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LESSONS FOR INDIA IN SUSTAINABILITY AND ANTITRUST: SUSTAINABLE AGREEMENTS (PART I)

– **MR. VIKRAM SOBTI[*] & MS. RIDDHIKA DUMANE[**]**

ABSTRACT

While many spheres of law have adapted to the shift of incorporating sustainability objectives in their application, competition law is still playing catch-up. Businesses find it difficult to achieve sustainability goals on a stand-alone basis, given the "first mover disadvantage" owing to higher risks in terms of input and production costs. To achieve sustainability objectives, businesses require cooperative efforts which can be viewed sceptically by the competition authorities.

In this part of the two-part series, the authors have analysed the factors under which cooperative efforts pursuant to a 'sustainable agreement' may not raise anti-competitive concerns, and why businesses should not shy away from playing an active role to achieve sustainability goals. These factors and principles can act as guidance tools in the assessment of anticompetitive effects under the law, as it stands today, given the dynamic nature of the Indian competition law.

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I. INTRODUCTION

The need to be more sustainable has now rightfully gained traction. Private and public entities across the globe have the responsibility to strengthen their commitment to the UN Sustainable Development Goals. Of the 17 sustainable goals, Goal 12.6 encourages the private sector to adopt sustainable business practices by either being a part of the '*green economy*' or by '*being sustainable*'. Society as a whole has woken up to the fact that working towards a sustainable environment is no longer an option but a necessity. Companies have also noticed a shift in consumer preferences towards sustainable products. To cater to the needs of the corporations to achieve their sustainability goals, various relaxations, under taxation and other regulatory laws, depending on the sector, size and resources, human capital, and other factors, have been given.

To remain competitive, companies are feeling the need to join forces and align themselves to achieve the sustainability goals. But such an alignment, from a competition perspective garners attention of the competition authorities which might derail the sustainability efforts. Anti-trust laws have never been at the forefront in helping achieve these goals.[1]

However, it is believed that a clear and goal-oriented anti-trust regime would help achieve these sustainability goals at a faster pace. The dual objective of protecting the consumer interests and the competition process[2] and the adversarial powers [of the competition authorities] make competition law best suited to fillip these efforts.

In the two-part series, the authors aim at understanding the relationship between the role of sustainability in assessing anti-competitive agreements and combinations. In this article, the authors have limited the study to the relationship between sustainability and anti-competitive agreements.

II. SUSTAINABLE AGREEMENTS

There have been apprehensions that coordination amongst businesses for achieving sustainable goals would be looked at as 'cartelization', which derails such efforts. To address

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[1] Jay Modrall, Sustainability, Anti-trust and the EU Green Deal, NORTON ROSE FULBRIGHT (2021) <https://www.nortonrosefulbright.com/en-nl/knowledge/publications/4d7ef55a/sustainability-antitrust-and-the-eu-green-deal> accessed 10 October 2022.

[2] Thomas Eilmansberger, *How to distinguish good from bad competition under Article 82 EC: In search of clearer and more coherent standards for anti-competitive abuses*,42 COMMON MARK. LAW REV.,129, 132 (2005).

such a concern, competition authorities are now looking at 'sustainable agreements' which are aimed at mitigating the impact of economic activities on the environment.

'Sustainable agreements' have not been conclusively defined by any of the competition authorities as of date. However, the decisional practice, across jurisdictions, gives us an indication of how such agreements might be assessed. We can infer that sustainable agreements can be agreements that (1) aim at contributing to mitigate the harm to the environment, (2) are non-binding on the individuals/undertakings giving them a leeway to determine their contributions and activities to realize them, (3) aim at removing less sustainable products from the market without adversely affecting the price or product diversity and (4) do not restrict competition in the efforts to promote sustainability.[3]

A. Why are businesses for it?

Making businesses more sustainable works in the best interest of not only the entity but also the society at large. Shifting to a green business has many advantages, namely:

1. *Long-term capacity building*: Companies are facing hurdles in their manufacturing process due to resource depletion. Investing in processes promoting sustainable consumption might address this concern to some extent.
2. *Economies of scale*: Sustainable consumption requires investment in clean raw materials and advanced technology which turns out to be expensive. Suppliers/manufacturers with their collective demand for clean raw materials might be able to reduce their average fixed costs to achieve economies of scale and scope.[4]
3. *Innovation and business opportunities*: Redesigning product and manufacturing capacities not only serves as a risk management tool, but also opens new avenues for innovation in the allied markets.
4. *Consumer loyalty*: Consumers view sustainability as a qualitative improvement that doesn't harm the environment. Investing in such sustainable products would not only open new avenues for businesses but at the same time offer consumers more options

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[3] Jay Modrall, Sustainability, Climate change and sustainability disputes: Antitrust considerations, NORTON ROSE FULBRIGHT (2021) <https://www.nortonrosefulbright.com/en-in/knowledge/publications/3633ff51/climate-change-and-sustainability-disputes-anti-trust-and-competition-perspective#section2> accessed 13 October 2022.

[4] Simon Holmes, et. al, Competition Policy and Environmental Sustainability, (INTERNATIONAL CHAMBER OF COMMERCE, (2020) <https://iccwbo.org/content/uploads/sites/3/2020/12/2020-comppolicyandenvironmsustainnability.pdf> accessed 19 December 2022.

to choose from.[5] Also, the new wave of sustainably conscious purchasing plays an important role in the purchasing patterns of consumers. Thus, brands that play their part by engaging and investing in the causes that consumers feel strongly about, generate a more loyal consumer base.

5. *Tax benefits*: Many countries, including India, are bringing in policies in the form of providing incentives, grants, rebates, and reliefs for green and clean technology and infrastructure. In India, these reforms have been introduced to accelerate the country's journey toward net-zero carbon emissions by 2070.[6]

This goes on to show that the incorporation of sustainable methods in the production and supply chain will help the business, and no doubt the environment, in the long run.

Sustainable Agreements are not in violation of Competition Law

Sustainable agreements can be divided into two categories:
The first category of agreements are those that attract relaxations under the competition law as they protect the social policy objectives[7]. These type of agreements by their very nature may not be considered to be violative of the competition law. Examples of such agreements could include agreement or statements to voluntarily set common objectives where the specific contribution of each participant is not binding; agreements to improve the quality of the products without an increase in the cost for the consumers or reduction in the choices available; agreements where the manufacturers require the businesses in the supply chain to abide by the standards that apply to them.

The second category are sustainable agreements that (1) are entered to achieve a sustainable goal[8] (2) use a fair standard-setting process, where (3) the standard is not made binding on the members to the agreement, and (4) there are no restrictions on competition.[9] These types of agreements are entered to achieve a sustainable objective such as setting a standard or a

[5] Autoriteit Consument Markt, Guidelines on Sustainability Agreements: Opportunities within Competition law 4 (ACM, 2020).
[6] PWC, 'Green Taxes and Incentives Tracker' <https://www.pwc.com/gx/en/services/tax/green-tax-and-incentives-tracker.html> accessed 12 November 2022.
[7] Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie [1999] C-67/96 ECR 1999; Geert Goeteyn, When Does Sustainable Co-operation Become an Anti-competitive Agreement? REED SMITH (2021), <https://www.antitrustandcompetitionreport.com/2021/03/antitrust-compliance/when-does-sustainable-collaboration-become-an-anticompetitive-agreement/#_ftn1> accessed 26 December 2022.
[8] Susan Black, et. al., Competition Law and Sustainability, Thomson Reuters (2022) < https://uk.practicallaw.thomsonreuters.com/w-035-2035?transitionType=Default&contextData=(sc.Default)&firstPage=true> accessed on 14 October 2022
[9] Simon Holmes (n 4).

code of conduct to promote environmentally conscious practices, improving product quality, removing less sustainable products from the market, and enter into a joint venture to achieve sustainable objectives by achieving sufficient scale.

In essence, agreements that (1) set standards that are transparent, non-discriminatory, non-exclusionary, and non-binding; or (2) are entered into with the objective of sustainability at its core, and which (3) do not restrict competition, might not be in violation of the competition law.

B. Greenwashing

With consumers becoming more conscious of their footprints and opting for greener and healthier lifestyles, the preference for "green" and "sustainable" products has increased. Consumer protection authorities have also started to crack down on companies for their false "green" and "sustainable" claims and misleading consumers.[10] Such "green-washing" has a different connotation when it comes to competition law. While there is a push for sustainability and anti-trust to reinforce each other, there is a risk that companies might distort the prevailing competitive conditions under the disguise of sustainability, which under competition law is termed as "Green Washing."[11]

Such agreements would include collective boycott / phasing out of products using or promoting sustainability goals, imposition of industry-wide standards and denying access to the use of set standards, imposition of binding commitments resulting in an increased price for the consumers, exchanging competitively sensitive information under the garb of discussing sustainable initiatives and restricting market entry of green technologies.[12]

[10] Press Release, Competition & Markets Authority, Misleading environmental claims (2020) <https://www.gov.uk/cma-cases/misleading-environmental-claims> accessed 13 October 2022; Zaneta Sedilekova and Isabelle Merchat 'DWS and Deutsche Bank raided over greenwashing allegations' LEXOLOGY (2022) <https://www.lexology.com/library/detail.aspx?g=80ebdc10-5617-4d8c-b78b-05ce4ae2495d> accessed 10 October 2022.

[11] Markus Röhrig, et. all, 'Green Deal and Anti-Trust: Less Red Tape for Green Cooperation?' HENGELLER MUELLER (2021) < https://www.hengeler.com/fileadmin/news/Newsletter/2021_02_BRX.pdf> accessed 18 October 2022.

[12]Competition & Markets Authority, Environmental sustainability and the competition and consumer law regimes – advice to the Secretary of State for Business, Energy and Industrial Strategy (Call for inputs document, CMA 148con, 2021) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1021364/CFI_-_sustainability_advice_.pdf > accessed 19 October 2022.

A commonly cited example is the European Commission's decision in *Consumer Detergents Case*[13] where the anti-competitive conduct was linked to the implementation of an environmental initiative concerning laundry detergents which led to a cartel for increasing prices.

European Commission has in the recent past fined a few car manufacturers for actively avoiding competing based on technology that could have been used to reduce harmful emissions beyond what was legally required, and for colluding on the development and consumption of 'AdBlue'. The Commission also provided the parties with guidance on the aspects of standardisation of AdBlue filler neck, quality standards or joint development of an AdBlue dosing software platform. This was the first time when the Commission noted that the agreement restricted competition on product characteristics relevant for the customers.[14] This case is an instance where the collusion was by object on a non-price aspect, and the Commission opined that the agreement did not require an examination of the effects of the agreement on the market.

Though the sustainability agenda of companies is always viewed sceptically owing to the high chances of green-washing, the competition authorities by evaluating and assessing the aim, competitive factors, efficiencies, and consumer benefit may be in a position to rule out such a possibility and help promote sustainability initiatives.

C. Sustainability Agreements with benefits offsetting the restrictions on competition

There might be instances where the sustainability agreement might lead to a negative impact on the consumers and create restrictions on competition. In such cases, the competition authorities will have to test whether the benefits of cooperation agreements outweigh the negative impact on competition and consumers.

This is generally done by undertaking an economic analysis of the benefits accrued to the consumers. However, the benefits might not always be monetary. Consumers value sustainability despite the fact that the product might cost slightly more. Consumers also

[13] Commission Decision of 13.04.2011 in COMP/39579 – Consumer Detergents, <https://ec.europa.eu/competition/antitrust/cases/dec_docs/39579/39579_2633_5.pdf >.
[14] Press Release, European Commission, 'Antitrust: Commission fines car manufacturers € 875 million for restricting competition in emission cleaning for new diesel passenger cars' (2021) <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3581> accessed 31 October 2022.

respond negatively to companies with a poor commitment to caring for the environment.[15] However, one must keep in mind that consumers might not be willing to spend significantly higher for the causes of sustainability.[16] This goes on to show that sustainability can be termed as a 'quality' element having some impact on consumer purchase patterns.[17]

As such, sustainable agreements call for a much broader analysis. The benefits would include or extend beyond *economic benefits*, such as lower emissions, durable solutions, etc. Also, the benefit derived would not be restricted to a particular consumer, but the relevant 'consumer group', making it difficult to assess the benefits accrued to the consumer group as a whole.[18]

Such analysis would have to consider whether the benefits derived are balanced across potentially higher prices and costs or at times even lack of substitutability. There have been cases in Europe[19] where agreements to stop producing lesser energy-efficient appliances were analysed. Normally such agreements harm the consumers as it leads to higher costs for the consumers, but in these cases, emphasis was placed on the fact that the environmental benefits outweighed the consumer harm.[20]

A study conducted by the Autoriteit Consument Markt [Dutch Antitrust Authority] displayed that the consumers were willing to pay for animal and environmental concerns but not for specific measures in the sustainability agreements.[21] Therefore, higher costs and prices have to be weighed against the benefits received by the consumers. If the benefits with regard to the environment, animals, and public health outweigh the negative effects, only then will the agreement be termed as not infringing competition laws.[22] It is equally important to establish

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[15] Sungchul Choi and Alex Ng, *Environmental and Economic Dimensions of Sustainability and Price Effects on Consumer Responses* 104(2) J. BUS. ETHICS, 269 (2011).
[16] McKinsey & Company, How much will consumers pay to go green? MCKINSEY & COMPANY (2012), <https://www.mckinsey.com/business-functions/sustainability/our-insights/how-much-will-consumers-pay-to-go-green> accessed on 5 October 2022.
[17] Cristina A. Volpin, Sustainability as a Quality Dimension of Competition: Protecting Our Future (Selves), CPI ANTITRUST CHRONICLE (2020), <https://www.competitionpolicyinternational.com/sustainability-as-a-quality-dimension-of-competition-protecting-our-future-selves/> accessed 28 October 2022.
[18] Julian Nowag, Sustainability & Competition Law and Policy, DAF/COMP(2020)3 (OECD, 2020).
[19] *CECED I: Washing Machines,* Commission decision 2000/475/EC of 24 January 1999.; *CECED II: Water Heaters*, Commission decision 2001/C 250/03 of 8 September 2001.; *CECED III: Dishwashers*, Commission decision 2001/C 250/02 of 8 September 2001.
[20] ibid.
[21] Simon Holmes (n 4).
[22] ACM's Analysis of the Sustainability Arrangements concerning the 'Chicken of Tomorrow', Consultation Document - 13.0195.66, Autoriteit Consument en Markt, 8 (2015).

a causal relationship between the conduct and the environmental benefits derived from the said conduct.[23]

The European Commission has recently also opened an investigation into a cartel for artificially increasing the prices and restricting the supply of biofuels which contribute to the reduction of greenhouse gas emissions.[24]

However, the challenge that remains is to differentiate between greenwashing agreements and sustainability aimed agreements. Here, India can take guidance from the Austrian sustainability guidelines[25] and the UK Competition Authority's guidance[26], which provide that:

1. the cooperation must lead to efficiency gains which requires overall social welfare;
2. these efficiencies cannot be achieved by less restrictive means;
3. the efficiency gains contribute substantially to a sustainable economy. The contributing efficiencies must outweigh the negative effects on competition;
4. constraints imposed by the cooperation are indispensable to realising the efficiency gains; and
5. cooperation does not restrict competition.

Thus, while assessing sustainable agreements, factors such as market share of the product covered under the cooperation agreement, constraints imposed upon the competitors and consumers, importance of the product from an innovation and investment standpoint, and production capacities of the members to the agreement, etc. must be considered.[27]

III. SUSTAINABILITY AND ANTITRUST IN INDIA

While some jurisdictions have come up with separate guidelines to address the issues surrounding sustainable agreements, India is yet to join the debate on the intersection between competition and sustainability.

[23] Zaneta Sedilekova and Isabelle Merchat (n 10).

[24] Press Release, European Commission, 'Antitrust: Commission sends Statement of Objections to Alcogroup and Agroetanol over alleged ethanol benchmarks cartel' (2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_4362> accessed 13 November 2022.

[25] Federal Competition Authority, 'AFCA publishes draft guidelines on the application of sustainability agreements, asking for comments (AFCA, 2022) <https://www.bwb.gv.at/en/news/detail/afca-publishes-draft-guidelines-on-the-application-sustainability-agreements-asking-for-comments> accessed 13 October 2022.

[26] Competition & Markets Authority, Environmental sustainability agreements and competition law (Guidance, 2021) <https://www.gov.uk/government/publications/environmental-sustainability-agreements-and-competition-law/sustainability-agreements-and-competition-law#overview-for-businesses> 9 November 2022.

[27] ibid at 25.

Though the discussion regarding sustainability and antitrust is still premature in India, the Competition Act, 2002 ["**the Act**"], in its current form is well equipped to deal with the consequences and assess the benefits of the cooperation agreements on competition.

Cooperation agreements in the form of joint ventures can be exempted under the *proviso* to Section 3(3) of the Act. Such joint ventures set up with the aim of combating inefficiencies in the market, and not affecting competition in an adverse manner may not be seen as adversarial to the competition laws.[28] Further, the efficiencies of the cooperation agreement may be assessed under factors provided under Section 19(3)[29] of the Act.

The current legislation provides the Commission the discretion to impose penalties considering the mitigating and aggravating factors. The Commission while assessing the sustainability agreements might consider the pro-competitive and sustainability benefits in its assessment as a mitigating factor.

Thus, Indian law as it stands today is well-equipped to assess the benefits of the sustainable agreements.

IV. KEY TAKEAWAYS

The need for use of sustainable resources and backing required by competition authorities is now moving to the centre of the debate of competition policy. Some jurisdictions are seeing a greater need to incorporate the debate in the form of a policy decision and implementing it in its decisional practice.

Although sector-specific regulations, taxation regimes and alterations to the investment policy seem better placed to facilitate the transition to a green economy, there is a need to tackle the climate emergency on all fronts. Not all sustainability agreements would need anointing by the competition regulators, but only those which restrict competition should be vetted by the competition regulators.

If sustainability-related matters are be conceptualized in the competition policy, it must be devised in a way as to provide a sense of certainty to businesses. Such agreements as long as they provide the consumers with sufficient choice in terms of the availability of products at competitive prices, it may not be in violation of competition law.

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[28] Association of Third-Party Administrators v. General Insurers' (Public Sector) Association of India, 2011 SCC OnLine CCI 55.

[29] The Competition Act, 2002, § 19(3).

The jurisprudence developed in the EU and US has shown that businesses engaged in various types of co-operation arrangements will not be treated as anti-competitive provided it is in line with the standards set under the competition law.

It is encouraged that the private sector plays an equally important role in achieving sustainable development goals and not be dissuaded due to the 'first mover disadvantage' apprehensions. Jurisdictions around the world are realizing the importance of cooperation for achieving sustainable goals and hence such agreements might not be seen through an adversarial lens. Additionally, care must be taken that such agreements have goal of sustainability at their core, the objectives are not imposed on the members, and the standards, if any, are set in a fair and transparent manner. Further, the most important element to avoid the competition regulator's radar is to ensure that the agreement does not have an adverse impact on competition.

In addition to assessing sustainability agreements, it is equally important that the merger control regimes also have a foothold in the newly developing sustainability and antitrust space. The risks of 'green killer acquisitions' and the need for incorporating 'green factors' in the combination assessment are gaining traction. The authors intend to assess the intersection of sustainability and antitrust from a merger control perspective in the forthcoming edition.

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HOSPITAL CONSOLIDATIONS IN INDIA: IS THERE 'HEALTHY' COMPETITION?[+]

– **MS. IKLEEN KAUR[*] & MR. ROHAN MALHOTRA[**]**

ABSTRACT

*The authors believe that India needs its healthcare industry and specifically the hospital constituent, to grow multi-fold to ensure that all consumers have access to quality -driven yet affordable healthcare services. However, the increasing trends of acquisitions, horizontal and vertical mergers witnessed in the market for owning and/or operating hospitals in India cast a shadow on whether sufficient number of competitors would remain in the market to compete with each other for the end consumers be able to reap the benefits of healthy competition amongst the hospitals. These concerns are in line with the international trends in consolidation of hospitals, primarily in the United States ["**USA**"], where the competition agencies have attempted to block such consolidations on account of higher costs for consumers and coordination amongst competitors. Recently, similar apprehensions have been caste by the US President in his executive order highlighting the urgency to combat the perils of hospital consolidation. The authors, while relying upon international and domestic judicial precedents, have attempted to list the anti-competitive issues that may arise as a result of such consolidations along with suggestions that maybe curated and implemented.*

[+] The views presented in this paper are personal and do not in any manner represent the views of the Competition Commission of India (CCI).
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I. INTRODUCTION

Good Health is the greatest asset possessed by any human being. With the prolongation of the pandemic, the importance of receiving timely, effective and affordable healthcare across jurisdictions cannot be undermined. Niti Aayog, in its report on Investment Opportunities in India's Healthcare Sector, has highlighted "*In addition to these demographic and epidemiological trends, COVID-19 is likely to catalyse long-term changes in attitudes towards personal health and hygiene, health insurance, fitness and nutrition as well as health monitoring and medical check-ups. The pandemic has also accelerated the adoption of digital technologies, including telemedicine*". [30] Therefore, access to an affordable and holistic healthcare system in any situation is essential.

The Indian healthcare industry, comprising of hospitals, medical devices, clinical trials, outsourcing, telemedicine, medical tourism, health insurance, and medical equipment,[31] has been one of the largest contributors to the economy of the country, as it is expected to reach $372 billion in revenue by 2022[32]. With respect to the hospital constituent of the healthcare industry in India, it attracts 80% of the total healthcare market and is expected to reach $132 billion by 2023 from $61.8 billion in 2017.[33]

Recently during the pandemic, and otherwise, the Indian medical sector, in particular the hospital constituent has made great strides. However, the country still has an acute shortage of healthcare infrastructure, health human resources, and capacity to provide basic preventive, curative & rehabilitative healthcare services across the country, for ensuring that each citizen has access to affordable healthcare[34]. India currently has 1.3 hospital beds per 1,000 population, with an additional 3 million beds needed for India to achieve the target of 3 beds per 1,000 people by 2025.[35] There is also a shortage of health human resource, with only 0.65 physicians per 1,000 people, (the World Health Organisation standard is 1 per 1,000

[30] NITI Aayog, 'Investment Opportunities in India's Healthcare Sector' (2021) <https://www.niti.gov.in/sites/default/files/2021-03/InvestmentOpportunities_HealthcareSector_0.pdf> accessed 24 February, 2022.

[31] India Brand Equity Foundation, 'Healthcare' (2021) < https://www.ibef.org/download/Healthcare-November-2021.pdf> accessed 12 March 2022.

[32] Invest India, 'Healthcare – Industry Scenario' < https://www.investindia.gov.in/sector/healthcare> accessed 13 March 2022.

[33] ibid.

[34] Fifteenth Finance Commission, *A Report of High-Level Group on Health Sector*, Section 1 – Regulatory Framework.

[35] ibid 4.

people) and 1.3 nurses per 1,000 people[36]. In order to meet the international acceptable standards of healthcare, India will require another 1.54 million doctors and 2.4 million nurses.

Investment opportunities in the healthcare system are ripe to be picked at this stage. Recently, it has been reported that Max Healthcare Institute Ltd., India's second-largest hospital chain operator, plans to invest $450 million over the next four years as it gears up to add capacity after the country's health care system last year was overwhelmed by the Covid-19 pandemic.[37] Moreover, there are nearly 464 investment opportunities worth USD 25.17 billion in the hospital/medical infrastructure sub-sector on Indian Investment Grid (IIG), a platform maintained by Invest India for showcasing investment opportunities[38]. During the period of April 2000 – June 2021, the hospital and diagnostic centres constituent of the healthcare industry, has received $ 7.4 billion in the form of Foreign Direct Investment[39], largely through investors such as (i) venture capital/private equity funds, e.g., KKR & Co. and Temasek Holdings acquiring shareholding in Max Healthcare India Limited and Manipal Health Enterprise, respectively, or (ii) international healthcare providers such as IHH Berhad acquiring Fortis Healthcare Limited.

Therefore, it appears that there will be growing demand for investment in entities engaged in owning and/or operating hospitals in India, either in the form of mergers or acquisitions. The authors believe that enforcement and upholding of the principles of competition law is of utmost importance at this stage, as it will go on to ensure that India witnesses an equitable and sustainable growth in the hospital constituent of the healthcare sector for all the stakeholders involved, ranging from the enterprises operating the hospitals to the human resource involved in operations of the hospitals, and ultimately the consumer who will be the beneficiary.

This paper analyses the consolidation activity witnessed in the hospital market of US and the manner in which their competition agencies like the FTC have responded by either attempting to block the transactions or by issuing statements in the public domain. At the

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[36] Demand Supply Gap, Sarwal R and others, *Investment Opportunities in India's Healthcare Sector,* (NITI Aayog, 2021)
[37] P R Sanjai 'Max Healthcare to invest $450 mn over next 4 years to double India capacity', (*Business Standard* January 18 2022) <https://www.business-standard.com/article/companies/max-healthcare-to-invest-450-mn-over-next-4-years-to-double-india-capacity-122011800720_1.html> accessed 18 March, 2022.
[38] India Investment Grid, 'Medical Infrastructure' <https://indiainvestmentgrid.gov.in/opportunities/nip-projects/social-infrastructure?subSector=129 > accessed 13 March, 2022.
[39] Invest India (n 32).

same time, the authors aim to holistically address the changes that may be observed with respect to the consolidation trends of the Indian hospitals, based on their categorization, either through private equity backed acquisitions or horizontal and vertical mergers, by determining the plausible theories of harm and how the CCI has responded to the initial few cases of hospital consolidation.

II. METHODS OF CONSOLIDATION IN THE HEALTHCARE SECTOR

A. Horizontal Mergers

Generally, a Horizontal Merger is a "*Merger between firms that produce and sell the same products, i.e., between competing firms. Horizontal mergers, if significant in size, can reduce competition in a market…*". [40]

Simply put, a horizontal merger would be the culmination of two firms that operate or function within the same sector or industry. For example, between Nike and Adidas or BMW and Mercedes, or Nescafe and Bru. Generally, the incentives for pursuing horizontal mergers are synergies, increased market power, economies of scale etc.

Horizontal Mergers as a method of consolidation, especially in the healthcare sector, can be lethal if the concentration of hospital consolidation remains unchecked. Hospital consolidations could lead to prominent specialist medical practitioners concentrated with one hospital (geographic area) or specialist medical facilities provided only by select hospitals. This means specialist healthcare facilities, established physician practise etc associated with a particular hospital will be monopolized at the cost of the patients. A study on healthcare consolidation had found that *"physicians in the most concentrated markets charged fees that were 14% to 30% higher than the fees charged in the least concentrated markets*".[17]

B. Vertical Mergers

Consolidation associated with vertical mergers means consolidation between firms operating at different levels of production. In the health care sector this could mean consolidation

[40] Organisation for economic co-operation and development, 'Glossary of Industrial Organisation Economics and Competition Law' < https://www.concurrences.com/IMG/pdf/oecd_-_glossary_of_industrial_organisation_economics_and_competition_law.pdf?39924/e9f9a49f59fa42b7de2397532968788aa2855447> accessed 10 March 2022.

between health care firms operating in different, yet associated product markets, such as insurers and physicians, insurers and hospitals, or hospitals and physicians[41].

There can be a cocktail of anti-competitive harms that can arise out of hospital mergers. However, it is the mergers that cement vertical integration at all levels of the supply chain that may cause immense harm to the end-consumers. Vertical Mergers in hospitals or associated services can lead to issues in the different levels of medical aid provided. Vertical mergers may be problematic if they *"discourage a company from entering the upstream or downstream market because, to compete successfully post-merger, the entrant would need to enter at both the upstream and downstream levels"*[42]. Keeping these issues in mind vertical merger enforcement in the United States "*has assumed a higher profile in recent years*[43].

There was a study conducted on highly concentrated hospital markets in California that found that *"an increase in the share of physicians in practices owned by a hospital was associated with a 12% increase in premiums for private plans sold in the state's Marketplace".*[20] Another study looking at Medicare beneficiaries' patterns of health care utilization found that "*patients are more likely to choose a high-cost, low-quality hospital when their physician is owned by that hospital."*[23]

C. Stealth Consolidation

Another form of solidification/reinforcing alliances is 'stealth consolidation' wherein minor acquisitions are made slowly and steadily over a few years. These acquisitions are too small to be captured by the regulatory radar and therefore miss antitrust scrutiny. "*Smaller transactions that fall below legal thresholds are exempt from the notification reporting requirement, meaning that many take place under the radar*"[44]. However, in the long run, these stealth acquisitions cumulatively build up a monopolist goliath which is very difficult to unscramble.

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[41] Haas-Wilson 'The Effects of Vertical Consolidation in Health Care Markets' <https://www.smith.edu/sites/default/files/media/Faculty/Haas-Wilson_Effects_of_Vertical_Consolidation_in_Health_Care_Markets.pdf> accessed 02 December 2022.

[42] Alexis J. Gilman and Akhil Sheth, 'Antitrust Analysis of Vertical Health Care Mergers' (Practical Law, April/May 2020) <https://www.crowell.com/files/20200401-Antitrust-Analysis-of-Vertical-HC-Mergers.pdf> accessed 12 March 2022.

[43] Lisl J. Dunlop & Cristina M. Fernandez, 'Navigating Vertical Mergers in Healthcare Through a Shifting Enforcement Landscape < https://www.competitionpolicyinternational.com/wp-content/uploads/2019/05/CPI-Dunlop-Fernandez.pdf > accessed 10 March 2022.

[44] Sarah Kuta, ''Stealth Consolidation' Is Leading to Kidney-Failure Deaths' (Chicago Booth Review , October 04, 2021) <https://www.chicagobooth.edu/review/stealth-consolidation-leading-kidney-failure-deaths> accessed 22 November 2022.

III. PARALLELS FROM CONSOLIDATION IN THE US HOSPITAL MARKET

A. Background

The authors have drawn reference to the hospital sector in the US, which has witnessed the primary antitrust enforcement authorities, i.e., the Federal Trade Commission ["**FTC**"] and the Department of Justice ["**DOJ**"], challenge several mergers involving hospitals when they were thought to be resulting in (i) higher costs for the consumers/patients without the corresponding improvement in the quality of care, or (ii) coordination between competing providers in any particular service or speciality[45].

The US had witnessed a wave of mergers among competing hospitals from the 1980s to the mid-1990s[46]. However, during the next few years, hospital merger enforcement was stalled due to a series of lost litigated hospital merger cases[47]. The lull experienced in appropriate enforcement may[48] "*have resulted in a number of hospital systems with substantial market power and in many highly concentrated hospital markets"*[49]. Further, "*Health care industry firms involved in merger activity often claim that consolidation will result in greater efficiency, lower costs, and more coordinated patient care. However, research shows that such efficiency often does not materialize; even when it does, savings are not passed on to consumer".*[50] "*In addition to consolidation between like firms—hospitals acquiring other hospitals or pharmacy chains merging together—the health care sector is also experiencing increased vertical consolidation, that is, integration among companies that provide different sets of services*"[51].

B. Private Equity Acquisitions in the US Healthcare Industry

Keeping up with the global trend, private equity funds have been leading the way in acquiring hospitals and physician practices as the US healthcare industry is approaching 20% of the gross domestic product and given the fragmented nature of many other sectors in the

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[45] Marina Lao, Francine Lafontaine, and Debbie Feinstein, 'Not just an opinion: competition really is key to healthy health care markets' (Federal Trade Commission, July 8 2015) <https://www.ftc.gov/news-events/blogs/competition-matters/2015/07/not-just-opinion-competition-really-key-healthy-health> accessed 3 March 2022.
[46] ABA Section of Antitrust Law, Antitrust Health Care Handbook (4th Ed. 2010), 216.
[47] ibid 217.
[48] ibid 217.
[49] ibid 217.
[50] Emily Gee and Ethan Gurwitz, 'Provider Consolidation drives up Health Care Costs' < https://www.americanprogress.org/article/provider-consolidation-drives-health-care-costs > accessed 10 March, 2022.
[51] ibid.

economy. In the early 1990s, there were only a handful of private equity firms actively seeking healthcare services investments, vis– a–vis today when virtually all of the 4000 private equity funds in 2019 having an interest in healthcare services[52]. In 2018, the valuation of private equity deals in the US health care sector (spanning across all subsectors, from physician practices to retail health and mobile application companies) surpassed $100 billion—a twenty-fold increase from the year 2000, when it was less than $5 billion[53]. Gradually, the investments have shifted from hospitals to outpatient clinics and other specialty services such as where value-added services offer more lucrative cash flow.

The former commissioner of the FTC, Ravi Chopra in his statement had publicly expressed concerns regarding 'roll up transactions' consummated by private equity funds, through which they bolt smaller entities to the larger groups that they control. These median consideration of these transactions executed by the private equity funds are generally between $60 - $70 Million, thereby escaping the purview of the Hart – Scott – Rodino Antitrust Improvement Act. Presently, for transactions in excess of $ 101 million, a notification is required to be filed with the FTC.

With respect to the health care markets, it was specifically stated that private equity firms are actively acquiring physician practices, with a particular focus on specialties like anaesthesiology and emergency medicine[54]. In addition, concerns were also pointed out with respect to collateral consequences, such as surprise medical billing, thereby urging for rolling up transactions which result in higher costs and reduction of quality of care, to be halted[55].

Similarly, apprehensions have also been expressed in the US, about how within a matter of the last three decades, the share of independent dialysis facilities has shrunk drastically and only two national chains now own the majority of dialysis facilities, earning nearly all of the industry's revenue, with most of the rolling up acquisitions occurring below the aforementioned thresholds.[56]

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[52] Staff, 'Private Equity in the Healthcare Space: Transaction Trends and Lessons Learned' (Becker's Hospital Review, 26 April 2019) < https://www.beckershospitalreview.com/hospital-transactions-and-valuation/private-equity-in-the-healthcare-space-transaction-trends-lessons-learned.html > accessed 13 March 2022.
[53] ibid 15.
[54] Rohit Chopra, 'Regarding Private Equity Roll-ups and the Hart-Scott Rodino Annual Report to Congress Commission File No. P110014' (FTC, July 8, 2020) <https://www.ftc.gov/system/files/documents/public_statements/1577783/p110014hsrannualreportchoprastatement.pdf > accessed 10 March 2022.
[55] ibid.
[56] Statement of Commissioner Christine S. Wilson, Joined by Commissioner Rohit Chopra, Concerning Non-Reportable Hart-Scott-Rodino Act Filing 6(b) Orders, (FTC, February 11, 2020)

C. <u>Worries raised about consolidation in the hospital market</u>

The Executive Order recently issued by the US President pertaining to promoting competition in the American Economy, has opened a pandoras box by stating "*Hospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options*."[57] The aforesaid order carries great weight and signifies the thinking of the current administration in reigning on the harmful effects of monopolies and monopsonies in the healthcare markets including hospitals[58], albeit it does not have the force of law or regulation[59].

Additionally, support has been extended towards promoting existing price transparency initiatives for hospitals, along with any new price transparency initiatives or changes made necessary by the No Surprises Act.[60]

D. <u>Prominent Case Laws of the US Jurisprudence</u>

"Section 7 of the Clayton Antitrust Act of 1914 is the principal federal substantive law governing mergers, acquisitions, and joint ventures. Section 7 prohibits not only the acquisitions of "stock" but also the acquisitions of "assets" where "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly[61].

The FTC devotes a substantial share of its resources to healthcare antitrust enforcement. During the fiscal years from 2016 – 2020, 21% of the FTC's competition enforcement actions were in the general healthcare sector (e.g., hospitals, physicians, etc.)[62].

In Hackensack Meridian Health, Inc./Englewood Healthcare Foundation[63] "*The Federal Trade Commission filed an administrative complaint and authorized a suit in federal court,*

<https://www.ftc.gov/system/files/documents/public_statements/1566385/statement_by_commissioners_wilson_and_chopra_re_hsr_6b.pdf> accessed 10 March 2022.

[57] The White House, 'Executive Order on Promoting Competition in the American Economy' (July 09 2021) <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/ > accessed 7 March 2022.

[58] ibid.

[59] American Hospital Association, 'President Signs Executive Order to Promote Economic Competition', (July 09 2021) <https://www.aha.org/news/headline/2021-07-09-president-signs-executive-order-promote-economic-competition-provisions> accessed 7 March 2022.

[60] Invest India (n 32)

[61] Summary of Section 7 of The Clayton Act, AAI Public Interest Advocacy Workshop on Mergers, The American Antitrust Institute <https://www.antitrustinstitute.org/wp-content/uploads/2018/09/Section-7.pdf> accessed 13 March 2022.

[62] Federal Trade Commission – Stats and Data 2020

[63] C-9399, FTC File No. 2010044 (administrative complaint filed December 3, 2020; federal complaint filed December 8, 2020; preliminary injunction granted August 4, 2021) <https://www.ftc.gov/newsevents/press-releases/2021/08/statement-ftc-office-public-affairs-director-lindsay-kryzak> accessed 13 March 2022.

to block Hackensack Meridian Health, Inc.'s proposed acquisition of Englewood Healthcare Foundation."[64] Hackensack Meridian Health was the largest healthcare system in New Jersey while Englewood was a non-profit independent hospital and healthcare network located in northern New Jersey, providing very similar services to Hackensack University Medical Centre[65]. If approved the merged healthcare system would control three of the six inpatient general acute care hospitals in Bergen County, New Jersey, eliminate close competition between Hackensack Meridian Health and Englewood in Bergen County and leave insurers with few alternatives for inpatient general acute care services. If such a merger would be allowed, Hackensack Meridian Health would be able to demand higher rates from insurers for the combined entity's services, which, in turn, may lead to higher insurance premiums etc.[66] On August 4, 2021, the U.S. District Court for the District of New Jersey issued a preliminary injunction, halting the transaction pending an administrative proceeding.[67] The hospitals appealed to the Third Circuit.

The opinion of the Third Circuit affirmed the decision of the district court on the grounds that he the post-merger HHI (a economic yardstick to measure concentration) would be 2,835—a number that crosses the highly concentrated market threshold. The District Court correctly concluded that these numbers demonstrate the merger is presumptively anticompetitive. the modest quality improvements and upgrades likely to occur because of this merger, were not significant enough and was likely to substantially lessen competition.

In Methodist Le Bonheur Healthcare/Tenet Healthcare Corporation[68] "the Federal Trade Commission filed an administrative complaint, and authorized a suit in federal court, to block the proposed $350 million acquisition by Memphis-based Methodist Le Bonheur Healthcare of two Memphis-area hospitals, known as Saint Francis, from Dallas-based healthcare system Tenet Healthcare Corporation"[69]. The issue was that the "proposed acquisition would substantially lessen competition in the Memphis area for a broad range of inpatient medical and surgical diagnostic and treatment services that require an overnight hospital stay, known as inpatient general acute care services, sold to commercial insurers and their insured

[64] ibid.
[65] ibid.
[66] ibid.
[67] ibid.
[68] C-9396, FTC File No. 1910189 (complaint filed November 13, 2020; complaint dismissed December 29, 2020) <https://www.ftc.gov/news-events/press-releases/2020/11/ftc-sues-block-proposed-acquisitiontwo-memphis-area-hospitals> accessed 13 March 2022.
[69] ibid.

members".[70] "The proposed acquisition would reduce the number of hospital systems providing general acute care services in the Memphis area to three, giving the combined health system an approximately 60 percent market share"[71]. According to the complaint, if the proposed acquisition was consummated, healthcare costs would rise, and the incentive to expand service offerings, invest in technology, improve access to care, and focus on quality of health care provided in the Memphis area would diminish. On December 23, 2020 Methodist and Saint Francis announced that they were abandoning the acquisition, of certain healthcare facilities, assets, and operating rights from Tenet and its subsidiaries and a joint motion was filed to dismiss the administrative complaint. The Commission granted this motion on December 29, 2020.[72]

In another case regarding US Healthcare OSF Healthcare System/Rockford Health System[73], the grievance was that OSF's proposed acquisition of Rockford Health System would reduce competition in two markets in the Rockford area i.e. general acute-care inpatient services, and primary care physician services. As a consequence, OSF would control 64% of general acute-care inpatient services in the Rockford area post-acquisition and OSF and Swedish American Health Systems would be the only significant competitors in this market. Cumulatively they would control more than 99% of the market for general acute-care services in the Rockford area[74]. During the evaluation it was noted that in the market for primary care physician services there are currently only three significant physician groups in the Rockford area[75]. Consequently, post the acquisition, OSF and Swedish American would control almost 60% of all primary care physician services. This presumably would have enabled OSF with a greater ability to leverage rates, imposing a significant financial burden on local employers and employees, either directly or through higher insurance premiums, co-pays and other out-of-pocket expenses. It was also stated that "the proposed acquisition would also increase the incentives and ability for the two remaining hospital systems in Rockford to engage in coordinated anticompetitive behaviour, including sharing confidential information, deferring competitive initiatives or aligning managed care contracting strategies.[76] Keeping these concerns in mind, the Complaint was dismissed after OSF abandoned the transaction. Anti-

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[70] ibid.
[71] ibid.
[72] ibid.
[73]D-9349, FTC file No. 1110102 (complaint dismissed April 13, 2012) <https://www.ftc.gov/enforcement/cases-proceedings/111-0102/osfhealthcare-system-rockford-health-system-matter> accessed 12 March 2022.
[74] ibid.
[75] ibid.
[76] ibid.

competitive transactions like these are generally abandoned when there is a foresight of regulatory hurdles to overcome. The anti-trust approvals by the regulator act as a deterrent for unhealthy consolidation.

IV. TRENDS OF CONSOLIDATION IN THE INDIAN HOSPITAL MARKET

A. Categorization of Hospitals in India

As per the Associations of Healthcare Providers Indian (AHPI), there are approximately 68,000 hospitals (inclusive of public and private sector) operating across the country, which can be categorized as following:

(i) Hospitals owned and/or managed by doctor entrepreneurs, i.e., nursing homes, with less than 30 beds being close to 40,000;

(ii) hospitals with the number of beds between 30 – 100 beds being 25,000; and

(iii) tertiary care hospitals with the number of beds being over 100 amounting to 3,000. It is estimated that nearly 70% of these beds belong to the private sector hospitals[77].

With respect to competition assessment of combinations involving hospitals, the CCI has in its decisional practice[78] has classified hospitals on the basis of facilities and treatment offered by the hospitals, as (i) primary hospitals, i.e., serving as a first point of contact between individuals and the health system chain, wherein the treatment is generally delivered by single physician outpatient clinics and dispensaries providing basic medical and preventive healthcare facilities, (ii) Secondary hospitals which are the key healthcare facility for patients who are referred for further treatment in cases with greater complexity as compared to cases under primary care facility, (iii) tertiary level of the healthcare system involves higher complexity of cases that require strong diagnostics and clinical support systems, and (iv) quaternary healthcare involves highly advanced and complex procedures such as organ transplants. The approach of CCI in this regard mirrors that of the FTC which also follows a similar classification of healthcare services and then conducts the competition assessment of the consolidating hospitals, by defining the relevant product markets on the basis of overlapping healthcare services.

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[77]Ruhi Khanduri, 'Will India save its hospitals before they save India?' (The Ken, 16th April, 2020) < https://the-ken.com/story/will-india-save-its-hospitals-before-they-save-india/> accessed on 10 March 2022.

[78] Order dated 08.01.2021 in Combination Registration No. C-2020/11/789 (*Manipal Health Enterprise Limited/Columbia Asia Hospitals Private Limited*).

In contrast, the CCI while dealing with an antitrust matter, as mentioned in the dissenting order of Shri Ramakant Kini v. Hiranandani Hospital[79], had relied upon the Guidelines of National Accreditation Board for Hospitals & Health Care Providers (**'NABH'**)[80], to conclude that super speciality hospitals are those which provide services such as Cardiology, Clinical Haematology, Clinical Pharmacology, Endocrinology, Immunology, Medical Gastroenterology, etc. A perusal of the aforementioned guidelines also suggests that the NABH then bifurcated services as being broad or super specialities and considered *inter alia* services such as General Medicine, Paediatrics, Dermatology to be in the former category.

B. Concerns faced by small hospitals

Markets such as Delhi NCR have witnessed hospitals chains namely Max Healthcare acquiring (i) Saket City Hospitals[81] and (ii) Pushpanjali Crosslay Hospital[82]. Otherwise, small category hospitals sign an operations-and-management (O&M) contract with a hospital and focus their entire attention on patients[83]. Such brand names can be leveraged for better buying power, negotiating with insurers and optimal utilisation of resources, as the hospitals with a large number of beds and many specialities across a large geography, are given preference by insurers[84].

C. M&A Activity of Indian Hospitals

Recently there has been a trend of healthcare consolidations[85] and the Indian healthcare is going through an unprecedented consolidation phase[86]. The total value of mergers and acquisitions in the hospital sector in the financial year 2018 – 2019 posted a record rise of 155 per cent, totalling Rs 7,615 crore — the highest in over five years — against Rs 2,991

[79] Dissenting Order by Member Geeta Gouri in Case No. 39 of 2012.

[80] Available on: https://www.nabh.co/international/pdf/ApplicationForm-Hospitals.pdf.

[81] Capital Market, 'Max Healthcare gains on hiking stake in subsidiary' (Business Standard, 16th March 2021) <https://www.business-standard.com/article/news-cm/max-healthcare-gains-on-hiking-stake-in-subsidiary-121031600208_1.html> accessed on 10 March 2022.

[82] Press Release, 'Max Healthcare to Acquire 76% Stake In NCR based Pushpanjali Crosslay Hospital For Rs 287 Cr.' (Max Healthcare, 13th January 2016) <https://www.maxindia.com/press-release/max-healthcare-to-acquire-76-stake-in-ncr-based-pushpanjali-crosslay-hospital-for-rs-287-cr/> accessed on 10 March 2022.

[83] Order dated 08.01.2021 (n 78).

[84] ibid.

[85] Consolidation in Healthcare (Business Today. In, 18 April, 2021) <https://www.businesstoday.in/magazine/industry/story/consolidation-in-healthcare-292227-2021-03-31> accessed 10 March 2022.

[86] ibid.

crore in financial year 2018.[87] For instance, a prominent transaction has resulted in the creation of the large hospital chain in India with a combined strength of hospitals in several cities.

D. Private Equity Acquisitions in the Indian Hospital Industry

India recently witnessed its largest private equity acquisition in the healthcare industry with Radiant Life Care Private Limited, backed by the private equity goliath KKR & Co., acquiring Max Healthcare Institute Limited, and gaining control of marquee hospitals like BLK Hospital and Max Hospital, Saket in geographic markets like Delhi NCR along with a chain of several smaller hospitals spread across the region. It had been proposed that the aforementioned marquee hospitals as hubs will encompass 16 hospitals centred in NCR. About five of these would be hubs or sizeable tertiary care hospitals with average revenue per operational bed of over INR 50,000 and the rest would make the spokes with average revenue of about Rs 30,000.[88]

Another global private equity giant, i.e., TPG Growth has also floated an investment vehicle valued at INR 1,800-2,000 crore, with 30 – 35% of the investment amount to be invested by Canadian pension fund *Caisse de dépôt et placement du Québec* (CDPQ), Singapore's sovereign fund *Temasek Holdings Pvt. Ltd* and American PE fund *Warburg Pincus LLC*. [89]

E. Prominent Case Laws of the Indian Jurisprudence

The CCI in its order of *Radiant Life Care Private Limited, Kayak Investments Holding Pte. Limited, Max Healthcare Institute Limited and Max India Limited*[90] [involving (i) KKR Group through its affiliate, (ii) Radiant Life Care which operates hospitals in Delhi and Mumbai, (iii) Max Healthcare which then ran a network of 14 hospitals in Delhi NCR, Mohali, Dehradun and Bhatinda], had considered the participants in the market for provision of healthcare services through hospitals to include corporate hospitals, standalone private multi – specialty hospitals, private/semi private beds of trust/autonomous hospitals, and

[87] Himani Chandana, 'Fortis, Max, Medanta — Why private Indian hospitals are selling out to foreign players' (The Print, 1st July, 2019) < https://theprint.in/economy/this-is-why-private-indian-hospitals-are-selling-out-to-foreign-players/255874/ > accessed on 10th March 2022.

[88] Ruhi Khanduri, 'KKR's divide-and-rule vision for Max after Radiant merger' (The Ken, 4th November, 2019), <https://the-ken.com/story/kkr-radiant-max-hospital/#:~:text=The%20KKR%20empire%20grows&text=In%20December%20last%20year%2C%20Max,from%2012%25%20to%207%25.> accessed on 10 March 2022.

[89] Reghu Balakrishnan, 'Temasek, Warburg, CDPQ eye stake in TPG's Asia Healthcare' (LiveMint, 28th November, 2017) <https://www.livemint.com/Companies/amUdfvyA6Z8b28G9WrPrzM/Temasek-Warburg-CDPQ-eye-stake-in-TPGs-Asia-Healthcare.html> accessed on 10 March 2022.

[90] Order dated 29.10.2018 in Combination Registration No. C-2019/01/629.

excluding smaller hospitals and nursing homes (fewer than 100 beds) in the geographic market of Delhi and Delhi NCR.

The competition assessment had been carried out on the basis of (i) total number of hospitals, total number of relevant operational beds and, for the broad market of hospital infrastructure; and (ii) number of procedures conducted for (a) secondary, tertiary procedures pertaining to cardiac care, neurosciences, orthopaedics, renal sciences and oncology) and (b) quaternary procedures separately, e.g., organ and tissue transplants.

Vertical overlaps involved (i) Panasonic Healthcare Co. Ltd., a seller of healthcare devices and services in the form of in vitro diagnostic devices and life science devices and services, in the position to sell its devices and services to the hospitals forming a part of the combined entity; and (ii) Max Labs providing diagnostic services to the hospitals of the combined entity. However, these overlaps were deemed to be insignificant to cause any adverse effect on the competition in the relevant market, specifically for the latter as Max Labs faced formidable competition from SRL Diagnostics, Thyrocare, Dr Lal Pathlabs.

Accordingly, the CCI held that (i) at a broader level of hospital infrastructure, the parties to the combination will not gain significantly, (ii) for the secondary and tertiary procedures, the combined entity will face significant competitive pressure from other competing players such as Apollo Hospitals, Fortis, Medanta and Sir Gangaram Hospital; and (iii) with respect to the quaternary procedure, from a patient's perspective, the choice of a hospital is based on perceived expertise of the doctor and likelihood of success of the procedure, with patients willing to travel across the country for specific doctors.

Also, the CCI in its previous order of *Northern TK Venture Pte. Ltd./Fortis Healthcare Limited*[91] [involving (i) IHH, an international provider of integrated healthcare services operating in Malaysia, Singapore, Turkey and India; (ii) Fortis Healthcare owning and/or operating 35 healthcare facilities in 18 Indian cities], while following the same approach for the relevant product market, had considered the relevant geographic market to be (i) nation – wide for requiring complicated procedures (such as quaternary procedures) and (ii) Bengaluru, Chennai, Kolkata and Mumbai, for the tertiary hospitals.

Moreover, IHH through its subsidiary, i.e., Gleneagles Development Pte. Ltd. (GDPL) and Apollo Hospitals Enterprise Limited operated the Apollo Gleneagles Hospital in Kolkata, a

[91] Order dated 29.10.2018 in Combination Registration No. C-2018/09/601.

50:50 joint venture ["**JV**"] between them. Because, Apollo and Fortis were competing with each other at a national level, there were concerns regarding the JV becoming a platform for coordinated behaviour. The CCI had accepted the voluntary commitments of the Acquirer, Northern TK Venture Pte. Ltd, and the primary commitment was to ensure that the JV and the combined entity to be formed by acquisition of Fortis Healthcare, will operate as a separate, independent and competitive business. To ensure this, the Acquirer assured the CCI that (i) No common directors appointed by IHH / its subsidiary Gleneagles Development Pte. Ltd., on the Board of the JV and the Combined Entity; (ii) there will be no sharing of commercially sensitive information relating to pricing data and day to day operations through a 'rule of information control' approach; and (iii) submitting an annual certificate of compliance with the voluntary commitments to the CCI, supported by affidavits from an authorized Director of the Acquirer and the IHH / Gleneagles nominated Directors on the JV within 60 business days of the yearly anniversary of the date of receipt of the order of the CCI.

V. CONCERNS REGARDING PROFITEERING OF PRIVATE EQUITY FUNDS VIS – VIS HOSPITALS

Transactions involving private equity funds in the healthcare services sector have been gaining traction all across the world, with investments amounting to $79 billion in 2019, equivalent to 18 percent of private equity deals worldwide.[92] Private equity transactions, specifically those pertaining to hospital sector, have been viewed, as a force that are changing how the healthcare systems function, and these changes are happening under the radar. The discerning factors are the lack of transparency surrounding private equity investment in general, coupled with the obligation to protect the health and safety of populations[93].

To have a holistic understanding of how private equity funds are causing tectonic shift in the functioning of the hospitals, it is fundamental to comprehend the reasoning behind most of the investments of private equity funds in general. In the view of the authors, private equity funds generally follow two models for acquiring.

[92] Anaeze C. Offodile II, Marcelo Cerullo, Mohini Bindal, Jose Alejandro Rauh-Hain, and Vivian Ho,'Private Equity Investments In Health Care: An Overview Of Hospital And Health System Leveraged Buyouts, 2003–17' (2021) 40(5) <https://www.healthaffairs.org/doi/10.1377/hlthaff.2020.01535> accessed 10 March 2022.

[93] Richard M. Scheffler, Laura M. Alexander and James R. Godwin,'Soaring private equity in the healthcare sector: Consolidation accelerated , competition undermined, and patients at risk' (2021) <https://publichealth.berkeley.edu/wp-content/uploads/2021/05/private-equity-i-healthcare-report-final.pdf>

Pursuant to this, the private equity funds may subsequently have the ability to exercise control over the target businesses (on the basis of material influence), i.e., (i) a mere investment into the holding company of the particular business and then endeavour to direct the operations in the capacity of a shareholder, or execute an operations agreement with the business for managing the operations on behalf of the promoters/holding company of the business, while collecting the management fee; and (ii) through the second route, the private equity funds also attempt to integrate the target business more closely with the other investee entities of its portfolio, e.g., asking the doctors of its investee hospital to direct patients for having tests done at diagnostic labs owned and/or operated by the same private equity fund[94].

In return the private equity fund managers receive a management fee equal to around two percent of the assets managed and also typically receive 20% of any return on capital above a certain threshold even though there is little of his/her own capital at risk but enjoys a large share of any profits.[95] The private equity funds have great appetite to invest as the liability of failure will squarely fall upon the investors of the private equity funds, i.e., limited partners such as sovereign funds and banks.[96]

Short – term revenue generation is the bedrock of the private equity investment business. Primarily, a private equity fund is always formed with a pre-determined expiration date. On that date, all of the money must be returned to the investors[97]. Therefore, the private equity funds invest in companies for an average of 4-7 years, with a goal of selling (or exiting) the investment at the end of that period for as much as possible[98].

VI. PLAUSIBLE THEORIES OF HARM

To evaluate and assess any kind of existing or perceived competitive harm for a defined market, it is constructive first to understand what we are up against. Therefore, formulating credible theories of harm will have to be to be encouraged and cultivated for a holistic evaluation of future novel challenges and for setting a reliable benchmark standard.

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[94] Heather Perlberg, 'How Private Equity Is Ruining American Health Care', (Bloomberg Law, 21st May 2020), <https://www.bloomberg.com/news/features/2020-05-20/private-equity-is-ruining-health-care-covid-is-making-it-worse> accessed 10 March 2022.
[95] Richard M. Scheffler, Laura M. Alexander and James R. Godwin, 'Soaring Private Equity Investment In The Healthcare Sector: Consolidation Accelerated, Competition Undermined and Patients at Risk', <https://publichealth.berkeley.edu/wp-content/uploads/2021/06/AAI-Petris-Private-Equity-Healthcare-Report.pdf> accessed 10 March 2022.
[96] ibid.
[97] ibid.
[98] ibid.

Some of the theories of harm pursued by the US Agencies are (i) Foreclosure (input/customer)*: An "input foreclosure," could be "where an upstream merger partner either refuses to supply critical inputs to downstream rivals or supplies them only on disadvantageous terms"*[99]. An instance of *"customer foreclosure," could be "whereby the downstream firm refuses to purchase products from competitors of the upstream supplier, cutting off an important route to market for the upstream company's competitors."*[100] (ii) Barriers to entry[101]can arise when new competitors are unable to enter the market due to deliberate hindrances or roadblocks created to hinder the arrival of new competition. (iii) Exchange of Information that puts the Competitor at a disadvantage[102]: for instance, *"Where a merger could generate access to competitively sensitive business information of an upstream or downstream rival that was not previously available*."[103]

The possible theories of harm could be when a dominant hospital merges with an insurance company. In that situation, the rival insurance provider's health plan may be less attractive to prospective buyers. Further, rivals might have to pay more to be included.[104] This could force rival insurers to raise the premiums charged to consumers, or even allow the merged company to raise its insurance premiums. Another instance is if a hospital merges with a dominant insurer in a particular market. The merged company might then refuse to include rival hospitals in the merged insurer's network[105]. As a result, rival hospitals would be foreclosed from accessing[106] customers of the dominant insurer, driving those patients to seek care from the merged hospital.[107] Another theory of harm could be if a hospital plans to launch a health insurance plan, but instead merges[108] with an insurer. This merger may eliminate potential health plan competition in the area.[109]

[99] Lisl J. Dunlop & Cristina M. Fernandez, 'Navigating Vertical Mergers in Healthcare Through a Shifting Enforcement Landscape' < https://www.competitionpolicyinternational.com/wp-content/uploads/2019/05/CPI-Dunlop-Fernandez.pdf > accessed 10 March 2022.
[100] ibid.
[101] Order dated 08.01.2021 (n 83).
[102] ibid.
[103] ibid.
[104] Alexis J. Gilman and Akhil Sheth, 'Antitrust Analysis of Vertical Health Care Mergers' (Practical Law, April/May 2020) <https://www.crowell.com/files/20200401-Antitrust-Analysis-of-Vertical-HC-Mergers.pdf> accessed 12 March 2022.
[105] ibid.
[106] Ruhi Khanduri (n 88).
[107] ibid.
[108] Alexis J. Gilman and Akhil Sheth, 'Antitrust Analysis of Vertical Health Care Mergers' (Practical Law, April/May 2020) <https://www.crowell.com/files/20200401-Antitrust-Analysis-of-Vertical-HC-Mergers.pdf> accessed 12 March 2022.
[109] ibid.

The plausibility of the leveraging theory of harm for a hospital merger is not farfetched. Leveraging can occur when an enterprise with market power in one market, leverages that advantage to catapult into another market and to capture it. By virtue of this advantage, the hospital will now be able to influence both the markets in its favour. This advantage can tilt the scales in favour of the ones with market power to venture into new markets and unchartered territories in the physical realm or digital space (telemedicine). Super hospital consolidations that also have presence in the pharmacy sector, medical equipment, insurance sector can leverage their advantage into those markets as well.

Further, the hospitals may also be able to capture the 'after sales' (dialysis patients'/post-surgery/patient retention/postnatal care) markets. These markets have a distinct characteristic of catering to vulnerable post-surgery patients who are either unable to take care of themselves or need regular medical assistance.

Another area of concern could be acquisitions of physician practise. Generally, physicians that have a good practise have a huge repeat patient clientele. Depending on the physicians' popularity, patients may even choose to travel far for medical attention. Therefore, when a hospital with considerable market power (by previous acquisitions) acquires a specific physician's practise' for its specialization or patients, associated network effects may also raises concern. It is very probable that the patients are also happy to move to the hospital where the physician relocates because of a sense of familiarity with the physician.

Interestingly, in the United States, the FTC in its statement regarding the complaint filed by them in order to block the merger of Lifespan Corporation and Care New England Health System had indicated towards the emerging situation of labour monopsony and stated that the loss of competition from mergers may be especially pernicious in the health care sector where skilled medical professionals are uniquely limited in employer options within their local geographic area, and increased employer labour market power via hospital mergers can contribute to wage stagnation for skilled health care professionals. A parallel could also be drawn with the recent landmark verdict given by the United States District Court for the District of Columbia in the favour of DOJ for blocking of the merger between Penguin Random House and Simon & Schuster[110], wherein it was held that the Big Five publishers offer significant advantages to the authors such as (i) offering advances upfront before publication: (ii) selling, publicity and marketing of the books. These benefits ensured that

[110] Memorandum Opinion in Civil Action No. 21-2886-FYP of the United States District Court for the District of Columbia.

authors would mostly give preference to the dominant publishers in order to increase their chances of a bigger and fatter advance payment along with royalties to be earned after the release of the book, rather than resorting to small publishers or self – publishing as the probability of the success of the book is drastically reduced. However, with the proposed merger of these mammoth publishing houses, the authors would no longer receive the advances that they had in the past, as a result of the publishing houses now stopping to compete with each other.

The CCI in its orders regarding the hospital mergers has also recognized the role that doctors have to play as from a patient's perspective, the choice of a hospital is based on perceived expertise of the doctor and likelihood of success of the procedure. Further, for quaternary procedures such as organ transplants, patients are often willing to travel large distances across the country to get themselves treated by a "specific" doctor team. Therefore, instances of hospital consolidation will only increase the pressure on doctors in terms of the opportunities available to them and their increase in remuneration as the merging hospitals will look to cut down on costs.

Some of the other issues regarding "*Doctor-hospital nexus*", "*Compulsory tying of consumables*" and "*Compulsory tying of diagnostic services*" were highlighted in the Policy Note on Making Markets work for Affordable Healthcare by the CCI[111]. It states the consumers' choice of a hospital is often guided by a doctor's reference[112]. The policy note further highlights that hospitals often have exclusive arrangements with in-house pharmacies, diagnostic labs etc. and may provide multiple services in a bundle or a package. Such arrangements driven purely by efficiencies are reasonable but when guided by private interests of the healthcare providers, result in vitiating the market dynamics.[113] There are instances where the patient is forced to purchase consumables such as medicines, syringes etc. at printed MRP from the in-house pharmacy of the hospital when the same is available at significantly lower prices outside the hospital premises. It was also been observed that hospitals commonly reject even recent reports of diagnostic tests conducted outside the hospital and mandates repeat tests from their in-house diagnostic labs. Further with no

[111] Competition Commission of India, 'Policy Note on Making Markets work for Affordable Healthcare' (October 2018) <https://www.cci.gov.in/sites/default/files/POLICY_NOTE.pdf> accessed 18 March 2022.
[112] ibid.
[113] ibid.

regulatory framework that ensures and governs portability of patient data, the switching cost for a patient becomes high.[114]

Recently it has been reported, that Max Healthcare, Fortis Healthcare and Apollo Hospitals, which run hospitals in the National Capital Region, received notices from CCI asking them to furnish details on the pharmacies, vendors and companies from which they procure their bestselling drugs and medical devices[115]. Apparently, this CCI investigation is the first such action against the high out-of-pocket prices of medicines set by hospitals, which operate unencumbered by regulation. The CCI scrutiny could potentially rein in the prices of medicines and healthcare equipment. or at the very least, bring in transparency in the way hospitals sell these items[116].

VII. POTENTIAL EFFICIENCIES

The authors 'don't suggest that all consolidations in the hospital sector are harmful *per se*. For instance, the failing firm theory can be cultivated where a weak competitor[117] may be absorbed/consolidated if its exit does not impact the market. "*Efficiencies that are frequently identified and considered in vertical merger analysis include: Elimination of double marginalization[118], New and better services and products, aligned incentives and Increased incentive to Invest*"[119]. Some hospital mergers may also lead to the end consumer paying less insurance premiums. Post-merger efficiencies can also take the form of expert know-how and coordinated care for the patients and better allocation of the available resources. Efficiencies may also include lower cost of equipment, devices and consumables.

A substantial positive impact of investments by private equity funds is the creation of the necessary healthcare infrastructure. With respect to the Indian healthcare sector, investments beyond the metropolitan areas are the need of the hour and are urgently required to expand

[114] ibid.
[115] Binoy Prabhakar, 'Big hospital chains face CCI scrutiny over inflated prices of medicines and medical devices' (Moneycontrol, 1st April 2022) <https://www.moneycontrol.com/news/business/hospitals-face-cci-scrutiny-over-high-prices-of-medicine-and-medical-devices-8304261.html> accessed 04 April 2022.
[116] ibid.
[117] Scott & White Healthcare/King's Daughters Hospital, FTC File No. 0910084 (investigation closed December 23, 2009) (https://www.ftc.gov/public-statements/2009/12/ftcs-closure-itsinvestigation-consummated-hospital-merger-temple-texas).
[118] Double marginalization arises when both the upstream and downstream markets exhibit some degree of economic market power, and thus firms at each level mark up their prices above marginal cost.
[119] Scott & White Healthcare/King's Daughters Hospital, FTC File No. 0910084 (investigation closed December 23, 2009) (https://www.ftc.gov/public-statements/2009/12/ftcs-closure-itsinvestigation-consummated-hospital-merger-temple-texas).

access to healthcare.[120] This will lead to help raise the standards and quality of healthcare, upgrade technology and create employment opportunities, with potential benefits to the economy.[121]

VIII. WAY FORWARD AND THE ROLE OF THE REGULATOR

While privately owned hospitals in India may have managed to provide healthcare/speciality services at a fraction of the cost of the developed world, the consolidation pattern is indeed a worrying sign of the times to come, as the hospital chains will stand to gain market power which could potentially cause harm to not only the end consumers but also the enterprises/persons involved in providing the services, i.e., (i) the staff at the hospitals including doctors, nurses; (ii) the enterprises manufacturing/supplying the equipment and services engaged for provision of healthcare services; and (iii) the insurance providers. At this point, it may be noted that CCI must include these factors as well, when conducting the competition assessment of combinations involving hospitals, as the aforementioned stakeholders too are equally affect by any AAEC that may potentially arise from such combinations. The perils of the labour monopsony situation have been greatly highlighted in the recent past, and the CCI too has recognized the importance of the doctors and their success as a key component for the patients to decide their choice of hospital.

The recent trend of private equity investments, as observed in India and elsewhere, also present a unique challenge to competition agencies such as the CCI, as the private equity funds may end up using commercially sensitive information obtained from the hospitals, with the purpose of coordinating with their other investee entities, leading to harming not only the consumers but also the competitors.

In its limited exposure towards combination filings received in relation to hospital consolidation, the CCI has adopted the suitable mechanism for competition assessment, being in line with competition agencies of the developed jurisdictions such as the FTC. However, it is the shortcomings in the healthcare sector observed by the likes of agencies including the FTC which the CCI needs to pay attention to, in order to ensure that the provisions of the relevant legislations and the competition policy at large, are well suited to deal with the

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[120] Raghuram Bommaraju, Ratna Geetika and D V R Seshadri, 'Private equity in healthcare a blessing or bane?', (The New Indian Express, 30th July 2021), <https://www.newindianexpress.com/opinions/columns/2021/jul/30/private-equity-in-healthcare-a-blessing-or-bane-2337390.html > accessed 10 March 2022.

[121] ibid.

plausible theories of harm that may arise in pattern with the consolidation of hospitals as observed by the USA. The authors strongly believe that the USA is the perfect jurisdiction to rely upon as the hospitals there operate in a for – profit manner and India too will have to grow in the same direction for all of its citizens to receive similar standards of the quality of healthcare.

As a good confidence building measure, the CCI may initiate conducting a market study or roundtable on the healthcare sector with the specific focus on hospitals and their relationship with the doctors, insurance providers and manufacturers/suppliers of equipment. This will assist the CCI in understanding how the relevant stakeholders in such combinations, are firstly affected and what they expect from the CCI in order to protect their interests, thereby allowing them to negotiate with the hospitals, without having to compromise their business in an unreasonable manner. The CCI also needs to conduct or commission a study to increase the public awareness of the interplay of regulations governing the medical fraternity, the medical device manufactures/suppliers and the Act, as the current lack of literature in India regarding these aspects leads to ambiguity in how certain actions of government/regulatory authorities across the country affects the competition of the healthcare sector.

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ABUSE OF DOMINANCE UNDER THE COMPETITION ACT:

The Need for a Competitive Effects Test

– **MR. ADITYA BHATTACHARJEA***

ABSTRACT:

*On a plain reading, the business practices listed in Section 4 of India's Competition Act are condemned as abusive per se, without the need to prove their anti-competitive effects. This note argues that even though the Competition Commission of India [“**CCI**”]) has intermittently applied a test for anti-competitive effects in its decisional practice, the Competition Act, 2002 [“**the Act**”] needs to be amended so as to mandate it. The wording of Section 4 creates confusion by not distinguishing between exclusionary abuses that harm competition, and exploitative abuses that might be objectionable even if competition is not impaired. I show how there are alternative remedies for exploitative abuse, while several of the practices listed in Section 4 need not be exclusionary, and even if they are, there may be offsetting efficiency benefits or objective justifications for them. I also draw attention to the possible complications that may arise in the implementation of Section 4 in conjunction with other sections of the Act. I conclude with a suggestion for a minimal amendment that will not impose an excessive enforcement burden on the CCI.*

I. INTRODUCTION: EXCLUSIONARY VS EXPLOITATIVE ABUSE

This short note provides a much more elaborate version of the arguments I made in my dissenting ‘Observations’ as a member of the Competition Law Review Committee.[122] I would like to restate and reinforce them here in the hope of stimulating a debate while the Competition (Amendment) Bill, 2022 [“**the Bill**”], is before Parliament. Even if the following suggestions are not implemented, I hope that this note will clear the air on the possible misapplication of the crucial Section 4 of the Act, which deals with ‘abuse of a dominant position’. Commentators have opined that once dominance of the enterprise is established, Section 4 as it stands condemns the practices listed in Section 4(2)(a) to (e) as abusive *per se*.[123] This amounts to a ‘form-based’ assessment of market conduct, which has given way in

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[122] Government of India, Ministry of Corporate Affairs, *Report of the Competition Law Review Committee*, July 2019, p.191.

[123] This was first pointed out, before the Act came into force, in Subhadip Ghosh and Thomas Ross, ‘India's New Competition Law: A Canadian Perspective’ (2008) 23 Canadian Competition Record 23. It was restated,

most jurisdictions to an 'effects-based' assessment based on the rule of reason. The latter would require an evaluation of the effects of the impugned conduct on competition, including offsetting gains in efficiency. In its decisional practice, the CCI has inconsistently applied both form and effects-based approaches.[124]

The problem with Section 4 of the Act is that it tries to cover two types of abuse of a dominant position without recognizing the distinction between them. The focus of a competition law should be on 'exclusionary abuse', that is, business practices that prevent or reduce competition by excluding existing or potential competitors. But unlike Sections 3 and 6, which deal with anti-competitive agreements and combinations, Section 4 does not require the CCI to establish that the dominant enterprise's conduct has created, or is likely to create, an Appreciable Adverse Effect on Competition ["**AAEC**"]. The likely reason for the omission of an 'effects test' in this section was that the drafters wanted the same section to cover 'exploitative abuse', that is, business practices that harm consumers through high prices, poor quality, or unfair contractual conditions, *without* necessarily harming competition. Competition law is usually not the appropriate remedy for such abuses. If entry into the market is feasible, the market mechanism itself provides the remedy. The dominant firm's high profits should attract fresh entrants, who can take its customers away by offering the product or service with lower prices, better quality or more balanced contractual terms. If this is not happening, then it is possible that the incumbent producer is discouraging entry in ways that could be regarded as exclusionary abuse.

II. ALTERNATIVE REMEDIES FOR EXPLOITATIVE ABUSE

On the other hand, the relevant product market may be characterized by inherent features that discourage entry, such as high setup costs, network effects, or licensing restrictions. In such cases, remedies should be available in the form of sector-specific regulations that specify entry conditions, prices, interconnectivity, quality, and terms of service. Matters become more complicated if entry is prevented because the dominant firm possesses legally-recognized intellectual property rights, which it might 'abuse' without the threat of competition. There is then a trade-off between incentives for innovation versus consumer

with some additional arguments, in Aditya Bhattacharjea, 'India's New Competition Law: A Comparative Assessment' (2008) 4 J Competition Law and Econ 609, 630-31, reprinted in Eleanor Fox and Abel Mateus (eds), *Economic Development: The Critical Role of Competition Law and Politics*, (Edward Elgar, 2011).

[124] See Payal Malik et al, 'Legal Treatment of Abuse of Dominance in Indian Competition Law: Adopting an Effects-Based Approach' (2019) 54 Rev Industrial Organization 435. This article noted a gradual movement in CCI jurisprudence towards an effects-based approach, but the more recent cases cited below suggest that the form-based approach is still decisive in some cases.

welfare. A full discussion of this trade-off would be beyond the scope of this note, but even for such cases, remedies such as price controls, manufacturing standards, parallel imports, or compulsory licensing can be considered. Competition law is usually not fit for purpose, and should be resorted to only if there are institutional gaps in the country's regulatory architecture that preclude such remedies.[125]

One such gap that has been identified in many jurisdictions is the dominance of giant digital platform intermediaries, whose advantages in terms of two-sided network effects, amassed user data, and consumer switching costs, make it almost impossible for fresh entrants to break into their markets and earn profits. The CCI has a few decisions and several pending enquiries against platforms for Section 4 offences, but until these matters attain finality after going through the protracted appeals process, there will be no decisive insight about the efficacy of competition law remedies. In bringing out a market study that flagged the issues, the CCI seemed to be encouraging e-commerce firms to regulate their own behaviour.[126] Meanwhile, other regulators started intervening in competition issues in this space.[127] However, a Parliamentary committee recently recommended that a new Digital Markets Division in the CCI should co-ordinate the different regulatory bodies governing e-commerce; the CCI should issue guidelines on different standards it would apply to abuse of dominance, and formulate a regulatory code of conduct, containing ex ante prohibitions for enterprises in the sector.[128] This follows on the heels of the growing shift in advanced economies towards ex-ante regulation (as in the European Union's Digital Markets Act) rather than the ex-post, case by case approach of competition law enforcement, whose timelines are far too long as compared to the rapid changes in technologies, business models, and market structures in the new economy. The regulatory architecture is still evolving in many jurisdictions, as apprehension grows about the power of the giant platforms. The rest of

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[125] For example, in the absence of a regulator for the real estate sector, the CCI imposed one of its largest-ever fines on a property developer for forcing one-sided contracts on buyers—a case of exploitative abuse—in the case of Belaire Owners' Association v. DLF Limited & Ors, Case No. 19 of 2010 (Competition Commission of India, August 12, 2011). Presumably, with the passage of the Real Estate (Regulation and Development) Act, 2016, this particular regulatory void has been filled, so the CCI has not ventured to make similar orders in recent years.

[126] Competition Commission of Indi, Market Study on E-Commerce in India: Key Findings and Observations, January 2020. https://www.cci.gov.in/economics-research/market-studies.

[127] For a survey of developments in different jurisdictions, and initiatives by different Indian government departments, see Vedika Mittal Kumar and Manjushree R.M., *Fair and Competitive E-marketplaces (F.A.C.E.): The Business Users' Narrative*, Working Paper, Vidhi Centre for Legal Policy (2021).

[128] See Parliament of India, Standing Committee on Commerce, Rajya Sabha Secretariat, Report No. 172, *Promotion and Regulation of E-Commerce in India*, June 2022, especially paras 7.8, 8.3 and 9.7.

this note, therefore, is limited to the application of Section 4 of the Act to firms that are dominant in sectors of the 'old economy'.

III. ABUSE OF DOMINANCE IN SECTION 4 OF THE ACT, AND THE CCI'S DECISIONAL PRACTICE

Let us begin by examining in more detail how abuse of a dominant position is treated in Section 4.[129] Section 4(1) simply states that "*No enterprise or group shall abuse its dominant position*". Section 4(2) then declares that "*There shall be an abuse of [a] dominant position under subsection (1) if...*" (emphasis added), and goes on to specify, in five clauses, various kinds of behaviour that constitute abuse. The concatenation of these two subsections gave rise to the supposition that those five types of conduct would be regarded as abusive *per se,* without any test for an AAEC.

The five types constitute a mixed bag. Each of the clauses describes business behaviour that could be exploitative or exclusionary or both, but not necessarily harmful. Section 4(2)(a) deals with unfair or discriminatory conditions or prices, explicitly including predatory prices. Elementary economics tells us that price discrimination is not necessarily harmful, and can even be beneficial by allowing an enterprise to reap economies of scale, or to serve low-income consumers who might be unable to afford a uniform non-discriminatory price. Even attempts at predatory pricing will benefit consumers, without necessarily driving out competitors. Discriminatory conditions or supplementary obligations in a contract (the latter are covered by Section 4(2)(d)) can also be objectively justified, for example to protect the dominant firm's reputation or intellectual property.

The CCI heard, but did not accept, economic arguments justifying price discrimination in recent cases that involved Grasim, the dominant producer of Viscose Staple Fibre ["**VSF**"]. Grasim's discriminatory discounts on sales of VSF to yarn spinners, for whom it was a non-substitutable input, were held to contravene Section 4(2)(a), while its imposition of contracts on the spinners, requiring them to provide data on their production and sales, was held to violate Section 4(2)(d). Several passages in the CCI orders suggest that the CCI viewed any discrimination by a dominant firm as necessarily anti-competitive, even though the adverse effect on competition, if any, would have been among the spinners in their downstream market for yarn (so-called 'secondary line injury'). But the CCI failed to develop a theory of

[129] In most cases, establishing that the enterprise is dominant in the relevant market is a condition precedent to finding that it has abused its dominance. However, in this note I do not discuss how a dominant position is defined in the Act, or how the CCI has operationalized this problematic definition in its decisional practice.

harm. Strangely, while Grasim acknowledged that price discrimination was a profit-maximizing strategy, the CCI held it to be "irrational".[130] Grasim's practices may well have caused a competitive injury further down the supply chain leading from VSF to yarn to cloth to garments and finally to consumers, especially since it seemed to be discriminating in favour of spinners who exported their product, possibly at the cost of those who sold it in the domestic market. But no such competition analysis was undertaken by the CCI, even though a much earlier verdict by the erstwhile Competition Appellate Tribunal seemed to require it in a very similar case of discriminatory pricing.[131]

Before proceeding any further, the similarities and differences between the wording of these two clauses of Section 4(2) and the corresponding clauses of Article 102 of the Treaty on the Functioning of the European Union ["**TFEU**"] are worth noting. Section 4(2)(d) is taken verbatim from Article 102(d). But Section 4(2)(a) clubs together the prohibitions of *unfair* prices or trading conditions in Article 102(a) with the 102(c) prohibition of "*applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage*". Thus, discrimination is treated as a violation under European competition law only if it affects competition, but there is no such statutory restraint in Indian law. (Although it must be acknowledged that the decisional practice of both the CCI and the European Commission has not always adhered to the scheme of their respective governing statutes.)

Moving on to Section 4(2)(b), this is a close paraphrase of Article 102(b) TFEU, but it cannot be easily classified. It covers acts that limit or restrict "*production of goods or provision of services or market therefore ..., or technical or scientific development relating to goods or services to the prejudice of consumers*". If the conduct of the dominant firm limits or restricts supply or innovation by existing or potential competitors, it is clearly exclusionary. On the other hand, if it restricts its own supply or innovation (as a monopolist would), it might be

[130] In Re: XYZ and Association of Man Made Fibre Industry of India and Ors. (Case No. 62 of 2016, Competition Commission of India, 16 March 2020). See especially para 104 on Grasim's justification, and paras 112-117 for the CCI's reasoning on entirely different grounds. Grasim's price discrimination and contractual clauses were again held to contravene ss 4(2)(a) and (d) in Informant v Grasim Industries Ltd. (Case Nos. 51, 54 and 56, Competition Commission of India, 6 August 2021). See especially para 33, which declared that "…a dominant entity, manufacturing and supplying an indispensable input/raw material to downstream domestic spinners, is entrusted with a special responsibility not to discriminate amongst its buyers". The problematic doctrine of the "special responsibility" of a dominant firm, followed in European Union cases since the 1980s, has been inconsistently applied by the CCI. See Bhawna Gulati and Ikleen Kaur, 'How 'Special' is the 'Responsibility' of Dominant Enterprises?' [2020] 5 ICLR 1.

[131] Schott Glass India Pvt. Ltd. v Competition Commission of India (Appeal No. 91/2012, Competition Appellate Tribunal, 2 April 2014). An appeal by the CCI against this order is pending in the Supreme Court.

regarded as exploitative, but the remedy should be sought in domains other than competition law, as specified above.

Section 4(2)(c) covers "*practices resulting in denial of market access in any manner*", which seems to cover clearly exclusionary conduct. But in the absence of a competitive effects test, it can easily be misapplied. In the second case involving Grasim discussed above, denial of any discount on VSF to a particular spinner was held to violate this clause because it rendered the spinner uncompetitive in its downstream market. The CCI equated this with 'refusal to deal', which it regarded as an exclusionary abuse, once again because of the "special responsibility" of the dominant supplier. The CCI did not conduct any assessment of competition in the downstream market with one less producer, and disregarded Grasim's argument that it was involved in a commercial dispute with that particular buyer.

In a notable judgment in a different case, the Supreme Court took a more nuanced view of Section 4(2)(c). A group of multi-system operators ["**MSOs**"] that dominated the cable TV market in Punjab and Chandigarh had terminated its agreement to carry a particular news channel, on the grounds that the latter's TRP ratings were extremely low. The CCI had held that this was a denial of market access and imposed a stiff monetary penalty. The Appellate Tribunal set aside this order on the grounds that the cable operators were not in competition with the news channel, so there could be no contravention of either Sections 3 or 4. The CCI appealed to the Supreme Court, which held that "once a dominant position is made out on facts, whether a broadcaster is in competition with MSOs is a factor that is irrelevant for the purpose of application of Section 4(2)(c)".[132] The Court upheld the CCI's finding of a contravention of Section 4(2)(c), but went on to accept the respondent MSOs' argument that the TV channel was dropped because its low ratings, and set aside the monetary penalty. If the wording of Section 4 had required an AAEC test from the start, this protracted litigation and its awkward outcome could have been avoided.

Finally, Section 4(2)(e) covers the misuse of a "*dominant position in one relevant market to enter into, or protect, other relevant market*". This is a form of business conduct which is called 'leveraging' in economics. A standard example of leveraging is tying the sale of a product in which the firm is dominant to another product in which it faces competition. This practice may be exclusionary, but cannot be routinely condemned as abusive; there may be

[132] Civil Appeal No.7215 of 2014, *Competition Commission of India v M/s Fast Way Transmission Pvt. Ltd. & Ors.*, (2018) 4 SCC 316, para 11.

objective justifications such as quality assurance, customer convenience, or cost savings in joint production and sales, so the rule of reason should be applied on a case-by-case basis.

IV. OTHER PROBLEMATIC SECTIONS OF THE ACT

The open-ended wording of Section 4 has thus allowed for inconsistent and erroneous interpretations. Greater clarity, in the form of a mandatory AAEC test, is therefore desirable. This is all the more important because Section 28 of the Act empowers the CCI to break up an enterprise to ensure that it does not abuse its dominant position—without requiring any evidence that it has actually done so. Fortunately, the CCI has never used this section, but there is no guarantee that it will not be abused in the future. In the author's opinion, Section 28 should remain on the books, but be very sparingly used when competition is seriously threatened, and no other remedy is feasible.

Yet another reason for incorporating an AAEC test into Section 4 is that the section as it stands is inconsistent with Section 32, which extends the jurisdiction of the CCI to cover "*Acts taking place outside India but having an effect on competition in India*". The text of the section further makes it explicit that it covers abuse of a dominant position "*if it has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India*". This means that an AAEC test is required to prove abuse of a dominant position by an enterprise which is based abroad, but not required for similar conduct by an enterprise which is based in India. This puts domestic firms at a disadvantage, by leaving their conduct open to condemnation as abusive *per se*, while identical conduct by foreign-based firms will be adjudged under the rule of reason.

V. SOME SUGGESTIONS

Incorporation of an AAEC test into Section 4 is therefore necessary on multiple grounds. Two possible objections to this might be that, firstly, it will put an excessively high burden of proof on the CCI to establish an AAEC; and secondly, it will prevent the CCI from taking up cases of exploitative abuse which cannot be addressed by other means. In order to avoid the first problem, the specific types of conduct listed in Section 4 can be treated as *presumptively* anti-competitive, like the specific types of agreements listed in Section 3(3). This puts the burden of proof on the Opposite Party to rebut the presumption, or provide an objective justification for the practice. As in cases involving agreements, the CCI can evaluate this rebuttal/justification with reference to the factors already specified in Section 19(3). Only a few words will need to be inserted into Sections 4(2) and 19(3) to enable this. As for the second problem, there is a proposal in Section 14(b)(ii) of the Amendment Bill, which is now before Parliament, to amend Section 19(3)(d) of the principal Act so that the Commission can have due regard to "benefits *or harm* to consumers" (emphasis added). This would cover exploitative as well as exclusionary abuses, if it is not feasible to rewrite Section 4 completely so as to disentangle them, with an AAEC test for the latter.

VI. CONCLUSIONS

The modest amendments suggested in this note would reduce the chances of 'false positives', while enhancing legal certainty and the Ease of Doing Business, without imposing an unnecessary burden on the CCI. By bringing the Act into line with international norms, it would provide a familiar template to foreign firms in assessing regulatory risks associated with setting up business in India, while levelling the playing field which at present is tilted against domestic firms, thanks to Section 32 of the Act.

Postscript (26 December, 2022)

The original version of this note was submitted to this journal on 18th October 2022. Thereafter, on 4th November, the author was invited to appear as an independent witness before the Parliamentary Standing Committee on Finance, where he gave his views on several aspects of the Competition (Amendment) Bill. In its report, presented to Parliament on 13th December 2022, the Committee has recommended amendment of Sections 4 and 19(3) along the lines suggested above.[133] It remains to be seen whether the Ministry of Corporate Affairs includes these amendments in a revised version of the Bill, and whether they are passed by Parliament.

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[133] Parliament of India, Standing Committee on Finance, Seventeenth Lok Sabha, 52nd Report, Lok Sabha Secretariat, *The Competition (Amendment) Bill*, 2022, para 3.80.

ASSESSING M&As BASED ON THE NEW DEAL VALUE THRESHOLD – A COMPARATIVE ANALYSIS

- **MS. ANUPAM SANGHI[*] & MS. SAKSHI SARAN AGARWAL [**]**

ABSTRACT

*The Competition Commission of India ["**CCI**"] has been conducting research studies and surveys to find ways to tackle the new challenges posed in the digital economy. Recently, it came out with the Competition Amendment Bill 2022 ["**Bill**"] which introduces several changes to the Competition Act 2022 ["**the Act**"] in an attempt to align the laws with the current market dynamics.*

These amendments include the proposal to alter the definition of combinations that are notifiable to the CCI to bring under purview as well as the mergers and acquisitions that CCI was unable to scrutinise under the traditional assets and turnover based threshold. For instance, deals with high value like Facebook-WhatsApp deal or Myntra-Jabong deal. The article discusses the introduction of the deal value threshold for notification of combinations and its impact on the competition framework in India. Additionally, a bird's eye view of jurisdictional comparison is attempted to assess the need and viability of the new threshold to assess digital M&As.

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I. INTRODUCTION

"The world stands on the cusp of the Fourth Industrial Revolution (4IR), with Big Tech firms like Facebook (now Meta) implementing mind-boggling tech like the Metaverse (based on Augmented Reality); and others like Google, which have achieved quantum supremacy; and SpaceX, which is on the verge of colonizing space. With these technological innovations becoming commonplace in the coming decades, India not only needs to push for innovation at home but also design robust policy mechanisms to achieve tech sovereignty."[134]

Globally, competition authorities are facing major challenges - to better understand the relationship between competition and innovation and to assess competition among platforms and ecosystems. Competition between platforms is dynamic - Take the business model of Amazon which started with book sales but scaled to offer lucrative cloud services, which was a discovery of the market by offering innovative services. In the case of Instagram - it was a photo app that unexpectedly became a rapidly growing social media platform. It is challenging when the simple economics of price competition and textbook monopoly model does not support the business model of scale economies, tipped markets or ecosystem competition.

In the last two decades, the Indian government has formulated policies and vision statements to keep pace with evolving technologies. These are designed, developed, and framed to strengthen India's technological position globally and for India to emerge as a world leader in the coming years.[135]

One of the changes that the Indian government has attempted to implement to keep pace with the evolving technologies is through competition law by proposing Competition Amendment Bill, 2022 that aims to align the competition policy of India with the technological development that has occurred in the digital economy.

The Bill was introduced in the Lok Sabha on August 5, 2022 and referred to a Standing Committee on August 17 for its opinion. While the Bill undergoes examination, it is important to assess some of the key provisions that it proposes. The Bill, *inter alia*, seeks to amend Section 5 of the Act to regulate mergers and acquisitions based on the size of transactions. The Bill provides that if the value of any transaction in connection with the

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[134] Prachi Mishra and Samyank Bai Leekha, 'Technology Policymaking in India: The need for a paradigm shift' (*Observer Research Foundation,* 15 January 2022) <https://www.orfonline.org/expert-speak/technology-policymaking-in-india-the-need-for-a-paradigm-shift/> accessed 20 December 2022.

[135] ibid.

acquisition of any control, shares, voting rights, etc., exceeds Rs. 2,000 crores, it would require filing a notice of combination before the CCI and empower the Central Government to exempt certain transactions from the requirement to file combination notice under the Act.[136]

This proposal was presented based on the premise that some combinations, especially in the digital economy, are required to be reviewed by the CCI due to the potential competition concerns, however, these combinations do not meet the existing assets or turnover thresholds enlisted under Section 5 of the Article. This is because some business models have low asset values and turnovers but can still make an impact on the competition in the market due to their potential competitiveness. The high deal values of such transactions can indicate the potential of smaller companies with innovative ideas and products.

However, the CCI is unable to review these transactions if the threshold requirements are not met unlike jurisdictions like the US where the agencies are allowed to review and challenge non-notifiable mergers even after the merger has been consummated. The Federal Trade Commission has reviewed 15 non-notifiable transactions and the Department of Justice reviewed 18 non-notifiable transactions in the period 2015-2020.[137] However, since non-notifiable transactions are not reviewable by the CCI in India, the drafters of the Bill thought it necessary to include deal value thresholds to ensure that these high-value deals are reviewed to fill this enforcement gap.

II. THE IMPACT OF THE AMENDMENT

The inclusion of the deal value proposal will cover high-value deals (valued over Rs. 2,000 crores) if the involved undertakings have substantial business operations in India. While it is clear that the transaction has to pass a deal value and local nexus test in order to trigger the mandatory notification requirement, the proposal currently does not provide much guidance regarding the same.

The adoption of this proposal by the Parliament will result in the expansion of the merger control regime in India. The deals that were able to go unscrutinized because the involved undertakings had low turnover and value of assets can now be examined by the CCI if they meet the deal value threshold. For instance, deals like the Facebook-WhatsApp deal ($19

[136] The Competition (Amendment) Bill 2022, cl 6; The Competition Act 2002, §6.
[137] Organization for Economic Co-operation and Development, 'Start-ups, Killer Acquisitions and Merger Control – Note by the United States' (DAF/COMP/WD(2020)23, 11 June 2020) Para 34, <https://one.oecd.org/document/DAF/COMP/WD(2020)23/en/pdf> accessed 11 December 2022.

billion), Myntra-Jabong deal ($70 million) and Jio-Facebook deal ($5.7 billion)[138] did not come under the ambit of Section 5 of the Act despite their high values. However, the CCI will be able to assess these transactions under the new threshold.

Facebook acquired WhatsApp in 2014 for $19 billion and essentially its 450 million monthly users worldwide.[139] This deal was, however, unscrutinized by the CCI as it did not meet the asset or the turnover threshold. The merger of the two undertakings has raised competition concerns across the globe. Acquiring WhatsApp, removed it as a potential threat to the monopoly that Facebook holds over the personal social networking market and the combination of user data between the two undertakings can strengthen the data advantage that Facebook possesses. In a recent case filed against the new privacy policy of WhatsApp, the CCI has observed that data collection by Facebook can be used to engage in consumer profiling and track user behaviour across platforms.[140] This can have exclusionary effects in the display advertising market, create high barriers to entry and leverage the data advantage to reinforce its dominant position in related markets as well.[141]

The CCI was unable to assess the risk back in 2014 due to the enforcement gap for mergers in the digital economy. However, the CCI will be empowered to review these kinds of transactions going forward, if the Bill is approved. Other deals that were concerning include the Myntra-Jabong deal worth $70 million in 2016.[142] The acquisition, which has been akin to acquiring the competition, has increased the level of concentration in the market for online fashion retail and likely tipped the scales in favor of Flipkart who beat Snapdeal and acquired Jabong through Myntra.[143] This high-value transaction was also not reviewed by the CCI due to the limitations of the asset and turnover thresholds.

It appears that there was a need to develop the law to allow the CCI to effectively regulate mergers where the sale figures or the turnover of the undertakings do not accurately reflect the competitive potential.

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[138] Anupam Sanghi, 'Facebook-Jio Deal: What India's Competition Regulator Will Have to Consider' (*The Wire,* 10 June 2020) <https://thewire.in/business/facebook-jio-deal-what-indias-competition-regulator-will-have-to-consider> accessed 16 December 2022.

[139] Press, 'Facebook buys WhatsApp for $19B. Yes, it is a big deal' (*Indian Express*, 20 February 2014) <https://indianexpress.com/article/technology/technology-others/facebook-whatsapp-19b-deal/> accessed 15 December 2022.

[140] I*n Re: Updated Terms of Service and Privacy Policy for WhatsApp Users*, Suo Moto Case No. 01 of 2021.

[141] ibid.

[142] Debojyoti Ghosh and Deepti Chaudhary, 'Myntra's Jabong Buy May've Nullified Competition, but what about Profits?' (*Forbes India,* 29 August 2016) <https://www.forbesindia.com/article/boardroom/myntras-jabong-buy-mayve-nullified-competition-but-what-about-profits/44131/1> accessed 17 December 2022).

[143] ibid.

Next, the article presents a jurisdictional comparison to examine how different competition authorities have approached the issue of these high value transactions.

III. JURISDICTIONAL COMPARISON

A. The European Region

The note will first assess how European countries have attempted to regulate these combinations and whether they have been effective.

i. PayPal – Honey Science eal (Germany)

In 2017, Germany decided to amend its Competition Act to include that a concentration notification requirement would apply if the transaction value of a merger or acquisition exceeded EUR 400 million and the target undertaking had substantial operations in Germany. The domestic activity in the digital sector is measured through criteria like monthly active users, unique visitors, etc and the local nexus can be established through the location of consumers and location assets if it is used for business activity.[144] The business activity in Germany must also be significant for it to fall within the contours of Section 35 (1a) of the German Competition Act.[145]

For a demonstration of how the test for the deal value threshold is applied, let us take a look at the PayPal and Honey Science acquisition.

Background –

PayPal's main products include digital wallets that allow users to make and receive payments. Honey's main product is a free browser extension that automatically finds and applies promotional and discount codes for users when checking out during online shopping. Advertisers provide codes to online retailers on a commission basis. The acquisition will allow PayPal to provide better and or more personalized services to consumers beyond the core checkout services.[146]

PayPal notified the German competition authority about its acquisition of Honey Science for approximately $4 billion as it exceeded the deal value threshold and Honey Science had considerable operations in Germany.

[144] Bundeskartellamt, 'Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)' (July 2018).
[145] ibid.
[146] *PayPal/Honey Science*, B6-86/19 (Germany).

Assessment of Local Nexus –

The authority considered factors like a large number of domestic users, considerable partnerships with retailers, the rendering of services in Germany, and the fact that the turnover did not reflect the economic and competitive potential (however, it acquired considerable investment showing its potential).

Substantive Analysis –

1. The business model of Honey Science had significant indirect network effects. Transaction platforms are often monetized on a larger scale only years after entering a market and the sales figures do not reflect competitive potential in the initial years.
2. The authority assessed the acquisition considering PayPal's relatively strong market position in the internet payment market and the possible conglomerate or vertical effects like market foreclosure or bundling practices. However, several fast-growing payment service providers (Klarna, WireCard, Apple Pay, Google Pay) have emerged and therefore, it concluded that it is unlikely that the transaction will have substantial anticompetitive effects.

Examining mergers via the deal value threshold seems like a cautionary step by jurisdictions to ensure that the big digital mergers do not adversely affect competition. Let us look at other cases to assess whether this threshold has been effective in filtering out potentially problematic mergers.

ii. Facebook – Giphy Deal (Austria)

Austria introduced a similar threshold in 2017 for transactions exceeding EUR 200 million and if the target is active in Austria to a significant extent.

In 2020, Facebook (Meta) acquired Giphy for approximately $400 million, but failed to notify the Austrian Federal Competition Authority [**"AFCA"**] of the transaction even though it exceeded the deal value threshold and Giphy had sufficient domestic activities in Austria. Meta was fined 9.6 billion EUR for failing to notify the transaction.[147]

Background - Giphy provides a searchable GIF library whose GIFs and stickers can be accessed through most of the popular social media platforms via an API.

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[147] Austrian Federal Competition Authority, 'Facebook fine for illegal merger now final' (31 August 2021) <https://www.bwb.gv.at/en/news/detail/facebook-fine-for-illegal-merger-now-final> accessed 18 December 2022.

Competition Concerns found by the AFCA - The AFCA found that the acquisition could potentially reinforce the dominant position of Meta in social media and online advertising by (1) Restricting non-discriminatory access to Giphy for other services;

(2) Obtaining sensitive information about rivals through the other apps integrated interface to the Giphy library and;

(3) Stifling potential competition between Meta and Giphy in online advertisement.[148]

Substantive Analysis –

i. The Cartel Court affirmed that the transaction could strengthen Meta's position in the market and impede competition. There was a possibility the transition could result in denial of access or limited access to Giphy's service for Meta's competitors.

ii. However, the Court found a remedy and allowed the transaction based on the conditions that – non-discriminatory access to Giphy's GIF library be provided; to grant alternative GIF libraries be granted access visa API to Giphy's GIF library to allow the establishment of an additional GIF provider.[149]

The deal value threshold enabled Austria to assess a digital merger and provide remedies to ensure that the potential adverse effect on competition could be avoided while allowing the merger. However, this deal was not so lucky in the UK.

While similar theories of harm were reviewed by both jurisdictions, the outcome has been different.

iii. Facebook – Giphy Deal (UK)

Substantive Analysis –

Apart from the vertical concerns found in Austria, the Competition and Markets Authority ["**CMA**"] also found horizontal concerns - the merger would also reduce dynamic competition in display advertising as the efforts to innovate and expand by Giphy could potentially make it a new entrant in the market.[150] It was noted that the behavioral remedies proposed by Meta were insufficient and that a structural remedy was required to resolve the

[148] Austrian Federal Competition Authority, 'Meta (Facebook)/Giphy merger: AFCA appealing against conditional clearance' (4 March 2022) <https://www.bwb.gv.at/en/news/detail/meta-facebook-giphy-merger-afca-appealing-against-conditional-clearance> accessed 15 December 2022.
[149] ibid.
[150] *Meta v Competition and Markets Authority*, Case No: 1429/4/12/21 (2022) (UK).

competition concerns. The nature of the substantial lessening of competition found in the merger was dynamic and not time-limited which could not be addressed by the remedies.[151] Further, the difficulty in specifying Meta's obligations, and the risk of circumvention of obligations and the difficulty in the enforcement and monitoring of the obligations were found.[152]

The above cases reflect how the same transaction, when assessed by different authorities, can lead to dissimilar outcomes. While similar vertical concerns were raised in the cases, Austria cleared them after imposing some conditions on Facebook, however, UK concluded that the only way to resolve the competition concerns was through the divestiture of Giphy. The CMA preferred structural remedy over behavioral remedy as they addressed the competition concerns of the merger at its source and monitoring and enforcement of behavioral remedies were quite difficult. In these merger analysis cases, the authorities are required to predict future market conditions and therefore, it is likely that these predictions will differ. Austria chose to take a more liberal approach by clearing the merger subject to conditions, while the UK chose to address the concerns by prohibiting the transaction.

iv. <u>Meta – Kustomer Deal and Illumina – GRAIL Deal (European Union)</u>

The European Commission has been a key competition regulator when it comes to the digital economy. The EU decided to take a different approach to tackle these mergers rather than introducing a deal value threshold. It proposed the Digital Markets Act ("**DMA**") which states that gatekeepers under the DMA are required to inform the Commission about any intended concentration that involves another provider of services in the digital sector irrespective of whether it is notifiable or not.[153] This sector-specific regulation allows the Commission to assess any merger involving gatekeepers to ensure that the competition in the market is not harmed. Further, the referral system (Article 22) of the EU Merger Regulations can be used by the member states to request the Commission to review a transaction if it (1) affects trade between the member states and (2) threatens to significantly affect competition.

To assess whether the transaction can significantly affect competition, the following factors are considered: "*the creation or strengthening of a dominant position of one of the undertakings concerned; the elimination of an important competitive force, including the elimination of a recent or future entrant or the merger between two important innovators; the*

[151] ibid.
[152] ibid.
[153] Digital Markets Act 2022, art 14 (EU).

reduction of competitors' ability and/or incentive to compete, including by making their entry or expansion more difficult or by hampering their access to supplies or markets; or the ability and incentive to leverage a strong market position from one market to another by means of tying or bundling or other exclusionary practices."[154]

Further, an indicative list of cases where the turnover of the target company is not a true estimate of its actual or future competitive potential includes -

(1) a start-up or recent entrant with significant competitive potential that has yet to develop or
(2) implement a business model generating significant revenues (or is still in the initial phase of implementing);
(3) an important innovator or undertaking conducting potentially important research;
(4) an actual or potential important competitive force;
(5) access to competitively significant assets;
(6) provides products or services that are key inputs/components for other industries.[155]

This mechanism is not sector specific and therefore, any potential problematic mergers can be assessed at the EU. Earlier this year, the Commission reviewed the acquisition of Kustomer by Meta for $1 billion under the referral mechanism.

Background - Kustomer provides customer service and supports the Customer relationship management ["**CRM**"] software market.[156] Popular messaging channels, like Meta's Messenger, are used by businesses for consumer interaction and form an important input for customer service and support for CRM software providers.

Substantive Analysis –

The Commission was concerned that Meta would have the ability and the incentive to engage in foreclosure strategies to the detriment of Kustomer's rivals and new entrants by denying or degrading access to the API for Meta's messaging channels resulting in the reduction of

[154] European Commission, Commission Guidance on the Application of the Referral Mechanism set out in Article 22 of the Merger Regulation to Certain Categories of Cases, C(2021) 1959 final, para 15 https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.
[155] ibid para 19.
[156] European Commission Press Release, 'Mergers: Commission Clears Acquisition of Kustomer by Meta (formerly Facebook), Subject to Conditions' (27 January 2022) <https://ec.europa.eu/commission/presscorner/detail/en/ip_22_652> accessed on 19 December 2022.

competition in the market for the supply of CRM software.[157] In response, Meta guaranteed free, non-discriminatory access to its publicly available APIs for its messaging channels CRM software providers and new entrants and made a core API access-parity commitment.[158] The transaction was cleared on the premise that these commitments are complied with by Meta.

The system is not restricted to the digital sector.

In 2021, some Member States referred the Illumina-GRAIL merger worth $7.1 billion to the EU using this mechanism.

Background –

GRAIL is developing a blood-based early cancer detection test that can contribute significantly to the fight against cancer.[159] Illumina is currently the only credible supplier of NGS systems for genetic and genomic analysis that GRAIL is required to develop and process these tests.[160]

Substantive Analysis –

The Commission was concerned that with this transaction, Illumina would have the ability and incentive to cut off GRAIL's rivals from accessing its technology, or otherwise disadvantage them. It found that Illumina would have had the ability and the incentive to engage in foreclosure strategies against GRAIL's rivals.[161] While the undertaking proposed several commitments, the Commission concluded that these were not sufficient to address the competition concerns and prohibited the transaction.

The EU referral mechanism seems to be effective in examining nascent mergers when they may raise competition concerns. However, this mechanism works due to the structure of the EU regulatory framework where the European Commission can assess the cases that affect trade between Member States. The Commission concluded that a deal value threshold was

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[157] ibid.
[158] ibid.
[159] European Commission Press Release, 'Mergers: Commission Prohibits Acquisition of GRAIL by Illumina' (6 September 2022) <https://ec.europa.eu/commission/presscorner/detail/es/ip_22_5364> accessed on 19 December 2022.
[160] ibid.
[161] ibid.

not a proportionate solution due to the difficulty in setting the threshold at the right level.[162] Setting up a value threshold that is too high is not helpful, whereas setting it too low can result in furthering the cost of compliance and filing for undertakings that may prove to be irrelevant.[163] The referral mechanism, therefore, seemed like an appropriate way to assess non-notifiable mergers if they can impact competition between the member states.

Next, the article will discuss how the Asian region regulates high value transactions. The approach in this region is mixed. While Japan introduced the deal value threshold for merger notification in its merger control, Singapore has chosen to assess such cases under its voluntary notification merger system.

B. The Asian Region

i. Google – Fitbit Deal (Japan)

In 2019, the Japan Fair Trade Commission ["**JFTC**"] amended its merger policies to explicitly recommend that the parties to a combination that do not meet the combination filing criteria (asset or turnover threshold) should voluntarily consult with the JFTC before implementing the proposed transaction if the value exceeds an and it affects domestic consumers. The local nexus is established if the business base or R&D base of the target is located in Japan if it conducts sales activities targeting Japanese consumers and if the total Japanese turnover exceeds JPY 100 million.[164] Further, the JFTC has the power to review transactions regardless of whether the parties consult with the JTFC; or whether the transaction fulfils the criteria mentioned if it considers that its necessary to scrutinize the impact on domestic competition.

In 2021, at the request of the JFTC, Google submitted detailed plans for its acquisition of Fitbit for $2.1 billion.

Substantive Analysis –

The JFTC was concerned, *inter alia*, that Google would provide discriminatory treatment to Fitbit's competitors regarding interoperability with Android Smartphones, access to all the

[162] EU – Margrethe Vestager, 'The Future of EU Merger Control' (Speech, 11 September 2020), <https://ec.europa.eu/commission/commissioners/2019-2024/vestager/announcements/future-eu-merger-control_en> accessed 19 December 2022.
[163] ibid.
[164] Japan Fair Trade Commission, 'Policies Concerning Procedures of Review of Business Combination' (17 December 2019) <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html> accessed 13 December 2022.

Android APIs, technical supports, etc.[165] However, it accepted the remedy proposed by Google that it would ensure that certain Android APIs are available, without access charge, under the same terms as other Android APIs that Google group makes available as part of AOSP on a non-discriminatory basis and committed to not discriminate by withholding, denying or delaying access to the API's functionalities.[166] Among other remedies, Google also proposed that it would report to the JFTC once every six months for 10 years to enable monitoring of the compliance of remedies.[167] The transaction was allowed on the premise that Google would implement all the accepted remedies.

ii. Uber – Grab Deal (Singapore)

Singapore is another leading Asian country that has assessed digital mergers. It has a voluntary merger notification regime that does not require parties to notify their transactions to the Competition Commission of Singapore ["**CCCS**"]. The parties are required to conduct a self-assessment and examine the competitive effects of their transaction and ensure compliance by relying on the confidential advice mechanism available to them. This merger framework allows Singapore to assess problematic mergers and take action while reducing costs for businesses involved in unproblematic mergers.[168] However, the parties are wary of consummating a transaction which may raise competition concerns and risk imposition of remedies that may be costly for them, and therefore, they notify the authority voluntarily.[169]

Uber and Grab had to bear such costs – remedies and financial fines.

Background –

Uber sold its Southeast Asian business to Grab for a 27.5% stake in Grab in March 2018 and completed the transaction without notifying the CCCS. CCCS was quick to respond and made its final decision in September 2018.

Substantive Analysis –

165 *Google/Fitbit* (2021) (Japan) <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114r.pdf> accessed 13 December 2022.
166 ibid.
167 ibid.
168 Organization for Economic Co-operation and Development, 'Disentangling Consummated Mergers – Experiences and Challenges – Note by Singapore' DAF/COMP/WD(2022)44 (14 June 2022) <https://one.oecd.org/document/DAF/COMP/WD(2022)44/en/pdf> accessed 10 December 2022.
169 ibid.

The CCCS noted that the transaction removed Grab's closest competitor (Uber) in ride-hailing platform services, and Grab was able to increase its fares and commissions.[170] Grab has a high market share and it imposed exclusive obligations on taxi companies, making it difficult for new entrants to expand in the market. CCCS concluded that the transaction led to a substantial lessening of competition and imposed remedies like - ensuring Grab drivers are free to use any ride-hailing platform; removing Grab's exclusivity arrangements with any taxi fleet; maintaining Grab's pre-merger pricing algorithm and driver commission rates; requiring Uber to sell Lion City Rentals vehicles (Uber's subsidiary involved in car rental business for private hire) to any potential competitor and not to Grab without CCCS's prior approval.[171]

The Competition Appeal Board upheld the decision of the CCCS in January 2021.[172]

iii. Comments on the Remedy in Uber-Grab Deal

While the remedies imposed managed to mitigate the effects caused by the transfer of tangible assets, they were unable to remedy the intangible part of the transaction – driver and customer network that moved to Grab, or to divest Uber's network, pre-transaction, to another competitor once it had been dismantled.[173] While the merger could not be completely reserved, the several remedies imposed by the CCCS managed to maintain contestability in the market.[174] Financial penalties were also imposed to act as a deterrence.

The Uber-Grab deal showcases the difficulty of dismantling a transaction that has also been consummated. It can be argued that the mandatory notification system with a deal value threshold can be desirable if they prove to be an effective way to prevent the problematic merger from being consummated since it is extremely difficult to completely reverse a completed transaction.

[170] Infringement Decision in relation to Acquisition of Uber's Southeast Asian Business by Grab and Uber's Acquisition of a 27.5 per cent Stake in Grab, (CCCS 500/001/18) (Singapore) <https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger> accessed 10 December 2022.
[171] ibid.
[172] CCCS Media Release, 'Competition Appeal Board upholds CCCS's Infringement Decision Against Uber for Anti-competitive Merger with Grab' (13 January 2021) <https://www.cccs.gov.sg/media-and-consultation/newsroom/media-releases/cab-upholds-cccs-id-against-uber-for-anticompetitive-merger-with-grab> accessed 9 December 2022.
[173] OECD (n 168).
[174] ibid.

IV. THE TAKEAWAYS

The evolution of merger control in all jurisdictions reflect that the digital market is rapidly evolving. The above analysis reflect that various jurisdictions are now assessing digital mergers. The merger control systems have either a mandatory notification system (like India and EU) or a voluntary notification system (like Singapore). Mandatory notification system enables a cautious and effective way of preventing potential harm in a particular market on the platform ecosystem. However, it would require sophisticated market analysis to define the particular relevant market that is affected by the deal. The traditional thresholds like the assets and turnover value which trigger notification requirements for mergers and amalgamations have proved to be inappropriate for assessing certain mergers, especially within the digital sector. Whereas, in a voluntary notification system, the innovation in the digital market is incentivized, giving way to collaboration amongst various markets on a digital platform. For instance, the liberal approach by the CCCS allowed the Uber-Grab deal despite it being a horizontal merger. However, as a consequence of adopting the liberal approach, the CCCS had to penalize Uber for the Uber-Grab deal and impose various remedies to rectify the harm caused to competition by the deal. In contrast to the voluntary notification system adopted by Singapore, there is consistency in the case of mandatory notification merger control system.

It was realised, world over, that jurisdictions would have to come up with alternate method to analyse these mergers as digital companies tended to have low assets and turnover value even though the companies were big and had a significant impact on competition. Some jurisdictions like Germany and Japan have used transaction value method for mergers which trigger notification requirements or other means to assess mergers that some of them have the potential to cause significant impact on competition in the markets.

Therefore, the Indian competition authority has to get equipped to analyse deals on the platform ecosystem and balance the potential benefits versus the possible harms, considering the unique India market dynamics. For example, the Facebook-Giphy deal in the Indian context can have a different impact as compared to the Austrian and UK market. Therefore, guidelines by the Indian competition authority would help in drawing out the safeguards for assessing the market dynamics of India. Guidelines will give consistency as the market dynamics in India are different from those in other jurisdictions. The Indian competition authority cannot impose copycat fines or remedies based on analysis in other jurisdictions and needs to assess deal based on the relevant geographic market which requires an independent analysis. This reflects the need for more sophisticated tools to understand and analyse tech markets. The competition authorities will have to make the merger control process collaborative to so as to understand the products and/or services on the digital platform and the business models of the parties concerned before they come to correctly define and assess those digital markets.

The discussion above, suggests that adopting a transaction value method for assessing digital mergers, by itself, may not be enough. The discussion reflects that there are other ways to assessing digital mergers rather than the notification obligation for combinations reaching a specified transaction value. The Indian competition authority can look at alternatives like providing the CCI the power to assess non-notifiable mergers if it is of the opinion that a particular non-notifiable merger can potentially cause harm to competition. This can reduce unnecessary additional legal compliance for the undertakings and reduce administrative burden on the CCI as well.

Finally, if the Indian competition authority has chosen to proceed with the deal value transaction method, there is a need for guidance, note or clarity on the test for establishing local nexus of the deal. Other jurisdictions have provided clarity on this to assist the undertakings in assessing whether they need to notify the relevant competition authority about their deal, however, the Indian competition authority has remained vague regarding this very important aspect of the proposed amendment.

The above analysis also reflects that setting a transaction value at which the notification requirement in merger control is to be triggered is very tricky. Establishing a threshold trigger transaction value is not black or white and does not apply equally in all jurisdictions. Germany decided to set the trigger value at EUR 400 million, Austria at EUR 200 million and Japan at JPY 40 billion, whereas India has decided to set the trigger transaction value at 2000 crore INR (approximately EUR 227 million). The European Commission decided to not opt for the transaction value threshold in merger control and one of the reasons was the difficulty in determining at what value the transaction should be notifiable to the authorities.[175] Too low of a transaction value may lead to overregulation, whereas, too high of a value will not prove to be very beneficial in tackling problematic mergers and

[175] Margrethe Vestager (n 162).

amalgamations. Therefore, authorities need to have a nuanced approach when setting a transaction value to trigger notification requirement under merger control.

V. VALUE-BASED THRESHOLD – THE FLAWS

The deal value threshold provides various benefits when it comes to the regulation of problematic mergers wherein the competitive potential of the undertaking is not reflected in its size or sale figures. However, the deal value threshold is not without its flaws.

1. The introduction of value-based thresholds can create an administrative burden for the competition authorities and the undertakings. This is especially true in India if this proposal is viewed along with Bill's amendment that provides a shorter time period for merger review. The CCI will be required to review cases faster, however, the number of cases being filed will increase. Since the new threshold will be introduced, the cases may require several follow-up questions and consultations with the CCI which the authority may not be able to accommodate given the shortened timeline.

2. There is also a risk that overregulation could potentially result in a chilling effect on innovation.[176]

3. It must also be noted that the current proposal is vague at best. It is unclear whether the Government is going to specify exemptions to the deal value threshold and on what basis. Without clarification on this, the wide ambit of the clause could catch a large number of cases. This could also result in diverting the resources of the Commission to these transactions which may lead to false positives and unnecessarily reduce resources that could have been applied for other significant cases.[177]

4. Further, it can be difficult to determine the value of transactions[178] and lead to confusion regarding whether the transaction has to be notified to the CCI. It could potentially increase gun-jumping cases as well if sufficiently clear guidelines are not formulated by the CCI. It will also be difficult to determine the local nexus in such transactions as well. Since this threshold for merger control is not a very old concept, it can also be difficult to find solutions from other jurisdictions as well.

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[176] EU – Summary of Replies to the Public Consultation on Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control (July 2017) on the Functioning of the EUMR's Jurisdictional Thresholds and the Case Referral System.
[177] ibid.
[178] ibid.

VI. CONCLUSION

The introduction of a threshold on the size of transactions seems like a step in the right direction to tackle digital mergers with potential competition concerns for India. However, it is clear that the CCI must release guidelines to clarify the parameters and extent of the proposed provision to enable the effective implementation of the merger control system.

Under the amendment proposed, the Bill defines "value of transactions" as "*every valuable consideration, whether direct or indirect, or deferred for any acquisition, merger or amalgamation.*"[179] However, this definition is vague and open to interpretation. The CCI will have to provide further guidance on what constitutes direct and indirect consideration. Further, acquisition of control can also result in a merger or amalgamation under Section 5 of the Act, however, the definition of "control" provided under Clause 6(c) of the Bill is also vague. The standard of proof to define control in competition law is lower than that of in the Indian company law, however, the CCI has not released any guidance as to what "material influence" constitutes. The local nexus test must also be expanded on by the CCI if it wishes to effectively tackle the issue of nascent M&As through a deal value threshold.

Many questions remain unanswered. Without clear guidelines, unambiguous answer, this step will be ineffective and have adverse consequences for the regulators and undertakings alike. It is also pertinent to note that while an effective mechanism can be constructed through deal value threshold to examine potentially concerning mergers, the Indian competition authority needs to develop its theories of harm in merger analysis. This development would require a deeper market analysis by experts conducting detailed substantive analysis into the conditions of the market at present and the potential competitiveness in the market in the future. Therefore, the CCI should also focus on the substantive analysis of mergers if it wishes to effectively deal with potentially problematic nascent mergers.

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[179] ibid.

REGULATING E-COMMERCE THROUGH CONSUMER AND COMPETITION LAW FRAMEWORK

- ***DR. SUSHILA****

ABSTRACT

*The faster growth of E-commerce in India has been enabled by a facilitating policy support by Government of India in permitting 100% FDI under automatic route in the marketplace model of E-commerce. The investments made by Government of India in rolling out fibre network is further likely to spur the entire e-commerce ecosystem as more citizens will be connected to digital network. Presently, E-Commerce is governed by multiple sectoral regulations (RBI, FSSAI, IRDA, Motor Vehicles Act, Consumer Protection Act etc.) apart from competition regulation [“**CCI**”]. The proposed Data Protection Bill is likely to add one more layer of regulation to E-Commerce. As the evolving E-Commerce has significantly contributed to consumer welfare, it is imperative that such a burgeoning ecosystem of e-commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself. The present paper seeks to focus on regulation of E-Commerce under the Consumer and Competition Law & Policy Framework only and endeavours to critically analyse the various policy interventions through such policy framework in regulating unfair trade practices and anti-competitive conduct of E-Commerce players. The paper attempts to analyse in detail the recently proposed amendments to E-Commerce Rules 2020 in order to ascertain their efficacy in regulating the unfair trade practices indulged in by E-Commerce entities as also their impact on the sector as such. The paper also seeks to examine the role of Competition Law in E-Commerce and an attempt has been made to study the enforcement interventions made by CCI in digital economy.*

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I. INTRODUCTION

E-commerce has been witnessing exponential growth in recent times. COVID-19 has further accelerated the pace of shift of consumers from traditional brick and mortar stores to E-commerce platforms. The Indian E-Commerce market is expected to grow to US$ 111.40 billion by 2025 from US$ 46.2 billion as of 2020. By 2030, it is expected to reach US$ 350 billion.[180] This shift is not peculiar to India as similar growth stories have been observed across the globe. However, despite the high rate of growth of e-commerce in India, online retail still constitutes a small segment of total retail market. As of 2019, online retail constituted only 4.7% of total retail and is likely to constitute 10.7% of total retail market by 2024.[181]

The faster growth of E-commerce in India has been enabled by a facilitating policy support by the Government of India in permitting 100% FDI under automatic route in the marketplace model of E-commerce[182]. The investments made by the Government in rolling out fibre network is further likely to spur the entire E-commerce ecosystem as more citizens will be connected to digital network.[183]

Digital markets have attracted the attention of governments and regulators across the world and have been a key focus area of regulation. The increased shifting of physical markets towards digital markets has accentuated the need to have a closer look at the digital markets. No doubt, digital markets are bringing in innovation and an enhanced consumer experience, at the same time, they are giving rise to various concerns which need suitable policy intervention.

Presently, E-Commerce in India is governed and regulated by various regulatory bodies and different horizontal regulations. The Reserve Bank of India was the first to move in

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180 'E-commerce Industry in India' (*IBEF*, August 2022) <https://www.ibef.org/industry/ecommerce.aspx> accessed 03 December 2022.

181 India Brand Equity Foundation (IBEF), E-Commerce Report (November, 2021) last accessed on 2nd January 2023.

182 PIB, 'E-Commerce Market growing at a rate of about 17% in 2018-19' (*PIB*, Nov 2022) < https://pib.gov.in/newsite/PrintRelease.aspx?relid=186472> accessed 18 November 2022.

In India, there are three type of e-commerce business model (i) Marketplace base model (ii) Inventory base model (iii) Hybrid model of inventory based and market place e-commerce model.

183 Prerna Lidhoo, 'Budget 2022: Optical fibre contracts could boost digital consumption in rural areas' (Businesstoday, Feb 2022) <https://www.businesstoday.in/union-budget-2022/news/story/budget-2022-optical-fibre-contracts-could-boost-digital-consumption-in-rural-areas-321155-2022-02-01> accessed 18 November 2022.

regulating E-commerce and it released guidelines for internet banking as early as in 2001. The Ministry of Electronics, Information and Technology ["**MeitY**"] also realised the importance of regulation of E-Commerce and accordingly, while exercising its powers under the Information Technology Act 2000 ["**IT Act**"], introduced the Information Technology (Intermediaries Guidelines) Rules 2011. Apart from recognition of the operational models of E-commerce companies through the FDI Policy in 2016, E-Commerce continues to be under fragmented sectoral regulation under various laws through amendments from time to time. Presently, E-Commerce is governed by multiple sectoral regulations (RBI, FSSAI, IRDA, Motor Vehicles Act, Consumer Protection Act 2019 ["**CPA 2019**"] etc.) apart from competition regulation (CCI). The proposed Data Protection Bill is likely to add one more layer of regulation to E-Commerce.

As the evolving E-Commerce has significantly contributed to consumer good and welfare, it is imperative that such burgeoning ecosystem is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself.

The present paper seeks to focus on regulation of E-Commerce under the Consumer and Competition Law & Policy Framework only and endeavours to critically analyse the various policy interventions through such policy framework in regulating unfair trade practices and anti-competitive conduct of E-Commerce players. The paper attempts to analyse in detail the recently proposed amendments to E-Commerce Rules 2020 in order to ascertain their efficacy in regulating the unfair trade practices indulged in by E-Commerce entities as also their impact on the sector as such. The paper also seeks to examine the role of Competition Law in E-Commerce and an attempt has been made to study the enforcement interventions made by the antitrust body of India i.e., Competition Commission of India ["**CCI**"] in the digital economy.

II. E-COMMERCE AND CONSUMER LAW

The Consumer Protection (E-Commerce) Rules 2020[184] ["**E-Commerce Rules**"] were notified by the Central Government on 23 July 2020. After the notification of the Rules,

[184] The E-Commerce Rules cover the duties and liabilities of e-commerce entities which apply to all electronic retailers offering goods and services to Indian consumers irrespective of their place of registration. The rules require e-tailers to facilitate easy returns, address customer grievances and prevent discriminating against

several representations were received by the Government of India from different stakeholders, particularly consumers complaining against unfair trade practices being indulged in by E-commerce operators rampantly.

In light of the above, the government proposed to amend the E-commerce Rules for protecting the interest of the e-consumers. Accordingly, the Government mooted amendments in the E-Commerce Rules in 2021 and put the proposed amendments in the public domain to elicit views/comments/suggestions till 6 July 2021, which was extended till July 21, 2021[185].

The proposals to amend the existing E-Commerce Rules attracted a lot of attention from the public and stakeholders due to the sheer scope of the proposed regulation and the potential impact thereof upon the E-commerce ecosystem.

At the outset, it is apposite to note that the proposed amendments to the E-Commerce Rules seek to provide a robust regulatory mechanism over E-commerce platforms to protect the interests of consumers who purchase goods or avail services through digital modes. This, of course, would go a long way in attaining and reinforcing the objectives of the CPA, 2019 in protecting the interests of e-consumers of E-commerce in a more organised, systematic and institutional manner. In fact, the proposed dispensation would provide an *ex-ante* check and balance over e-commerce entities in regard to their unfair business practices and this may minimize the *ex-post* complaints filed before the consumer fora by consumers of e-commerce. Thus, the *ex-ante* regulatory requirements would supplement the *ex-post* enforcement task of the consumer fora and would help achieve the larger objectives of law in a more coherent, efficient and speedier way.

A. <u>Scope of Coverage.</u>

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merchants on their platforms. The rules apply to all goods and services bought or sold over any digital platform; all forms of unfair trade practices across all models of e-commerce.

185 The proposed amendments to extant E-Commerce Rules are yet to be finalised. As per media reports <https://economictimes.indiatimes.com/industry/services/retail/draft-ecommerce-policy-rules-to-be-released-together-soon/articleshow/88578236.cms> accessed on 2 January 2023, the Department for Promotion of Industry and Internal Trade (DPIIT) under the Ministry of Commerce is likely to release the draft e-commerce Policy, which will lay down the rules for online trade and address gaps in overall digital commerce policy; along with the revamped E-Commerce Rules by the Ministry of Consumer Affairs, Food and Public Distribution, which will aim at ensuring consumer interest.

The E-Commerce Rules, by virtue of their overarching coverage as provided in Rule 2[186], are applicable in respect of "*all goods and services bought or sold over digital or electronic network"* including all models of e-commerce *i.e.* marketplace or inventory models of e-commerce; all e-commerce retail, including multi-channel single brand retailers and single brand retailers in single or multiple formats; and all forms of unfair trade practices across all models of e-commerce."[187]

Notwithstanding such wide coverage, the definition of "e-commerce entity" as provided in Rule 3(b)[188] essentially confines coverage of these Rules to marketplace platform operators only (as is evident from reference to sellers offering goods or services for sale on such platforms), and thereby excludes the applicability thereof to other modes of e-commerce such as those where a seller is providing goods or delivering services through their own website. Further, including entities within the sweep of "e-commerce entity" who are engaged by platforms for fulfilment of orders may cover even logistic arms, storage facilities and payment gateways *etc.* even though the principal selling entity itself is excluded from the scope of the definition. End-consumers do not have any privity of contract with such service providers. It may not be appropriate to disperse the single node liability of the platform by roping in other peripheral service providers. The "related party" may extend the coverage vastly and may affect the efficiencies brought about by joint ventures.

Accordingly, it is imperative that the coverage of the Rules and definition of "e-commerce entity" are in sync, so that they do not exclude any mode of e-commerce providing goods or services. Else, the regulatory mechanism under the Rules would create an uneven and discriminatory field, besides being in conflict with the declaration of universal application of the Rules to all types of e-commerce i.e., whether platform based or direct retail through website, as provided in Rule 2.

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186 The Consumer Protection (E-Commerce) Rules 2020, r 2.
187 ibid.
188 The Consumer Protection (E-Commerce) Rules 2020 r 3(b) defines "e-commerce entity" as meaning "any person who owns, operates or manages digital or electronic facility or platform for electronic commerce, <u>including any entity engaged by such person for the purpose of fulfilment of orders placed by a user on its platform and any 'related party' as defined under Section 2(76) of the Companies Act, 2013</u>, but does not include a seller offering his goods or services for sale on a marketplace e-commerce entity [the underlined portion is proposed to be inserted vide the 2021 draft amendments to E-Commerce Rules, 2020]".

B. Cross-Selling.

The definition of "cross-selling"[189] as proposed is confined to the sale of goods or services which are related/ adjacent/ complimentary. The supplementary impositions need not be in neighbouring products or services and any type of cross-selling whether for related products or otherwise should be brought within the discipline of "cross-selling". Further, to introduce the requirement to establish "intent" for showing cross-selling, is not in accord with the standards and norms of a civil statute, as such requirements are appropriate for criminal legislations. Establishing "intent" would place a high threshold of burden upon the consumers and thereby upon consumer fora and may result in exoneration of e-commerce entities in various cases of cross- selling.

As such, the criminal standards of establishing "intent" need to be removed, so should be the phrase "*….to maximize the revenue of such e-commerce entity*" from the proposed definition as maximizing revenue *per se* may not be the concern from consumer welfare perspective so long as no harm is caused to the consumers and the entity concerned is not commanding any market power or dominance.

In fact, consumers may be deprived of various complimentary products that are offered by various players *gratis* across consumer goods categories and such blanket prohibition upon e-commerce entities may rather result in consumer harm than providing any tangible benefits to the consumers. Maximizing revenue is a legitimate business objective and in the absence of any predatory behaviour by a dominant entity having significant market power, such overarching embargo on such behaviour *per se*, may not be appropriate and hence may be considered for deletion from the proposal.

C. Fall-back Liability.

The "fall back liability[190]" clause seeks to place legal obligation upon online platforms who are essentially intermediaries for the negligent conduct, omission or commission of any act of

[189] The Consumer Protection (E-Commerce) Rules 2020, r 3(c) proposes definition of "Cross-selling" as "sale of goods or services which are related, adjacent or complimentary to a purchase made by a consumer at a time from any e-commerce entity with an intent to maximise the revenue of such e-commerce entity".

[190] The proposed amendments to E-Commerce Rules seek to insert Rule 3(d) therein by providing definition of "Fall back liability":

Rule 3(d). "Fall back liability" "means the liability of a marketplace e-commerce entity where a seller registered with such entity fails to deliver the goods or services ordered by a consumer due to negligent conduct, omission the sellers, who are registered with the platform, in fulfilling the duties and liabilities which causes loss to consumers.

To begin with, such imposition of liabilities upon the intermediaries through a subordinate legislation such as the proposed amendments to the E-Commerce Rules may not be legally tenable as such intermediary platforms enjoy protection against legal action for the acts and omissions of the sellers, under the Information Technology Act 2000. It may be pointed out that Section 79 of the Information Technology Act, 2000, in certain instances, provides exemption to intermediaries from liability. As per the section an intermediaries will not be liable for any third-party information, data or communication link made available by them.[191] Thus, any subordinate legislation such as the proposed Rules which overreaches the supreme legislations, may not stand judicial scrutiny and may be declared *ultra vires*.

Besides, holding marketplace e-commerce entities liable for the acts of sellers registered with them, may make this form of business model highly unattractive and unviable, which has otherwise grown very fast. This may deprive the willing consumers from buying goods or availing services through such channels.

D. Flash Sale.

Flash sales are very popular amongst consumers due to attractive discounts and wide variety of goods available during flash sales. However, the proposed Rule 5(16)[192] imposes a blanket ban upon flash sales[193]. The question arises - whether sweeping and blanket embargo upon flash sales, will be in interest of consumers? It is submitted that such sweeping and blanket embargo upon flash sales, without any empirically validated harm to consumers or markets due to such sales, may deprive consumers of discounts and reduction in prices. This may also

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or commission of any act by such seller in fulfilling the duties and liabilities in the manner as prescribed by the marketplace e-commerce entity which causes loss to the consumer".

[191] The Information Technology Act 2000, §79.

[192] The proposed amendments to E-Commerce Rules seek to insert Rule 3(e) therein by providing definition of "Flash sale" and further by proposed Rule 5(16) imposes a blanket ban upon flash sales:

Rule 3(e). "'Flash sale' means a sale organized by an e-commerce entity at significantly reduced prices, high discounts or any other such promotions or attractive offers for a predetermined period of time on selective goods and services or otherwise with an intent to draw large number of consumers.

Provided such sales are organised by fraudulently intercepting the ordinary course of business using technological means with an intent to enable only a specified seller or group of sellers managed by such entity to sell goods or services on its platform."

[193] Digbijay Mishra and Himanshi Lohchab, Government clarification on Flash Sales (The Economic Times, 22 June 2021) <https://economictimes.indiatimes.com/tech/technology/govt-clarification-on-flash-sales-compounds-confusion-among-e-tailers/articleshow/83757968.cms?from=mdr> accessed on 2 January 2023.

interfere with freedom of trade. Further, the issue of predatory behaviour and practices of such e-commerce entities, such as deep discounting, may be appropriately examined by Competition Commission of India. As such, to create an additional and overlapping regulatory mechanism to address such issues without any supporting enforcement infrastructure and expertise, may not be necessary. [194]

The proviso to definition of "flash sale" seems to confine meaning of "flash sale" to those which are organised "*...by fraudulently intercepting the ordinary course of business using technological means with an intent to enable only a specified seller or group of sellers managed by such entity to sell goods or services on its platform...*".

The use of terms such as "fraudulently", "intent" *etc*. used in the Rules may not be appropriate as this may have the effect of placing a high threshold in the civil law for establishing proscribed behaviour of e-commerce entities, which may not be desirable looking at the summary nature of the proceedings of consumer fora and the need to deliver speedier justice to consumers of unfair trade practices.

E. Mis-selling.

The proposed amendments seek to insert the following definition of "mis-selling":

Rule 3(k) defines 'mis-selling' as "*an e-commerce entity selling goods or services by deliberate misrepresentation of information by such entity about such goods or services as suitable for the user who is purchasing it*". The explanation provides that misrepresentation means:

> *(i) the positive assertion, in a manner not warranted by the information of any entity making it, of that which is not true;*
>
> *(ii) any display of wrong information, with an intent to deceive, gain an advantage to the e-commerce entity committing it, or any seller claiming under it; by misleading consumer to the prejudice of e-commerce entity, or to the prejudice of anyone claiming under it;*

[194] The government has later clarified in press conference that all flash sales won't be banned. However, distinguishing between conventional flash sales and other specific flash sales (sought to be banned under the proposed Rules) may not pass the muster of intelligible differentia.

> *(iii) causing, however innocently, a consumer to purchase such goods or services, to make a mistake as to the substance of the thing which is the subject of the purchase* [195]

To begin with, it is observed that the misrepresentation itself should be made actionable without requiring such misrepresentation to be deliberate.

Further, explanation to the definition of "mis-selling" is mutually contradictory in as much as clause (i) thereof requires such misrepresentation to be actuated by "intent" whereas misrepresentation relatable to clause (iii) makes this category of misrepresentation to be actionable even if it is done *innocently*. As mentioned already, mental elements should not be introduced in the Rules and thereby in the adjudicatory process of consumer fora. This may create a higher threshold for consumers to prove their claims. Mental elements should not be made the prerequisites for establishing consumer harm and for obtaining remedies under the Consumer Protection Law.

F. Registration of E-Commerce Entities.

The new Rules stipulate registration by e-commerce entities.[196] It is not readily evident as to what are the prerequisites for registration of e-commerce entities by the Department for Promotion of Industry and Internal Trade ["DPIIT"]. Neither such requirements have been spelt out in the proposed amendments nor any enabling provision by way of rules or other such instrument has been conceived or made in this behalf. Registration *simpliciter* without any conditions thereto may be vacuous exercise. Further, it is also not clear as to what useful purpose would be served through such additional registration requirement when entities before commencing business have to register either under the Companies Act or the Partnership Act or the LLP Act *etc*. The Rule states that every e-commerce entity which "*intends"* to operate in India shall register itself with DPIIT meaning thereby that the existing

[195] Rule 3(k) of the proposed amendment to the Rules.
[196] The Consumer Protection (E-Commerce) Rules 2020, r 4(1) Registration of E-Commerce entities:
"Rule 4(1) Every e-commerce entity which intends to operate in India shall register itself with the Department for Promotion of Industry and Internal Trade (DPIIT) within such period as prescribed by DPIIT for allotment of a registration number.
Provided that the DPIIT may extend the period for registration of such e-commerce entity for sufficient reason, to be recorded in writing.
(2) Every e-commerce entity shall ensure that such registration number and invoice of everyday order is displayed prominently to its users in a clear and accessible manner on its platform".

operating entities need not register. This may itself create discrimination and an uneven field between the incumbents and the new entrants.

It is also important to point out that no specific consequence by way of penalty or otherwise is provided for non-compliance with such registration requirement and other requisitions such as display requirement of registration number by e-commerce entity. A general declaration that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not suffice[197].

Further, such compliance requirements with no tangible benefits to consumers, may only result in increased costs for consumers as firms may pass on the burden incurred on such additional regulatory compliance, upon the end consumers.

i. <u>Duties of e-commerce entities (appointment of grievance officer/nodal officer/compliance officer etc.)</u>

The E-Commerce Rules outline duties of E-Commerce entities including the duty to appoint a nodal officer.[198] The Rule proposes that E-Commerce entities are to obligated to appoint a nodal person of contact or an alternate senior designated functionary (who is resident in India, to ensure compliance with the provisions of the Act or the rules made thereunder). No mechanism has been provided in the Rules to ensure monitoring with such requirements. Further, a general declaration that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not suffice.[199]

Specifically, the E-Commerce Rules contains prohibition against display or promotion of misleading advertisement whether in the course of business on its platform or otherwise.[200] This prohibition will be on e-commerce entities.

The above proposed obligation upon E-Commerce entities under Rule 5(4) of not allowing display/promotion of misleading advertisement (whether in the course of business on its platform or otherwise) puts a heavy burden of due diligence upon e-commerce platform operators to ascertain the misleading advertisements displayed by sellers registered with

[197] The Consumer Protection (E-Commerce) Rules 2020, r 8.

[198] The Consumer Protection (E-Commerce) Rules 2020, r 4 (to be numbered as Rule 5 post-proposed amendments) outlines duties of e-commerce entities.

[199] Proposed Amendment to E-Commerce Rules (n 191).

[200] The Consumer Protection (E-Commerce) Rules 2020, r 5(4).

online platforms. When millions of orders are placed on online platforms every day, it will be impossible for the platform to ascertain the accuracy of each and every advertisement put by the sellers to advertise and market their products on the platform. Besides, even such requirement is not backed by any mechanism to enforce or monitor the same. The only obligation that can be put upon the e-commerce entity in this regard, is the situation where an e-commerce entity is notified or reported to take down such product from the platform due to misleading nature of the advertisements. Alternatively, platform operators may be obligated to obtain a suitable declaration in this regard from the sellers.

The mechanism may provide a ruse to platforms to delist the sellers, not preferred by them, and may become an arbitrary tool in the hands of platforms in the garb of compliance with this proposed norm to be followed by e-commerce entities.

The E-Commerce Rules[201] further require e-commerce entities to establish an adequate grievance redressal mechanism keeping in consideration the number of grievances ordinarily received by such entity and specifically mandates appointment of a Chief Compliance Officer [“**CEO**”] who shall be responsible for ensuring compliance with the CPA, 2019. The CEO shall be liable in any proceedings relating to any relevant third-party information, data or communication link made available or hosted by that e-commerce entity where he fails to ensure that such entity observes due diligence while discharging its duties under the Act and rules made thereunder. [202]

The proposal *vide* Rule 5(5) to obligate E-Commerce entities to appoint Compliance Officers and consequent liability thereof, requires some clarifications. It appears from Rule 5(5)(a) that Compliance Officer shall be personally responsible for ensuring compliance and shall be liable accordingly. The proviso, however, says that no liability shall be imposed upon *e-commerce entity* without being given an opportunity of being heard. Thus, it is not understood as to why an opportunity of being heard is accorded to an e-commerce entity, and not to a Compliance Officer, when the liability is fixed upon the Compliance Officer personally. Analogously, providing of an opportunity of being heard to e-commerce entity is meaningless when the Rule makes the Compliance Officer personally liable for such non-compliance.

[201] The Consumer Protection (E-Commerce) Rules 2020, r 5(5).
[202] ibid.

The E-Commerce entities are further obligated to publish prominently on their website/ mobile based application (or both), the name & contact details of the Grievance Officer as well as the mechanism by which a user may make a complaint against violation of the provisions of the rule or any other matters pertaining to the resources and services made available by it on its platform, and the Grievance Officer shall receive and acknowledge any order, notice or direction issued by the Appropriate Government, any competent authority or a court of competent jurisdiction.[203]

The multiplicity of requirements to appoint a Nodal Contact Person, a Resident Grievance Officer and a Chief Compliance Officer; may add compliance burden/cost upon the entities which is likely to be passed upon the consumers by way of enhanced costs. In the absence of any statutory mechanism to monitor compliance of these stipulations or a specific mechanism to ensure compliance, no tangible benefits are likely to accrue to consumers. It should suffice if e-commerce entities are left to devise their own self-regulatory mechanism in respect of grievance redressal or compliances. Whether such functions should be discharged by separate designated officers or by one officer, should also be left for the e-commerce entities to decide. The Parliamentary Standing Committee on Commerce [“**The Standing Committee**”],[204] in its report presented to the Rajya Sabha has recommended that additional duties and liabilities (especially related to the appointment of the abovesaid officers) to be introduced through the proposed amendments should be made applicable only to e-commerce entities qualifying a certain threshold.

G. <u>Additional compliances by E-Commerce Entities selling imported goods or services.</u>

Rule 5(7) provides that where an e-commerce entity offers imported goods or services for sale, it shall:-

[203] ibid.

[204] The Department related Parliamentary Standing Committee on Commerce, ‘Promotion and Regulation of E-Commerce in India’, 15th June 2022. The Standing Committee presented to the Rajya Sabha when the mandate of the Committee was to examine the current regulatory regime for e-commerce in India in consultation with the Department for Promotion of Industry and Internal Trade (DPIIT) and the Department of Revenue and the industry. The Committee in its report recommended inter alia the formulation of the National E-Commerce Policy at the earliest and filling the regulatory and enforcement gaps in the e-commerce ecosystem. The Committee was headed by Shri V. Vijayasai Reddy.

> *(a) mention the name and details of any importer from whom it has purchased such goods or services, or who may be a seller on its platform;*
>
> *(b) identify goods based on their country of origin, provide a filter mechanism on their e-commerce website and display notification regarding the origin of goods at the pre-purchase stage, at the time of goods being viewed for purchase, suggestions of alternatives to ensure a fair opportunity for domestic goods;*
>
> *(c) provide ranking for goods and ensure that the ranking parameters do not discriminate against domestic goods and sellers.*

The proposal in Rule 5(7) to obligate E-Commerce entities to comply with requisitions made thereunder such as mentioning of details of importers and identifying goods based on their country of origin; are burdensome and unworkable. Such obligations can be more appropriately discharged by the sellers registered with online platforms than the platforms themselves.

The requirement of suggesting domestic alternatives in Rule 5(7)(b) is impractical besides having the effect of affecting organic search parameters and skewing algorithms. For example, every time a person tries to book a flight on a foreign airline, which might be cheaper than Indian alternative, does the foreign airline need to flash an Indian airline?

Moreover, such Rules do not apply to brick-and-mortar players who are handling 95% sales.

Further, Rule 5(7)(c) is made applicable in the case of "goods" only, leaving out "services" from its ambit for reasons which are not readily discernible. Search-bias through ranking parameters may also happen in sectors providing services such as hospitality, travel, food delivery *etc*.

H. Obligation upon E-Commerce Entities against search bias.

E-Commerce entities have been further obligated to ensure that no search bias takes place on their platforms.[205]

[205] The Consumer Protection (E-Commerce) Rules 2020, r 5(14) (c) – (f).

Issues of search bias/preferential treatment/self-preferencing may be left to the CCI, which has already investigated such a case of search bias against dominant entities.[206] Consumer fora may not have the necessary technical expertise or wherewithal to examine manipulation in algorithms. Also, it may not be necessary to create a parallel jurisdiction between CCI and the Central Consumer Protection Authority ["**CCPA**"] on these aspects when a regulatory authority is already well-equipped to address such issues.

Proceedings before the CCI are inquisitorial unlike adversarial proceedings before consumer fora and as such, public enforcement of Competition Law through its already existing and well-equipped multidisciplinary investigation arm backed with forensic support, can more suitably address issues of algorithmic collusions than leaving it to individual consumers before consumer fora to establish such algorithmic manipulations or to the consumer fora themselves, in the absence of any technical expertise available with them.

Furthermore, provisions relating to sharing of consumer data must be left to the proposed Personal Data Protection Authority i.e., through the parliamentary legislative route than through subordinate legislatures such as Rules.

I. <u>Abuse of dominant position by dominant entity.</u>

Rule 5(17) declares that no e-commerce entity holding a dominant position in any market shall be allowed to abuse its position. An explanation to this, further states that for the purpose of this clause, "abuse of dominant position" shall have the same meaning as prescribed under Section 4 of the Competition Act, 2002.[207]

The proposed Rule 5(17) is superfluous as already the Competition Act, 2002 forbids abuse of dominant position and therefore, to repeat the same legislative prohibition in subordinate legislation may rather diminish the impact of the supreme law made by the Parliament. Such unnecessary insertions may inadvertently impinge upon the jurisdiction of other regulators without any tangible benefits and as such may be avoided. Also, it may create jurisdictional overlaps and wastage of resources of two agencies in pursuing the same cause. The Standing Committee has also raised the concern of potential overlap of jurisdictions between consumer authorities, CCI, FDI Regime and Data protection authorities which, must be avoided.[208]

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[206] *In re: Matrimony.com v Google CCI* Case Number 07 and 30 of [2012].
[207] The Consumer Protection (E-Commerce) Rules 2020, r 5(17).
[208] The Consumer Protection (E-Commerce) Rules, 2020, r 5(5).

III. E-COMMERCE AND COMPETITION LAW

A. Role of CCI.

The modern competition law with an aim to secure efficient allocation of economic resources, seeks to promote and protect the process of free market competition. As per common belief, it is ultimately concerned with the protection of consumers' interest and when the competition is thwarted or damaged, consumers' interest is harmed.

Consumer protection law and competition law have common goal of promotion of consumer welfare. At the root of both consumer protection and competition law is the recognition of an unequal relationship between consumers and producers. Protection of consumers is accomplished by setting minimum quality specifications and safety standards for both goods and services and establishing mechanisms to redress their grievances. The objective of competition is met by ensuring that there are sufficient numbers of producers so that no producer can attain a position of dominance. If the nature of the industry is such that dominance in terms of market share cannot be avoided, it seeks to ensure that there is no abuse on account of this dominance. Competition law also seeks to forestall other forms of market failure, such as formation of cartels, leading to collusive pricing, division of markets and joint decisions to reduce supply. Mergers and acquisitions also need to be regulated as they reduce competition.[209]

B. CCI Interventions in E-Commerce.

CCI has been very proactive in dealing with anti-competitive practices in E-Commerce. It has received cases against different e-commerce entities (including their associate/holding companies etc.) operating as marketplace platforms, search engine service providers operating in different verticals, online sellers/service providers *etc*., alleging anti-competitive practices and abuse of dominant position in contravention of the Competition Act's provisions.

It would be appropriate to discuss some key interventions of CCI in E-Commerce:

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[209] 'Consumer Protection and Competition Policy' (*NITI Aayog*) <https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/11th/11_v1/11v1_ch11.pdf> accessed 30 November 2022.

In *Delhi Vyapar Mahasangh* v. *Flipkart and Amazon*,[210] Delhi Vypaar Mahasangh filed Information before the CCI against Flipkart and Amazon alleging that these marketplaces are foreclosing non-preferred traders or sellers from accessing these online marketplaces through vertical arrangements with their respective 'preferred sellers'. It was alleged in the Information that exclusivity through discounting and preferential listings is being provided by having exclusive tie-ups in the relevant market with smartphone companies.[211]

After examining the Information at a *prima facie* level, the CCI *vide* its order dated 13.01.2020 observed that there were four alleged practices in these marketplaces *viz.* exclusive launch of mobile phones, 'preferred sellers' in the marketplaces, deep discounting and preferential listing/promotion of private labels, which needed to be investigated. Exclusive launch and preferential treatment combined with deep discounting practices of platforms may create an ecosystem that might have an adverse effect on competition.[212]

Accordingly, CCI directed the Office of the Director General ["**DG**"] to cause an investigation into the matter against Amazon, Flipkart and their affiliated entities. After some litigation before High Court and Supreme Court, the matter is presently pending investigation before the DG.

In *Federation of Hotel & Restaurant Associations of India* v. *MMT/GoIbibo/OYO*, Case No. 14 of 2019,[213] an Information was filed by Federation of Hotel & Restaurant Associations of India against MMT/GoIbibo/OYO alleging that MMT & Goibibo ["**MMT-Go**"] indulged in certain anti-competitive practices *inter alia*, including predatory pricing, charging of exorbitant commissions from hotels, registering and providing on its platform illegal and unlicensed bed & breakfast and misrepresentation. Further, MMT-Go allegedly imposed a price parity in their agreement with hotel partners whereby the hotel partners were not allowed to sell their rooms at any other platform or even on its own online portal at a price below the price at which it is being offered on MMT-Go's website/portal. In addition to it, the hotel partners were under obligation to observe room parity whereby they could not refuse to provide rooms on MMT-Go at any given point of time if the rooms are being provided on any other platform. Furthermore, it was alleged that MMT and OYO entered into

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[210] *Delhi Vyapapar Mahasangh v. Flipkart and Amazon* [2019] CCI Case No. 40/2019 [2020].
[211] ibid.
[212] ibid.
[213] *Federation of Hotel & Restaurant Associations of India v. MMT/GoIbibo/OYO* [2019] CCI Case No. 14/2019 [2019].

confidential commercial agreements wherein MMT had agreed to give preferential treatment to OYO on its platform, further leading to a denial of market access to Fab Hotels and Treebo in violation of Section 3 as well as Section 4 of the Competition Act, 2002. [214]

On taking cognisance of this information, the CCI noted that MMT-Go and OYO operate in different relevant markets. In the '*market for franchising services for budget hotels in India*', OYO was held to be possessing a significant market power, though it was not found to be in a dominant position. In "*market for online intermediation services for booking of hotels in India*", MMT-Go was *prima facie* held to be dominant as a "Group".[215]

As regards the Room and Price Parity Imposition through agreements, CCI observed, "though the magnitude of the anticompetitive effects of these agreements *inter alia* will depend on the market power of the platform, given the *prima facie* dominance of MMT-Go, such parity restriction needs to be investigated to gauge its impact under Section 3(4) as well as Section 4 of the Competition Act, which deal with vertical restraints and abuse of dominant position respectively."[216]

As regards the allegation of denial of market access to competitors of OYO pursuant to the commercial agreement between MMT and OYO, CCI *prima facie* opined that if MMT gives preferential treatment to OYO on its portal pursuant to an agreement between them, to not list the closest competitors of OYO on the platform; may potentially be contravening the provisions of Section 3(4) of the Competition Act, 2002 which needs to be investigated.[217]

In view of the above, an investigation was opened up by the CCI *vide* its order dated 28.10.2019 and the Office of the DG was directed to investigate into the matter.

Vide the said order, the CCI also ordered an investigation in respect of other allegations which included predatory pricing, misrepresentation due to delayed de-listing and manipulation of market dynamics and charging of service fee by MMT-GO respectively. The CCI *prima facie* found a case for investigation against MMT-Go for contravention of Section 4 as well as Section 3(4) of the Competition Act. As regards OYO, an investigation under

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[214] ibid.
[215] ibid.
[216] ibid.
[217] ibid.

Section 3(4) of the Competition Act has been ordered. The matter is currently under investigation.[218]

In *Meru Travel Solutions Private Limited* v. *UBER*,[219] Meru Travel Solutions Private Limited filed an Information against UBER alleging that owing to its deep pockets, it has indulged in a series of anti-competitive practices of predatory pricing, imposition of unfair conditions *etc.* with the intent of establishing monopoly and of eliminating otherwise equally efficient competitors from the relevant market. Uber was alleged to be having a dominant position in 'radio taxi services in Delhi & NCR' (relevant market in this case) and owing to its dominant position, it was alleged to have adopted certain abusive practices such as offering of unreasonable discounts to the customers leading to abysmally low/predatory prices to oust its competitors from the market. Further, it was alleged that Uber had an *incentive policy* which was not economically justified and was only aimed at exclusively attaching the drivers to its network so as to exclude its competitors having access to such drivers. Thus, Uber was alleged to have abused its dominant position in the relevant market.[220]

Though initially the CCI closed the matter, the Hon'ble Appellate Tribunal and the Hon'ble Supreme Court ordered the Director General to investigate the matter and submit an investigation report.[221]

In *XYZ AND Alphabet Inc. and Others*,[222] based on an Information filed against Google and its affiliates, the CCI initiated an investigation against Google in November, 2020 primarily related to three allegations:

(i) *"Firstly*, in relation to the allegation of pre-installed *Google Pay* on Android smartphones resulting in a *"status-quo bias"* damaging the interest of other apps facilitating payments through UPI, the CCI noted that Google already has a significant market presence in UPI based digital payment applications market and it may affect the evolving and transitory market in its favour and thus, may disturb the level playing field.

(ii) *Secondly*, in relation to mandatory use of Google Play Store's payment system

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[218] ibid.
[219] *Meru Travel Solutions Private Limited v. UBER* [2015] CCI Case No. 96/2015 [2016].
[220] ibid.
[221] Competition Appellate Tribunal Appeal No.31/2016.
[222] *XYZ AND Alphabet Inc. and Others* [2020] CCI Case No. 07/2020 [2020].

and Google Play In-App Billing system by the app developers for charging their users for purchase of apps on Play Store and/or for In-App purchases, the CCI was of *prima facie* view that mandatory use of application store's payment system restricts the choice of the app developers of selecting a payment processing system of their choice.

(iii) *Thirdly,* in relation to excluding/discriminating other mobile wallets/UPI apps as one of the effective payment options in the Google Play's payment system, CCI noted that Google Pay and other competing UPI apps were integrated in Play Store with different methodologies which *prima facie* resulted in better user experience in case of Google Pay. This difference has the potential to shift users towards adopting Google Pay over other UPI based payment apps."

In view of the above, Google, as per the CCI's *prima facie* view, has abused its dominant position in contravention of Section 4(2) of the Competition Act. Therefore, the CCI ordered an investigation in this matter by the DG. The case is presently under investigation.

In *Umar Javed & Others* v. *Google LLC & Others,*[223] the CCI ordered an investigation against Google for imposing alleged restrictions on Android device manufacturers through various agreements i.e., Mobile Application Distribution Agreement ["**MADA**"] and Android Compatibility Commitment ["**ACC**"]. As per MADA, android device manufacturers will have to preinstall the entire suite of Google apps at a predetermined position, in order to be able to preinstall any proprietary app of Google, e.g., Play Store. Pre-installation of Google apps may create behavioural bias among consumers and reduce the ability of rival apps to compete in the relevant market. ACC reduces the ability and incentive of device manufacturers to develop and sell devices operating on alternative versions of Android i.e., Android forks. The matter is under consideration of the CCI.

In *Matrimony.com Limited* v. *Google LLC & Others*,[224] the CCI levied a penalty of INR 135.86 crores upon Google for indulging in search bias in abuse of its dominant position in the relevant market. It was found by the CCI that ranking of Universal Results (news/ images/ local businesses) prior to 2010 were pre-determined to trigger at certain fixed (1st, 4th or 10th) position on the Search Engine Result Page ["**SERP**"] instead of by their relevance.

[223] *Umar Javed & Others v. Google LLC & Others* [2018] CCI Case No. 39/2018 [2019].
[224] *Matrimony.com Limited v. Google LLC & Others* [2012] CCI Case Nos. 07/2012 and 30/2012 [2018].

Such practice of the Google was found to be in contravention of the provisions of Section 4(2)(a)(i) of the Competition Act which pertain to imposition of unfair condition by a dominant enterprise and was also unfair to the users/consumers. On Google's Flight Commercial Unit, prominent display of Commercial Flight Unit by Google on SERP with link to Google's specialized search options/services (Flight) in contravention of the provisions of Section 4(2)(a)(i) of the Competition Act was found by the CCI. Prohibitions imposed under the negotiated search intermediation agreements upon the publishers were also held to be unfair as they restricted the choice of these partners and prevented them from using the search services provided by competing search engines. Imposition of unfair conditions on such publishers by Google was found to be in contravention of the Section 4(2)(a)(i) of the Competition Act. Given the gatekeeper role of Google, the order of the CCI was aimed at eliminating search bias, promoting competition on merits and creation of a level playing for all firms irrespective of their sizes.[225]

In *Ms. Prachi Agarwal* v. *Swiggy Bundl Technologies Private Limited*,[226] the Informants alleged a contravention of the provision of Section 4 of the Competition Act on account of *Swiggy* charging higher rates through its app/website than the price/rates offered by the respective restaurant(s) in their outlets for walk-in customers, over and above the delivery charges. It was also stated by the Informants that the customers generally are not aware about the price/rates charged by a particular restaurant in the offline mode due to which they cannot compare the same with the rates listed/displayed on Swiggy's app/website. This, as per the Informants blinds the customers who are completely oblivious of the inflated prices charged by Swiggy.

The CCI considered the information and the response of Swiggy with regard to the allegations made by the Informant. The CCI observed that the Swiggy had no role to play in the pricing of the products offered by the restaurants on Swiggy's platform. In the facts and circumstances of the case, it was further noted by the CCI "*it may not be germane to define a precise relevant market and conduct further analysis. Having been satisfied with the averments of Swiggy that it had no role to play in the pricing of the products offered by the Partners on the platform".* The CCI did not find a *prima facie* case of contravention of the provisions of Section 4 of the Competition Act, 2002.

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[225] ibid.

[226] *Ms. Prachi Agarwal v. Swiggy Bundl Technologies Private Limited* [2019] CCI Case No. 39/2019 [2020].

Thus, it can be seen that the CCI has been playing a key role in regulating the anti-competitive conduct of E-Commerce players through its interventions particularly in the cases which have impact upon a large number of consumers.

IV. CONCLUSION

The proposed amendments to the E-Commerce Rules, 2020 seek to provide a robust regulatory mechanism over e-commerce platforms to protect the interests of consumers who purchase goods or avail services through digital modes. This, of course, would go a long way in attaining and reinforcing the objectives of the CPA, 2019 in protecting the interests of e-consumers in a more organised, systematic and institutional manner. In fact, the proposed dispensation would provide an *ex-ante* check and balance over e-commerce entities in regard to their unfair business practices and this may minimize the *ex-post* complaints filed before the consumer fora by consumers of e-commerce. Thus, the *ex-ante* regulatory requirements would supplement the *ex-post* enforcement task of consumer fora and would help achieve the larger objectives of law in a more coherent, efficient and speedier way.

Evolving e-commerce has significantly contributed to consumer welfare and more and more consumers are shifting towards purchases in online mode. The recent pandemic has also contributed in nudging consumers in availing services through online platforms. It is, therefore, imperative that such a burgeoning ecosystem of e-commerce is not unduly constricted through multiple and overlapping regulations and sector specific compliance requirements, which may have an unintended effect not only on the growth of the sector but on the consumer interests itself.

The proposed Rules seek to provide overarching *ex ante* prescription for all e-commerce entities irrespective of their size or any other criteria. Such uniform compliance requirements, particularly that operate at regulatory level *ex ante,* may disturb the level playing field between big & incumbent players on one hand and small & new entrants on the other, as these requirements may act onerously upon the latter even though they may remain otherwise compliant with such prescriptions. Also, additional compliances and norms to be followed by e-commerce entities may further create a discriminatory framework *vis-à-vis* brick-and-mortar players as well, who are handling about 95% sales and would not be covered by such *ex-ante* compliance and regulation.

Further, the proposals affect a paradigm change in the focus of consumer law & policy from regulating business-to-consumer ["**B2C**"] relations to regulating platform-to-business ["**P2B**"] and business-to-business ["**B2B**"] relations, an area more appropriate for regulation by other policy tools and agencies such as CCI/ED/Data Protection Authority/IT Act *etc.* Such shift in approach and focus, apart from stretching the resources thin, may also inadvertently impinge upon the regulatory domain of other Agencies and Departments which are well-suited to discharge regulation of P2B and B2B transactions and conduct within their regulatory framework. For example, the reference in the proposed amendments to proscribed conduct of dominant undertakings under the Competition Act, 2002 is unnecessary as it may confuse consumers as to the appropriate forum for pursuing cases against exploitative abuses of dominant firms i.e., whether to pursue before consumer fora/CCPA or before Competition Commission of India. Similarly, the proposed Rules touch upon the regulatory framework of the Information Technology Act, 2000; the proposed Personal Data Protection Bill and Enforcement Directorate (FDI Regulations in E-commerce). Potential overlaps amongst different organs may create jurisdictional issues and may also result in consumer detriment.

The proposed Rules seek to create a dedicated compliance mechanism and appointment of a Compliance Officer from a sectoral perspective. In this, businesses must be allowed to have the flexibility to have a compliance mechanism through a single window mechanism across the sectors instead of mandating them to have multiple compliance officers for ensuring compliance with different regulations administered by different agencies and wings of the Government. Such fragmented mechanism would result in enhanced costs for doing business and may again ultimately burden the end-consumers, besides resulting in micro managing the businesses and thereby interfering with freedom of trade. E-commerce is a sunrise sector and any micro-management through granular policy prescriptions, may have the unintended consequence of affecting the growth and innovation in the sector. E-commerce is a fast-evolving sector and regulatory intervention has to be very calibrated and targeted lest it stifles growth and innovation.

Though a number of *ex-ante* measures are required to be followed by e-commerce platforms uniformly but in the absence of any institutional mechanism to monitor and enforce those measures, the same may not be in themselves sufficient to achieve their avowed objectives. A general provision in the Rules to provide that the provisions of the CPA, 2019 shall apply for any violation of the provisions of these Rules, may not be enough without any institutional and enforcement support.

In sum, a comity of regulators, working harmoniously in their respective fields governing E-Commerce, through inter-regulatory coordination would go a long way in creating an ecosystem of regulation which would not only protect consumer interests in E-Commerce without stifling businesses and innovation.

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