti-competitive conduct that might come to its attention based on the information filed before it. The order of the Supreme Court in the *Excel Crop* case and the judgment of DHC's division bench in the *Cadila* case led to a subsequent overturning of the order of the single judge in the *Grasim* case before a division bench of the DHC.[21] The division bench observed that an order of the CCI under Section 26(1) of the Act 'triggers' an investigation by the DG and the powers of the DG are not necessarily limited to examine only such matters that formed a part of the original complaint. These judicial precedents have led to a proposed change in the law. Last year, in February 2020, the Competition Commission of India (General) Amendment Regulation, 2020, was enacted to modify Regulation 20 of the Competition Commission of India (General) Regulations, 2009 ["**General Regulations**"]. Regulation 20(4) of the General Regulations delineates the scope of the DG's investigation report and by the latest amendment, it has been modified to remove any limitations upon the DG to examine only such matters that form the subject matter of the original information or the reference made to the CCI by the DG. Therefore, after this recent modification to Regulation 20, the scope of the investigation which the DG can conduct is, seemingly, almost limitless.

D. <u>The right to cross-examine</u>

In the *Cadila case,* the petitioners had filed an application before the CCI for cross-examination of a key witness who had deposed before the DG. The Commission dismissed the application simply because it was not satisfied with the grounds made out in the

[21] *Competition Commission of India v Grasim Industries* 2019 SCC OnLine Del 10017.

application.[22] The division bench held that, although the CCI has the discretion to accept or reject the plea for cross-examination under Regulation 41(5) of the General Regulations, the reason given by the Commission for rejecting Cadila Healthcare Ltd.'s request could not possibly imply a judicious exercise of discretion and therefore, the dismissal was erroneous. Recently, in *MAHYCO Monsanto Biotech (India) Pvt. Ltd. v. Competition Commission of India & Ors.*,[23] the DHC entertained a writ petition challenging an order of the CCI. The said order rejected Monsanto's application for cross-examination of 40 witnesses who had deposed before the DG but allowed for Monsanto to cross examine 23 other witnesses. The petition was dismissed, subsequent to the Commission submitting that, it would not rely on the testimony of the 40 witnesses who had not been cross examined by Monsanto and the same would be expunged from the record. Further, the DHC observed that it would always be open for a party to raise a grievance before the CCI regarding the procedure adopted by it in its decision-making process. Therefore, the DHC left it open for Monsanto to raise any issues it might have concerning the cross examination of the remaining 23 witnesses before the Commission.

E. Jurisdiction of the DG to investigate conduct prior to the enactment of provisions of the Act

In *Kingfisher Airlines v. Competition Commission of India,*[24] a division bench of the Bombay High Court ["**BHC**"] laid down the test of "continuing effect of past conduct" which states that the provisions of the Act would apply to anti-competitive activities entered into before the Act came into force but continuing and subsisting even afterwards. In the *Excel Crop* case as well, the Supreme Court examined the issue of retrospective jurisdiction of the DG to investigate conduct prior to the CCI commencing operations and before Section 3 and Section 4 were notified. The matter had initially been filed before the MRTPC and was transferred to the Commission upon its commencement. Concerns were raised before the Supreme Court in relation to an anti-competitive agreement entered in relation to a tender of

[22]The CCI had dismissed Cadila's application for cross-examination on two grounds – (i) the application was filed at an extremely late stage and therefore, CCI had no occasion to grant such request; and (ii) the individuals sought to be cross-examined by Cadila were those whose affidavits were not relied upon by the DG during investigation.

[23]*Monsanto Biotech (India) Pvt. Ltd. v Competition Commission of India* 2018 SCC OnLine Del 12991.

[24]*Kingfisher Airlines v Competition Commission of India* 2010 SCC OnLine Bom 2186.

March 2009, before Section 3 was notified. Relying on the test laid down in the *Kingfisher* case, the Supreme Court held that although the tender in question was from March 2009, the anti-competitive agreement in relation to the tender continued for future negotiations and bids in June 2009, 2010 and 2011 and therefore, the effects of the past conduct had continued even after Section 3 was notified and the DG had rightly considered the same in its investigation report.

F. The power to review/recall

The question of whether the CCI has the power to review or recall its orders passed under Section 26(1) of the Act was first considered by the DHC in *Google Inc. & Ors. v. Competition Commission of India & Anr.*[25] It was contended that the investigation had been ordered without affording an opportunity of a hearing and the application for recall of the impugned order was wrongly dismissed by the Commission on the grounds that it did not have the power to do so. The DHC examined Section 36 (power of commission to regulate its own procedure) and Section 37 (which granted the CCI the power to review its own orders prior to being omitted from the Act by the 2007 Amendment) and held that the CCI had the power to recall its order even if the same was no longer expressly provided for in the Act. However, the Commission could take a preliminary view on a complaint and order a probe without hearing the party against whom the complaint has been filed and therefore, no grounds were made for recall of the order simply because the CCI did not grant a hearing before formulating its *prima facie* view. In appeal, the division bench of the DHC, held that the Commission had the power to review or recall its orders irrespective of whether the jurisdiction being exercised to do so was judicial, quasi-judicial or administrative. The CCI orders directing investigation in exercise of its power under Section 26(1) of the Act are capable of being reviewed or recalled even in the absence of any specific provision under the Act. Such an order for review or recall of an order under Section 26(1) is passed in exercise of its administrative power, as Section 36 of the Act empowers the Commission to regulate its own procedure during the discharge of its functions and the CCI does not become *functus officio* after ordering investigation. Further, the deletion of Section 37 of the Act, by the 2007 Amendment could not be taken as a conclusive indication of the legislative intent to divest the CCI of its power to review or recall any of its orders since they would already fall within the ambit of the inherent powers of the Commission. Therefore, the division bench directed

[25] *Google Inc. v Competition Commission of India* 2015 SCC OnLine Del 8992.

the CCI to consider the recall application afresh within a definite time schedule of two months.

The CCI's power to review or recall its orders also came up for consideration in the *Cadila* case. It was contended that the CCI was bound to review its order directing investigation by the DG in light of the decision in *Google*. However, the division bench distinguished the case of *Cadila* from the decision in *Google* on the ground that, the application for recall in *Google* had been filed before the DG submitted its investigation report to the Commission, whereas in *Cadila* the application was filed afterwards.

Hence, after the decisions in *Google* and *Cadila*, it is clear that the CCI has to regulate its own procedure under Section 36 of the Act, which includes the power to review or recall its orders under Section 26(1). The exercise of this power is administrative in nature and is therefore subject to the same threshold of reasoning as other administrative orders of the Commission.

G. Locus for filing information

The most recent jurisdictional shift to the CCI came in the form of the Finance Act of 2017. The Act was amended by the Finance Act, 2017, which merged the COMPAT with the National Companies Appellate Tribunal ["**NCLAT**"] in a move aimed at streamlining the functioning of tribunals. In the brief period since it assumed responsibilities for handling appeals arising from CCI orders, the NCLAT has had to deal with the interesting and very important question concerning *locus standi* for filing information before the Commission. In *Samir Agarwal v. Competition Commission of India & Ors.*,[26] the NCLAT held that any person who files an information before the CCI regarding any anti-competitive conduct ought to be a person who has suffered an invasion of their legal rights as a consumer or as a beneficiary of healthy competitive practices. Since the informant was an independent law-practitioner, who had alleged that cab aggregator platforms viz. Ola and Uber were using their respective pricing algorithms in their respective apps to fix prices charged by their drivers at rates lower than what the drivers would charge on their own, the NCLAT held that the informant did not have any *locus standi* to initiate action under the Act.

This restrictive delineation of *locus standi* for filing an information before the CCI was overturned by the Supreme Court.[27] Based on a reading of the provisions of the Act and the

[26] *Samir Agarwal v Competition Commission of India* 2020 SCC OnLine NCLAT 811.

[27] *Samir Agarwal v Competition Commission of India* 2020 SCC OnLine SC 1024.

General Regulations, the Apex Court observed that, any person may approach the Commission with information pertaining to anti-competitive conduct as the definition of "person" in Section 2(l) of the Act is extremely wide and inclusive. Further, the provisions of Sections 19(1) and 35 of the Act were amended by the 2007 Amendment, substituting the words "receipt of a complaint" with "receipt of any information" in the former, while substituting the expression "complainant or defendant" with "person or enterprise" in the latter. This amendment clearly reflected the legislative intention of emphasizing the inquisitorial nature of the proceedings before the CCI, which are proceedings *in rem* and not an *inter se* dispute between the informant and the opposite party. Further, the Supreme Court noted that, Regulation 10 of the General Regulations does not impose any obligation upon an informant to disclose how they have been personally aggrieved by contraventions of the Act. With this judgment from December 2020, the Supreme Court has clarified that the CCI conducts inquisitorial proceedings in public interest. Therefore, it should be open for any person to approach the Commission with information pertaining to anti-competitive conduct.

V. THE ROAD AHEAD FOR COMPETITION LAW IN INDIA – COMPETITION AMENDMENT BILL, 2020

Although, since its enactment, the Act and the CCI have functioned more efficiently than even the most optimistic supporters could have envisaged, evolving market trends have once again brought forth the need to amend and update the Act. Therefore, the Central Government constituted the Competition Law Review Committee ["**CLRC**"] and gave it the mandate to – (i) study market trends and international practices; (ii) examine whether the Act was sufficient to deal with them; and (iii) suggest any changes that might be required to the Act. Based on the recommendations made in the CLRC report, the Ministry of Corporate Affairs ["**MCA**"] published the much-awaited Draft Competition (Amendment) Bill, 2020 ["**2020 Amendment Bill**"] on 12th February, 2020. The 2020 Amendment Bill proposes some major changes to the jurisdiction and the functioning of the Commission –

A. Introduction of a Governing Board

It has been proposed that a "Governing Board" be established for the CCI, which will be responsible for supervising and regulating the functioning of the Commission. The Governing

Board would be composed of part-time members,[28] and *ex-officio* members powered to pass regulations and exercise supervision over the functioning of the CCI. It is anticipated that this will reduce the burden on the CCI as general superintendence, direction and management of the affairs of the Commission shall rest with the Governing Board. Further, the creation of a Governing Body, with the introduction of part-time and *ex-officio* members will increase judicial discipline, as well as accountability and reduce the number of procedural challenges raised during investigations under Section 3 and Section 4 of the Act.

B. Appointment of the DG

Earlier, the office of the DG was not answerable to the CCI, but rather to the Central Government. The 2020 Amendment Bill proposes to merge the office of the DG with the Commission as an investigative branch and thus, shifting the power to appoint the DG from the Central Government, into the hands of the CCI. While this may improve the coordination between the Commission and the office of the DG, this may also have a bearing on the independence of the investigation process.

C. Deposit of penalty for appeal

The 2020 Amendment Bill proposes to incorporate a stipulation that already exists with respect to appeals against penalties imposed and taxes levied under various municipal laws, such as property tax. This amendment would require any party seeking to file an appeal before the NCLAT against any order of the CCI to deposit 25% amount of the penalty levied upon them or such other lower amount 'as may be prescribed' at the time of filing the appeal.

D. Settlements and commitments

The 2020 Amendment Bill seeks to introduce the concepts of – (i) settlements; and (ii) commitments to the Act in line with mature competition regimes.

i. Under the settlements mechanism, a party will be allowed to make an application for closure of proceedings before the CCI, at the stage after the investigation report has been submitted by the DG but before the Commission has delivered its final verdict.

ii. Under the commitments mechanism, a party under investigation by the DG will be allowed to give a voluntary undertaking by making certain commitments pertaining to the alleged anti-competitive conduct that is under investigation. The party will be

[28]See Section 2(kb), Draft Competition (Amendment) Bill 2020. In this context, a "Part-Time Member" means a part-time member appointed under clause (b) or clause (c) of sub-section (1A) of Section 8.

allowed to make an application for commitments after initiation of investigation by the DG but before the investigation report is submitted to the Commission.

The proposed amendment also provides that the mechanism for settlements and commitments may be revoked under certain circumstances. Further, in such scenarios, the CCI would have the power to initiate an inquiry based on the evidence submitted under either mechanism. Introduction of these voluntary measures would allow parties to reduce the burden on the CCI to carry out full-fledged investigations in cases where the wrong can be corrected by adopting less onerous measures. This would reduce the time and cost implications for the parties as well.

E. Punitive powers of the DG

Perhaps the most interesting change proposed by the 2020 Amendment Bill is to grant punitive powers to the DG. Currently, neither the DG nor the CCI possess any punitive powers and therefore, the institution did not have any powers to enforce compliance with any orders. The 2020 Amendment Bill intends to introduce a wide range of powers for both the DG as well as the Commission. For instance, any person who fails to produce any documents, information, or record; or does not appear before the DG; or fails to answer any question by the DG; or does not sign the note of cross-examination, such a person will be punishable with imprisonment for a term extending up to six months or fine up to one crore rupees.

Foreseeing the future challenges to India's competition regime, the 2020 Amendment Bill also makes provisions for introducing regulations to deal with anti-competitive actions resulting from the evolving market conditions including digital markets. This can be seen most pertinently in the amended text for Section 19(3), (6) and (7), where the existing provisions are sought to be widened. The 2020 Amendment Bill seeks to introduce sub-clauses (g), (k) and (i) to sub-sections 19 (3), (6) and (7), which would allow the CCI include any additional factor that may be necessary for the purposes of assessing AAEC and the relevant market by way of regulations. The open-ended proposal would prevent the need to repeatedly amend the Act as the nature of markets evolves. For instance, data as a factor for assessing digital markets could now be included specifically by regulation. The 2020 Amendment Bill evolved through a consultative process involving the CCI, legal practitioners, economists, industry experts and will hopefully also include suggestions made by other stakeholders and the public at large. A lot of the changes suggest the maturity of the Commission and that it is ready to take on a role at par with other evolved antitrust

regulators. Additionally, it is evident that some of the changes have been necessitated by the change in market dynamics.

One of the most challenging tasks for the Commission in the near future will be the regulation of the e-commerce sector and the digital economy. Perhaps the biggest challenge arising from the digital markets would be how the CCI deals with the tech-giants – Apple, Google, Amazon, and Facebook. Recently, the CEOs of the four companies were even questioned in a high-profile anti-trust hearing by the US congress amidst allegations of the companies having engaged in several anti-competitive activities.[29] The issue of tackling the tech-giants is a challenge currently being dealt with by all the competition regulators across the world. The United Kingdom's Competition & Markets Authority has proposed the creation of a separate pro-competition regulatory regime to regulate the functioning of the tech-giants, given that existing laws and understanding of business activities were not suitable for effective regulation in the e-commerce sector.

Although some of the amendments proposed in the 2020 Amendment Bill indicate an inclination to regulate digital markets both, in terms of conduct as well as consolidation, since the CCI and most other competition regulators are still developing an understanding of digital markets, no concrete regulatory regime has been put in place. Therefore, it remains to be seen whether such open-ended amendments such as those to Section 19 of the Act will prove to be sufficient. Another concern with the 2020 Amendment Bill is the seemingly excessive delegation of powers to the DG, while also shifting the office of the DG away from the control of the Central Government and merging it with the Commission. The proposal to confer the DG with punitive powers that would allow it to impose a penalty of six-month imprisonment or a fine or one crore rupees for non-cooperation during investigations is likely to result in another constitutional challenge on the violation of the doctrine of separation of powers unless subsequent amendments to the General Regulations place reasonable restrictions on the exercise of the powers granted to the DG. Under the current scheme of the Act, the Commission has the power to impose penalty for non-compliance with directions of the DG under Section 43. However, including a penalty provision under Section 41 leads to the inference that penalty powers (including the power to imprison) now also resides with the

[29]Brian Fung, 'Congress grilled the CEOs of Amazon, Apple, Facebook and Google. Here are the big takeaways' CNN Business (30 July 2020) <https://edition.cnn.com/2020/07/29/tech/tech-antitrust-hearing-ceos/index.html> accessed 17 November 2020.

DG. Given that the DG is only an investigative authority and it is the Commission which is the adjudicating authority under the Act, such an amendment would result in excessive delegation to the DG and strikes at the clear separation of powers of the two under the scheme of the Act.

VI. CONCLUSION

Since it commenced operations in 2009, the Commission has had an extraordinary journey filled with legal precedents and statutory amendments. This journey has seen CCI develop into a mature regulator of markets, focused on ensuring a free and fair economy that secures the benefits to consumers over all others. It has been established without doubt that the CCI deals with matters *in rem*, i.e. in the benefit of the Indian public, and therefore the scope of its powers and jurisdiction must be as wide as possible. It is only when the Commission gets to exercise this wide jurisdiction that it can serve the function it has been tasked to perform under the Act and protect the consumer by regulating anti-competitive conduct that may harm the market. However, businesses develop, and the market evolves, and it is up to the regulator to keep pace with the changes. Recent times have seen the digital economy expand exponentially to a point where it has become necessary for the CCI to rise up to the many challenges posed by the different digital market segments. The 2020 Amendment Bill seeks to imbibe learnings from the past decade and at the same time prepare for the future. The Commission undoubtedly is growing into a formidable regulator and the 2020 Amendment Bill seeks to equip it for the next decade of competition law in India.

COMPETITION LAW AND SIGNIFICANCE OF DATA IN DETERMINATION OF MARKET POSITION

- *DR. ABHA YADAV[*] AND MR. TARUN DONADI[**]*

ABSTRACT

Most antitrust agencies around the world are currently focusing on challenges in the enforcement of antitrust laws posed by the data in possession of tech giants. As businesses are edging towards digitalization amid the pandemic, enough emphasis cannot be laid on the importance of data and the reliance placed on it by companies. One of the important issues faced by the antitrust agencies is the infinite quantum of such data which makes measuring such data impractical. Although platform markets are usually zero priced, in the current times, it is not wrong to equate data with the currency of digital markets. Many industry experts and businesses have referred to data as the new oil. However, these digital markets are dominated by a few players that have no significant threat to their market position. This article aims to analyze the impact of the acquisition of data and challenges faced in implementing competition law in data-oriented markets. The article further discusses the possible abuse of dominance caused due to data amassed by tech giants.

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I. INTRODUCTION

One of the main criteria to assess the size of a business is its capital wealth. More often than not, in traditional markets, profits are associated with the success of an entity as well as all the stakeholders involved. However, this is not the case with the digital or data-driven markets. Various agencies have recognized and accepted the fact that profits may not be the true indicator of market power in data markets.[1] In digital markets, market power can be ascertained by the amount as well as the nature of the data collected by the firms, including both personal and non-personal data (either publicly available or acquired through tracking).[2] Most of the digital platform markets are multi-sided markets, where the success of one side of the market depends on the flourishing of the other side of the market. For instance, advertisers are attracted to Google as compared to other search engines due to its huge consumer base. They are both interdependent and this phenomenon is known as networking effect. Networking effect also plays a strong role in ascertaining market power which, in turn, is intertwined with the data collected, as both grow simultaneously. As first movers in the market, these tech giants are able to tip the market/ network effect in their favour, making it difficult for a new entrant in the market. The enormous amounts of data along with tools of machine learning and artificial intelligence ["**AI**"], further amplifies market strength of these data driven technology companies.[3]

The data collected is not limited to the information that the consumers provide as product reviews or under surveys, but also includes the market studies and the consumers' behavioral patterns. Such market studies involve the application of analytics to the simple data collected. However, the big tech firms are uniquely positioned as they can monitor data of each player dependent on the platform. Even minute data for instance, time spent by an individual on viewing each product and deep tracking such as amount of time a consumer focuses on certain post, can be extracted using AI. This endless data allows for tracking of the consumer behavior and provides exclusive access to tech giants to such data without any scope of replication, and thereby creating dominance. This collection and possession of data has not

[1]Ramji Tamarappoo and Nandita Jain, 'Competition Assessment of Mergers in Digital Market' (National Conference on Economics of Competition Law, New Delhi, March 2020).

[2]Michael Porter, 'Strategy and the Internet' (2001) Harvard Business Review <https://hbr.org/2001/03/strategy-and-the-internet> accessed 07 November 2020.

[3]C. Scott Hemphill, 'Disruptive Incumbents: Platform Competition In An Age Of Machine Learning' (2019) 119(7) Columbia Law Review, 1973.

only raised privacy concerns among the consumers, but has also highlighted competition law concerns due to the unfair advantage of the big-tech firms over their competitors. Further, it becomes important to understand that the first mover's advantage and the network effect help the tech-firms to consolidate their market power.

The Competition Act, 2002 ["**Act**"] provides an inclusive list of factors[4] that the Competition Commission of India ["**CCI**"] may take into regard while determining the dominant position of an enterprise. The CCI has the power to rely on any other factor that is relevant to the investigation and this provision should be utilized by the CCI to deal with cases concerning the digital markets.[5] The whole concept of dominance would see a paradigm shift if possession of data, in terms of both quantity and quality, is included within the aforementioned list of relevant factors in determining the dominance of a firm. In case of digital markets, the market power might be shared simultaneously amongst the key players and hence, market share is not sufficient as the sole indicator of dominance in the relevant market. Needless to say, even in case of mergers, the CCI is required to assess the amount of data accumulated by each firm as well as the consolidating networking effects, which has the potential to make their market position formidable. Big-tech firms and many competition law authors claim that in the digital markets, competition is just a click away, as consumers have an option of multi-homing, i.e. to use multiple platforms for a similar purpose. For instance, a consumer may use Whatsapp as well as Hike for messaging services. This claim is far from reality in many cases as, despite having a choice, very few consumers practice multi-homing, especially in the market of search engine.[6] Adding to these problems is the lack of transparency in data collection, storage, processing, as well as the actual utilization.

II. STRENGTHENING MARKET POWER

The critics of competition law enforcement in the digital markets argue that disruption of the digital market may stifle innovation.[7] However, they fail to consider the price-oriented framework of competition law enforcement, which does not fit well into the dimensions of

[4]Section 19(4), the Competition Act 2002.

[5]ibid.

[6]*Google Search (Shopping)* (Case COMP/AT.39740) Commission Decision [2017] OJ C9/11<http://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf> accessed 07 November 2020; *GVG/FS* (Case COMP/37.685) Commission Decision [2004] OJ L11/17.

[7]Geoffrey A. Manne and Joshua D. Wright, 'Google and the Limits of Antitrust: The Case Against the Case Against Google' (2011) 34(1) Harvard Journal of Law and Public Policy 171, 244.

innovation and data-driven markets. Data-driven companies aim to expand and make the most out of networking effects in the supply-side markets, rather than reaping profits due to significant cross-subsidization of advertising and other related markets.

Once the size of a firm grows, thereby increasing the data collected, there is a significant networking effect tipping in their favour, while drastically reducing the marginal costs incurred in operating the business or catering to additional users. The market dynamics of the digital arena are such that the increase in capacity and the retention of users increases the data collected and thereby, enhancing the quality of targeted advertisements.[8] This, further increases the predictability of an individual's behaviour and the likelihood of clicking on a particular advertisement or a website. While the data collected in itself may not hold value, it is constructed and analyzed in comparison with the data previously stored or collected. AI and machine learning can combine non-personal data and personal data collected through cookies, trackers, and other methods through various sources, to develop into sensitive information which may not be replicated.[9] For example, Facebook accumulates data not only during usage on its own platform but also from the third-party applications using Application Programming Interface when an individual chooses an option to log-in or avail the service using Facebook login credentials. Simply put, the data collected and the size of a firm are directly proportional, leading to further reinforcement of the market power of the incumbents. This renders them invulnerable to the new market entrants, which are at a greater risk of being acquired by the existing giants.

The case against Facebook, investigated by the German antitrust authority, Federal Cartel Office ["**FCA**"]**,** brings out the concerns surrounding the amount and methods of collection of information by the tech-giants.[10] The judgment illustrates how Facebook collects not only individual, but also family data, and data from other related hardware using Bluetooth, Wi-Fi etc. The FCA had left the market definition open because not only the social networking market, but also the integrated as well as the related markets were affected. In its analysis, the

[8]Fabiana Di Porto and Gustavo Ghidini, 'Big Data between privacy and competition: dominance by exploitation? Which remedies?' (2018) 5 ASCOLA <https://www.law.nyu.edu/sites/default/files/upload_documents/Di%20Porto%20and%20Ghidini.pdf> accessed 07 November 2020.

[9]Italian Communications and Media Authority (ICMA), 'Big data Interim Report' (2018) n. 217/17/CONS.

[10]Bundeskartellamt, Case B6-22/16 [2016] <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Entscheidungen/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=5> accessed 07 November 2020.

FCA had also acknowledged and accepted the European Commission's ["**EC**"] view in the *Google* judgment.[11]

"*Even though users do not pay a monetary consideration for the use of general search services, they contribute to the monetization of the service by providing data with each query. In most cases, a user entering a query enters into a contractual relationship with the operator of the general search service. For instance, Google's Terms of Service provide: 'By using our Services, you agree that Google can use such data in accordance with our privacy policies.'*"[12]

This further ascertains that merely because the services are being offered free of charge, does not necessarily conclude a lack of a commercial angle. The consumers have to pay in terms of their data collected by the firms, which is monetized. This confirms the assertions regarding reinforcement of market power in terms of growth of size and wealth when monetary value is attached to the data collected. Data history acts as another factor in establishing market power. While a new player with huge capital investments may establish data centers with machine learning/AI expertise to process data, it would still lack the raw material or past data which is essential for making meaningful predictions. For instance, Amazon suggests a follow-up purchase related to the product already bought through the behavioral pattern collected by the platform.[13] Data history acts as an essential feature to train new AI to predict basic consumer behavioral pattern. The presence of data can be directly linked to the market power in case of the big players. Further, it has the potential to act as an entry barrier and expansion to the new players.

III. BARRIERS TO ENTRY AND EXPANSION

There is a significant first-mover advantage that plays a prominent role in establishing a market leader. Thus, the existence of the Google, Apple, Facebook, Amazon, Microsoft ["**GAFAM**"] are, in practice, uncontested due to the vast amount of practically non-replicable data amassed by them over the years.

[11] *Google Search (Shopping)* (n 6).

[12] ibid [158].

[13] C. Scott Hemphill (n 3)..

Google and other tech firms view data collected and the AI as one of the significant features for their success.[14] The reaction time and relevance are also directly proportional to the number of search queries.[15] The Tail queries or the uncommon queries' results increase with increase data hours i.e. time spent by each individual creating data using the tech services, which is imperative for a successful tech-company. This, indeed, acts as a significant entry barrier and negates the argument of "*competition is just a click away*". A new entrant would never be practically able to compete with the already dominant players that have developed advanced AI, trained using consumer data. Hence, new players never have the opportunity to amass such huge volumes of data without the market power. This can be substantiated by the fact that since the launch of Microsoft's search engine, Bing, in 2009, it has never seen an increase in its market share beyond 10%.[16] It is evident that capital is not the only requirement to enter the digital market and data plays a crucial role in acquisition of market share.

Data history is the source for the AI and machine learning software to increase user-satisfaction. The past behavioral patterns stored in terms of data are required to train and improve the efficiency and accuracy in the predictions of algorithms.[17] The lack of access to historical data renders tough competition to new players in offering quality products to consumers, efficiently reprogramming their AI technology, and sustaining the competition in the digital market without incurring huge losses initially. The new entrants are forced to compete with players who have already gained the advantage of networking effects, changing the dynamics of the market as "winner take all", thus, creating artificial barriers and making co-existing in the same market improbable.[18]

Moreover, the undeterred access data enables the tech giants to constantly improve the AI and assessing data to determine the success of the innovation, a luxury which the new

[14]Bernard Marr, 'The 10 Best Examples Of How Companies Use Artificial Intelligence In Practice' *Forbes* (09 December 2019) <https://www.forbes.com/sites/bernardmarr/2019/12/09/the-10-best-examples-of-how-companies-use-artificial-intelligence-in-practice/?sh=6340e1ca7978> accessed 07 November 2020.

[15]*Google Search (Shopping)* (n 6).

[16]'Search Engine Market Share Worldwide-October 2020' (*Statcounter*, December 2020) <https://gs.statcounter.com/search-engine-market-share> accessed 07 November 2020.

[17]Xinran He and others, 'Practical Lessons from Predicting Clicks on Ads at Facebook' (8th International Workshop on Data Mining for Online Advertising, New York, 24 August 2014).

[18]Maurice E. Stucke and Allen P. Grunes, *Big Data and Competition Policy* (OUP 2016); Lina M. Khan, 'The Separation of Platforms and Commerce' (2019) 199(4) Columbia Law Review 973.

entrants cannot avail. This allows data dominant enterprises to improve targeted advertisements which increase the revenue stream of the enterprises, enabling them to leverage it for cross-subsidization.[19] The phenomenon of snowball effect, where the data collected by tech companies grows exponentially with increase in size, in a loop, is observed in digital markets in relation to the data collected, access to data, and eventually, the quality of service provided. The gap between the market leader and the new player is ever widening because the data access enables big companies to provide better service, in turn, enticing more customers, and thereby gaining access to more data.[20] This leads to a huge gap between the successful player and the new entrants, especially when the access to data is cut-off by the former.

Even though some might argue that third-party data can be and is, in fact, purchased even by the large incumbent players, the new entrants do not have the access to firsthand data. Such firsthand data collected by the platform players captures the time spent by consumers viewing a product their comparisons of various products, including when the consumers click on the product, but not through with the purchase. This primary data is collaborated with third-party data and the collective is imperative to improve existing AI. The latter only acts as a supplement and a catalyst, but not a substitute, to the former in creating accurate behavioural data.[21] This adds to the significant existing barriers as well as limits the amount of data that can be accessed due to the privacy concerns of the consumer and hence, restricts the data access of new entrants to a bare minimum public data.

Data may ideally be considered 'non-rivalrous', as, theoretically, any player can collect the data and the same is not restricted by other competitors. However, in practice, we need to take into account that the ability to collect data, in itself, requires a large database. The lack of interoperability concerning social media platforms further stifles the entry of new players. Interoperability would allow new entrants to flourish with the help of existing big players in the markets as the switching costs would be reduced to a great extent. For instance, consumers who would want to shift to alternate messaging services like Hike, Telegram, etc.

[19]Tom Symons and Theo Bass, 'Me, My Data and I: The Future of the Personal Data Economy' [2017] European Commission Decode Project COM (34)..

[20]Autorité de la Concurrence and Bundeskartellamt, 'Competition Law and Data' (2016) <https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2> accessed 07 November 2020.

[21]ibid.

could not shift easily without waiting for other consumers to shift on to such platforms for viability. This phenomenon is more significant in the social networking markets where the networking effects are strong and the switching costs are high in contrast to search-engine markets.[22] A lack of data retention when switching to new platforms coupled with lack of interoperability, erects huge barrier in entry with huge switching costs. Simply put, any person who would want to shift to alternate social media platform than Facebook would have to create a new profile from scratch and would also require the friends to shift to this alternate platform for the switching to be viable. Any new entrant is, therefore, required to develop disrupting technology in order to compensate the high switching costs involved to attract users from an established market.[23] This is challenging, especially in such digital markets where the existing competitors, with their immense resources, either buy out a potential competitor or easily mimic the disrupting feature of new entrants, catering the same to their large existing user base. This was witnessed in the futile takeover attempt of Snapchat by Facebook, where the latter, later, incorporated the distinguishing features of Snapchat into its own platform, Instagram. This eventually reduced Snapchat's market power. Although, such acquisitions are harmful, the antitrust agencies are yet to detect the monopolistic tendencies of data companies in foresight. In addition to the entry barriers created by platform markets, a dangerous threat is posed to subsequent markets, which rely on these platforms for conducting businesses. Such unbridled data is used by platforms to enter and consolidate their market power in vertically integrated markets.

IV. TECH GIANTS AS DATA VULTURES

A. Data scrapping

In addition to overcoming the entry barriers, the new players in digital space are often tasked with steering clear and sustaining the challenges posed by the tech giants acting as data vultures. These dominant enterprises leverage their dominance and engage in data scrapping, where they access and collect data of the competitors in the downstream markets who rely on these dominant platforms for their existence. This problem is not just confined to digital

[22]Dan Prud'homme, 'How digital businesses can leverage the high cost for consumers to switch platforms' (*LSE Business Review*, 24 September 2019) <https://blogs.lse.ac.uk/businessreview/2019/09/24/how-digital-businesses-can-leverage-the-high-cost-for-consumers-to-switch-platforms/> accessed 07 November 2020.

[23]German Monopolies Commission (Monopolkommission), 'Competition policy: The challenge of digital markets' (2015) Special Report No. 68 <https://www.monopolkommission.de/images/PDF/SG/s68_fulltext_eng.pdf> accessed 07 November 2020.

business but also make the traditional business relying on these platforms, vulnerable. By the very nature of these platform markets, tech companies, as well as other companies relying on them for conducting their daily business, risk sharing the data collected by them to be simultaneously recorded with these platforms. Mere collection of this data does not pose any threat to the downstream markets even if it is used to enhance their services. However, the problem arises when they start to use this data to eliminate competition in such downstream markets. Vertical integration by the tech giants causes serious disruptions in the related markets. This is mainly due to the asymmetrical data among the competitors, and the large user database of the platforms, with practically, unlimited access and the ability to refine and analyze the data. This, to a great extent, exposes the players in the downstream market to data scraping.

One of the classic examples of data scrapping is the case of Google and Yelp. Google tried to acquire Yelp, a local reviews site. However, when rejected, the former started to mimic Yelp's content on its platform. At that time, Google's local reviews were comparatively inferior to Yelp and lesser relied upon.[24] The United States antitrust authority, the Federal Trade Commission ["**FTC**"]**,** in their investigation, had found Google to have engaged in preferential treatment to its own vertical searches. Google was also found to be engaging in data scrapping or stealing content from its downstream competitors such as Yelp and other stand-alone search providers who relied on Google for their viewership.[25] Google, in the pretext of resolving the issue, had offered a 'False Choice' to the helpless players like Yelp, relying on Google, to either accept content scraping or to quit using Google's services and shift to its competitors, and eventually, risking reduction in visibility.[26]

Google was even warned by the EC that the use of third-party data, without their consent, could amount to an abuse of dominance.[27] The EC had acknowledged that Google's initial shopping comparison service operating without any preferential treatment from Google, had performed poorly as compared to its subsequent versions. It was observed that the latter were

[24]Howard A. Shelanski, 'Information, Innovation, And Competition Policy For The Internet' (2013) 161(6) University of Pennsylvania Law Review, 1663.

[25]Lina (n 18).

[26]Jeremy Stoppelman, 'The Power of Google: Serving Consumers or Threatening Competition?' (*U.S. Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 21 September 2011) <https://www.judiciary.senate.gov/imo/media/doc/11-9-21StoppelmanTestimony.pdf> accessed 07 November 2020.

[27]Ibáñez Colomo, 'Restrictions on innovation in EU competition law', (2016) 41(2) European Law Review 201.

a success due to the preferential treatment meted, at the cost of other players providing shopping comparison services. To safeguard the interest of the consumers and many downstream developers, it is imperative for the antitrust agencies to take cognizance of data scraping as potential anti-competitive conduct that could hamper the innovation and growth of a nascent player in the field.

B. Self- preferencing

Self-preferencing, in simplest terms, means prioritizing products of your enterprise in comparison with that of your competitors. Self-preferencing, in itself, is not *per se* an anti-competitive practice. Most of the businesses grow with the help of vertical integration and it is often economical as well as logical to depend on one's own products in the downstream markets. The way of conducting business has transformed with time. Recent market studies have shown that 55 % to 70 % of the population prefers to shop online.[28] In India, the value of e-commerce sales has risen by 31.9 % from 2018-19.[29] With the COVID-19 pandemic, this number has further risen rapidly. Therefore, it can be said that digitalization has forced companies to have an online presence, in turn, increasing their reliance on digital marketing. Digital marketing has greater reach with a fraction of offline advertisement costs, making it the most plausible method for startups.

However, helping the small enterprises may not be the agenda for the big techs that look to expand in every possible way, having the requisite ability and the required data to execute it. This behavior of digital platforms becomes risky when coupled with self-preferencing. The tech giants not only collect a massive user data compared to a traditional counterpart, the GAFAM also act as intermediaries while competing with the businesses who are dependent on these platforms. These platforms can monitor the consumer behavior pattern, continuously, not only concerning their products, but any downstream company who uses their services to forward their business. This, in turn, creates unfair playing field and huge data asymmetry in the downstream markets. In the United States congressional hearing ["**Hearing**"],[30] it was highlighted that Amazon merely has a policy which recommends non-

[28]Maddy Osman, 'Ecommerce Statistics for 2020-Chatbots, Voice, Omni-Channel Marketing' (*Kinsta Blog*, 17 December 2020) <https://kinsta.com/blog/ecommerce-statistics/> accessed 07 November 2020.

[29]'Ecommerce Statistics' (*Ecommerce guide*) <https://ecommerceguide.com/ecommerce-statistics/> accessed 07 November 2020.

[30]Tony Romm, 'Amazon, Apple, Facebook and Google grilled on Capitol Hill over their market power' *The Washington Post* (Washington DC, 29 July

usage of competitors' data collected on their platform, to improve its own line of products or even develop a new product similar to its competitor. Mr. Jeff Bezos, the Chief Executive Officer of Amazon, had testified that there is no enforcement mechanism for the policy, and neither can he guarantee that the policy has not been violated by their product developers. In such a scenario, the small competitors who use Amazon's services stand no chance to compete with the tech giant.

Further, Amazon funded the research project of the Nucleus, researching in the voice recognition area. Nucleus was assured that Amazon won't replicate its data, despite contrary reservations from the promoters. Once the information was shared by the Nucleus with Amazon for funding, Amazon Echo was launched within a year with features similar to that of the Nucleus.[31] The promoters had no choice but to give in to Amazon because of Nucleus' inability to compete with a firm of its size. Another example can be the Quidisi's hostile takeover, where Amazon had monitored the baby products sold on its platform and has forcefully acquired diapers.com after an ugly price war. This involved undercutting the prices and forcing Quidisi to sell its business to Amazon.[32] During the hearing, Mr. Bezos accepted that promoting one's products is a general business order and also that Alexa might be promoting their products over others.[33] Further, he admitted there are incidents where Amazon has sold products below the cost price on promotions. This will potentially drive out small competitors being forced to either sell their business to Amazon or face the risk of being driven out of the market. Amazon can track consumer preferences and replicate the most profitable or successful products by preying on competitors' non-public data. Further, the risk factor gets reduced with the bare minimum research and development ["**R&D**"] costs because the data collected enables the company to identify the products which can be

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2020) <https://www.washingtonpost.com/technology/2020/07/29/apple-google-facebook-amazon-congress-hearing/> accessed 07 November 2020.

[31]Dana Mattioli and Cara Lombardo, 'Amazon Met With Startups About Investing, Then Launched Competing Products' *The Wall Street Journal* (New York, 23 July 2020) <https://www.wsj.com/articles/amazon-tech-startup-echo-bezos-alexa-investment-fund-11595520249> accessed 07 November 2020.

[32]Lina M Khan, 'Amazon's Antitrust Paradox' (2016) 126 Yale Law Journal 710 <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5785&context=ylj> accessed 07 Novemberr 2020.

[33]Adi Robertson, 'Everything you need to know from the tech antitrust hearing' *The Verge* (Washington DC, 29 July 2020) <https://www.theverge.com/2020/7/29/21335706/antitrust-hearing-highlights-facebook-google-amazon-apple-congress-testimony> accessed 07 November 2020.

replicated profitably and have scope for development. The competitors would never be able to match the prices of the competing product launched by the tech giants as a result of the use of this data. This stifles innovation and destroys any incentive to further invest in R&D knowing that they face the risk of hostile takeovers by these tech giants.

The congressional hearing has surfaced reports of various market studies where the small businesses which depend on these tech giants, describe these tech companies as bullies. Due to lack of competitors in the digital market space, these companies find themselves competing with the tech giant in the product market that have vertically integrated. This is not restricted to one tech platform but other platforms as well, as seen in the *Google Shopping* case[34], wherein a study conducted by the Wall Street Journal unearthed many discrepancies regarding how Google handled its search algorithms.[35]

The Competition Agencies must strictly analyze such issues where the data dominant firms have an undue advantage over the rest of the competitors, not only in their market, but in the related markets as well. This behaviour can be considered as an issue of leveraging which has been long established in competition law enforcement. Many authorities have acknowledged the 'Gatekeepers' or the 'bottleneck problem' caused by the tech-giants engaging in self-preferencing. Further, the authorities must take into account the effect of such data possession on the competition including both ex-post and ex-ante consequences.[36] Tackling the problem of data scraping and self-preferencing must be made the priority to safeguard the interest of the smaller players dependent on the big techs and prevent the big tech firms from taking undue advantage of the hard work of the dependent firms to prevent stifling of innovation in the relevant markets.

[34]*Google Search (Shopping)* (n 6).

[35]Kirsten Grind and others, 'How Google Interferes With Its Search Algorithms and Changes Your Results" *The Wall Street Journal* (United States,15 November 2019) <https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753> accessed 07 November 2020.

[36]Rod Carlton and Rikki Haria, 'Self-Preferencing – Legal and Regulatory Uncertainty for the Digital Economy (and Beyond?)' (*Competition Policy International*, 24 June 2020) <https://www.competitionpolicyinternational.com/self-preferencing-legal-and-regulatory-uncertainty-for-the-digital-economy-and-beyond/> accessed 07 November 2020.

V. CONCLUSION

Data has been one of the major driving factors in the digital age and has become an indispensable part of our economy. It is safe to conclude any enterprise having access and control over such data has the ability to succeed and control the relevant markets. When platform markets have access to such data, smaller competitors or new entrants often lack any scope to compete with the dominant players. It is time to acknowledge and deal with the new challenges introduced by data-driven markets.

The volume of data and access to it cannot be overlooked while assessing a digital antitrust case, as it forms the main foundation for the tech-markets. Access to data determines the power of these enterprises to control not only in its market but also in the related markets where such dominance and access to data is leveraged. Dealing with such cases may not be possible through establishing harm in terms of innovation, because the existing jurisprudence makes it highly improbable for it to succeed. Antitrust agencies need to acknowledge that in addition to harm to innovation, undeterred size of big tech firms significantly reduces consumer choice and alternate options or business avenues for the small businesses which are dependent on these platforms. It is time to consider access to data itself as an integral factor which could impede competition when leveraged to enter vertical markets. The time has come to try and experiment with the structural remedies to deal with the data problems, as the behavioral changes have not been quite successful. Division of enterprise and isolating the platform services provided by the tech giants with that of other subsidiaries would solve the issue of self-preferencing and ensuring healthy competition in other downstream markets. However, the feasibility of this solution is yet to be analyzed by the antitrust agencies around the world. Many jurisdictions, including the EU, are contemplating on developing new tools to analyze and tackle issues in the digital market space. It remains to see how the competition regulation framework will be developed to tackle the problems associated with the data markets. One key point to be kept in mind while making a new legislation or expanding the scope of existing laws, is not to overreach. This is detrimental to innovation and quality of the products or services provided by the tech companies.

Lastly, the possession of data should be a key consideration while analyzing mergers or acquisitions in digital markets that help the tech-giants to reinforce their market power by creating barriers to entry and expansion or other anti-competitive effects. With the introduction of the new Draft Competition Amendment Bill, 2020 in line with the recommendations of the Competition Law Review Committee, 2019, it would be interesting

to see if and how deal value thresholds introduced to regulate mergers, would affect the mergers in the digital market space. The key challenges which the CCI might face would be with respect to quantifying data and tackling dynamic deal values. The CCI should keep the above discussed ambiguities in mind while introducing any new threshold, to ensure clarity and maintain ease of doing business.

EXPLORING THE VICES OF SEARCH BIAS IN DIGITAL MARKETS – AN ANTITRUST ANALYSIS IN LIGHT OF DIFFERENT JURISDICTIONAL PRACTICES AND DEVELOPMENTS

- *MS. PRERANA DE*[*]

ABSTRACT

The rising reliance on search engines and digital platforms in recent years, specifically in this pandemic era, has posed daunting challenges for both consumers and competitors of such platforms in a way that was unforeseen by antitrust authorities across the globe. Search engines and online marketplaces, which possess significant network effects and data, indulge in self-preferencing practices such as search result manipulation, to place their own products/services at the very top of their search results. This practice occasionally places existing competitors in vertical markets at a competitive disadvantage to the platform's own products/services, by diverting customer traffic and revenue away from them. It not only affects existing players, but also acts as an entry barrier to potential competitors of the platform's products/services. With no alternative platform to turn to or the ability to create one, such competitors in the long run may face elimination, thereby reducing choices for customers in the market. This paper presents the views of the author on the issue of search bias under antitrust law and presents an analysis of the legal position and developments in this area, in jurisdictions such as the European Union and the United States of America. This paper further analyses the position in India and advocates for stronger enforcement, coupled with the introduction of a digital markets' regulation under the Competition Act, 2002, to effectively deal with the menace of anticompetitive self-preferencing through search ranking manipulation.

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I. INTRODUCTION

The rising reliance on search engines and digital platforms in recent years, to meet our everyday needs, has posed a number of challenges for both consumers and competitors of such platforms in a way that was unforeseen by antitrust authorities across the globe. The exclusionary and predatory conduct of such website owners, who are either dominant or hold significant market power, has also led to an undeniable ripple effect on upstream and downstream market players, who are reliant on these websites for their survival in the digital marketspace. In some cases, where digital platforms are concerned, the peculiar problems associated with multi-sided markets,[1] have also thrust antitrust enforcers into unchartered territory.

Several antitrust authorities across the world have indeed made laudable and well-intentioned attempts to introduce guidance notes, competition tools, and studies to navigate the growing cornucopia of issues that arise in digital markets. However, there is little doubt about the fact that it is difficult to truly encapsulate all possible issues that may arise in such a dynamic market and make them fit into the predefined boxes that current antitrust statutes provide.[2] Current antitrust laws do not appear to provide concrete remedies which may solve the issues posed by these technological platforms, and the calls for 'breaking up Big Tech' are often hollow and fail to take into account practical issues such as data privacy issues and network externalities.[3] If new laws and enforcement are to be effective, the genesis of the rise of such digital media players must be traced and accordingly curtailed at the first whiff of serious anticompetitive breaches. This is not to say that antitrust authorities should necessarily act as gatekeepers into various technological markets. The same is likely to nip innovation in the bud. However, swift enforcement and the ability to detect and penalize anticompetitive technological platforms in such fast, developing markets is the need of the hour.

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[1]Digital platform providers, especially business-to-consumer ["**B2C**"] platforms, tend to connect suppliers/ sellers/ service providers with end-consumers, thus providing services to both suppliers of a product or service on one side and to consumers on the other. B2C platforms thereby deal with two relevant markets simultaneously and the consequent antitrust issues arising from such multi-sided markets require deeper scrutiny from competition authorities.

[2]John M. Newman, 'Antitrust in Digital Markets' (2019) 72 VLR 1497 <https://cdn.vanderbilt.edu/vu-wp0/wp-content/uploads/sites/278/2019/10/11172710/Antitrust-in-Digital-Markets-1.pdf> accessed 4 November 2020.

[3]Benedict Evans, 'Would Breaking Up 'Big Tech' Work? What Would?' (*Benedict Evans,* 10 August 2020) <https://www.ben-evans.com/benedictevans/2020/8/10/would-breaking-up-big-tech-work> accessed 4 November 2020.

Apart from traditional factors such as deep funding sources which inevitably set the scene for possible monopolization, there are some factors,[4] that have allowed several tech companies to grow in size, assert their market power, exclude competitors, and reduce competition with impunity across multiple relevant markets. Such factors,[5] include network effects, possession of large amounts of data, self-preferencing, tying, exclusive dealing arrangements, and other vertical restrictions. Strategic mergers/acquisitions,[6] with tech companies operating in the same, similar, or complementary relevant markets, and/or mergers with major upstream or downstream counterparts have also emerged as glaring practices that further consolidate the monopoly powers of such platforms across multiple connected markets.

Of the factors mentioned above, network effects,[7] data, and self-preferencing pose unique problems in tech markets, creating an unholy trinity of issues that plague competition on these platforms as we know them today. Network effects and data collection together, arguably, create the ultimate digital honey trap which locks in,[8] customers and providers alike into a self-reinforcing, seemingly endless positive feedback loop.[9] Many would argue that the creation of network effects and the accrual of data are natural outcomes of such markets and are bound to continue even if the tech companies are forced to structurally split up or divest. This poses a daunting challenge to antitrust authorities who seek to curb any anticompetitive behaviour that these platforms may indulge in.

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[4]OECD, 'Abuse of Dominance in Digital Markets' (2020) <http://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf> accessed 23 December 2020.

[5]ibid.

[6]Mark Glick and Catherine Ruetschlin, 'Big Tech Acquisitions and the Potential Competition Doctrine: The Case of Facebook' (October 2019) Institute for New Economic Thinking Working Paper No. 104 <https://econ.utah.edu/antitrust-conference/session_material/Tech%20Acquisitions%20and%20Competition%20Doctrine.pdf> accessed 7 November 2020.

[7]'Network effects' refers to the phenomenon where the value of a product/service increases with an increase in the number of users of the said product/service. For example, as more consumers flock to a particular platform, the platform is likely to attract more sellers/suppliers and vice-versa. See Catherine Tucker, 'Network Effects and Market Power: What Have We Learned in the Last Decade?' (2018) <http://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf> accessed 31 October 2020.

[8]ibid.

[9]Timothy F. Bresnahan, 'Network Effects and Microsoft' (2001) Stanford Institute for Economic Policy Research Discussion Paper No. 00-51 <https://siepr.stanford.edu/sites/default/files/publications/00-51_0.pdf> accessed 5 November 2020.

In contrast to network effects and access to data, self-preferencing not only raises entry barriers but is an actual, conscious tool used by entities to leverage their dominant position,[10] to enter another relevant market or strengthen their dominance in a connected relevant market and eliminate competitors from the aforesaid market. Self-preferencing can manifest itself in several ways – through search bias, higher discounts and lower prices to affiliates, imposition of less favourable terms in vertical arrangements, among others. Anticompetitive self-preferencing of an already dominant platform is frequently viewed as an abuse of dominant position under contemporary competition analysis in jurisdictions such as the European Union ["**EU**"] and India.[11] Given the evolving nature of digital markets, anticompetitive self-preferencing by large digital monopolies should also be interpreted as a violation of the anti-monopoly provisions in other major jurisdictions such as the United States ["**US**"], where such wide interpretations are yet to be conclusively made, often out of an apprehension that it may stifle innovation and reduce efficiencies.[12] However, antitrust authorities in the US, of late, appear to have widened the lens through which they look at self-preferencing and, in particular, search bias practices by platforms such as Google and Amazon.[13] It would be interesting to see how the authorities proceed against them in the changing politico-legal climate of the US, which has long influenced attitudes towards antitrust enforcement.

In recent years, the debate about how far self-preferencing should be considered a violation of antitrust laws has raged on across different jurisdictions, with some arguing that there exist *bona fide* business justifications and that the right to promote one's own products/services should not be curtailed. Still, others believe that the conduct of such platforms, while affecting competitors on occasion, are free and do not ultimately harm consumers, and fail

[10]'Self-Preferencing and EU Competition Law' (*Digital Freedom Fund*, May 2020) <https://digitalfreedomfund.org/wp-content/uploads/2020/05/5_DFF-Factsheet-Self-preferencing-and-EU-competition-law.pdf > accessed 5 November 2020.

[11]*Google Search (Shopping)* (Case COMP/AT.39740) Commission Decision [2017] OJ C9/11; *In Re: Matrimony.com Limited v Google LLC and Ors* 2018 SCC OnLine CCI 1.

[12]Eleanor M. Fox, 'A Comparative Look at Competition Law Approaches to Monopoly and Abuse of Dominance in the US and EU' (*Prepared Statement before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 19 December, 2018) <https://www.judiciary.senate.gov/imo/media/doc/Fox%20Testimony.pdf> accessed 5 November 2020.

[13]Dianne Bartz, 'Big Tech's Market Dominance Spurs Numerous US Antitrust Probes' *Reuters* (Washington, 20 October 2020) <https://www.reuters.com/article/us-tech-antitrust-bigtech-factbox-idUSKBN2751TK> accessed 5 November 2020.

the test of the restrictively interpreted consumer welfare standard.[14] But the reality is more nuanced than that. Self-preferencing, combined with the twin factors of network externalities and data possession, pose immediate short-term and long-term threats to competition in the relevant market as well as to consumers.

In this article, the author specifically explores the concept of self-preferencing through search result manipulation and discusses how it may harm existing competition and potential competition in relevant markets where the platform's own products/services compete, and how such conduct eventually harms consumers. Subsequently, the author analyses how certain jurisdictions (principally India, the EU, and the US) have viewed search bias under their respective antitrust laws. Finally, the author suggests the way forward for enforcers in India.

II. SELF-PREFERENCING THROUGH SEARCH BIAS – HOW CAN IT BE ANTICOMPETITIVE?

Perhaps the form of self-preferencing that has gained the most prominence in recent times is the concept of 'search bias'. Search bias, as the term suggests, refers to the practice of ranking,[15] or positioning one's own products or services, or the products and services belonging to affiliated parties, in the first few spots or pages of search results. Manipulating algorithms to produce search results that favour the platform's own preferred products or services has, for many years, been justified under the garb of promoting one's own business. Search engines go a step further to argue that consumers are not affected since search services are, in any case, free and all other choices are displayed, even if they are not prominently placed in the very first set of search results. The dilemma that this puts antitrust authorities in, is this – if consumers truly are provided with all choices possible and if non-affiliated businesses are not entirely blocked out from the search results, is self-preferencing not a reasonable business decision,[16] as opposed to the demon that antitrust critics make it out to be?

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[14]Geoffrey A. Manne, 'Why US Antitrust Law Should Not Emulate European Competition Policy' (*Prepared Statement before the United States Senate Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights*, 19 December 2018) <https://www.judiciary.senate.gov/imo/media/doc/Manne%20Testimony.pdf> accessed 5 November 2020.

[15]Andrew Langford, 'Monopoly: Does Search Bias Warrant Antitrust or Regulatory Intervention?' (2013) 88 ILJ 1559 <http://ilj.law.indiana.edu/articles/19-Langford1.pdf> accessed 8 November 2020.

[16]Maurits Dolmans and Tobias Pesch, 'Should We Disrupt Antitrust Law?', (*Cleary Gottlieb Steen & Hamilton LLP*, 15 July 2019) <https://www.clearygottlieb.com/-/media/files/should-we-disrupt-antitrust-law-pdf.pdf> accessed 5 November 2020.

In as early as 2011, the Office of Fair Trading ["**OFT**"], United Kingdom ["**UK**"] came out with a report,[17] in which it recognized a traditional consumer's tendency to click on the first few search results of a search engine. This idea was also validated in 2017 when the Competition Markets Authority ["**CMA**"], UK,[18] came out with a report succinctly summarizing how consumer behaviour plays a strong role in the amount of traffic that a website receives, when reflected in the search results of a search engine. The CMA had noted that consumers, on an average, disproportionately click on only the top few search results. This, in effect, ensures that only those websites which dominate the first few pages of search results receive maximum traffic, customers, and revenue, whether they may be on search engines or on online marketplaces. From a pure business standpoint, allowing one's services or products to appear in the first few pages of search results makes perfect sense. It is, after all, an approach that is specifically tailored keeping in mind this exact facet of consumer behaviour.

How this kind of deliberate preferential placement is detrimental to competition is of course crucial for antitrust authorities to examine on a case to case basis. The three ways in which search result manipulation by dominant entities/monopolies maybe anticompetitive and the stakeholders that are affected by such practices are as follows –

A. Existing competitors

The immediate impact of self-preferencing through search bias is, of course, felt by existing competitors in the specific relevant market in which the platform itself is trying to compete, by favouring its own products or services. Once a firm gains enough market power and market shares to become dominant/a monopoly in the appropriate relevant market in the digital space, self-preferencing can allow it to leverage its dominant position to either enter or strengthen the position of its own products/services in another relevant market. For instance, a search engine such as Google, which enjoys a virtual monopoly in most jurisdictions in the market for general search services, may utilize its position as a dominant platform, to increase

[17]Steffen Huck, Jidong Zhou and London Economics, 'Consumer Behavioural Biases in Competition A Survey' (*London Economics*, May 2011) <https://londoneconomics.co.uk/wp-content/uploads/2012/06/Consumer-behavioural-biases-in-competition-OFT1.pdf> accessed 5 November 2020.

[18]Competition and Markets Authority, 'Online Search: Consumer and Firm Behaviour' (7 April 2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/607077/online-search-literature-review-7-april-2017.pdf> accessed 4 November 2020.

the visibility of one of its online services at the very top of all search results.[19] This, in turn, is likely to cause massive financial setbacks to its competitors in the relevant market for the aforesaid online services.[20] If existing competitors do not receive the opportunity to fairly compete against the services provided by the dominant platform due to search result manipulation, there is a strong likelihood that many such competitors, in the absence of strong funding sources, shall eventually be unable to sustain themselves over an extended period of time and will have no other alternate platform to turn to. A platform like Google enjoys the full benefits of network effects, and the competitors of its products/services will not be able to take advantage of Google's massive network if they decide to switch platforms. Ultimately, they shall be eliminated.

B. Potential competitors

Undoubtedly, in high tech markets, there are several factors that may contribute to the existence of major entry barriers and market foreclosure. Network effects, high capital costs, regional requirements, a high level of required innovation, among others, often contribute to the creation of entry barriers.[21] However, by indulging in self-preferencing practices such as search result manipulation, platforms may effectively create a huge impediment to the entry of new players who may seek to enter the digital space. An example of such a practice is the one adopted by online marketplaces in different jurisdictions. As discussed earlier, numerous marketplaces manipulate their search algorithms in such a way that only their own inventory or the products sold by their own affiliates are prominently displayed in the first few pages of search results. This makes it practically impossible for new sellers or smaller sellers to find their footing on the platform and they are, thus, either unable to access the relevant market or unable to survive in it. Further, due to the existence of network effects, lack of data reserves, and high capital costs, it is nearly impossible for most sellers to create an alternate platform for themselves that could rival the dominant marketplace. Search bias, combined with these other factors, therefore has an adverse impact on potential competition as well.

C. Consumers

The impact on consumers, as a consequence of search bias, may be of two kinds – immediate and long-term. One possible immediate concern that emanates from search bias practices is

[19]Christian Ahlborn and others, 'Shaping Competition Policy in the Era of Digitisation' (Shaping Competition Policy in the Era of Digitisation conference, Brussels, 17 January 2019).

[20]*Google Shopping Case* (n 11).

[21]Section 19, The Competition Act 2002 (Act 12 of 2003).

that consumers may be deprived of a superior product or service simply because the search engine has demoted it in the search results to prop up its own competing product or service.[22] However, the long-term effect of such a practice also merits antitrust scrutiny. Once a large chunk of competitors is eliminated and new competitors are unable to break the deadlock to enter the market, consumers will be left with fewer choices and platforms will be in a position to adopt exploitative policies.[23]

III. A SNAPSHOT OF THE RELEVANT ANTITRUST LAWS AND THE OUTLOOK OF ENFORCERS ON SEARCH BIAS IN THE EU AND US

Multiple jurisdictions have looked into or are now looking into the issue of search bias as a possible anticompetitive practice adopted by search engines and online marketplaces. Some antitrust enforcers have taken an aggressive stance against it, while some others are now looking at it through a new lens beyond the narrow confines of past interpretations and statutory restrictions. Enforcers and legislators in the EU and the US have viewed search bias issues in the following manner –

A. European Union

Any discussion about search bias would be remiss without discussing the EU's staunch crusade against such practices. The EU has traditionally taken an all-round approach to competition enforcement, protecting not just consumer welfare but also the welfare of competitors.[24] However, the EU's stance is often seen as overly regulatory and has left it open to criticism from antitrust practitioners from several other parts of the world.[25] Nonetheless, the EU's stance vis-à-vis search bias so far has been necessary, especially in light of the growing dominance of certain digital platforms and the near extinction of other competitors in such markets.

Despite nuanced variations in their interpretations, it is almost unanimously agreed across jurisdictions such as the US,[26] EU,[27] and India,[28] that merely being dominant/a monopoly is

[22]Ahlborn and others (n 19).

[23]*Google Shopping Case* (n 11).

[24]Kati Suominen, 'On the Rise: Europe's Competition Policy Challenges to Technology Companies' (*Centre for Strategic & International Studies*, 26 October 2020) <https://www.csis.org/analysis/rise-europes-competition-policy-challenges-technology-companies> accessed 8 November 2020.

[25]ibid.

[26]*Verizon Communications, Inc. v Law Offices of Curtis v Trinko LLP* 540 U.S. 398 (2004).

not sufficient to warrant penalties under antitrust statutes. The monopolist or dominant player must indulge in some form of anticompetitive conduct or abuse to merit antitrust penalties.

In the EU, this provision is specifically laid down in Article 102 of the Treaty on the Functioning of the European Union ["**TFEU**"]. Article 102 prohibits 'any abuse' by one or more undertakings of their dominant position and further enlists a non-exhaustive list of specific abuses such as the imposition of unfair pricing and trading conditions, discriminatory transactions that place trading partners at a competitive disadvantage, limitation of markets, production or technical development to the detriment of consumers, and imposition of unconnected supplementary obligations in contracts. In the *Google Search (Shopping)* case,[29] the European Commission ["**EC**"] construed Google's restrictive search bias practices to be an 'abuse' of its dominant position in the relevant market under Article 102 of the TFEU.

The *Google Search (Shopping*) case is, in many ways, the first major case where an antitrust authority has heavily penalized a dominant online entity for indulging in search result manipulation and, perhaps, rightfully so. The EC was of the opinion that Google, which was a dominant player in the market for general search services, had manipulated the search results in such a way that its own comparison-shopping services occupied the first few spots in the results.[30] Competing comparison-shopping services were pushed down in the search results as a consequence and lost a significant amount of traffic that they would have otherwise received had they not been demoted. The EC noted that Google was unable to show any objective justification for its conduct and had the potential to foreclose the competing shopping services.[31]

Recently, the EU has also taken measures to ramp up its laws, to deal with the menace of anticompetitive self-preferencing and other anticompetitive activities by tech companies. The Digital Services Act ["**DSA**"],[32] proposed by the EU aims at introducing ex-ante regulation of

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[27]Massimiliano Vatiero, 'Power in the Market: On the Dominant Position' <https://ec.europa.eu/competition/antitrust/art82/005.pdf> accessed 5 November 2020.

[28]*Competition Commission of India v Coordination Committee of Artists and Ors* (2017) 5 SCC 17.

[29]*Google Shopping Case* (n 11).

[30]ibid.

[31]ibid.

[32]Commission, 'Digital Services Act package – ex ante regulatory instrument of very large online platforms acting as gatekeepers' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12418-Digital-Services-Act-package-ex-ante-regulatory-instrument-of-very-large-online-platforms-acting-as-gatekeepers> accessed 6 November 2020.

large internet platforms which act as digital 'gatekeepers' to such markets on account of the significant network effects enjoyed by them. The DSA may potentially pave the way for setting certain prescriptive rules which may prohibit or 'blacklist' self-preferencing practices by digital platforms. Further, the DSA also proposes that the new ex-ante regulation framework would provide for flexible and tailor-made remedies (for example, data access obligations and interoperability requirements) which, after prior assessment, may be applied to these digital platforms to curtail their ability to carry out anti-competitive practices in the market.[33]

In conjunction with the DSA, the EU has also proposed a New Competition Tool ["**NCT**"],[34] which envisages the imposition of behavioural and structural remedies upon dominant companies engaging in anti-competitive unilateral conduct prior to a finding of infringement under Article 102. The NCT, much like the DSA, also proposes ex-ante intervention,[35] before the market is foreclosed, taking into consideration the fact that digital markets evolve quickly and network effects grow stronger over time.

The ramifications of the DSA and the NCT, if approved, shall be considerable and is likely to face even more pushback from tech companies than it is now. There are apprehensions about how ex-ante regulation may launch a severe blow to innovation in the market. However, if a balanced approach is taken to the issue at hand, introducing new rules that regulate self-preferencing and enforcing the same prior to an Article 102 violation, may be exactly what such markets need to prevent the unwarranted growth of digital mammoths that are accountable to none.

B. United States

In sharp contrast to its transatlantic counterpart, antitrust authorities in the US are yet to render any decision in relation to the emerging anticompetitive menace of search bias. In

[33]Niombo Lomba and Tatjana Evas, 'Digital Services Act: European Added Value Assessment' (October 2020) <https://www.europarl.europa.eu/RegData/etudes/STUD/2020/654180/EPRS_STU(2020)654180_EN.pdf> accessed 8 November 2020.

[34]Commission, 'Single Market – new complementary tool to strengthen competition enforcement' <https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12416-New-competition-tool> accessed 6 November 2020.

[35]Marc Wiggers, Marc Custers and Robin Struijlaart, 'Commission's New Tools for Policing Digital Markets Are Shaping Up Gradually, But Slowly' (*Kluwer Competition Law Blog*, 30 October 2020) <http://competitionlawblog.kluwercompetitionlaw.com/2020/10/30/commissions-new-tools-for-policing-digital-markets-are-shaping-up-gradually-but-slowly/> accessed 6 November 2020.

2013, the Federal Trade Commission ["**FTC**"] had closed its antitrust investigation against Google for its alleged search bias practices. Ironically, the FTC in its statement,[36] regarding Google's search practices noted that Google's algorithm and design caused the demotion of competing comparison-shopping services to a subsequent page, which weakened them and led to a significant loss of traffic. Despite such an observation, the FTC ultimately treated it as a product design that significantly improved the quality of search results for Google's consumers.[37]

This decision of the FTC to close the investigation against Google in 2013 may in hindsight be considered myopic. The FTC's decision in 2013 to drop the investigation against Google is perhaps a reflection of its age-old reliance on the narrowly construed consumer welfare standard and an amplification of its fear of causing a chilling effect on innovation. It did not, unfortunately, holistically review the effect on competition in the market. Even from a consumer welfare perspective, the FTC had failed to look at the ultimate effect that reduced competition would have on Google's users. However, the times have changed since 2013 and there has been a drastic shift in the attitude of enforcers towards these giant tech companies.

The past year has witnessed a remarkable resurgence of antitrust activity in the US vis-à-vis major technological companies, popularly referred to as GAFA (Google, Amazon, Facebook, Apple) in antitrust circles. Both federal antitrust enforcers such as the FTC and the Department of Justice ["**DOJ**"], as well as the Offices of the Attorney Generals of several states in the US, have initiated proceedings against the GAFA companies.

The DOJ's recent antitrust complaint against Google before the United States District Court of Columbia,[38] filed along with the Attorney Generals of multiple states, encapsulates the very essence of Google's monopoly power in the markets for general search services, search advertising, and general search text advertising in the US. Perhaps, the most telling part of the complaint, that captures the extent of Google's market power, is the one that points out that the word 'Google' is used almost synonymously as a verb with internet searching.

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[36]'Statement of the Federal Trade Commission regarding Google's Search Practices' (*Federal Trade Commission*, 3 January 2013) <https://www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf> accessed 6 November 2020.

[37]ibid 3.

[38]'Justice Department Sues Monopolist Google for Violating Antitrust Laws' (*US Department of Justice*, 20 October 2020) <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws> accessed 6 November 2020.

The recent Investigation Report of the House Subcommittee on Antitrust, Commercial and Administrative Law, 2020 ["**Subcommittee Report**"],[39] has also recognized the overwhelming dominance of Google in the market for search services in the US, accounting for up to 87%,[40] of all general search enquiries. The Subcommittee Report has noted that Google occasionally manipulates its algorithms to place its own services over its superior vertical competitors in search results, thereby siphoning off a large amount of internet traffic as well as revenue from other businesses. The Subcommittee Report cites the example of Froogle,[41] to show how Google often props up its own sub-par services at the very top of the search results, although the very same services would not have met Subcommittee Report for search ranking had they been supplied by another provider. It is clear from the Subcommittee Report that Google's enormous hold over the market has placed it in a position to act as a judge, jury, and executioner to any market player which may attempt to compete with one of Google's own services in a different relevant market.

Interestingly, this huge flurry of antitrust activity in the digital space has not only come from the enforcers' side in the US but also from that of the legislators. For years, federal antimonopoly laws have derived their powers from the provisions of the Sherman Antitrust Act, 1890, a statute that has seen little to no change in the past century and is often criticized for not being able to adequately address the issues in innovative markets.[42] In the state of New York, the Donnelly Act, 1893, is equally criticized as a relic of the past,[43] which notably does not include provisions penalizing single-firm conduct and monopolization. However, recently, Senator Gianaris introduced a new Assembly Bill,[44] in the New York State Senate,

[39]Subcommittee on Antitrust, Commercial and Administrative Law, 'Investigation of Competition in Digital Markets' (*House Judiciary Committee*, 6 October 2020) <https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf> accessed 6 November 2020.

[40]ibid 177.

[41]ibid 190.

[42]Harry First and Eleanor Fox, 'Big Tech and Antitrust – Calling Big Tech to Account under US Law' (*House Judiciary Committee*, August 2020) <https://judiciary.house.gov/uploadedfiles/submission_from_harry_first_and_eleanor_fox.pdf> accessed 6 November 2020.

[43]Gordon Schnell and Sam Rikkers, 'A Call to Albany: It's Time to Amend the Donnelly Act', *New York Law Journal* (New York, 12 November 2008) <https://constantinecannon.com/wp-content/uploads/2017/09/11122008schnellrikkerartdon.pdf> accessed 5 November 2020.

[44]'Senate Bill S8700A' (2020) <https://www.nysenate.gov/legislation/bills/2019/s8700/amendment/a> accessed 1 November 2020.

aptly titled the 'Twenty-First Century Anti-Trust Act', which seeks to cure this glaring deficiency in the Donnelly Act.

Should the Assembly Bill be passed, New York State authorities would be able to penalize market players, including tech platforms, for monopolization under State laws. Surprisingly, a provision in the Assembly Bill makes it unlawful to abuse one's dominant position,[45] in addition to making it unlawful to monopolize, attempt to monopolize, or conspire to monopolize.[46] The proposed provision notably also envisages penalizing more than one person holding a dominant position in the relevant market for abuse – a concept known as 'collective dominance' that is recognised under EU laws, but till date has not been recognized under US law or Indian law, for that matter.

The introduction of abuse of dominance provisions, a concept that is prevalent in both Europe and India, is likely to make it harder for tech companies to escape the net of antitrust scrutiny by claiming that they do not meet the unusually high market-share based standards against which monopolies are judged in the US. This is because, traditionally, the thresholds for adjudicating on abuse of dominance cases are far lower than those for monopolization in the US.[47] In the EU, authorities have considered firms to be dominant even in cases where the market share of the firm is below 50% as long as they illustrate enough market power to manipulate and/or control the market in their favour.[48] Further, there is an inherent presumption of dominance where firms hold market shares of at least 50%,[49] which is not the case in the US where the threshold is much higher.

If the Assembly Bill is approved, it may open the floodgates for more antitrust action against tech companies under the wider abuse of dominance provisions proposed by it – including action against self-preferencing practices such as search ranking manipulation. The Assembly Bill has naturally drawn criticism from many who prefer a hands-off approach to antitrust

[45]ibid.

[46]Grant Petrosyan, 'New York Could Lead the Nation into 21st Century Antitrust Enforcement' (*Constantine Cannon*, 16 September 2020) <https://constantinecannon.com/2020/09/16/new-york-could-lead-the-nation-into-21st-century-antitrust-enforcement/> accessed 6 November 2020.

[47]James Keyte, 'Why the Atlantic Divide on Monopoly / Dominance Law and Enforcement is so Difficult to Bridge' (*Antitrust*, 2018) <https://www.antitrustinstitute.org/wp-content/uploads/2018/12/fall18-keyte.pdf> accessed 6 November 2020.

[48]Case T-219/99 *British Airways Plc. v Commission of European Communities* [2003] ECR II-05917.

[49]Case C-62/86 *AKZO BV Chemie v Commission of European Communities* [1991] ECR I-03359.

enforcement in a bid to prevent the chilling of innovation and competition.[50] The criticisms, however, do not hold water in a market where tech companies have hidden behind the shield of innovation for so long that entry into the market by equally efficacious potential competitors is no longer possible.

It is pertinent to note that 'abuse' and 'dominant position' remain undefined in the Assembly Bill and the implications of this proposed provision remain wide open to interpretation. It would be premature to ascribe the same parameters of interpretation to these provisions as are traditionally applied in the EU. How this proposed law would affect antitrust enforcement against tech platforms and their self-preferencing practices remains to be seen.

IV. HOW HAVE INDIAN COMPETITION AUTHORITIES DEALT WITH THE ISSUE OF SEARCH BIAS?

Under the Competition Act, 2002, in India, Section 4 specifically states that no enterprise or group shall abuse its dominant position. Section 4 incorporates all of the abusive practices outlined in Article 102 of TFEU, and in addition, recognizes leveraging as well as the denial of market access as anti-competitive abuses. Perhaps the most relevant and interesting provision under Indian competition law, which could be considered in search bias cases, is Section 4(2)(c) which classifies "practices resulting in denial of market access in any manner" as abuse. The Supreme Court of India,[51] has interpreted the words "in any manner" in this particular Section, to truly and literally mean – "in any possible manner". Such a wide interpretation has left it open to competition authorities in India to expand the traditional definitions of abuse to include self-preferencing through 'search bias', which may deny non-affiliated competitors access to the relevant market.

In 2018, similar to the *Google Search (Shopping)* case,[52] in the EU, the Competition Commission of India ["**CCI**"], in the case of *In Re: Matrimony.com Limited and Google LLC*,[53] had found Google guilty of abusing its dominant position by prominently placing its own Commercial Flights Unit above the blue link results, thereby diverting traffic from other

[50]Shaoul Sussman, 'Could New York's 21st Century Antitrust Act Usher a New Chapter in the History of Anti-Monopoly Legislation?' (*Competition Policy International,* 20 September 2020) <https://www.competitionpolicyinternational.com/could-new-yorks-21st-century-antitrust-act-usher-a-new-chapter-in-the-history-of-anti-monopoly-legislation/> accessed 6 November 2020.

[51]*Competition Commission of India v Fast Way Transmission Pvt. Ltd. and Ors* (2018) 4 SCC 316.

[52]*Google Shopping Case* (n 11).

[53]*In Re: Matrimony.com Limited v Google LLC and Ors* 2018 SCC OnLine CCI 1.

online flight services. The case is now pending in appeal before the National Company Law Appellate Tribunal.

The *Google* case,[54] decided by the CCI is perhaps the first of its kind in India, signalling the way forward for more enforcement on self-preferencing in the digital space. The CCI's sudden but welcome proactivity regarding digital markets is also apparent from its recent Market Study on E-commerce in India ["**Market Study**"],[55] where it has recognized search bias as a possible antitrust issue. Noticeably, the Market Study delves into details about the source of search rankings, recognizing and distinguishing between algorithmic ranking and paid rankings for advertisement. However, as the CCI has rightly observed, sellers or service providers often found the search ranking criteria of such platforms to be rather opaque.[56] In the Market Study, the CCI went on to recommend platforms to make the criteria for search rankings transparent, subject to the protection of their intellectual property and algorithm, and to clearly reveal if the payment of any sum to the platform is likely to allow an entity to gain a favourable spot in the search results.

Carrying forward the torch of its recent activity in the digital space, the CCI has also recently directed an investigation,[57] against e-commerce giants Amazon and Flipkart in India on several grounds including allegations of search bias.

However, while these market studies and investigations are certainly baby steps in CCI's effort to become more receptive to the changing digital environment, they are not enough. Over the years, the CCI has fallen into a familiar pattern of minimal enforcement where large foreign investment is at stake, leaving it open to criticisms of being toothless.[58] Much like competition authorities in many developing and underdeveloped countries, the CCI has shown a reluctance to coming down heavily on potential investors and entrants in innovative sectors, and this tendency is perhaps best underpinned by the fact that the CCI does not seem to block any combination at all. Even the cases with conditional clearance granted in Phase II

[54]ibid.

[55]Competition Commission of India, 'Market Study on E-Commerce in India' (8 January 2020) <https://www.cci.gov.in/sites/default/files/whats_newdocument/Market-study-on-e-Commerce-in-India.pdf> accessed 6 November 2020.

[56]ibid 15.

[57]*Delhi Vyapar Mahasangh v Flipkart Internet Private Limited and Anr* 2020 SCC OnLine CCI 3.

[58]Arjun Srinivas, 'Why Antitrust is a Jumbo Indian Problem' *Mint* (Bengaluru, 3 August 2020) <https://www.livemint.com/news/india/why-antitrust-is-a-jumbo-indian-problem-11596375452543.html> accessed 6 November 2020.

are few and far between. Enforcement from the CCI's side needs to be more assertive if major issues like self-preferencing are to be curbed and it is the need of the hour for new regulations to be brought in to regulate innovative markets, like the EU and US are attempting to introduce.

That said, there is a fine line between strong antitrust enforcement and protectionism. Antitrust authorities, while formulating such regulations, must ensure that the lines between the two are not blurred in a way that would stifle innovation and foreign investment entirely. Antitrust enforcement should be strong, but reasonable, and should not turn into a witch-hunt against all and sundry in the digital space. The key lies in finding the perfect balance.

V. CONCLUSION: THE WAY FORWARD FOR INDIAN ENFORCERS

The age-old tussle between the appropriateness of active antitrust intervention into new markets vis-à-vis the possible impact on innovation and efficiency has once again left proponents of different schools of antitrust policy divided. Nevertheless, it is clear that once the veil is lifted, the arguments for preserving efficiency and allowing a new market to flourish are far outweighed by the glaring consequences of the exclusionary practices of several digital mammoths. Digital platforms cannot be permitted to flout antitrust laws merely because innovation is essential. If anything, antitrust laws must step in where necessary to foster innovation.

In a market afflicted by COVID-19, with more individuals working remotely and avoiding stepping out of their homes, digital platforms have become indispensable. In such a situation, antitrust authorities in India have a greater responsibility to ensure that these markets remain competitive. It is imperative for antitrust authorities in India to tailor and evolve their approach towards digital markets. It is the author's opinion that merely declaring such platforms as essential facilities and mandating platform neutrality may not be sufficient. Active enforcement is the need of the hour, as is the formulation of new laws and regulations that specifically deal with the issues arising in digital markets.

India may consider introducing a new digital markets regulation under Section 64 of the Competition Act, 2002, which would consider ex-ante intervention like the DSA and NCT or a provision similar to the 'attempt to monopolize' provision under the Sherman Antitrust Act, 1890. This may permit the CCI to intervene at an earlier stage to scrutinize anti-competitive activities such as search bias practices, which may potentially foreclose the market and lead to an abuse of dominance in the long run. Current laws only allow the CCI to address the abuse once the damage is done. However, owing to the huge network effects and data dumps

that such digital platforms enjoy, it may be too late to break the deadlock once the abusive conduct has already pushed other market players out of the picture. The CCI may need to prohibit practices such as anti-competitive self-preferencing outright and impose appropriate behavioural remedies at an early stage, if such practices are to be curbed. While some cases may warrant behavioural remedies such as access and interoperability requirements,[59] (i.e., providing competitors with access to relevant data, essential facilities and/or certain functionalities which shall enable them to effectively compete with the platform[60]), remedies may need to be specifically tailored by the CCI on a case to case basis to resolve the issue of self-preferencing. Structural remedies such as divestitures may not be appropriate at early stages. They are likely to fail to address the issues posed by network effects and data ownership and, therefore, should only be taken as a last resort.

However, the author would like to caution that, such a regulation may have implications on data privacy of individuals and there would be a need to harmonize any potential regulation with the data protections laws of India, to ensure that one does not prejudice the operation of the other. Since certain remedies may potentially involve the transfer or division of sensitive personal data of the users of such platforms or access to such data, this harmonization of competition laws with data protection laws becomes of utmost relevance.

India's data privacy regime at present, is severely lacking in many ways, with the Personal Data Protection Bill, 2019 ["**PDP Bill**"], still pending in Parliament. Section 26 of the PDP Bill notably includes provisions granting the right to data portability, which shall undoubtedly be significant in increasing the agency of individuals to transfer their data across online providers. However, this provision is likely to be nuanced in its application and would not be sufficient in itself to curb anti-competitive activities. In certain, but not all circumstances, the CCI may need to enforce data-sharing orders,[61] which could raise privacy issues for consumers whose information may be shared with the competitors of the platform concerned. Thus, if antitrust regulation of digital markets is to become a success, it would be necessary for all relevant authorities dealing with competition law and privacy laws to take

[59]Elettra Bietti, 'Explainer: Competition, Data and Interoperability in Digital Markets' (*Privacy International*, 20 August 2020) <https://privacyinternational.org/explainer/4130/explainer-competition-data-and-interoperability-digital-markets> accessed 8 November 2020.

[60]ibid.

[61]Sunny Seon Kang, 'Don't Blame Privacy for Big Tech's Monopoly on Information' (*Just Security*, 18 September 2020) <https://www.justsecurity.org/72439/dont-blame-privacy-for-big-techs-monopoly-on-information/> accessed 8 November 2020.

stock of each other to iron out any potential conflicts. Further, depending on the facts and circumstances of the case, the CCI may even need to ensure that adequate technological safeguards are implemented to enforce data de-identification,[62] in its remedy packages.

The menace of anti-competitive self-preferencing and in particular search bias may, therefore, only be curbed if the CCI implements a regulation that takes a holistic view of the peculiar characteristics of digital markets, available technologies and the privacy interests of the consumers whom Competition Act, 2002 seeks to protect. This, coupled with vigilant but balanced enforcement practices, should help India move one step closer towards the free flow of competition in digital markets. However, the author would like to re-emphasise that such a regulation and its consequent enforcement should not be used as a shield for subtle implementation of digitally protectionist policies.

[62]ibid.

LOCUS STANDI VIS-À-VIS NATURE OF THE COMPETITION ACT: AN ANALYSIS OF ITS CHANGING FRONTIERS

- *MS. PARUMITA PAL* AND MR. RAHUL JAIN***

ABSTRACT

The business community of India has evolved significantly over the years. Currently, India is witnessing the rise of a start-up culture leading to the formation and materialization of innovative ideas. The question, however, remains whether these start-ups can compete with the incumbents or die down if they ultimately choose not to be controlled by them. Competition law is crucial for the evolution of the market economy and thus, it is necessary that competition law paces itself with the changing business needs of the country.

*The judgment of the National Company Law Appellate Tribunal ["**NCLAT**"] in Samir Agrawal,[1] ["**Samir Agrawal case**"] created ripples of conceptual and legal uncertainties in the competition law fraternity. An information was filed by an independent law practitioner alleging that the two leading cab aggregators in India use algorithms to facilitate price fixing between the drivers. The information was dismissed by the Competition Commission of India ["**CCI**"] and an order[2] under Section 26(2) of the Competition Act, 2002 ["**Competition Act**"] was passed. The informant appealed against the said order before the NCLAT, and the Appellate Tribunal, while deciding the appeal,[3] took a rather conservative approach. The NCLAT dismissed the locus standi of the Appellant (i.e., the Informant) on the ground that the Informant did not suffer a direct legal injury from the alleged violation of provision(s) of the Competition Act. However, much has been settled by the recent judgment of the Supreme Court in Samir Agrawal* case,[4] *which overruled the conservative approach taken by the NCLAT in light of the nature of and intent behind the Competition Act.*

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[1] *Samir Agrawal v Competition Commission of India* Competition Appeal (AT) No.11 of 2019 (NCLAT).

[2] Case No. 37 of 2018 (CCI).

[3] *Samir Agrawal* (NCLAT) (n 1).

[4] *Samir Agrawal v Competition Commission of India* SCC Online SC 1024 (SC).

I. INTRODUCTION

"*Antitrust law isn't about protecting competing businesses from each other, it's about protecting competition itself on behalf of the public.*" - Al Franken

The date of July 24, 1991, marked the historic budget that had set the liberalisation, privatisation, and globalisation of Indian markets in motion by ending the license raj. The liberalisation of Indian economy necessitated a market which could provide a level playing field and an investor-friendly environment, and a market regulator which ensures the same. Consequently, the focus was required to be shifted from regulation of monopolies to promotion of competition amongst market players, by adequately preventing the abuse of a dominant market position. This was the very basis for introducing the Competition Act by replacing the erstwhile Monopolistic and Restrictive Trade Practices Act, 1969 ["**MRTP Act**"]. The then Finance Minister of India in his Budget Speech,[5] had stated "*The MRTP Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. The Government has decided to appoint a commission to examine this range of issues and propose a modern competition law suitable for our conditions.*"

The entire premise of the Competition Act is based on the objectives that it seeks to achieve. As enshrined in its Preamble, the Competition Act was introduced to prevent practices with an adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers, and to ensure freedom of trade ["**Objectives of Competition Act**"]. To achieve these objectives, the CCI was established.

However, the NCLAT judgment in the *Samir Agrawal* case,[6] pronounced on May 29, 2020, created a sceptical disposition in the minds of the competition law fraternity *inter alia* regarding (i) the scope and objective of the Competition Act; (ii) the nature of competition law (i.e., law *in rem or* law *in personam*); (iii) the limitations of the Competition Act; (iv) the legislative intent behind the Competition Act, and keeping the same in mind, (v) the relevance of the *locus standi* of an Informant alleging a contravention of the Competition Act.

Before we proceed, it will be crucial to understand the significance held by 'law *in rem*' and 'law *in personam*'. The phrases '*in rem*' and '*in personam*' were always opposed to one another. The Supreme Court defines an act or proceeding *in personam* as one that is done or

[5]Shri Yashwant Sinha, 'Budget Speech 1999-2000' (*Parliament Digital Library*, 27 Feb 1999) <https://eparlib.nic.in/bitstream/123456789/123/1/Budget_speech_1999-2000.pdf> accessed 4 October 2020.
[6]*Samir Agrawal* (NCLAT) (n 1).

directed against or with reference to a specific person, while an act or proceeding *in rem* is one done or directed with reference to no specific person, and consequently against or with reference to all of whom it might concern, or all the world.[7] In light of the foregoing definitions, a statutory enactment may also be categorised as law *in personam* or law *in rem.* While the former is a statute which is enacted to either resolve the private conflicts between the parties (*for instance*, the Consumer Protection Act, 2019), the latter regulates a sector or an industry, in the interest of public at large (*for instance*, Securities and Exchange Board of India Act, 1992).

This article is an attempt to establish that the Competition Act is a law *in rem*, by analysing the current scheme and framework of the Competition Act, past precedents, and legislative intent, as encapsulated in the legislative documents. Recently, the Supreme Court, through its Judgment dated 15 December 2020,[8] affirmed our submission that Competition Act is in fact law *in rem* and attenuated the relevance of the 'direct legal injury' test as observed by the NCLAT in the *Samir Agarwal* case.[9] This article, however, seeks to address existing and future concerns arising out of (i) the narrow interpretation of '*locus standi*' of an Informant; (ii) treatment of Competition law as law *in personam*. Further, the article suggests the best possible way forward for the above-mentioned concerns, by analysing the practices followed in various international jurisdictions.

II. SCHEMES OF THE COMPETITION ACT

The Objectives of the Competition Act, as highlighted above, in itself indicates that the aim of the Competition Act is to regulate the market at large and is not restricted to the mere settlement of disputes between private parties. If the legislature intended to make the Competition Act legislation to resolve private conflicts, the Objectives of the Competition Act may not have been worded, as it exists today in the Preamble of the Competition Act. The Supreme Court in *Excel Crop Care Limited*,[10] also pointed out that "*the Competition Act is clearly aimed at addressing the evils affecting the economic landscape of the country in which interest of the society and consumers at large is directly involved.*"

In addition to the objectives set forth in the Competition Act, the wordings of various provisions of the Competition Act read with the CCI (General) Regulations, 2009 ["**General Regulations**"] suggest that the Competition law is a law *in rem* and not a law *in personam*.

[7]Henry Campbell Black, *Black's Law Dictionary* (4th edn. West Publishing Co. 1951) 899.
[8]*Samir Agrawal* (SC) (n 4).
[9]*Samir Agrawal* (NCLAT) (n 1).
[10]*Excel Crop Care Limited v Competition Commission of India* [2017] 8 SCC 47 [22].

Section 19 of the Competition Act read with Regulations 10, 11, and 15 of General Regulations, deal with the filing of an 'information' and matters connected therewith. As seen in the next section, the above-mentioned provision read along with the relevant inter-related regulations, is broadly drafted to include any information, whether or not it invades the legal rights of the Informant. Further, Section 53N of the Competition Act, which deals with 'awarding compensation', provides a right to 'any enterprise or any person' to make an application to the NCLAT for seeking compensation that may arise from the findings of the Commission or the Appellate Tribunal. Evidently, Section 53N being much wider in its scope, is not restricted to providing compensation only to the Informant, but to anyone who is affected by the anti-competitive conduct of an enterprise.

Further, the observations of the CCI in the *Harshita Chawla v WhatsApp Inc*,[11] that "*the Competition Act has been conceived to follow an inquisitorial system wherein the CCI is expected to investigate cases involving competition issues in rem, rather than acting as a mere arbiter to ascertain facts and determine rights in personam arising out of rival claims between parties*", reinforces the broader mandate of the CCI. This finding is in line with the CCI's observations in the case of *XYZ v Indian Oil Corporation Limited*[12] that, "*a ruling/action by the CCI is a decision in rem and one which is intended to achieve market correction*".

III. CONTOURS OF SECTION 19 (FILING OF INFORMATION)

Section 19 of the Competition Act, allows the CCI to initiate an inquiry into an anti-competitive conduct (i) on receipt of any '*information'* accompanied with the required fees (Section 19 (1) (a)); (ii) on receipt of a reference made to it by the Central Government or a State Government or a statutory authority (Section 19(1) (b)); or (iii) on its own motion. A literal interpretation of the word 'any' in Section 19(1) (a) does not, in any way, portray a nexus between an informant filing an information under the Competition Act and the requirement of him suffering a direct legal injury.

Further, *"the use of the words 'any' connote extension. For 'any' is a word of wide meaning and prima facie the use of it excludes limitation."*[13] The Supreme Court, in the case of *Lucknow Development Authority v MK Gupta,*[14] elucidated the meaning of the word 'any' and while stating that the word has a wide amplitude, observed that, "*In Black's Law*

[11]Case No. 15 of 2020 (CCI) [50].
[12]Case No. 05 of 2018 (CCI).
[13]Justice G. P. Singh, *Principles of Statutory Interpretation* (13th edn, Lexis Nexus 2016) 179.
[14][1994] 1 SCC 243 [4] (SC).

Dictionary it is explained thus, the word "any" has a diversity of meaning and may be employed to indicate 'all' or 'every' as well as 'same' or 'one' and it's meaning in a given statute depends upon the context and subject matter of the statute". This interpretation was further reiterated in the case of *Shri Balaganesan v. MN Shanmugham Chetty,*[15] wherein it was observed that "*the word any has one of the following meanings: some, one out of many, an indefinite number, one indiscriminately of whatever kind or quality. It further observed that it is synonymous with 'either', 'every' or 'all'.*"

Further, the General Regulations provide for other requisites of filing an information such as contents of information (Regulation 10), procedure for filing information (Regulation 12 and 13). Regulation 10 states that an information shall contain (a) a statement of facts; (b) details of the alleged contravention of the Competition Act and documents in its support thereof; (c) narrative in support of alleged contravention; (d) relief sought, if any; and (e) such other particulars which may be required by the CCI.[16] As is evident, proving an 'invasion of legal right' is not a pre-requisite to file an Information. Rather, the Informant has to show the contravention of the provisions of the Competition Act. Further, while claiming damages or relief can be seen as an integral part of private litigation. Regulation 10 has made seeking relief an optional claim, thus, indicating the non-private nature of the Competition Act.

Furthermore, Regulation 15 of the General Regulations which provides for the procedure of scrutiny of information does not highlight any criteria wherein an information filed maybe ousted on the mere ground that there is no invasion of the legal rights of the Informant. Moreover, Regulation 15 states, "*Nothing contained hereinabove shall preclude the CCI from using the contents of such information in any manner as may be deemed fit, for inquiring into any possible contravention of any provision of the Act*".[17] Thus, the CCI has reserved with itself the right to rely upon an information, irrespective of its validity, and act *suo-moto* upon it. However, this might not have been a popular option in private litigation.

Therefore, it is manifestly clear that the legislature intended to make the Competition Act a crucial instrument in regulating the market at large, and, not to resolve the limited issues between the Informant and the alleged party.

IV. THE COMPETITION ACT: LAW *IN REM* AND THE CONCEPT OF *LOCUS STANDI*

[15][1987] 2 SCC 707 [18] (SC).

[16]The Competition Commission of India (General) Regulations 2009, Reg. 10.

[17]The Competition Commission of India (General) Regulations 2009, Reg. 15.

The discussion on whether competition law is a law *in rem* or a law *in personam* stems from the recent judgment of the NCLAT in the *Samir Agrawal* case.[18] NCLAT ruled that an 'informant' in terms of Section 19(1) (a) of the Competition Act ought to be the one who has suffered an invasion of his legal rights as a consumer or a beneficiary of healthy competitive practices. Otherwise, a person would not have the *locus standi* to bring an action against a violator of the provisions of Competition Act. The Latin term '*locus standi*' means the 'place of standing'. The Supreme Court, while referring to the Concise Oxford English Dictionary, has held that the term '*locus standi*' refers to the right or capacity to bring an action or to appear in a court.[19] We believe that the *Samir Agrawal* case[20] has perturbed the settled design and object of the Competition Act.

The inevitable conclusion of this judgement seems to be that a person who has not suffered any legal injury as a direct consequence of an alleged contravention of the Competition Act is not entitled to furnish information before the CCI. Consequently, that legal injury is a pre-requisite to file an information before the CCI.

First and foremost, the observation of NCLAT in the *Samir Agrawal* case,[21] is unconvincing and far-fetched considering that any person can be a consumer or a potential consumer directly or indirectly for any good or service available in the market and thus, is likely to have his legitimate interest at stake at all times. At this juncture, it is also pertinent to note that the Competition Appellate Tribunal ["**COMPAT**"], was a specially constituted tribunal to deal with competition matters and consisted of members having significant subject matter expertise, whereas the NCLAT falls short of such specialised competition law knowledge. The observation of the NCLAT with respect to '*locus standi'* is based on the reasoning that any other interpretation of Section 19(1)(a) would result in unscrupulous people to rake issues of anti-competitive agreements or abuse of dominant position targeting some enterprises with oblique motives.

As also highlighted earlier, the fundamental objectives of the Competition Act is the fair functioning of the markets and *not* to judge the antecedents of the informant. If the CCI finds merit in the anti-competitive conduct being reported to it, the *bona fide*/locus/motive of an informant should become subservient to the duty of the CCI to ensure fair functioning of the markets. Steered by the legislative intent behind the Competition Act, the CCI, in the case of

[18]*Samir Agrawal* (NCLAT) (n 1).
[19]*Amanullah v State of Bihar* [2016] 6 SCC 699 (SC).
[20]*Samir Agrawal* (NCLAT) (n 1).
[21]ibid.

Reliance Agency v Chemists and Druggists Association of Baroda,[22] had held that "*the proceedings before the Commission are inquisitorial in nature and as such, the locus of the Informant is not as relevant in deciding whether the case filed before the Commission should be entertained or not. As long as the matter reported to the Commission involves anti-competitive issues falling within the ambit of the Act, the Commission is mandated to proceed with the matter*."

Considering the NCLAT's perspective, the following concerns may arise if a wider interpretation is given to Section 19(1) (a), allowing information to be filed by anyone, with or without any invasion in their legal rights:

1) Possibility of frivolous or vexatious litigations with oblique motives;
2) Increased burden on the resources of the CCI and its investigative arm;
3) CCI is sufficiently equipped with the *suo-moto* power to initiate an inquiry and hence a wider interpretation of Section 19(1) (a) of the Competition Act to include anyone as a 'person' eligible to file an information, may not be required.

The first concern i.e., the NCLAT's apprehension with respect to unscrupulous people raking anti-competitive issues to pursue oblique motives is not dumbfounded. However, we submit with diffidence and welcome any counter to our submission that the Competition Act contains sufficient safeguards to cull such practices. First and foremost, the CCI is required to form a *prima facie* opinion in terms of Section 26(1) of the Competition Act which is merely an administrative order and does not require a thorough investigation by the investigative arm i.e., the Directorate General of the CCI.[23] This also tackles the second concern. If the CCI believes that an 'information' is filed with oblique motives or it discloses no *prima facie* case, it can very well close the case under Section 26(2) of the Competition Act after recording its reasoning. Further, Section 45 of the Competition Act empowers the CCI to impose a penalty which may extend up to rupees one crore on a person (including the who furnishes the information), who, *inter alia*, makes any statement or furnishes any document which he knows or has reason to believe to be false in any material particular. The CCI has reinforced this position in *Alkem Laboratories Limited* case,[24] wherein it has held that "*Section 45 of the Competition Act empowers the Commission to punish any person who fails to provide necessary information or documents or knowingly omits to state any material fact*".

[22]Case No. 97 of 2013 (CCI), [83]-[84].
[23]*Competition Commission of India v Steel Authority of India Ltd* [2010] 10 SCC 744 (SC).
[24]*Alkem Laboratories Limited v Competition Commission of India* [2016] Comp LR 757 (COMPAT).

Addressing the third concern, we submit that the Annual Report of the year 2018-19 published by the CCI[25] itself provides that the *suo-moto* power of the CCI to initiate proceedings against anti-competitive conduct is not the sole derivative for initiating action. The third-party complainants assume an even greater significance in an anti-competitive atmosphere. The Report highlights the fact that the percentage of alleged contraventions noticed due to receipt of information under Section 19(1) (a) was comparatively higher than the percentage of *suo-moto* investigations initiated by the CCI, in the past decade. Upon analysing the data provided in the aforesaid Annual Report,[26] it can be concluded that the *suo-moto* investigations initiated by the CCI in the past decade were just thirteen percent of the total contraventions noticed by the CCI due to receipt of information under Section 19(1)(a). Moreover, on August 23, 2019, the Hon'ble Finance Minister of India, while addressing the gathering on the CCI's 10th anniversary, emphasized on the need to increase the number of *suo-moto* proceedings by the CCI. The Hon'ble Finance Minister envisioned a new competition law regime - 'CCI Version 2.0' which will see an increase in the number of *suo-moto* cases by the CCI.[27]

Further, when most of the anti-competitive activities are carried out in a clandestine manner, it becomes essential for the CCI to act upon the slightest information it receives against any possible violation of the Competition Act. Accordingly, we submit that reading a requirement of *'locus standi'* of an informant into Section 19(1) (a), (i.e., the narrow interpretation of Section 19(1) (a) given by the NCLAT), maybe against the legislative intent of the framers of the Competition Act, and may even contribute to its progressive weakening.

V. THE GENERAL LEGISLATIVE INTENT

We support our submission that Competition Law is in fact law *in rem* and not law *in personam* and advocate the wider interpretation of Section 19(1) (a) of the Competition Act by referring to certain amendments, legislative frameworks, and parliamentary debates. Firstly, the Raghavan Committee captures a framework of the administrative structure of the CCI, by noting that "*in the view of the Committee, the CCI should be the sole recipient of all*

[25]Competition Commission of India, *Annual Report 2018-19* (2019) <http://www.cci.gov.in/sites/default/files/annual%20reports/ENGANNUALREPORTCCI.pdf> accessed 6 October 2020.

[26]ibid.

[27]Nirmala Sitharaman, 'Speech at CCI 10th Anniversary Celebrations' (Press Information Bureau, 23 August 2019) <https://pib.gov.in/PressReleseDetailm.aspx?PRID=1582738> accessed 7 October 2020.

complaints regarding infringement of the Competition Act from whatsoever sources it may be; an individual, a firm or an entity or the Central or State Governments".[28]

The words, '*from whatsoever sources it may be*', sufficiently indicates that the legislature intended to keep the powers of the CCI with respect to receiving information (then 'complaint'), as wide as possible, in order to ensure free play in the market**.** Further, the word 'complaint' used in Section 19 (1) of the Competition Act earlier, was often misinterpreted and was subsequently substituted by the term 'information' via the 2007 amendment to the Competition Act ["**2007 Amendment**"].[29] This seems to be a conscious attempt by the legislature to widen the ambit of the CCI to initiate enquiry on any possible contravention of the provisions of the Competition Act. In fact, the Delhi High Court, in the case of *Walmart India Private. Limited v Central Vigilance Commission*,[30] had also stated that the term 'information' is broader and more inclusive than the term 'complaint'.

Further, in *Shri Surendra Prasad*,[31] the erstwhile COMPAT gauged the legislative intention behind Section 19(1) (a) and opined that Parliament has neither prescribed any qualification for the informant nor prescribed any pre-condition to be fulfilled before filing an information under Section 19(1) (a). The COMPAT held that the plain language of Sections 18 and 19 read with Section 26(1) of the Competition Act does not infer that the informant must have any personal interest in the matter.[32] A similar view was taken by the CCI in *Shri Saurabh Tripathy v Great Eastern Energy Corporation Limited*,[33] *wherein* it was noted that the Competition Act allows a person to approach the CCI with an information, bringing to the notice any anti-competitive conduct in the market, without necessarily being personally aggrieved by such conduct.

To buttress the argument that the primary object of the CCI is market correction, rather than to resolve conflicts between private parties, it must be noted that the CCI regularly challenges the orders of courts and appellate tribunals before higher forums whenever it deems fit as per the circumstances of the case. Recently, the CCI had also filed a review petition[34] against an

[28]Competition Law Review Committee, *Report of the High-Level Committee on Competition Law and Policy* (Ministry of Corporate Affairs, 2000) para 6.16, ch.VI.

[29]Competition (Amendment) Act 2007, s 13.

[30]2018 SCC Online Del 11005 (DHC) [33].

[31]*Shri Surendra Prasad v. Competition Commission of India* Appeal No. 43 of 2014 (COMPAT) [22].

[32]ibid.

[33]Case No. 63 of 2014 (CCI) [15].

[34]*Competition Commission of India v Nhava Sheva International Container Terminal,* WP No. 25458 of 2019 (BHC).

order[35] of the Bombay High Court allowing the closing of the competition proceedings on account of personal settlement between the parties. The review petition[36] was filed by the CCI against this settlement order[37] *inter alia* on the ground that it exercises its jurisdiction *in rem* with an obligation to curb anti-competitive practices in the market, and hence, a settlement between the parties should not affect its ability to proceed with its investigation.

To further substantiate our argument, para 3.4 of the Competition Law Review Committee Report ["**CLRC Report**"] states "*the Competition Act allows any person having information about any contravention of the Competition Act to provide such information to the CCI..... Given that unlike courts, CCI does not decide a traditional lis which is premised on adversarial proceedings (also observed by the judgment[38] of the Delhi High Court) as proceedings before the CCI are inquisitorial in nature. Against this background, the Committee deliberated on the role of the informant in the proceedings. The Committee agreed that the informant should not be burdened with substantiating allegations.*"[39]

This leads to the conclusion that: (i) the Competition Act is a law *in rem*; (ii) *locus standi* of the Informant is subservient to the objective of the CCI and Competition Act; (iii) the CCI is a market regulator and not an arbiter of private parties; and (iv) its decisions are applicable to the parties beyond the Informant.

Finally, the author(s) would emphasize on certain provisions of the Draft Competition (Amendment) Bill, 2020,[40] ["**Draft Competition Bill**"] read with observations in the CLRC Report.[41] The Draft Competition Bill seeks to empower the CCI to close cases in contravention of Section 3 and Section 4 of the Competition Act, on grounds that same or substantially the same facts and issues have already been decided by the Commission in its previous orders.[42] It can be inferred from this proposed provision that an order passed by the CCI is applicable to the society at large and not to a specific person such as the Informant. Accordingly, the CCI may not look into the cases which concern the same facts and issues. Although the said provision is yet to come into effect, however, it reinforces the limited point that competition law is *in rem* and not *in personam*.

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[35]*Nhava Sheva international Container Terminal Private Limited. v Union of India* WP No. 14277 of 2018 (BHC).
[36]ibid.
[37]ibid.
[38]*Mahindra Electric Mobility Limited v Competition Commission of India* 2019 SCC Online Del 8032.
[39]Ministry of Corporate Affairs, *Competition Law Review Committee Report* (2019).
[40]Draft Competition (Amendment) Bill 2020.
[41]ibid.
[42]ibid, s 26.

VI. APPROACH OF CONTEMPORARY ANTI-TRUST REGULATORS

A. United Kingdom

The Competition & Markets Authority ["**CMA**"] considers complaints as a useful and important source of information relating to potentially anti-competitive behaviour. The Competition Act, 1998 provides that there are a variety of ways in which information can come to the CMA's attention, leading the CMA to investigate into competition contraventions. The CMA relies upon its own market intelligence to make initial enquiries into anti-competitive activities. Alternatively, evidence gathered through other CMA work streams, such as the CMA's merger or markets functions may potentially reveal anti-competitive behaviour. In these circumstances, the CMA gathers publicly available information and may write to businesses or individuals, seeking the relevant further information. Heavy reliance is also placed upon information received from the external sources which helps the CMA to uncover potentially anti-competitive conducts.[43]

B. United States

In the United States ["**US**"], the requirement of 'direct antitrust injury' has become a poignant gatekeeper, being used to weed out those plaintiffs who are not directly harmed by an alleged reduction in competition. The Supreme Court of the US in the *Illinois Brick* case[44] had observed that the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party "injured in his business or property" and accordingly the consumer suffering 'direct legal injury' may only have the right to file an antitrust complaint. That is to say the principle of 'direct antitrust injury' requires that the plaintiff prove not only that he suffered an injury, but that the injury is of a particular type that would bring it under the ambit of the antitrust laws.

The bright-line 'direct antitrust injury test' is visibly contested in the US with two-thirds of the states having passed statutes to repeal the principles laid down in the *Illinois Brick* case.[45] While the states have proposed to allow consumers to bring indirect purchaser claims under

[43]'Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (*GOV UK*, 4 November 2020) <https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases> accessed 14 October 2020.

[44]*Illinois Brick Co. v Illinois* [1977] 97 S.Ct.2061.

[45]ibid.

their respective state laws, the abovementioned test,[46] as upheld in the *Apple v Pepper*,[47] still prevails.[48]

Unlike other jurisdictions, the test of 'direct legal injury' is of significance in the US, especially because their antitrust legal framework provides for criminal conviction. Given that India's competition law regime is more in line with the civil nature of antitrust laws, as followed in the European Union, it is only logical that the Indian competition authorities take a cue from the European antitrust authorities in relation to the *locus standi* of the Informants.

C. European Union

The European Commission has the power to act on a complaint by undertakings, other natural and legal persons and even Member States for an investigation of an alleged breach of Articles 101 (anti-competitive agreements) or 102 (abuse of dominant position) of the Treaty on the Functioning of the European Union ["**TFEU**"].[49]

It is further provided in the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU ["**Notice**"][50] that Information from citizens and undertakings is important in triggering investigations by the European Commission. The European Commission, therefore, encourages citizens and undertakings to inform it about suspected infringements of the competition rules which can be done either by lodging a formal complaint or by simply providing market information to the European Commission.

It is pertinent to note that only natural or legal persons who can show a legitimate interest to lodge a complaint are entitled to file complaints with the European Commission for the purposes of Articles 101 or 102 of TFEU.[51]

The Court of First Instance in the case of *Bureau Européen des Médias et de l'Industrie Musicale*,[52] had held, "*an association of undertakings may claim a legitimate interest in lodging a complaint regarding conduct concerning its members, even if it is not directly*

[46]ibid.

[47]*Apple Inc v. Pepper* [2019] 139 S.Ct.1514.

[48]Colin Kass and David Munkittrick, 'Causation and Remoteness: the US Perspective' (2019) 1 Private Litigation Guide Global Competition Review <www.lexology.com/library/detail.aspx?g=a2155ac4-dcac-43ba-a70b-ba652a619bde> accessed 15 October 2020.

[49]Commission Notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU [2011] OJ C 308/06.

[50]ibid.

[51]Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2003] OJ L 1/1, art 7(2).

[52]Case T-114/92 *Européen des Médias et de l'Industrie Musicale (BEMIM) v Commission of the European Communities* [1995] ECR II-147, para 28.

concerned, as an undertaking operating in the relevant market, by the conduct complained of, provided that, first, it is entitled to represent the interests of its members and secondly, the conduct complained of is liable to adversely affect the interests of its members".

Further, the Court of First Instance in the case of *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft v Commission*,[53] had observed that "*a final customer who shows that his economic interests have been harmed or are likely to be harmed as a result of the restriction of competition in question and who is a purchaser of goods and services that are the object of the infringement has a legitimate interest in making an application or a complaint in order to seek a declaration from the European Commission that Articles 81 and 82 of the Treaty establishing the European Community (currently 101 and 102 of the TFEU) have been infringed.*"

The above-quoted precedents indicate that consumers (both current as well as potential) have the standing to approach the European competition authorities and their legitimate rights cannot be negated. In the *Samir Agrawal* case,[54] the NCLAT had concluded that the Informant, an independent law-practitioner, does not have the *locus standi* and has not seemingly suffered a legal injury due to the practices of Ola and Uber as a consumer or as a member of any consumer or trade association. Without going into the merits of the case, we submit that irrespective of the profession, an individual residing in India is a potential customer, with his legitimate interests at stake. Therefore, the decision[55] of the NCLAT does not consider the 'potential of legal injury' to the Informant.

Consequently, as many of the anti-competitive practices take place in a clandestine manner, the *suo-moto* power of the European Commission only strengthens, when certain facts have been brought to its attention. The same is true for the *suo-moto* power of the CCI. Third-party or even anonymous information are important sources helping the CCI to uncover anti-competitive activities taking place in a clandestine manner, furthering its objective of market correction.

VII. CONCLUSION

The *Samir Agrawal* case[56] along with stirring the settled position of *locus standi*, highlighted potential issues that can arise from resorting to a conservative approach while interpreting the

[53]Cases T-213/01 and T-214/01 *Österreichische Postsparkasse AG and Bank für Arbeit und Wirtschaft* v Commission [2006] ECR II-1601, para 114.
[54]*Samir Agrawal* (NCLAT) (n 1).
[55]ibid.
[56]ibid.

provisions of the Competition Act. The ruling[57] of the Supreme Court on December 15, 2020, reversing the NCLAT decision[58] regarding the issue of *locus standi* has indeed settled the perplexity surrounding the issue of *locus standi* of an informant by observing that "*the doors of approaching the CCI and the appellate authority, i.e., the NCLAT, must be kept wide open in public interest, so as to subserve the high public purposes of the Competition Act*".[59]

Nevertheless, in a country where there is a visible boost in the start-up culture, an interpretation such as the one contemplated by the NCLAT in the *Samir Agrawal* case[60] have the potential to indirectly hinder the growth of the start-ups and Small and Medium-sized Enterprises ["**SMEs**"] in the feet of the incumbents. The connection between the two (i.e., start-ups/ SMEs and *locus standi*) is simple as, even before entering the market, start-ups and SMEs have no option but to rely on the existing policies of the incumbents to even start, let alone survive. If such start-ups/ SMEs cannot address the issues before entering the market (given the 'direct legal injury test'), then there will be no incentive left to move into the market in the first place. A broader interpretation of '*locus standi*', as envisaged and laid down by the Supreme Court in its latest ruling[61], will not only help the CCI to bust anti-competitive activities of enterprises, but is also likely to assure the small and new players, that the CCI, as a market regulator, is going to ensure the functioning of the market without prejudices.

Further, the Draft Competition Bill[62] has proposed substantial changes to the Competition Act with respect to antitrust, merger control, and regulatory provisions. Further, given the ever-evolving nature of business economy, unforeseen issues surrounding '*locus standi*' and 'interpretation of provisions of the Competition Act' may come up in the near future. Consequently, this article may be of relevance while dealing with the aforesaid issues and to showcase that Competition law being a law *in rem*, may be interpreted liberally in the interest of the market at large.

[57] *Samir Agrawal* (SC) (n 4).
[58] *Samir Agrawal* (NCLAT) (n 1).
[59] ibid [22].
[60] *Samir Agrawal* (NCLAT) (n *1*).
[61] *Samir Agrawal* (SC) (n 4).
[62] Draft Bill (n 40).

SCOPE OF DIRECTOR GENERAL'S INVESTIGATION UNDER THE COMPETITION ACT, 2002

- *MS. ELA BALI[*] AND MS. ADITI KHANNA[**]*

ABSTRACT

*The Competition Act, 2002 ["**Competition Act**"] was enacted with the objective to ensure fair competition by prohibiting trade practices that have an appreciable adverse effect on competition ["**AAEC**"] in India. For this purpose, the Competition Commission of India ["**CCI**"] was established and tasked with the duty to: eliminate practices having an AAEC, promote and sustain competition, protect the interests of consumers, and ensure freedom of trade carried on by market participants, in India. The investigative wing of the CCI, i.e., the Director General ["**DG**"], assists it in investigations into anti-competitive practices of enterprise(s). Any person aggrieved by the anti-competitive conduct of an enterprise can provide information to the CCI requesting investigation. If the CCI is of the prima facie view that an investigation is warranted, it passes an order under Section 26(1) of the Competition Act, directing the DG to conduct the investigation ["**Prima Facie Order**"]. A Prima Facie Order sets out the facts and contraventions of the Competition Act triggering an investigation by the DG. Oftentimes, the authority of the DG is challenged when the enterprises under investigation are dissatisfied upon being the subject of investigation. Interestingly, considering the recent judicial precedent, as discussed later in this comment, the powers of the DG have been upheld and to a great extent, widened. From such precedent, it flows that the Prima Facie Order permits the DG to rightfully bring within its investigation undiscovered facts, unnamed parties, and unidentified competition concerns. Further, with the Draft Competition (Amendment) Bill, 2020 ["**Draft Bill**"] in the offing, the broad powers of the DG are likely to be amped-up. In this comment, the authors seek to portray the current legal and jurisprudential position of the ambit of the DG's powers of investigation.*

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I. INTRODUCTION

The objective of the Competition Act is to ensure fair competition by prohibiting trade practices that have an AAEC in India. The Competition Act, *inter alia*, prohibits anti-competitive agreements and abuse of dominant position of enterprises, under Sections 3 and 4 of the Competition Act, respectively.

II. INVESTIGATION PROCESS UNDER THE COMPETITION ACT

Under Section 19(1) of the Competition Act, any person, consumer, or their association can provide an information to the CCI, alleging anti-competitive practices and/or abuse of dominant position by an enterprise. To this end, a reference can also be made to the CCI by the Central or State Government or a statutory authority. Upon receipt of such information or reference, the CCI can either dismiss the information under Section 26(2) of the Competition Act at the outset, or direct the DG to investigate the matter if it is of the view that there exists a *prima facie* case of contravention of the provisions of the Competition Act. In the latter case, the CCI passes a *Prima Facie* Order. Thus, the *Prima Facie* Order forms the basis for the DG to initiate its investigation.

Typically, a *Prima Facie* Order sets out the: (a) facts, based on which the CCI comes to the *prima facie* view of contravention of the provisions of the Competition Act; (b) the relevant provisions (i.e., Section 3 and/or Section 4 of the Competition Act) whose contraventions are *prima facie* established; and (c) enterprises that have indulged in anti-competitive practices and whose conduct need to be investigated.

The DG derives its powers of investigation from Section 41 read with Section 36(2) of the Competition Act. These provisions empower the CCI, and by extension, the DG, with the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, i.e., to summon and enforce the attendance of a person; examine him on oath; require the discovery and production of documents; receive evidence on affidavit, etc.

During the investigation, the DG collects information from enterprises under investigation, third parties and the informant. Upon conclusion of the investigation, the DG prepares a report of its findings along with the evidence/ documents collected during the investigation. This report, being non-binding in nature, is then submitted to the CCI for its consideration.

There is a possibility that during an investigation, the DG uncovers new facts and events, or discovers that an enterprise has violated certain additional provisions of the Competition Act, that were not mentioned in the *Prima Facie* Order. It may also be possible that certain enterprises which were not named in the *Prima Facie* Order, also indulged in anti-

competitive conduct. Thus, the question that arises is: what is the scope of the DG's investigation? The corollary being – can the DG go beyond the *Prima Facie* Order?

III. JUDICIAL JOURNEY OF THE DG'S SCOPE TO INVESTIGATE

The scope of the DG's investigation was deliberated upon by the Supreme Court ["**SC**"] in *Excel Crop Care Limited v Competition Commission of India & Others*[1] ["**Excel Crop**"]. In the said case, the Food Corporation of India ["**FCI**"] filed an information with the CCI, alleging that four manufacturers of Aluminium Phosphide ["**ALP**"] tablets had formed a cartel to quote identical prices in response to a tender issued by the FCI in 2009 for purchase of ALP tablets.

The CCI passed a *Prima Facie* Order in February 2011 and directed the DG to investigate.[2] The DG's investigation concluded that the ALP manufacturers (being the enterprises under investigation) had *inter alia* cartelised in relation to the 2009 tender. Subsequent to the CCI's *Prima Facie* Order, another tender was floated by the FCI in May 2011, but no separate information was provided to the CCI against the 2011 tender. However, the DG gave its findings in relation to the 2011 tender as well and concluded that the ALP manufacturers had colluded by collectively deciding to boycott the 2011 tender. The ALP tablet manufacturers challenged the DG's authority to arrive at findings in respect of the 2011 tender before the CCI. However, the CCI rejected the contention *inter alia* observing that the *Prima Facie* Order was not event specific.

Aggrieved, the ALP manufacturers approached the erstwhile Competition Appellate Tribunal ["**COMPAT**"]. The COMPAT set aside this contention and held that although the DG did not have *suo-moto* powers to investigate any matter that, however, did not mean that the investigation was to be restricted only to the 2009 tender.[3] Thus, the language of the *Prima Facie* Order must be taken into consideration. The COMPAT noted that the order in the present case was broad enough to empower the DG to look at all the facts till the investigation was complete. The DG is duty bound to conduct a comprehensive investigation, and in the present case, was correct in considering the 2011 tender as well.

The ALP manufacturers appealed against the COMPAT's decision to the SC, which ruled that the DG was vested with the power to investigate the 2011 tender, as the purpose of a DG investigation is to probe all necessary facts and evidence. Therefore, although the starting

[1] 2017 8 SCC 47 (SC).

[2] *In Re: Aluminium Phosphide Tablets Manufacturers,* 2012 CCI 24 (CCI).

[3] *Excel Crop Care Limited v Competition Commission of India & Ors.*, 2012 Comp AT 104 (COMPAT).

point of the inquiry was the allegations in the information, if other facts were uncovered during the course of the investigation, the DG would be well within its powers to include those too.[4] Further, in the initial stages, the CCI could not have foreseen or predicted whether the investigation would reveal any violation of the Competition Act and, if so, what the nature of the violation so revealed, would be. Accordingly, the SC held that any restriction of the investigation process would defeat the very purpose of the Competition Act.

Subsequently, on 12 September 2018, the division bench of the Delhi High Court ["**DHC**"] delivered the judgment in *Cadila Health Care Limited & Others v Competition Commission of India & Others*,[5] ["**Cadila**"], endorsing the view taken in *Excel Crop*. In the abovementioned case, the CCI passed a *Prima Facie* Order directing the DG to investigate the conduct of certain pharmaceutical enterprises that had allegedly denied supply of medicines to the informant. However, the DG also investigated the conduct of Cadila Healthcare Limited ["**Cadila Ltd.**"] (a pharmaceutical enterprise), not named as an enterprise under investigation in the *Prima Facie* Order. Cadila Ltd. challenged the investigation being undertaken by the DG, before the DHC. The DHC set aside Cadila Ltd.'s challenge and observed that at the stage when the CCI takes cognizance of information and directs investigation, it does not necessarily have complete information or facts relating to the pattern of behaviour that affects the marketplace. It can only go by the information provided at the time, and so, the DG is asked to look into the matter. The DG's investigation may also reveal more enterprises that may have contravened the provisions of the Competition Act. Therefore, the DG's power is not limited or restricted to matters only included within the *Prima Facie* Order. Cadila Ltd. has now filed an appeal against the DHC judgment before the SC and the same is pending adjudication.

On 10 April 2019, a division bench of the DHC in the case of *Mahindra & Mahindra v Competition Commission of India & Others* [6] ["**Mahindra Order**"] clarified the scope of the DG's investigative power. In this case, multiple car manufacturers challenged the DG's authority to investigate against them. The challenge was on the grounds that the original information filed with the CCI was only against three car manufacturers, namely Honda, Volkswagen, and Fiat India, for indulging in anti-competitive practices. Based on the said information, the CCI passed a *Prima Facie* Order directing investigation against only the

[4] *Excel* (n 1), 36.

[5] 2018 252 DLT 647 (DHC).

[6] WP(C) 6610 of 2014 (DHC).

above named three car manufacturers. During the investigation, the DG noted that similar practices were being followed by other car manufacturers not named in the original information and in the *Prima Facie* Order. Through an internal note, the DG requested, and was granted, permission by the CCI to expand the scope of the investigation by including other car manufacturers as well. The car manufacturers contested the CCI's decision before the DHC on the ground that the CCI should have passed a separate *Prima Facie* Order to initiate an investigation against such unnamed car manufacturers. The DHC's judgment heavily relied on the *Excel Crop*[7] judgment and observed, *inter alia*, that Section 26(1) of the Competition Act refers to action by the CCI directing the DG to inquire into "the matter". Therefore, it is well within the DG's power to investigate the role of other players as well. The car manufacturers have preferred an appeal against the said decision before the SC, pending adjudication.

On 12 September 2019, the division bench of the DHC delivered its judgment in *Competition Commission of India v Grasim Industries*,[8] ["**Grasim**"] following the law laid down in *Excel Crop*.[9] In this case, the CCI, in its *Prima Facie* Order, had directed the DG to investigate the conduct of certain enterprises, including Grasim Industries, in relation to anti-competitive practices under Section 3 of the Competition Act. While the DG exonerated Grasim Industries from the violation of Section 3, it concluded that Grasim Industries had abused its dominant position under Section 4 of the Competition Act. Grasim Industries challenged this finding before the CCI on the grounds that the DG could not have expanded the scope to investigate its conduct under Section 4 of the Competition Act, as it was beyond the scope of the original information, and it did not form part of the *Prima Facie* Order. However, the challenge was rejected by the CCI.

Grasim Industries appealed[10] against the CCI's rejection before the single-judge bench of the DHC, which disagreed with CCI's view, and held that the DG cannot expand the scope of investigation beyond the allegation mentioned in the *Prima Facie* Order. The single-judge bench had held that the DG is not competent to travel outside the information or reference. Consequently, the DG would be empowered to investigate a contravention of Section 4 only if the CCI had considered it while forming a *prima facie* opinion under Section 26(1) of the Competition Act. However, the CCI would be entitled to treat the impugned part of the DG

[7] *Excel* (n 1).

[8] [2019] 265 DLT 535 (DHC).

[9] *Excel* (n 1).

[10] *Grasim Industries Limited v Competition Commission of India*, [2014] 206 DLT 42 (DHC).

report (the part dealing with abuse of dominant position by Grasim Industries) as an information under the Competition Act and proceed accordingly. The said decision was, thereafter, challenged before the division bench of the DHC, which disagreed with the findings of the single-judge bench in view of jurisprudence laid down in *Excel Crop*[11] and *Cadila*.[12]

The division bench of the DHC relied on the SC decision in *Competition Commission of India v Steel Authority of India Limited*,[13] and observed that the CCI's *Prima Facie* Order is not meant to restrict the opinion that may be formed by the DG upon such investigation. In the present case, the direction to the DG was to investigate "the matter", which not only enabled the DG to investigate the violations set out in the *Prima Facie* Order, but also any other violation that may have come to its notice during the investigation. The DHC observed that the *Prima Facie* Order only triggers investigation. The DG is required to investigate the entire matter, i.e., the allegations made in the information, with all the evidence, documents, statements or analysis collected during the investigation. The investigation must be comprehensive, and the allegations and information mentioned in the *Prima Facie* Order cannot restrict or constrain the DG from examining the violation of other provisions of the Competition Act. Grasim Industries has challenged the said judgment before the SC, and its petition has been clubbed with Cadila Ltd.'s petition involving the same question of law. This petition is currently pending before the SC.

Considering the precedent discussed above, the position that emerges is that the DG has very wide scope to investigate, and the DG's powers are not circumscribed by the *Prima Facie* Order. The DG can expand the investigation to include additional enterprises, facts, events, as well as additional allegations, not originally included in the *Prima Facie* Order.

IV. POWERS OF THE DG UNDER THE DRAFT BILL

The DG's wide powers are reverberated in the recently released Draft Bill.[14] Presently, Section 41(3) of the Competition Act, which refers to Sections 240 and 240A of the Companies Act, 1956[15] ["**1956 Act**"], governs the DG's powers. These provisions empower

[11] *Excel* (n 1).

[12] *Cadila* (n 5).

[13] 2010 10 SCC 744 (SC).

[14] Draft Competition (Amendment) Bill 2020.

[15] Under the Companies Act, 1956, the Central Government can appoint an inspector to investigate and report on the affairs of a company/enterprise as per its directions. The powers granted to the Inspector under Sections 240 and 240A of the Companies Act, 1956, shall be applicable to the Director General.

the DG to enter premises of an enterprise(s) under investigation, conduct searches, and subsequently seize any material or information that is pertinent to the investigation ["**Dawn Raids**"]. While the 1956 Act has now been replaced with the Companies Act, 2013 ["**2013 Act**"], the 2013 Act does not contain any provisions corresponding to Sections 240 and 240A of the 1956 Act. To bridge this gap and to solidify the DG's wide powers in competition law enforcement, the Draft Bill proposes to amend Section 41 of the Competition Act, to explicitly provide the power to conduct Dawn Raids by the DG.

As discussed previously, the current position under Section 36(2) of the Competition Act, is that the CCI is vested with the same powers as a Civil Court while trying a suit. The DG exercises these powers by extension, by virtue of Section 41(2) of the Competition Act.[16] However, the Draft Bill proposes to insert a specific provision empowering the DG to exercise these powers directly. In addition, the DG will now be able to examine, under oath, "*any of the officers and other employees and agents of the party being investigated*". This provision includes past as well as present officers, employees, and agents. The proposed definition of the term 'agent' is wide and includes legal advisors as well.

Further, the Draft Bill proposes to grant the DG the authority to require officers, employees, and agents of the party being investigated, or any other person to "*produce books, papers, other documents, records, and information in their possession*", which are relevant for the investigation. Presently, while this authority exists with the CCI by virtue of Section 36(4) of the Competition Act, the same authority is not conferred on the DG by extension. Furthermore, as per Section 43(b) of the Competition Act, if any person fails to comply with the directions of the DG while it exercises its powers under Section 41(2)[17] of the Competition Act, such person shall be punishable with a fine of up to rupees 1 lakh for each day of non-compliance, which may extend to rupees 1 crore. The Draft Bill proposes to amplify this penalising provision. It is proposed that any person who fails to produce any documents, information, or records, or fails to appear before, or to answer any questions raised by the DG, shall be punishable with imprisonment of a term of up to six months or a

[16]As per Section 41(2) of the Competition Act, 2002, "*the Director General shall have all the powers as are conferred upon the Competition Commission of India under Section 36(2).*"

[17]As per Section 36(2) of the Competition Act, 2002, these powers are: *"(a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavit; (d) issuing commissions for the examination of witnesses or documents; and (e)requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), any public record or document or copy of such record or document from any office*."

fine of up to rupees 1 crore, or both, coupled with an additional fine of up to rupees 5 lakhs for each day of non-compliance.

In light of the above discussed judicial precedent recognising the wide investigative powers of the DG, and the proposed enhancement under the Draft Bill, enterprises are required to be cautious. It is possible that an enterprise following an industry practice which is being investigated for being anti-competitive, could be roped into the DG's investigation, although the original information may be filed against its competitor. Thus, enterprises must regularly audit and closely scrutinise their activities to ensure that they are compliant with competition law. On the other hand, it is also necessary, in light of such significant proposed enlargement of the DG's powers, to carve out adequate checks and balances within the Competition Act to ensure that the DG's powers are not unduly or unjustly exercised.