ISSN No.: 2347-8327

RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

COMPETITION LAW

VOLUME 6 **2019** **ISSUE 1**

RGNUL FINANCIAL & MERCANTILE LAW REVIEW

Vol. 6 (1) 2019

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RGNUL FINANCIAL AND MERCANTILE LAW REVIEW

ISSN No.: 2347-8327

[Mode of Citation: 6 RFMLR 1 (2019)]

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A publication of the Rajiv Gandhi National University of Law, Punjab

RGNUL FINANCIAL & MERCANTILE LAW REVIEW

Vol. 6 (1) 2019

PREFACE

This is the first issue of the sixth edition of RGNUL Financial & Mercantile Law Review. The objective of the law review is to better understand the laws regulating the activities related to trade and commerce in the markets of India and other South East Asian regimes. This issue of the law review intends to promote discourse between Academia over the theoretical overview and development of Competition Act, 2002 as one of the primary legislations to regulate the free markets of the Country. India's pursuit of globalization has resulted in removal of controls and liberalization of the economy. A key step in India's march towards facing competition both from within the country and from international players is the inception of a strong competition law regime.

Competition Law or antitrust laws aims at restricting agreements or practices that hinder free trade and supervise transactions of large corporations in a pursuit to contain abusive behaviour by dominant firms. The role of competition law authorities is to ensure that markets work in a manner that allows the process of competition to drive market outcomes. One way of doing this is by using enforcement measures like taking action against enterprises that are hindering the process of competition by entering into anti-competitive agreements or abusing their position of dominance. With the increase in cross border trade and e-commerce, competition law has achieved an international perspective and gained considerable significance today.

The current issue has received papers from across the country along with a greater display of enthusiasm. The review makes for an interesting read and loves to hear your opinion on how to make it better. Please feel free to write in to us.

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ALGORITHM-FUELLED CONSCIOUS PARALLELISM: POSING MULTIFACETED CHALLENGES TO THE COMPETITION REGIME

Vijay Bishnoi[*]

ABSTRACT

In recent times the algorithm has emerged as a new emerging technology that enable computer to take over the task, which were earlier reserved for human beings. Algorithm particularly pricing algorithm have potential to enhance competition landscape in a given market. But, nonetheless algorithm-fuelled conscious parallelism poses multidimensional challenges to the competition regime in form of difficulty in proving plus factors, attributing liability for act of conscious parallelism, distinguishing algorithm fuelled conscious parallelism from oligopolistic interdependence, increased market transparency, over enforcement problems, replacement of explicit collusion with conscious parallelism, *etc.* To tackle such challenges there is a need for proper market study, changes in competition regime, reviewing *ex*-ante merger control regulations, ensuring competition compliance by design, auditing pricing algorithm *etc.* But at the same time it must also be kept in mind that pricing algorithm is still an area of high complexity and uncertainty, so any intervention should be subject to deep assessment and maintain a

[*] Deputy Director (Law), Competition Commission of India (vijaybishnoi@hotmail.com).

fine balance between consumer protection, promotion of competition and innovation.

1. INTRODUCTION

Thomas Watson who was the president of IBM, in 1943 said, "I think there is a world market for maybe five computers." The same is evident in the present era where the way consumers engage with suppliers has changed rapidly over the past few decades, with an increase in the number of transactions being conducted online. The digital revolution has also enabled the companies' ability to capture, store and analyse the big data[1] about their customers and competitors and also help them price their products and services using algorithms.

The algorithm is a new emerging technology that enable computer to take over the task, which were earlier reserved for human beings. Algorithms are used for calculation, data processing and automated reasoning. There is not one precise definition of an algorithm[2] that has been universally adopted.[3] But it is generally defined as "A well-defined

[1] Information technology research company Gartner defines big data as: "high-volume, high-velocity and high-variety information ('3V') assets that demand cost-effective, innovative forms of information processing for enhanced insight and decision making". *See also*, James Manyika et al., *Big Data: The next frontier for Innovation, Competition and Productivity*, MCKINSEY (Nov. 2, 2018), https://www.mckinsey.com/business-functions/digital-mckinsey/our-insights/big-data-the-next-frontier-for-innovation.

[2] YIANNIS MOSCHOVAKIS, WHAT IS AN ALGORITHM? 919 (Björn Engquist & Wilfried Schmid, 2001). The author state that elucidating what an algorithm is has proved to be a challenging problem.

[3] Competition & Market Authority, *Pricing Algorithms: Economic working paper on use of Algorithms to facilitate collusion and personalised pricing,* UKGOV (Nov. 12, 2018, 03:23 PM), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf

computational procedure that takes some value or set of values as input and produces some value or set of values as output."[4]

There are various types of algorithms, depending on their purpose, the question or the problem they are supposed to provide the answer to. The OECD Roundtable on "Algorithms and Collusion"[5] outline certain types of algorithms, which may be used by businesses in the process of setting prices, these are as follows: (a) Monitoring algorithms[6] that are used for collection, screening and analysis of data; (b) Parallel algorithms or dynamic pricing algorithms[7] that automatically react to any changes in market conditions and adjust prices accordingly; (c) Signalling algorithms[8] that disclose and disseminate information; (d) Self-learning algorithms that use machine learning and deep learning technologies.[9]

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[4] THOMAS H. CORMEN et. al., INTRODUCTION TO ALGORITHMS 6 (3rd ed., MIT Press 2009). See also, Michal Gal & Niva Elkin-Koren, *Algorithmic Consumers*, 30 HARVARD JOU. OF L. & T. 45, 47 (2017).

[5] OECD, *Algorithms and collusion*, OECD (Nov. 09, 2018, 12:33 PM), http://www.oecd.org/competition/algorithms-and-collusion.htm

[6] This role may include the collection of information concerning competitor's business decisions, data screening to look for any potential deviations and eventually the programming of immediate retaliations. See, OECD, *Algorithms and Collusion: Competition policy in the Digital Age*, OECD (Nov. 15, 2018, 04:33 PM), http://www.oecd.org/daf/competition/Algorithms-and-colllusion-competition-policy-in-the-digital-age.pdf

[7] Dynamic pricing algorithms have been implemented, for instance, by airlines, hotel booking services and transportation network companies to efficiently adjust supply to periods of lower or higher demand.

[8] *In Re* High Fructose Corn Syrup Antitrust Litigation Appeal of A & W Bottling Inc. et al., United States Court of Appeals, Seventh Circuit, 295 F3d 651, 2 (2002). The Court defined the same in context of Competition Law as: If a firm raises price in the expectation that its competitors will do likewise and they do, the firm's behaviour can be conceptualized as the offer of a unilateral contract that the offerees accept by raising their prices.

[9] These are the most complex and subtle way in which algorithms can change price outcomes. OECD, *supra* note 6.

Here, the pricing algorithm is defined as a code describing how prices are assigned to market conditions.[10] Thus, in general terms it implies algorithms used by businesses in the process of setting prices, whether it is one of the abovementioned categories, a combination of them or even a type of algorithm not mentioned above.[11]

2. ALGORITHMS INDUCED BENEFITS

It is also to be noted that the introduction of algorithm has brought many benefits to consumers and has potential to enhance competition landscape[12] in a given market. For example, algorithms can reduce transaction costs for firms, reduce frictions in markets and give consumers greater information[13] on which to base their decisions.[14] Algorithms can also substantially reduce the costs of setting and changing prices and facilitate entry of new suppliers as they can quickly learn how a market

[10] Joseph E. Harrington Jr., *Developing Competition Law for Collusion by Autonomous Price-Setting Agents*, SSRN (Nov. 15, 2018, 07:43 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3037818

[11] Agnieszka Bartłomiejczyk, *Algorithmic pricing under EU Competition Law*, SCRIPTIESONLINE (Nov. 22, 2018, 04:43 AM), http://www.scriptiesonline.uba.uva.nl/document/660502

[12] Elvinger et al., *Luxembourg: Competition Law Exemption For Webtaxi Pricing Algorithm,* MONDAQ (Nov. 23, 2018, 03:23 AM), http://www.mondaq.com/x/720718/Antitrust+Competition/Newsletter+July+2018. The Competition council of Luxembourg, in its decision on 7th June 2018 on Webtaxi Pricing Algorithm, took into account the efficiency gains generated by the it in form of fewer empty journeys and shorter waiting times and the benefit for the clients in form of lower prices and quality gains.

[13] Michal Gal, *supra* note 4. The author states that pricing algorithm provides consumer with the decision-making muscles to make good decisions. Also see, Peter Georg Picht & Benedikt Freund, *Competition (Law) in the Era of Algorithms*, SSRN (Nov. 17, 2018, 04:54 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3180550

[14] Competition & Market Authority, *supra* note 3.

works.[15] Moreover, even the competition authorities have started using the algorithm to detect bidding anomalies and suspicious bidding patterns. For instance, The Korea Fair Trade Commission (KFTC), which has in several occasions succeeded in detecting bid rigging conspiracies by screening procurement bidding data using algorithms.[16]

3. COLLUSION IN ERA OF PRICING ALGORITHM

Despite their numerous advantages, pricing algorithms may raise competition concerns,[17] if they facilitate and sustain collusion particularly behaving in a coordinated way[18] and charge inflated prices like a monopolist.

In this regard it is pertinent to mention here that "collusion" is usually understood as a form of coordination among competitors that aims at raising profits to a higher level than attained through competition on

[15] David Jevons, *When algorithms set prices: winners and losers*, OXERA (NOV. 25 , 2018, 03:47 AM), https://www.oxera.com/agenda/when-algorithms-set-prices-winners-and-losers/

[16] OECD, *Country case: Korea's Bid Rigging Indicator Analysis System (BRIAS)*, OECD (Nov. 27, 2018, 03:46 PM), https://www.oecd.org/governance/procurement/toolbox/search/korea-bid-rigging-indicator-analysis-system-brias.pdf

[17] Isabelle de Silva, President of the French Competition Authority, has said that the digital economy is the "no. 1 problem in competition policy". Whereas Andreas Mundt, President of Germany's cartel office, the *Bundeskartellamt*, has said that the impact of digital technology companies on the economy is "new land" for competition agencies.

[18] Pricing algorithm has been described often as the digital equivalent of the smoke-filled room agreement. See, Freshfields Bruckhaus Deringer LLP, *Pricing algorithms: the digital collusion scenarios*, FRESHFIELDS (Oct. 22, 2018, 02:33 PM), https://www.freshfields.com/globalassets/our-thinking/campaigns/digital/mediainternet/pdf/freshfields-digital---pricing-algorithms---the-digital-collusion-scenarios.pdf

merit.[19] The collusion may manifest itself into two forms, one being the "explicit collusion", which is based on an agreement or some other form of concertation between the involved market players like joint setting of prices, market sharing *etc.* and the other being the "tacit collusion or conscious parallelism or coordinated efforts"[20] that requires no such concertation and can, in particular, spring from players in oligopoly market[21] monitoring and reacting to each other's independent business decisions.[22] A classical model for describing conscious parallelism type of behaviour is the "Cournot duopoly".[23] In this model,[24] two firms act independently but they are aware of each other's actions. Hence, they do not explicitly agree on prices and make their choices independently, but they are aware of each other's production functions and calculate their economic response accordingly. In consequence, each firm will price at a

[19] OECD, *supra* note 6. See also, Joseph E. Harrington Jr., *supra* note 10. Sherman Act, 15 U.S.C., § 1 defines collusion as "joint action to divide markets or fix prices, (...). Such collusive action is the substance of the conspiracy in restraint of trade which § 1 of the Act makes a crime". In EU, Article 101 Treaty on the Functioning of the European Union ('TFEU') define collusion as "actively conspiratorial behaviour of the kind captured by the expressions of agreement and concerted practices".

[20] In conscious parallelism the competitors create an atmosphere of mutual certainty that when one party raises its price, the other competitor will follow. Due to this, the competitors can maintain a unilateral profit maximization scheme, with a greater amount of certainty that the competition will not undercut them.

[21] An oligopoly is a market where few firms compete and the actions of each are considered by each other. See, ALAN DEVLIN, FUNDAMENTAL PRINCIPLES OF LAW AND ECONOMICS 338 (Routledge 2015).

[22] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 594 (8th ed. Oxford University Press 2015).

[23] Salil K. Mehra, *Antitrust and the Robo-Seller: Competition in the Time of Algorithms*, 100 MINNESOTA L. R. 1323, 1323 (2016).

[24] Christian Fischer & Hans-Theo Normann, *Collusion and Bargaining in Asymmetric Cournot Duopoly: An Experiment*, DICE (NOV. 17, 2018, 09:37 AM), http://www.dice.hhu.de/fileadmin/redaktion/Fakultaeten/Wirtschaftswissenschaftliche_Fakultaet/DICE/Discussion_Paper/283_Fischer_Normann.pdf

supra competitive level rather than competing away as in a market with perfect competition.[25]

As mentioned above, the pricing algorithms may be used intentionally to implement, monitor and police already made cartels (explicit collusion), in such scenario, human agree to collude and machines execute the collusion, acting as mere intermediaries.[26] The U.S. Department of Justice (DoJ) and US Federal Trade Commission (FTC) Paper specifically identified the scenarios in which algorithmic pricing could be used to implement explicit coordinated anti-competitive price changes.[27] For example, in 1994, the DoJ found that the use of a jointly owned computerized online booking system (algorithm), the Airline Tariff Publishing Company, provided the airlines, not only with the means to disseminate fare information to the public, but also to engage in private dialogues on fares and certain features of the system enabled the airlines to reach overt price-fixing agreements. Similarly, in July 2018 the European Union (EU) Commission imposed a total fine of €111 million on the four consumer electronics groups for restricting their online retailer's ability to set their own retail prices for widely-used electronics

[25] Salil K. Mehra, *supra* note 23 at 1345.
[26] Freshfields Bruckhaus, *supra* note 18.
[27] Bertold Bär-Bouyssière et al., *Risky IT Programs - The Use of Algorithms and Risk of Collusion under Antitrust Laws*, DLAPIPER (Nov. 19, 2018, 04:56 PM), https://www.dlapiper.com/en/us/insights/publications/2017/06/risky-it-programs/. An example is also the United States v. David Topkins, No CR 15-00201 (Poster Cartel case), in this case David Topkins, the founder of Poster Revolution was prosecuted under antitrust law by the US Department of Justice. David Topkins and his co-conspirators adopted specific pricing algorithms that collected competitor's pricing information, with the goal of coordinating changes to their pricing strategies for the sale of posters on amazon marketplace.

products.[28] The Commission specifically pointed to the fact that the companies used sophisticated algorithms to monitor the prices set by distributors, thereby allowing them to intervene quickly in case of price decreases.[29] From a legal perspective, the use of algorithms to help execute the cartel's task has the same effect as a cartel executed by humans and is deemed as violation of competition law.[30]

4. PRICING ALGORITHM-FUELLED CONSCIOUS PARALLELISM & CHALLENGES TO THE COMPETITION REGIME

The existing competition law is sufficiently equipped to cater to the challenges where pricing algorithm merely act as an intermediary for the implementation of the already existing cartel. But the algorithms facilitating the conscious parallelism by acting as parallel and signalling algorithms is of particularly concern to the current competition law regime. In these type of cases, each undertaking has an independently

[28] European Commission, *Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices*, EUROPA (Nov. 26, 2018, 06:03 AM), http://europa.eu/rapid/press-release_IP-18-4601_en.htm

[29] Jacquelyn MacLennan, *RPM comes back from the dead: EU Commission tackles pricing in e-commerce*, WHITECASE (NOV. 26, 2018, 06:32 AM), https://www.whitecase.com/publications/alert/rpm-comes-back-dead-eu-commission-tackles-pricing-e-commerce

[30] Margrethe Vestager, *Bundeskartellamt 18th Conference on Competition, Berlin*, *16 March 2017*, EUROPA (Nov. 17, 2018, 03:23AM), https://ec.europa.eu/commission/commissioners/2014-2019/vestager/announcements/bundeskartellamt-18th-conference-competition-berlin-16-march-2017_en. Here the European Commissioner for Competition pointed out that "the companies can't escape responsibility by hiding behind a computer program". See also, Eturas and others v. Lietuvos Respublikos konkurencijos taryba [2016] OJ C 98/3 ECLI:EU:C:2016:42; CMA decided Trod/GB eye Case (online sales of posters and frames case).

selected algorithm that continually monitors and adjusts the price based on the data obtained from the market.[31] Each of these algorithms persistently and very quickly (using trial and error method) sends to and receives signals from the market as long as it finds the temporary optimum, usually setting the price higher than the real competition would have kept it.[32] For example, in the e-commerce sector this is evident from the EU Commission's E-Commerce Sector Inquiry Staff Working Document, where it noted that:

> *53% of the respondent retailers track the online prices of competitors, out of which 67% use automatic software programmes for that purpose. Larger companies have a tendency to track online prices of competitor's more than smaller ones. The majority of those retailers that use software to track prices subsequently adjust their own prices to those of their competitors (78%).*[33]

This is a scenario of a collective elimination of price competition without committing a cartel.[34]

Further, it is observed that incidences of price algorithm induced conscious parallelism will be more evident in oligopolistic market

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[31] Michal s. gal, *Algorithmic-facilitated Coordination: Market and Legal solutions*, CPI (Nov. 13, 2018, 01:43 PM), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/05/CPI-Gal.pdf

[32] Václav Šmejkal, *Cartels by Robots: Current Antitrust law in search of an answer,* HRCAK (Nov. 4, 2018, 01:23 PM), https://hrcak.srce.hr/file/284431

[33] European Commission, *Final report on the E-commerce Sector Inquiry*, EUROPA (NOV. 23, 2018, 03:45 PM), http://ec.europa.eu/competition/antitrust/sector_inquiry_swd_en.pdf

[34] A. EZRACHI & M.E. STUCKE, VIRTUAL COMPETITION: THE PROMISE AND PERILS OF THE ALGORITHM-DRIVEN ECONOMY 56-81 (Harvard University Press 2016). The authors in their book mentioned four different types of *modus operandi* to execute explicit collusion or conscious parallelism *i.e.* the Messenger scenario, the Hub and Spoke scenario, the Predictable Agent & Digital eye scenario respectively.

characterized by concentration involving homogeneous products,[35] cross ownership,[36] high entry barriers, high market transparency,[37] high frequency of interaction between market players,[38] presence of credible deterrent mechanism to deviation *etc.*[39]

Thus, taking into consideration the recent evolution of the digital economy, change in *modus operandi* of collusion from smoke filled hotel rooms to a world where pricing algorithms continuously monitor and adjust to each other's price in form of conscious parallelism poses multifaceted challenges to the competition regime.[40] Some of these challenges before the competition authorities are as follows:

4.1 LEGAL LACUNA IN THE EXISTING COMPETITION REGIME

Algorithm fuelled conscious parallelism raises challenging questions with respect to liability under competition law.[41] Under most jurisdictions' antitrust laws, the unilateral use of pricing algorithms (free

[35] WHISH, R. & D. BAILEY, COMPETITION LAW 598 (8th ed., Oxford University Press 2015).
[36] Marc Ivaldi et al., *The Economics of Tacit Collusion,* EUROPA (10 Nov. 2018, 01:34 PM), http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf
[37] OECD, *Roundtable on information exchange between competitors under competition law*, OECD (Nov. 22, 2018, 03:37 AM), http://www.oecd.org/competition/cartels/48379006.pdf
[38] David H. Evans, *Alarmist Algorithms: Why Pricing Bots Won't Be the End of Society*, ONCOMPETITIONPOLICY (Nov. 5, 2018, 02:17 PM), https://www.oncompetitionpolicy.com/2017/06/alarmist-algorithms-why-pricing-bots-wont-be-the-end-of-society/. See also, Competition & Market Authority, *supra* note 3.
[39] FLORIAN WAGNER-VON PAPP, HANDBOOK ON EUROPEAN COMPETITION LAW SUBSTANTIVE ASPECTS 138 (Elgar 2013). See also, David Jevons, *supra* note 15.
[40] A. Ezrachi, *supra* note 34. The authors in their book have described theses challenges as the "end of competition as we know it".
[41] § 1 of the Sherman Act or Article 101 TFEU or § 3 of the Indian Competition Act, 2002, prohibits anti-competitive agreements.

from agreements or communications) to monitor and adjust pricing to that of the competitor's price is legal,[42] even if it leads to parallel price increase,[43] to the detriment of consumer.[44] As, one cannot condemn a firm for behaving rationally and interdependently on the market.[45] For this reason many judges, lawyers observes it as the end of the story for the competition law[46] as interdependent parallel conduct, without more, has not been held to satisfy "agreement" language.[47]

Further, even under the existing law, challenges of the pricing algorithms is that it expand the grey area between unlawful explicit

[42] Monopolkommission, *Algorithms and collusion*, MONOPOLKOMMISSION (Nov. 26, 2018, 12:21 PM), https://www.monopolkommission.de/images/HG22/Main_Report_XXII_Algorithms_and_Collusion.pdf

[43] Shearman & Sterling, *Artificial intelligence and Algorithms in cartel cases: Risks in potential broad theories of harm*, SHEARMAN (Nov. 16, 2018, 04:43 PM), https://www.shearman.com/perspectives/2018/04/2018-antitrust-report/artificial-intelligence-and-algorithms-in-cartel-cases. For example, Article 101, TFEU does not prevent companies from using information available in the market to adapt to existing and anticipated conduct of their competitors. Companies, foreseeing their rival's conduct are free to change their prices.

[44] Ariel Ezrachi & Maurice Stucke, *From Smoke-Filled Rooms to Computer Algorithms: The Evolution of Collusion*, CLSBLUESKY (Nov. 23, 2018, 03:06 AM), http://clsbluesky.law.columbia.edu/2015/05/14/from-smoke-filled-rooms-to-computer-algorithms-the-evolution-of-collusion/. This is a situation where competitors do not explicitly collude with each other, but engage in conscious parallel behaviour that the result is as if they had colluded. Thus, economically, the result is the same, but legally they can be qualified differently.

[45] A. Ezrachi *supra* note 34 at 61.

[46] Salil K. Mehra, *supra* note 23.

[47] Case C-199/92, P Hüls AG v. Commission, (1999) 5 CMLR 1016; Joined Cases C-89, 104, 114, 116, 117, 125, 129/85, Ahlström Osakeyhtiö and others v. Commission (Wood Pulp II), (1993) 4 CMLR 407; Cases T-442/08, CISAC v. Commission, (2013) 5 CMLR 15 (General Court); Clamp-all Corporation v. Cast Iron Soil Pipe Institute & others, 851 F.2d 478, 484 (1st Cir. 1988). See also, PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 1428 (2d ed. 2001) (stating that "mere interdependent parallelism has not been held to constitute agreement" but continuing on to discuss the arguments for doing so).

collusion and lawful conscious parallelism[48] allowing firms to sustain profits above the competitive level more easily without necessarily having to enter into an agreement.[49] For instance, in situations where collusion could only be implemented using explicit communication, algorithms may create new automatic mechanisms that facilitate the implementing of a common policy and the monitoring of the behaviour of other firms without the need for any human interaction. In other words, algorithms may enable firms to replace explicit collusion with conscious parallelism.[50]

4.2 CHALLENGE OF PROVING VIOLATION USING "PLUS FACTOR" IN CASES OF ALGORITHM INDUCED CONSCIOUS PARALLELISM

The analysis of the available case laws allows for a conclusion that price parallelism in itself does not amount to a concerted practice, there is also a need of showing "plus factors"[51] to impose liability for an anti-competitive agreement.[52] Traditionally, such plus factors have included evidence of clandestine meetings and secret exchanges of information

[48] Joseph E. Harrington Jr, *A Theory of Tacit Collusion*, TSE (Nov. 25, 2018, 09:12 PM), https://www.tse-fr.eu/sites/default/files/medias/stories/SEMIN_11_12/ECONOMIC_THEORY/harrington.pdf

[49] Tacit collusion may serve to establish collective dominance under Article 102 TFEU, but absent a separate abuse, it will also escape scrutiny under this provision.

[50] OECD, *supra* note 6.

[51] The plus factors doctrine is used in the competition regime for the prosecution of certain types of parallel conduct and can be defined as "the body of economic circumstantial evidence of collusion and beyond parallel movement of prices by firm in an industry." See, ROBERT C MARSHALL & LESLIE M MARX, THE ECONOMICS OF COLLUSION: CARTELS AND BIDDING RINGS 213 (MIT Press 2012).

[52] Imperial Chemical Industries Limited v. Commission, ECLI:EU:C:1972:70 (1972) ¶ 66. See also Rajasthan Cylinders and Containers Limited v. Union of India and Another, Civil Appeal No. 3546 of 2014 (India), here also the Court held that mere price parallelism does not amount to concerted practice. MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 25 (Cambridge University Press 2004).

etc.[53] However, conventional plus factors are unlikely to be very helpful with pricing algorithms as the delegation of competitive intelligence and pricing activities previously done by marketing and sales people to pricing algorithm will likely render such plus factors irrelevant.[54] Further, algorithms crunching massive data collections cannot "meet" nor will they necessarily exchange information[55] as their ability to gather and process huge amounts of data obviates the need to do so.

Therefore, it can be said that the ease of online conscious price parallelism goes hand in hand with the difficulty of their detection. The fact that customer usually learn about overcharge only when it amounts to blatant price aberration, make life difficult for the competition authorities.[56] Thus, unlike humans the pricing algorithm will not leave evidence of plus factors[57] and will make it difficult to prove conscious

[53] See, United States v. Andreas, 216 F.3d 645, 650 (7th Cir. 2000) (pointing to aliases, front organizations, and the use of prostitutes to clandestinely gather information from competitors as examples of particularly egregious behavior demonstrating "an inexplicable lack of business ethics and an atmosphere of general lawlessness"); C-O-Two Fire Equipment Co. v. United States, 197 F.2d 489, 497 (9th Cir. 1952) (citing price hike during a time of surplus). See also, William E. Kovacic et al., *Plus Factors and Agreement in Antitrust Law*, 110 MICH. L. REV. 393, 405-407 (2011).

[54] Salil K. Mehra, *supra* note 23.

[55] NICOLAS PETIT, THE OLIGOPOLY PROBLEM IN EU COMPETITION LAW- HANDBOOK ON EUROPEAN COMPETITION LAW SUBSTANTIVE ASPECTS 2-10 (Edward Elgar 2013).

[56] Václav Šmejkal, *supra* note 32. Under the circumstances of the rapidly changing price levels, which in the markets with predominantly online trading (securities, software, music *etc.*) do not have a clear and palpable benchmark, a gradual but inconsistent upward trend in prices may be difficult to detect and prove. Further, in a pricing algorithm driven market a "price snake" is perfectly imaginable that would twist around a slightly but inconsistently rising axis. This would resemble a perfect adaptation to market's ups and downs and it would be very difficult to tell if the price at a specific moment were really above its competitive level.

[57] William Kovacic et. al., *Plus Factors and Agreement in Antitrust Law* 110 MICH. L. REV. 393, 395 (2011).

parallelism as violation of competition law.[58] Moreover, it will also create challenge in form of investigation of infringement by pricing algorithm as auditing the algorithms requires not only a high level of expertise in computer science that competition authorities might be lacking, but also significant time and costs to carry out such an investigation.[59]

4.3 CHALLENGE OF ATTRIBUTING LIABILITY FOR ACT OF CONSCIOUS PARALLELISM

Travis Kalanick, founder of Uber, in reaction to a severe price increase on what should have been a normal Uber fare said, "We are not setting the price. The market is setting the price. We have algorithms to determine what that market is."[60] This may lead to a worrying trend in the future as algorithm setting the prices with decreasing level of human involvement[61] and person attempting to hide behind their algorithms to claim that they are not responsible for pricing decisions.[62] In dealing with a pricing algorithm that takes conscious parallel actions there are three choices in attributing responsibility: to the algorithm itself, to the humans who deploy it or to no one.[63] This debate has highlighted the challenges of attributing antitrust liability to individuals when commercial strategies are

[58] Joseph E. Harrington Jr., *supra* note 10.
[59] Agnieszka, *supra* note 11.
[60] Jill Priluck, *When Bots Collude*, NEWYORKER (Nov. 1, 2018, 05:46 AM), https://www.newyorker.com/business/currency/when-bots-collude. The Uber co-founder argued that their algorithms, not the people working for the company, were responsible.
[61] Kellie Lerner & David Rochelson, *How Do You Solve a Problem Like Algorithmic Price Fixing?*, ROBINSKAPLAN (Nov. 23, 2018, 03:45 PM), https://www.robinskaplan.com/~/media/pdfs/how%20do%20you%20solve%20a%20problem%20like%20algorithmic%20price%20fixing.pdf?la=en
[62] Mandrescu Daniel, A*pplying EU Competition Law to online platforms: the road ahead (Part 1)* 38 EUR. COM. L. R. 348, 357 (2017).
[63] Salil K. Mehra, *supra* note 23

delegated to an algorithm and humans have no ability to influence the way in which such decisions are taken or are even unaware of conscious parallelism by pricing algorithms.[64] In such a scenario question arises whether existing competition law can be applied at all to autonomous pricing algorithm systems, which no longer require interaction with natural persons.[65]

Further, it can be challenging to effectively fight pricing algorithms, which implement conscious parallel behaviour, if such algorithms are being run on servers located abroad as competition authorities investigational power is limited to national borders.[66]

4.4 CHALLENGE OF DISTINGUISHING ALGORITHM FUELLED CONSCIOUS PARALLELISM FROM OLIGOPOLISTIC INTERDEPENDENCE

Under certain market conditions (*i.e.* transparent markets with few sellers and homogeneous products) conscious parallel behaviour may be the normal outcome[67] of rational economic behaviour[68] of each firm in the market.[69] As noted by Ezrachi and Stucke, one of the main difficulties when it comes to algorithm induced conscious parallelism is to identify the counterfactual *i.e.* to assess what would be the market situation if not

[64] *Id.*
[65] Andreas Heinemann & Aleksandra Gebicka, *Can Computers form Cartels? About the Need for European Institutions to Revise the Concertation Doctrine in the Information Age*, 7 JOU. OF EURO. COMP. L. & P. 423, 431 (2016).
[66] Peter Georg Picht, *supra* note 13.
[67] ICI v. Commission, Case C-48/69, 655 ¶ 66 (1972).
[68] Nicolas Petit, *supra* note 55 at 284.
[69] OECD, *supra* note 6.

for the use of algorithmic pricing.[70] Thus, it will be difficult for competition authorities to determine whether the conscious parallel behaviour is the one of tacit collusion *i.e.* artificially enhanced or created or whether there is an alternative plausible explanation for it like oligopolistic interdependence[71] *i.e.* a "natural" outcome.[72] Consequently, it will be challenging to identify a clear, enforceable triggering event for intervention, which would prevent the change of market dynamics that foster conscious parallelism.[73]

The situation is further aggravated by the fact that pricing algorithm may amplify the so-called oligopoly problem[74] by giving individual firms the incentive to raise the price above the competitive level as pricing algorithm ensure greater accuracy in detection of price changes[75] and the minimal level of human collaboration can remove the

[70] OECD, *Algorithmic Collusion: Problems and Counter-Measures- Note by A. Ezrachi & M. E. Stucke*, OECD (Nov. 27, 2018, 10:07 AM), https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD%282017%2925&docLanguage=En

[71] Donald Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 HARVARD L. REV. 655, 666 (1962).

[72] Patrick Andreoli-Versbach & Franck Jens-Uwe, *Econometric Evidence to Target Tacit Collusion in Oligopolistic Markets*, 11 JOU. OF COM. L. & ECO. 452, 470 (2015).

[73] Ariel Ezrachi, *supra* note 44.

[74] R.A. POSNER, ANTITRUST LAW (University of Chicago press 2001). The book says that the expression "oligopoly problem" refers to the concern that high interdependence and mutual self-awareness in oligopolistic markets might result in conscious parallelism, an outcome, which is socially undesirable but that falls out of the reach of competition law. Competition authorities in some jurisdictions have attempted to extend antitrust tools to address the oligopoly problem, using in particular two distinct solutions: (a) *Ex*-ante merger control rules to prevent structural changes, which favour coordinate effects. (b) *Ex*-post rules to prevent unilateral conducts that promote oligopolistic interdependence, such as facilitating practices under the notion of joint dominance.

[75] Maureen K. Ohlhausen, *Should We Fear The Things That Go Beep In the Night? Some Initial Thoughts on the Intersection of Antitrust Law and Algorithmic Pricing*, FTC (Nov. 16, 2018, 02:34 PM),

element of irrationality and reduce the chance that the collusive scheme is undermined by mistake.[76]

4.5 CHALLENGE OF ALGORITHM INDUCED MARKET TRANSPARENCY VIS-À-VIS CONSCIOUS PARALLELISM (END OF PRISONER'S DILEMMA)

Transparency of prices is a "double edged sword"[77] as the greater transparency in the market is generally efficiency enhancing and as such, welcome by competition agencies. But it can also produce anti-competitive effects by facilitating conscious parallelism[78] or providing firms with focal points around which to align their behaviour, thereby benefiting only the suppliers. The increase of market transparency is not only a result of more data being available, but also of the ability of pricing algorithms to make predictions and to reduce strategic uncertainty.[79] Thus,

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https://www.ftc.gov/system/files/documents/public_statements/1220893/ohlhausen_-_concurrences_5-23-17.pdf

[76] Michaela Ross, *Artificial Intelligence Pushes the Antitrust Envelope*, BNA (Nov. 27, 2018, 12:47 AM), https://www.bna.com/artificial-intelligence-pushes-n57982087335/. See also, Margrethe Vestager, *supra* note 30. Margrethe Vestager, the European Commissioner for Competition, recently remarked on the potential for algorithms to sustain cartel behavior: "Every cartel faces the risk that its members will start cheating each other as well as the public. If everyone else's price is high, you can gain a lot of customers by quietly undercutting them. So whether cartels survive depends on how quickly others spot those lower prices and cut their own price in retaliation. By doing that quickly, cartelists can make sure that others will be less likely to try cutting prices in the future. And the trouble is, automated systems help to do exactly that."

[77] Mario Monti, *Speech by Mr. Mario Monti- Defining the Boundries Competition Policy in High Tech Sectors*, EUROPA (Nov. 24, 2018, 03:44 PM), http://europa.eu/rapid/press-release_SPEECH-01-375_en.pdf

[78] Jay Modrall, *OECD Workshop Addresses Algorithms and Collusion Issues*, KLUWERCOMPETITIONLAW (Nov. 19, 2018, 06:47 AM), http://competitionlawblog.kluwercompetitionlaw.com/2017/07/17/oecd-workshop-addresses-algorithms-collusion-issues/

[79] OECD, *supra* note 6.

with pricing algorithms firms have more information about market trends and this may render conscious parallelism more feasible, due to the enhanced capacity of firms to rapidly adjust to the price changes of competitors.[80]

Moreover, challenge due to the algorithm fuelled market transparency is accentuated in situation where a firm reduces its prices, the other competitors could be able to match such price reduction much faster if they use algorithms, reducing the firm's incentive to undertake a price reduction strategy.[81] The empirical experience with transparency provided by online tools shows that the perfect information for market participants does not necessarily lead to greater but, on the contrary, to a less intense price competition. The authorities in Chile, Australia and Germany have witnessed such effect when they tried to display and update online the information about current fuel prices at petrol stations in the country. The well-intentioned effort to release motorists from the grip of overcharging local micro-monopolies by informing them about an alternative price available at acceptable distance ended up with an overall (albeit non-nationwide) increase in the price level by 10% on average.[82]

[80] David J. Lynch, *Policing the digital cartels*, FINANCIALTIMES (Nov. 28, 2018, 11:22 AM), https://www.ft.com/content/9de9fb80-cd23-11e6-864f-20dcb35cede2

[81] A. Ezrachi, *supra* note 34 at 62-64. The damaging influence conscious parallelism could have on a market is that it becomes less attractive for competitors to lower their prices and engage in price wars. In order for such decisions to attract customers, time is needed. Algorithms, by making decisions in less than a second, essentially take away this element, leading to prices being kept high artificially and resulting in distorted market conditions.

[82] OECD, *supra* note 70.

Further, the rivalry based on a competitive uncertainty has been underpinned in theory by the well-known model of prisoner's dilemma.[83] Doubts about whether one can rely on an opponent with whom it is not possible to communicate directly have dictated to "every prisoner" to prefer an aggressive strategy that disregarded the opponent's interests and fought him ruthlessly. Such a strategy, applied to prices, usually led to the downward movement of prices or occasionally event to price wars that were beneficial for consumers. But as soon as price algorithms that are capable to monitor online each change in price and consciously follow it quickly and precisely before the price war initiator were able to profit from it,[84] the competition through the lowering of prices is quickly assessed as ineffective.[85] Thus, widespread use of price algorithm marks the end of so-called prisoner's dilemma and the conscious parallelism becomes the norm of the market, thereby further aggravates the challenge to the competition regime.

4.6 PRICE ALGORITHM ENSURING, SUSTAINING AND PROMOTING CONSCIOUS PARALLELISM

The advent of digital economy has revolutionized the speed at which firms can make business decisions by increasing frequency of interaction. If automation through pricing algorithms is added to

[83] Two accomplices locked in separate cells. Each is offered three choices by the police: (1) if both confess to the charges, both will be jailed for five years, (2) if only one confesses, he will be freed but the non-confessor will be jailed for ten years or (3) if neither confesses, both will be tried for a minor offense and will be jailed for one year.
[84] Kai-Uwe Kühn et al., *Fighting Collusion by Regulating Communication between Firms*, 16 ECO. POLICY 167, 183 (2001).
[85] Václav Šmejkal, *supra* note 32.

digitalization, prices may be updated in real-time, allowing for an immediate retaliation to deviations from conscious parallel conduct.[86] To illustrate the same, it suffices to remind that by using price algorithm, the well-known internet business trader Amazon performed in November 2012 as many as 2.5 million changes in charged prices within one day, while the Walmart retail chain changed at the same time around 50,000 prices per month.[87]

Further, as noted by Ezrachi and Stucke, pricing algorithms could create a so-called "tacit collusion on steroids" scenario.[88] The reason to assert this is that the extensive use of pricing algorithms could clearly make coordination easier, cheaper and faster and thus lead to more cases of conscious parallelism[89] and make it more common in the already oligopolistic markets and even extend the oligopoly problem[90] to non-oligopolistic markets structures.[91] In fact, the combination of machine

[86] Monopolkommission, *supra* note 42.
[87] Václav Šmejkal, *supra* note 32. Similarly, in 2011, a developmental biology textbook on fruit flies available on Amazon for the astonishing price of $23.7 million. That particular market price was set through the interaction of two different seller's programmed algorithms. The first algorithm automatically set the price of the first book for 1.27059 times the price of the second book, which belonged to the other seller in the marketplace. The second algorithm automatically set the price of the second book at 0.9983 times the price of the first book. The result was an upward spiral in which each algorithm's price hike was subsequently responded to by a price hike from the other and *vice versa*. From April 8 to 18, 2011, the offer prices of the two books rose in tandem into the millions of dollars. See, John D. Sutter, *Amazon Seller Lists Book at $23,698,655.93—Plus Shipping*, CNN (Nov. 25, 2018, 02:24 PM), http://edition.cnn.com/2011/TECH/web/04/25/amazon.price.algorithm/index.html.
[88] A. Ezrachi, *supra* note 34 at 56.
[89] Margrethe Vestager, *supra* note 30.
[90] R.A. Posner, *supra* note 74.
[91] Kone AG and others v. ÖBB-Infrastruktur AG, Case C-557/12 (2014), the European Court of Justice (ECJ) has endorsed the validity of a causal relationship between a cartel and "umbrella pricing", *i.e.* inflated prices charged by non-cartelists whose prices are benchmarked against market-wide prices which are artificially inflated as a result of a

learning with market data may allow algorithms to accurately predict rival's actions[92] and to anticipate any deviations before they actually take place.[93] Therefore, after a period of repeated interactions, firms become conscious that their respective strategic choices are interdependent[94] and that by matching each other's conduct, they can set prices at a *supra* competitive level, without actually communicating. In other words, the challenge to the competition regime is the structure of some markets is such that through conscious interdependence and mutual self-awareness, prices may rise towards the monopoly level.[95]

4.7 CHALLENGE OF OVER-ENFORCEMENT AND CONSEQUENT NEGATIVE EXTERNALITIES

In first place, it is highly complex to distinguish coordinated from non-coordinated outcomes, so attempts to intervene against such conscious parallel conduct carry a clear risk of false convictions.[96] Secondly, for dealing with such situation the policy makers might come up with policies to change the structural characteristics of digital markets that

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cartel. The ECJ held in this context that: "even if the determination of an offer price is a purely autonomous decision, taken by the undertaking not party to a cartel, it must none the less be stated that such decision has been able to be taken by reference to a market price distorted by that cartel and as a result, contrary to the competition rules." See also, A. Ezrachi, *supra* note 34 at 60.

[92] For maintaining conscious parallelism, the information has to be complete and perfect and this is where pricing algorithms aid in the completeness and perfection of the information.

[93] A. Ezrachi, *supra* note 34 at 60.

[94] SIGRID STROUX, US AND EC OLIGOPOLY CONTROL 15 (Kluwer Law International 2004).

[95] R. WHISH & D. BAILEY, COMPETITION LAW 139 (Oxford University Press 2012).

[96] RBB Economics, *Automatic Harm to Competition? Pricing algorithms and coordination*, RBBECON (Nov. 4, 2018, 04:55 AM), https://www.rbbecon.com/downloads/2018/02/RBB_Brief-55-Online1.pdf

most facilitate conscious parallelism. For instance, in order to make markets less transparent, policy makers impose restrictions on the information that can be published online; likewise, in order to reduce the high frequency of interaction in digital markets, they could enforce lags on price adjustments.[97] Unfortunately, such policies will also likely to result in severe restrictions to competition,[98] by reducing the amount of information available to consumers and by preventing fast price adjustments by efficiently matching demand and supply.[99]

Further, policy makers could eventually consider the creation of rules that restrict the way pricing algorithms are designed, for example- pricing algorithms could be programed not to react to most recent changes in prices or instead to ignore price variations of individual companies. This solution might constrain the ability of firms to develop innovative algorithms[100] and may have chilling effect on the economic activity.[101] On the other hand, regulating pricing algorithm design could also pose on competition agencies the additional burden of supervising *i.e.* whether companies are effectively complying with the rules or not.[102]

[97] A. Ezrachi, *supra* note 34 at 43.
[98]OECD, *Competition Assessment toolkit*, OECD (Nov. 18, 2018, 02:33 AM), http://www.oecd.org/competition/assessment-toolkit.htm
[99] OECD, *supra* note 6.
[100] Jonathan Galloway, *Driving Innovation: A Case for Targeted Competition Policy in Dynamic Markets*, SSRN (Nov. 26, 2018, 08:23 PM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1763676
[101] Louis Kaplow, *On the Meaning of Horizontal Agreements in Competition Law*, SSRN (Nov. 13, 2018, 04:56 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1873430
[102] *Id.*

5. SOLUTIONS TO THE CHALLENGES POSED BY ALGORITHM FUELLED CONSCIOUS PARALLELISM

Thus, be it an *ex*-post or *ex*-ante regime, competition authorities still has to confront the challenge of identifying the adequate level of intervention, if such exists, when dealing with the creation of market conditions for conscious parallelism. Some may argue that these challenges should tilt the balance in favour of non-intervention.[103] But a non-interventionist approach, however, risks creating a lacuna, which market players can exploit, again to consumer's detriment.[104] Therefore, some of the proposed solutions to the challenges posed by algorithm fuelled conscious parallelism are as follows:

5.1 MARKET STUDY

When there are signs that the market is not functioning well, but there are no indications of any coordination among the market players, competition agencies may decide to engage in market studies[105] or sector inquires in order to understand why the market is failing and to identify possible solutions.[106] Hence, the use of market studies typically precedes

[103] OECD, *Algorithms and Collusion - Note from the European Union*, OECD (Nov. 28, 2018, 02:56 AM), https://one.oecd.org/document/DAF/COMP/WD(2017)12/en/pdf
[104] Ariel Ezrachi, *supra* note 44.
[105] The French and German competition authorities, Autorité de la concurrence and Bundeskartellamt, have started a joint project on algorithms and their effects on competition. See, Thomas Oster & Dr. Jörg Witting, *Algorithms and Competition Law*, LEXOLOGY (Nov. 27, 2018, 03:23 AM), https://www.lexology.com/library/detail.aspx?g=87d6373f-07f5-402b-9f61-1b23882ecf6f
[106] According to OECD, market studies and sector inquiries are useful tools to understand the dynamic of the market and to promote competition. Market studies are used primarily for the assessment of markets and their competitive conditions. They are mainly

other enforcement actions[107] on the implications of pricing algorithms on various markets.[108] In this sense, market studies/sector inquiries may support competition agencies' efforts to understand the market characteristics that can lead to conscious parallelism,[109] such as high transparency, predictability and frequent interaction or any other structural characteristics that have not been identified yet.[110] For example, in United States, the FTC's Bureau of Consumer Protection established the "Office of Technology Research and Investigation", which is responsible for conducting independent studies and providing guidance in several topics, including algorithmic transparency.[111]

Further, the use of market studies can lead to recommendations for the government to engage in regulatory interventions to address legal or

considered as an advocacy tool to issue recommendations to change laws and regulations or as a pre-enforcement tool in case they reveal constraints to competition of a behavioural nature.

[107] According to the EU Commissioner for Competition, Margrethe Vestager: "we certainly shouldn't panic about the way algorithms are affecting markets. But we do need to keep a close eye on how algorithms are developing."

[108] Agnieszka Bartłomiejczyk, *supra* note 11.

[109] A. Ezrachi *supra* note 34 at 74. Ezrachi and Stucke suggest that "such approach may prove useful in helping agencies understand the new dynamics in algorithm-driven markets and the magnitude of any competitive problems."

[110] OECD, *supra* note 6.

[111] In addition, the US Public Policy Council of the Association for Computing Machinery (USACM) published a statement proposing a set of principles for algorithmic transparency and accountability, which are intended to minimise harm while at the same time realizing the benefits of algorithmic decision-making. See, USACM, *Statement on Algorithmic Transparency and Accountability*, ACM (Nov. 29, 2018, 05:07 AM), http://www.acm.org/binaries/content/assets/public-policy/2017_joint_statement_algorithms.pdf. Further, Competition & Market Authority recently appointed a new data unit to better understand the impact that data, machine learning and other algorithms have on markets and people. See, Competition and Markets Authority, *CMA appoints Stefan Hunt to top digital role*, GOVUK (Nov. 23, 2018, 03:55 AM), https://www.gov.uk/government/news/cma-appoints-stefan-hunt-to-top-digital-role

structural restrictions to competition, as well as to the opening of investigations[112] when the cause of the concern is behavioural.[113] Market studies could also lead to advocacy efforts and recommendations to the business community itself with the objective of fostering stronger compliance with competition principles.[114] This could result, for instance, in the adoption of self-regulation in the form of codes of conduct, which companies would agree to comply with when designing and using pricing algorithms.[115]

5.2 CHANGES IN THE COMPETITION REGIME

The first option for enforcing conscious parallelism enhanced by use of pricing algorithm is to revisit the concept of "agreement" and "concerted practices".[116] The conscious parallelism needs to be reclassified and recategorized by making a clear-cut distinction between

[112] Recently, the Competition Commission of India decided to study/probe the issue of use of algorithms by airlines to determine fares, as part of a detailed probe into alleged fixing of air ticket prices. See, Meetu Jain, *Competition Commission of India to look into hike in airfares during peak season*, INDIATODAY (Nov. 30, 2018, 03:18 AM), https://www.indiatoday.in/india/story/why-airlines-charge-so-much-for-a-ticket-during-rush-time-competition-commission-of-india-to-look-at-algorithms-1231781-2018-05-11

[113] For this, the competition authorities also need sufficient in house or third party expertise in computer science and in particular in artificial intelligence to properly assess the impact of pricing algorithm on market as such. See, Ulrich Schwalbe, *Algorithms, Machine Learning, and Collusion*, SSRN (Nov. 27, 2018, 04:06 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3232631

[114] The advantage of market study is that they offer the agency a degree of flexibility in restoring competition in the market that would not be possible through other means.

[115] OECD, *supra* note 6.

[116] Catalina González Verdugo, *Horizontal restraint regulations in the EU and the US in the Era of Algorithmic Tacit Collusion*, UCL (Nov. 29, 2018, 05:14 AM), http://discovery.ucl.ac.uk/10049901/1/Verdugo%20-%20Algorithms.pdf

independent behaviour,[117] interdependent behaviour[118] and express agreement. By doing so, the concept of plain interdependence can be brought within the purview of "agreement"[119] and be made subject to enforcement action[120] under competition act.[121] The rationale being that the pricing algorithms theoretically increase the risk of conscious parallelism as it may occur more frequently and therefore, amending the current regulation on horizontal restraints may be an option. Moreover, the term "concerted practice" should be interpreted widely in order to include into it the repeated information exchanges between competitor's pricing algorithms *i.e.* to treat communications *via* algorithms as information exchanges evidencing an illegal concerted practice.[122] For example, Section 46 of the Australian Competition and Consumer Act, 2010 requires no proof of the "meeting of minds" to make companies liable, who are benefiting from collusion.[123] Thus, under the Australian competition law, the companies that have deployed pricing algorithm can be held responsible, whether or not there was an agreement or the

[117] Independent behaviour can be defined as "behavior by two or more parties that has no relationship whatsoever as well as behavior that has similarities yet is motivated by considerations that do not depend on other's reactions."
[118] Interdependent behaviour can be defined as "behaviour that involves coordination with others."
[119] *In Re* High Fructose Corn Syrup, *supra* note 8.
[120] R.A. Posner, *supra* note 74. The author argues that conscious parallelism should be analyzed as a conscious meeting of minds to which the competition act will be applicable.
[121] Louis Kaplow, *supra* note 101.
[122] Jay Modrall, *supra* note 78.
[123] There is a consensus among the experts that there is a need to shift the focus away from requirement to establish a "meeting of mind" to consider whether there has been cooperation between the competing businesses that substantially lessens the competition.

intention to collude.[124] But at the same time the benefits and risks should be carefully analysed to avoid undesired effects, such as deterring competitive conduct.[125]

Further, as suggested by the German Monopolies Commission's (*Monopolkommission*) proposal,[126] in markets where there are concrete indication that pricing algorithm are highly likely to lead to conscious parallelism, the burden of proof with regard to damage caused by an infringement of competition law be reversed.[127] Thus, in such cases any liability for the adverse consequences arising should be assigned to the user of such pricing algorithm.[128]

5.3 AN AGENCY LAW SOLUTION

Most pricing algorithms today still operate based on instructions designed by human beings[129] and there is no doubt that humans will be in most cases responsible for the decisions made by algorithms. Based on the current stand of the law, computer programs and pricing algorithms are to be considered simply as tools, implying that their decision can be directly

[124] James Panichi et al., *Australia reckons it's ready to fight algorithmic collusion as world scrambles to review laws*, MLEXMARKETINSIGHT (Nov. 29, 2018, 02:03 AM), https://mlexmarketinsight.com/insights-center/editors-picks/antitrust/cross-jurisdiction/australia-reckons-its-ready-to-fight-algorithmic-collusion-as-world-scrambles-to-review-laws

[125] Catalina González Verdugo, *supra* note 116.

[126] Monopolkommission, *supra* note 42.

[127] Miranda Cole et al., *The German Monopolies Commission's Proposals Regarding Pricing Algorithms*, COVCOMPETITION (Nov. 29, 2018, 02:41 AM), https://www.covcompetition.com/2018/09/the-german-monopolies-commissions-proposals-regarding-pricing-algorithms/

[128] OECD, *supra* note 70.

[129] SAMIR CHOPRA & LAURENCE F. WHITE, A LEGAL THEORY FOR AUTONOMOUS ARTIFICIAL AGENTS 171–72 (University of Michigan Press 2011).

attributed to their human operators.[130] As the European Commissioner Vestager stated in a recent speech:

> *The challenges that automated systems create are very real. If they help companies to fix prices, they really could make our economy work less well for everyone else. (...) So as competition enforcers, I think we need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program.*[131]

Thus, like an employee or an outside consultant working under a firm's direction or control, a pricing algorithm remains under the firm's control and therefore the firm is liable for its actions.[132] This stands true no matter how intelligent pricing algorithm becomes or how independently they can make decisions.[133]

5.4 *EX-ANTE* MERGER CONTROL MEASURES

The possible *ex-ante* approach consists in establishing a system capable of preventing conscious parallelism, through the enforcement of merger control rules in markets with algorithmic activities.[134] Such an approach would allow agencies to assess the risk of future coordination,

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[130] OECD, *supra* note 6.
[131] Margrethe Vestager, *supra* note 30.
[132] Stephen Wisking & Molly Herron, *Algorithmic Pricing - The new Competition Law frontier?*, HERBERTSMITHFREEHILLS (Nov. 28, 2018, 10:07 AM), https://www.herbertsmithfreehills.com/file/22201/download?token=0vOY3W7j
[133] Nicolas Petit, *Antitrust and Artificial Intelligence: A Research Agenda*, SSRN (Nov. 21, 2018, 04:37 AM), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2993855
[134] It is a central object of merger policy to obstruct the creation or reinforcement by merger of such oligopolistic market structures in which conscious parallelism can occur. See, F.T.C. v. H.J. Heinz Co., 246 F.3d 708, 725 (D.C. Cir. 2001). See also, PHILLIP E. AREEDA ET AL., ANTITRUST LAW 9 (Little, Brown & Comp. 1998).

going beyond the traditional duopolies where conscious parallelism is more easily sustainable; to include also cases where the use of pricing algorithms may facilitate conscious parallelism even in less concentrated industries.[135] In order to effectively prevent algorithm fuelled conscious parallelism, competition agencies should focus their analysis particularly on the impact of the transactions on market characteristics such as transparency and velocity of interaction, which are the factors that are mostly affected by the use of pricing algorithms.[136]

5.5 COMPETITION COMPLIANCE BY DESIGN

An additional possibility can be the enactment of statutory requirement for companies to develop pricing algorithm that rule out anti-competitive behaviour and make price decision understandable to the competition authorities, which can be denominated as compliance by design.[137] For example- in a recent speech at the Bundeskartellamt, the EU Commissioner Vestager (2017) stated that businesses have the obligation of programming algorithms to deliberately comply with data protection and antitrust laws.[138] Similarly, the German Chancellor Angela Merkel made also a public statement calling for companies like Facebook and

[135] A. Ezrachi *supra* note 34 at 77. The authors says that the "one factor is of conscious parallelism, because of algorithms, spreads beyond duopolies to markets with as many as five to six significant players. The agencies can be more sensitive to whether the elimination of a particular player would increase significantly the risk of algorithmic-fuelled conscious parallelism. It may be preserving a market of diverse sellers with different horizons for profits and different capacity constraints.

[136] OECD, *supra* note 6.

[137] Dr. Sebastian Janka, *Antitrust authorities turn their attention to algorithms in 2018*, NOERR (Nov. 30, 2018, 04:18 AM), https://www.noerr.com/en/newsroom/News/antitrust-authorities-turn-their-attention-to-algorithms-in-2018.aspx

[138] Margrethe Vestager, *supra* note 30.

Google to publicly disclose their proprietary algorithms, she remarked that:

> *The algorithms must be made public, so that one can inform oneself as an interested citizen on questions like: what influences my behaviour on the internet and that of others? (...) These algorithms, when they are not transparent, can lead to a distortion of our perception, they narrow our breadth of information.*[139]

Thus, the pricing algorithm should be designed in such a way to ignore information about certain market conditions.[140] Further, there can also be *per se* prohibition of certain algorithms, e.g. prohibition of "price matching" algorithms.[141]

Moreover, it will be prudent for algorithm developers and users to maintain a clear audit trail of all the steps taken during the development of the algorithm and in particular the decision making process of the pricing algorithm and any changes that are made to the algorithm during its use. It will also be prudent to ensure that the input parameters (source data) used by the pricing algorithm are set by the user and the default settings are not used. Consideration should also be given to whether the same algorithm is being used by other competitors.[142]

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[139] BBC News, *Angela Merkel wants Facebook and Google's secrets revealed*, BBC (Nov. 28, 2018, 04:37 AM), https://www.bbc.com/news/technology-37798762

[140] The other ways to prevent conscious parallelism is to have regulators reverse engineering pricing algorithms in order to understand how their decision-making process functions.

[141] Joseph E. Harrington Jr., *supra* note 10.

[142] Bertold Bär-Bouyssière, *supra* note 27.

5.6 AUDITING PRICING ALGORITHM

Ezrachi and Stucke propose that algorithms could be audited in a "sandbox" or a "collusion incubator", where their effects on the market could be observed. This could guarantee that pricing algorithms are programmed in a way to steer clear of any competition concerns.[143] Moreover, from an enforcement and regulatory perspective, auditing pricing algorithm will be beneficial to understand whether and if a firm could know that its pricing algorithm is implementing a conscious parallel outcome. For instance, if a firm observes that its profits have risen since it implemented algorithmic pricing, would it be able to determine whether this is because the algorithm has attracted new customers, increased sales to existing customers, raised prices to loyal customers or engaged in conscious parallel conduct?[144]

However, as noted by Ezrachi and Stucke, this can fail in leading to a meaningful tool, since pricing algorithms do not necessarily include instructions to collude, but rather to maximize profit. Moreover, auditing is not likely to keep pace with the development of the industry, especially given the self-learning nature of algorithms and it may be hard to prevent pricing algorithms from ignoring information that is publicly available ("cheap talk" problem).[145]

[143] OECD, *supra* note 70.
[144] Competition & Market Authority, *supra* note 3.
[145] OECD, *supra* note 70.

5.7 OTHER INTERVENTIONS

The other intervention proposing big or small legal changes includes regulating the frequency with which the companies may adjust prices, requirement for companies to monitor the effects of their pricing algorithms on a regular basis and correcting *supra*-competitive prices,[146] introduction of consumer's algorithm or digital butler,[147] treating use of pricing algorithm with certain characteristics itself as "plus factors" in cases of conscious parallelism,[148] use of prohibition against abuse of collective dominant position[149] when faced with cases of conscious parallel conduct by pricing algorithm of two or more dominant market

[146] Competition policy in Digital age, *Cartels and Pricing Algorithms – The Next frontier of Competition Law?,* HENGELER (Nov. 26, 2018, 06:03 AM) https://www.hengeler.com/fileadmin/news/BF_Letter/BF-CompNewsletterMay2017.pdf

[147] Digital butlers are algorithms that are employed by consumers, which make and execute decisions for the consumer by directly communicating with other systems through the Internet. The algorithm automatically identifies a need, searches for an optimal purchase and executes the transaction on behalf of the consumer. These offer many benefits to consumers as they can significantly reduce search and transaction costs and help consumers overcome biases and enable more rational and sophisticated choices. Digital butler can also create buyer power, if such algorithms have a sufficiently large number of users or if it coordinates its conduct with other digital butlers. This in turn, may allow consumers to counteract supplier's buyer power. Indeed, such algorithm can be coded not to buy a certain good if price is above a certain level. The aggregation of buyers can also make transactions less frequent and small, thereby increasing incentives of suppliers to deviate from the *status quo.* Or it might always buy some portion of its goods from at least one new source to strengthen incentives for new suppliers to enter the market. Indeed, once consumers are aggregated into sufficiently large consumer groups, suppliers will lose the ability to collect information on consumer's individual preferences with regard to products bought through the group. See, Michal s. Gal, *supra* note 31.

[148] Joseph E Harrington Jr., *Posted Pricing as a plus Factor*, UPENN (Nov. 26, 2018, 06:03 AM), https://repository.upenn.edu/cgi/viewcontent.cgi?article=1130&context=bepp_papers

[149] Under the theory of collective or joint dominance, several firms can share and abuse a dominant position. See, Massimiliano Vatiero, *Power in the Market: on the Dominant Position*, EUROPA (Nov. 30, 2018, 04:20 PM), http://ec.europa.eu/competition/antitrust/art82/005.pdf

players,[150] expanding the traditional duo of major antitrust offences (cartels and abuse of dominant position) of a new offence that could be the abuse of excessive market transparency or simply the anti-competitive algorithmic parallelism as a type of behaviour different from the permissible "normal" conscious parallelism (market adaptation) *etc.* [151]

6. CONCLUSION

The interaction between pricing algorithms and concisions parallelism is a developing area, and in future policy makers may need to reconsider the current antitrust toolkit in order to adequately tackle such misconduct. But at the same time pricing algorithms have a major influence on the way firms compete in today's economy and have undoubtedly led to pro-competitive influence in many markets. Thus, there should be no disagreement about maintaining a fine balance between consumer protection, promotion of competition and innovation. Moreover, the policy approaches to tackle algorithm-induced conscious parallelism should be developed in cooperation with competition law enforcers, consumer protection authorities, data protection agencies, relevant sectorial regulators and organisations of computer science with expertise in algorithms. In conclusion, despite the clear risks that pricing algorithms may pose on competition, this is still an area of high complexity and

[150] Manon van Roozendaal, *Algorithms: Teenage troublemakers of EU Competition Law*, EUROPEANLAWINSTITUTE (Nov. 20, 2018, 05:15 AM), https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Award/Winner_2018_ELI_Young_Lawyers_Award_Manon_van__Roozendaal_FINAL.pdf

[151] Dylan i. Ballard & Amar s. Naik, *Algorithms, Artificial Intelligence and Joint Conduct*, COMPETITIONPOLICYINTERNATIONAL (Nov. 25. 2018, 05:45 AM), https://www.competitionpolicyinternational.com/wp-content/uploads/2017/05/CPI-Ballard-Naik.pdf

uncertainty, where lack of intervention and over regulation could both pose serious costs on society. Whatever actions are taken in the future, they should be subject to deep assessment and a cautious approach.

ONE HOUSE, MULTIPLE FAMILIES: SHOULD ENFORCEMENT OF CONSUMER PROTECTION AND COMPETITION LAWS BE HOUSED TOGETHER?

Saravanan Rathakrishnan[*]

ABSTRACT

With the increasing integration of India's economy with the rest of the world, growth of Indian companies has surpassed expectations. As a result, Indian companies have grown phenomenally and have established dominant positions within India. At the same time, companies based outside of India have entered into India's burgeoning and profitable consumer market. Thus, Indian regulators must grapple with two concerns: first, ensuring that there is competition in the markets and second, protecting consumers. It is trite that both concerns are essentially about enhancing consumer welfare, albeit via different pathways. Ensuring competition in the markets is a macro-based, supply-side approach to enhancing consumer welfare: an indirect approach. Consumer protection is a micro-based, transaction-focused, demand side approach to enhancing consumer welfare: a direct approach. This paper posits that despite this differential, there are advantages to housing enforcement of competition and consumer protection under the same house. Overall, benefits of such an amalgamation far outweigh the costs. To conclude, this paper submits

[*] Practice Trainee, Peter Doraisamy LLC Advocates & Solicitors, Singapore (ratha.corp@gmail.com).

merely housing these two disciplines is not an adequate strategy, it must be complemented with an educational outreach program. It is critical to ensure that the burden of enforcing consumer protection is shared between the Competition Commission of India and consumers.

1. INTRODUCTION

Consumer Protection and Competition laws are often seen as complementary forces: they result in the same outcome, but undertake different pathways to do so. Each pathway has its own mechanism, thereby creating different implications en route to the outcome.

The crux of the matter is the consequences of this relationship and the extent to which they can be reconciled. In the event, that such a reconciliation creates synergistic value and cost efficiencies, an argument can be made for the combination of two separate agencies into one umbrella watchdog. However, as with all merger situations, one must take into consideration whether such reconciliation creates net value to justify the abovementioned amalgamation.

This paper will proceed on three fronts; first it will chart the different pathways that competition and consumer protection policies and laws undertake. Second, it will analyse the interplay between both disciplines and the implications that emerge. Finally, it will enumerate on the practicality of amalgamating two agencies into a single one.

2. COMPETITION POLICY AND CONSUMER PROTECTION POLICY

Competition policy deals with anti-competitive practices arising from the exercise of undue market power by firms that reduce consumer welfare.[1] This may take the form of higher prices with reduced quality, restrictions in product and service choices and finally, an overall inertia in innovation.[2] Thus, competition policies seek to increase consumer welfare indirectly: by ensuring that markets are regulated to optimize consumer welfare.[3] This rationale was recognised by the Supreme Court of India when it noted that competition law promotes economic efficiencies and creates markets that are sensitive to consumer preferences.[4] Hence, competition policies take a macro approach; they do not directly deal with individual transactions between consumers and businesses. Instead, the effects of competition policies on those transactions are indirect.

Competition law concentrates on maintaining the process of competition between enterprises and remedies behavioural or structural issues to establish effective competition in the market. This results in greater economic efficiency, greater innovation and overall enhancement

[1] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.
[2] Meglena Kuneva, *Consumer and Competition Policies – Both for Welfare and Growth*, EUROPEAN UNION (Feb. 22, 2008), http://www.eu/rapid/press-release_SPEECH-08-95_en.pdf.
[3] Max Huffman, *A Standing Framework for Private Extraterritorial Antitrust Enforcement*, 60 S.M.U. L. REV. 103, 103-04 (2007).
[4] Harsha Asnani, *What Is the Relationship between Competition Law and Consumer Protection*, IPLEADERS (May 10, 2016), https://blog.ipleaders.in/relationship-competition-law-consumer-protection/.

of consumer welfare. Thus, consumers get access to a wider variety of goods at affordable prices, and at higher quality.

Consumer protection policies, on the other hand, govern individual transactions to improve consumers' capabilities to make well-informed decisions and to protect consumers' interests by removing consumer detriment.[5] The two disciplines focus on dissimilar market failures and offer different remedies, but are both aimed at supporting well-functioning, competitive markets that uphold consumer welfare. They are mutually re-enforcing.

2.1 INTERPLAY – IMPLICATIONS OF THIS RELATIONSHIP

Despite the apparent complementariness of both disciplines, the effects of one create adverse consequences in the other. Although, they serve to create the same outcome, they each adopt a different machinery to fulfil that. This creates distinct implications for each discipline, some of which may be in direct conflict with the other.

Generally, consumer protection policies enable competitive markets to flourish by removing information asymmetries, by providing access to accurate information. Accurate information indirectly forces markets to get more competitive by driving producers to lower costs and to increase value of their products for consumers.

Likewise, and using a different pathway, competition policies push companies to be more sensitive to consumer preferences. Consumers directly benefit as such policies drive down costs when companies undertake economies of scale and scope in the short run. In the long term,

[5] *supra* note 2.

competition drives innovation, as companies innovate to survive. Innovation in turn creates products with greater value in terms of quality and variety. Due to the commonalities of the policies and their intended implications, both sets of policy tools can be harmonised into one agency. However, it must be noted that both policies utilise different pathways to reach their objective.

The differences in machinery undertaken by both disciplines stem from the nature and role of the disciplines. Competition policy is a creature of supply-side economics[6]in that it *inter alia* works to safeguard the sufficient and affordable choices consumers have. For example, within the Indian context, section 4 of the 2002 Competition Act[7] recognises when a company is considered to be abusing its dominant position; when said company "limits or restricts technical or scientific development relating to goods or services to the prejudice of consumers."[8]

It is clear, that the provision aims to enhance competition by targeting market players because section 4 regulates abuse of "dominant position."[9] Companies that meet this "dominant position" are those that enjoy a position of strength, in the relevant market within India however defined, that allows said company to affect its consumers or the relevant market to its advantage. Section 4 should be read together with section 19(4) of the 2002 Competition Act to determine whether a company

[6] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.
[7] Competition Act, 2002, No. 12, Acts of Parliament, 2003, § 4.
[8] *Id.*, § 4(2) (b) (i) & (ii).
[9] *Id.*, § 4(2).

enjoys a dominant position. Section 19(4) provides that a dominant position is to be determined, *inter alia,* by the following factors:[10]

a. Market share of the enterprise;
b. Size and resources of the enterprise;
c. Size and importance of the competitors
d. Dependence of consumers on the enterprise;
e. Market structure and size of market;
f. Barrier to entry:
    i. Regulatory barriers;
    ii. Financial risk;
    iii. High cost of capital for entry into relevant market;
    iv. Marketing entry barriers;
    v. Technical barriers;
    vi. Economies of scale;
    vii. High cost of substitutable goods; or
    viii. Service for consumers.

In addition, Section 19 of the Act stipulates that the Competition Commission of India is empowered to take *suo moto* action to remove practices that have an adverse effect on competition, to promote and sustain competition and to protect the interests of consumers and ensure freedom of trade carried on by other market participants.[11] Taken together, competition law is predominantly focused on supply-side economics and this market-based approach is predicated on the elimination of market distorting behaviour by firms. The focus here therefore, is the regulation

[10] *Id.*, § 19(4).
[11] *Id.*, § 18.

of firm behaviour and not the regulation of transactions between consumer and the company. It should be noted that the Competition Act does not preclude scrutiny of individual transactions where said transaction is deemed anti-competitive. This recognises the intersection between prevention of consumer harm and anti-competitive. The prevalence of such confluences further augments the value for a single agency.

On the flipside, consumer policy deals with demand-side issues by removing deceptive or unfair practices, which perpetuate information asymmetry and other impediments, thereby, allowing consumers to exercise their choices effectively. The Competition Act, 2002 does not recognise unfair trade practices, unlike the Consumer Protection Act, 1986.[12]

Unpacking the inclusion of restrictive trading practices but not unfair trading practices further reinforces the assertion that competition law is "supply-side" focused. Unfair trading practices as defined in the Consumer Protection Act includes practices which involve having made a misleading or false representation as to the nature, quality of a good or service, etc. Thus, the focus is between the company and the customer; the nature of the relationship and preventing the vitiation of informed consent of the customer.

The demand-side polices are clear here as they seek to ensure that there is accurate information upon which demand is based, demand based on misleading or false representations creates a skewed picture of demand. For instance, unfair trade practice as defined in the Consumer Protection Act includes making a representation to the public regarding a warranty or

[12] *supra* note 4.

guarantee of a product or of any good or service.[13] Such a representation has the potential to affect demand for such a good or service as the provision of a warranty or guarantee may, in the eyes of the customer, increase the value of such good or service or reduce the cost of the product once the cost savings accrued from the warranty are factored in. Hence, this raises demand for a product that otherwise would not have been purchased, if the representation has not been made.

On the flipside, restrictive trade practices are included in the Competition Act. Restrictive trade practices unlike unfair trade practices (as defined by in the Consumer Protection Act), are macro in application. This is clearly seen from the way restrictive trade practices are recognised in the Competition Act; practices that have the potential of "preventing, distorting or restricting competition." Previously, the Monopolies and Restrictive Trade Practice Act, 1969 (MRTP) defined Restrictive Trade Practice as trade practices that impede the flow of capital or resources into production[14]Price manipulation and imposition of conditions that have an effect of applying unjustified costs and restrictions on the supply of goods[15] were instantiations of such practices. However, the definition of Restrictive Trade Practice was broadened when the MRTP was repealed and the Competition Act was passed.

Restrictive trade practices are recognised in the Competition Act as seen from the fact that with effect from 1 September 2009, all pending investigations regarding restrictive trade practices will be transferred to the Competition Commission of India. This is rightfully so, since the trade

[13] Consumer Protection Act, 1986, No. 68, Acts of Parliament, 1986, § 2 (1) (r).
[14] *supra* note 4.
[15] *Id.*

practices characterized as restrictive invariably touch on supply-side and macro- economics. Firms engage in restrictive trading practices by attempting to control the supply of goods or products in the market either by restricting production or controlling the delivery.[16] This is quintessentially a supply-side economics issue – the control of production or delivery of goods affects the supply of such goods in the market, in the former case, the absolute supply of the goods is restricted, in the latter cases, the customers' access to said goods is restricted. This contrast in legislative scopes lends great credence to the individual rationales that underpin the Competition and Consumer Protections Acts. Nonetheless, the different rationales and mischief that the Acts respectively address leads to a policy decision to separates these two disciplines into two enforcement agencies. However, it is the position of this paper, that despite the discrete nature of each Act, there is no need for such a division and that the enforcement of both Acts can be housed under one house.

The separation of these disciplines creates two problems – which can be resolved by better coordination of policies. First, there is a difference in consumer harm in competition policy as compared to consumer protection policy. In the latter, the failings in individual consumer transactions are construed as consumer harm, whereas, in the former, consumer harm is not exactly envisioned – it is under-theorized – as competition policy is focused on preventing harm to competition.[17]

[16] Shreyaa Chaturvedi, *Monopolistic and Restrictive Trade Practices Act, 1970*, IPLEADERS (Aug. 30, 2018), https://blog.ipleaders.in/mrtp/.

[17] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.

Competition policies drive firms to provide consumers access to information, however, this does not guarantee that such information may not be misleading or inaccurate.

For instance, the rapid deregulation under the guise of increasing the competition within the U.S. financial industry led to increased competition amongst financial institutions, this led to greater financial innovation without regulatory oversight. The pace of innovation outpaced regulatory development in the years preceding the 2007 sub-prime mortgage crisis. This eventually led to the financial crisis which causes harm to a great number of consumers.

This is an example where the focus on increasing competition in silo creates a myopic situation, where competition policy focuses on eliminating anti-competitive behaviour, but in doing so, creates a situation which may perpetuate harmful practices in violation of consumer protection policies.[18] For instance, if an individual transaction produces a sub-optimal result because of an unscrupulous merchant, competition law assumes that the merchant will be replaced by someone who meets the consumer's needs properly. Competition law wrongly assumes that the solution is always provided by the market. Those left unsatisfied before the merchant exits the market are too little in numbers to bring down the average. Those few do not constitute "harm to competition."

Therefore, across a mass of consumers, then, welfare may be optimized, but at an individual level, welfare declines. This blind spot

[18] Michael Adam et al., *The Effect of Anti-competitive Business Practices on Developing Countries,* U.N. CONF. ON TRADE & DEVELOPMENT (2008), https://unctad.org/en/Docs/ditcclp20082_en.pdf.

must be addressed by micro-level enforcement via the application of consumer protection framework. Therefore, macro-level approaches must be combined with micro-level approaches to plug lacunas that exist when policies are implemented. The merging of agencies will create a single agency with a wider portfolio and an expanded set of policy tools to solve these lacunas. Thus, whilst solving issues related to competition act, it can at the same time, address lacunas that occur at micro-level transactions that cause consumer harm.

The second problem arises when competition policy works a little too well. A well enforced competition policy will create competitive markets that provide incentives for firms to offer quality products and services at the best prices. This allays certain consumer protection concerns such as product and service standards.

However, an extremely competitive market may result in market failures when participants in the market engage in unethical behaviour to obtain a competitive advantage. This creates externalities that require regulations to be addressed – in this case, consumer protection regulations.[19] These externalities should not be addressed in silo, but rather by a broad application of policy tools under one agency since as mentioned above, solely focusing on competition issues may cause consumer harm. Likewise, unduly focusing on consumer protection policies may adversely affect competition in the economy. For instance, private hire companies such as Uber may face complaints regarding their pricing methods – surge-pricing – and local governments may ban this method or place limitations on them on the basis of protecting consumers.

[19] *Id.*

However, this detracts from the fact that surge-pricing allows for allocative efficiency - a by-product of increased competition. Allocative efficiency is critical to sustain a healthy business environment. Thus, myopically focusing on consumer law without taking into consideration effects on competition and vice-versa creates reduced economic gains all around.

In newly liberalized markets, incumbent firms may engage in locking in of consumers by increasing switching costs to competitors, while new entrants may engage in unfair trading practices to expand their market shares.[20] Consumer protection enforcement may be applied to end these practices, whilst balancing this with the need to ensure there is sufficient competition in the market.

Having two separate enforcement agencies creates poor policy co-ordination, overlapping jurisdictions and completion for resources. Whilst, these may create impediments to policy effectiveness of each agency, the issue is not about removing these impediments, but leveraging on the synergies that exist between them to create better policy gains. Specifically, housing these two agencies results in increased coherence in promulgated solutions. Separately implementing solutions may create disconnection between intended results and create unintended consequences, as such as the Sub-Prime Mortgage Crisis and the issues surrounding Uber's price surging. Housing both agencies under one

[20] United Nations Conference on Trade and Development secretariat, *United Nations Conference on Trade and Development*, U.N. CONF. ON TRADE & DEVELOPMENT (Apr. 29, 2014), http://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf.

umbrella allows for simultaneous pulling of levers on supply-side and demand-side, thereby creating a much more calibrated approach.

For example, consumer protection measures imposed must not be too strict, as this will raise the barriers of entry for new entrants, thereby entrenching the positions of incumbent companies and eliminating the long-term goal of more competitive markets. The two types of policies should be coordinated to facilitate a whole-market approach. Competition and consumer authorities must share information and coordinate with each other. This reduces the chances of one policy creating adverse, unintended consequences on the other. Information sharing in the first step to greater policy coordination and improved efficiency. In a rapidly evolving world, where technology may create new markets and dominants players within a short span of time, any gain in efficiency would be a boon to regulatory development and enforcement.

2.2 CONSOLIDATION

The problems discussed above arise from a lack of coordination of policies. Policies and laws that are formulated in-silos are not cognizant of the effects of other policies. At the implementation stage, contradictory or overlapping implications arise, creating something similar to the "spaghetti-bowl" effect. There is an increasing trend to consolidate competition law enforcement and consumer protection in a single institution thereby creating synergistic value between these two functions.[21] A crucial synergy is that of better flow of information between the formerly-separated agencies as well as leveraging on the existing

[21] *Id.*

capabilities and information networks of each agency to create a multi-pronged approach.

3. A CROSS BORDER PERSPECTIVE: SINGAPORE'S APPROACH

Singapore undertook the decision to merge both agencies into one house because it recognised that a single agency would leverage the synergies that pre-exist in both agencies and that a streamlined central agency would allow for a more holistic assessment of competition and consumer protection policies.

Singapore, has recognised this trend as evinced by the recent creation of the Competition and Consumer Commission of Singapore ("**CCCS**"), formerly the Competition Commission of Singapore.[22] Given that competition polices may have consumer protection implications, a calibrated approach must be utilised. A single agency housing two functions allows for exchange of information and coordinated approaches to strengthen the joint framework. Such an amalgamation must allow for timely exchange of information between each side. The barrier between the two-disciplines must be porous and must allow external information to transfer and be utilised.

At present, the Singapore Tourism Board ("**STB**") and Consumers Association of Singapore ("**CASE**") are the first points of contact for consumer protection cases, after-which errant retailers who do not stop

[22] Tiffany Tay, *Competition watchdog gets new name, consumer protection powers*, THE STRAITS TIMES (Apr. 6, 2018), https://www.straitstimes.com/singapore/competition-watchdog-gets-new-name-consumer-protection-powers.

their unfair trading practices will be referred to the consumer protection body for investigation. Measures must be put in place to allow information from STB and CASE to diffuse through CCCS, starting from the consumer protection side and proceeding to reach the competition authority within. This would be a good leverage of existing information networks. Additionally, the competition authority must provide information from its studies and reports on competition issues in specific sectors that have effects on consumers. This process informs the consumer agency of its decisions in competition cases and reports on mergers that may affect consumers' interests such as the recent Grab and Uber merger.[23]

This seamless flow of information allows authority to identify and enforce measures against businesses that have been investigated and censured for anti-competitive practices and whose conduct have consumer protection implication. Similarly, this can be applied onto the Indian enforcement landscape as well.

4. CONSOLIDATION CHALLENGES – AN INQUIRY

It is clear that housing the two disciplines in one agency allows for the melding of know-how, economics of scale, manpower, and information transfer and therefore, ensuring that coordination of competition and consumer protection policies are a crucial element of the agency's institutional design. However, the question of whether a house

[23] Christopher Tan, *Competition watchdog issues interim measures to stop Grab, Uber merger*, THE STRAITS TIMES (Apr. 13, 2018), https://www.straitstimes.com/singapore/transport/competition-watchdog-issues-interim-measures-to-stop-grab-uber-merger.

with a divided mission would perform better than two separate houses arises. It can be argued that separation of the missions may create specialised skillsets and thus, each house would develop deep expertise in the demand side (consumer protection) and supply side (competition), which may create an overall positive net result on consumer welfare.

However, this positive net result is predicated on the assumption of perfect, timely transfer of information, which allows both agencies to ensure that their policies do not hamper each other. This faulty assumption together with lag time between implementation, outcome and other inherent issues with policy formulation may cumulatively distort the transfer of perfect, timely information. Therefore, to minimize such interferences, polices should be promulgated within one house.

Notably, the systematic question that needs to be answered is whether an agency, created to address competition issues can also protect individual consumers. A key concern is whether consumer protection enforcement should be handled by private individuals and not by public agencies,[24] given the micro-nature of individual transactions.

This may result in the opening of floodgates where individuals may approach the Competition Commission of India for every apparent consumer protection violation. This may place a strain on the Commissions' resources to administer to each complaint. This concern does not vitiate the argument that the two agencies should merge, but rather it highlights the fact the merger should be accompanied with other developments that complements the benefits of such a merger.

[24] Huffman, *supra* note 3.

It is more likely for individual litigants to seek recourse via Competition Commission of India, because the role of private enforcement vis-à-vis consumer protection is limited in India, compared to jurisdictions like the United States. The U.S.'s regulatory sphere has built-in incentives that favour and promulgate private suits.[25] Devices such as class-actions suits, punitive damages, together with contingency fee agreements with lawyers allow for private litigants to sue without incurring too much. However, India's legal system is devoid of such devices and as such, there is no incentive for a private litigant to enforce for a consumer protection issue where the legal costs may outweigh the cost of buying another product. As a result of these impediments, consumers would turn to C.C.I. to ventilate their claims as the C.C.I. is the enforcement agency.

Thus, C.C.I. should utilise a multi-pronged approach. Both competition and consumer projection polices utilise a regulatory framework and an enforcement mechanism to achieve their goals. However, private litigants must play a role as well. The domains of competition and consumer protection law is not solely the responsibility of public institutions. Private litigants must be aware of their rights and must be able to enforce those rights when necessary. Education and awareness is key to individual consumers taking responsibility and as such, C.C.I. should create outreach and educational programs to raise awareness. Only with such a multi-pronged approach, can a robust framework be created and enforced in India.

[25] *Id.*

5. CONCLUSION

Whilst, competition and consumer protection policies take different paths, they lead to the same outcome. Despite, this complementariness, contradictions may occur, due to differences in how each discipline works. To reduce differences, there must be better coordination in the formulation and implementation of policies. Competition policy increasing consumer welfare is not automatic, it must be followed by consumer protection – the alignment of demand-side and supply-side effects collectively enhance consumer welfare. This whole-market approach is required to solve any competition issues that create consumer protection problems.

This is predicated on successful and timely transfer of information. This can be achieved via agreements and systems implementation, however, given the difference in intermediate goals – competition policy focuses on protecting competition, whilst, consumer protection policy focuses on preventing consumer harm – each agency may tend to their mandate first.

To eliminate such a risk, this paper supports the notion of housing the two disciplines in one house. However, merging of the two agencies is not sufficient, it must be complemented with a new strategy beyond enforcement measures. Education and awareness of consumer rights is critical to ensure that the burden of enforcing consumer protection does not lie solely with Competition Commission of India, but with individual consumers as well.

ARBITRATION, COMPETITION LAW AND SECOND LOOK DOCTRINE: AN INDIAN PERSPECTIVE

Abhisar Vidyarthi[*]

ABSTRACT

Historically, competition law enforcements agencies have eluded arbitration as a means of adjudicating competition law disputes owing to the technical nature of the disputes and the larger public interest involved. Competition Law deals with the competitiveness in the market and its impact on the consumer welfare. Therefore, the disputes include the adjudication of '*rights in Rem*' along with the individual claims of the aggrieved parties. Moreover, the Competition Act, 2002 provides for the exclusion of jurisdiction of the Civil Court in any competition related matter. These are the hurdles which restrict the arbitrability of anti-trust disputes in India. In Competition Commission of India v. Union of India, the Delhi High Court stated that the scope of investigation of the Commission is very different from the scope of investigation of the arbitral tribunal due to the lack of expertise of the tribunal. These problems have been faced by the judiciary of most countries while dealing with the arbitrability of competition disputes. Despite these shortcomings, the global acceptance of arbitrators determining competition issues has risen considerably post the Supreme Court of United States affirmation in 1985. The 'Second look Doctrine' developed by the Court in *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth*

[*] Student, 4th Year, B.A., LL.B. (Hons.), Maharashtra National Law University, Mumbai (avividyarthi@gmail.com).

provided a balance between the need for arbitration and the need for securing public interest. The Doctrine provided for a review of the arbitral award to foresee the proper compliance with the Competition laws of the land. Thereafter, most countries have moved in favour of arbitrating Competition matters and promoting the international consensus of the pro-arbitration culture. There is no conclusive judicial pronouncement of the issue in India and this paper discusses adopting the measures taken by other countries and allowing arbitral tribunals to decide competition disputes along with the assistance from the Competition Commission of India.

1. INTRODUCTION

Arbitrability of a dispute refers to its ability to constitute the subject-matter of an arbitration proceeding.[1] Different jurisdictions have had different stands with regard to the scope of arbitration. While certain jurisdictions like United States have been more liberal in allowing arbitration to cover most technical issues, others have refrained from opening the doors of arbitration to issues involving intricate disputes. Over time, arbitration has become the primary and the preferred forum for consensual dispute resolution. However, as the award passed by the tribunal to subject to judicial scrutiny, it is important to address the question of arbitrability of the subject matter of the dispute. Section 34 and Section 48 of the Arbitration and Conciliation Act, 1996 provide that the awards passed shall be set aside, if the dispute *per se* is not arbitrable.

Competition law disputes primarily concern the market and the welfare of the consumers. The enforcement and application of competition law by the

[1] Natalja Freimane, Master's Thesis, *Arbitrability: Problematic Issues of the Legal Term*, RIGA GRADUATE SCHOOL OF LAW, *available at* http://www.sccinstitute.com/media/56097/arbitrability-problematic-issues.pdf (last visited Apr. 9, 2019).

competition commissions aims to eliminate any anti-competitive tendencies from the market. The Indian Courts have restricted the domain of arbitration to disputes that deal with '*rights in personam*'.[2] Therefore, as certain aspects of competition disputes have a bearing on public interest such as cartel formation and other anticompetitive activities under Section 3, the arbitrability of competition law dispute is an underdetermined issue. It is a common understanding that Competition law and arbitration are contrary to each other's functioning. While Competition law seeks to promote the involvement of State in order to ensure healthy competition and welfare of the consumers, arbitration aims to exclude the involvement of the State and promote party autonomy.

The primary question that needs to be answered to determine the arbitrability of a dispute is whether it can be decided by a private arbitral tribunal or is it reserved for the public *fora* (Courts). Traditionally, Courts in most jurisdictions have excluded competition disputes from the ambit of arbitration. However, the judicial trend saw a positive change in 1985, when the Supreme Court of the United States, in *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth*,[3] ruled in favour of the arbitrability of competition law issues, if it was part of the arbitration agreement. This stand was adopted by the European Court of Justice as well in the case of *Eco Swiss China Time Ltd. v. Benetton International N.V.*[4]

The general attitude of the Courts in India has been towards restricting arbitration to disputes of commercial nature. The Supreme Court in *Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.*, stated that adjudication of certain types of disputes are reserved for the Public Fora and cannot be subject to

[2] Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd., (2011) 5 S.C.C. 532.
[3] Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc. 723 F.2d 155 (1983).
[4] Eco Swiss v. Benetton [1999] E.C.R. I-03055.

arbitration.[5] Further, in the case of *Kingfisher Airlines v. Prithvi Malhotra Instructor*, the court ruled that even certain *Rights in Personam* can be reserved for the public fora.[6] Despite the general trend, there is no conclusive pronouncement on the question of arbitrability of competition issues. In one of the cases, the Delhi High Court stated that the mere presence of an arbitration clause would not stay the proceedings of the Court.[7] The case related to a concession Agreement with the Ministry of Railways. The other parties had filed a complaint before the C.C.I. alleging that the Railway Board had abused its dominant position by imposing increased charges and restricting access to infrastructure. The Court opined that the scope and focus of the C.C.I.'s investigations would diverse from that of the arbitral tribunal.[8]

Securing public interest and promoting arbitration culture are the primary policy objectives involved in this discussion. The *Mitsubishi* case tried to find a mutual ground between the two by implementing the 'second look doctrine' wherein the tribunal had to apply the anti-trust laws. Thus, the Court shall have the power to verify the application of competition laws in a just manner. The judicial trend seen in cases dealing with the issue of arbitrability of cases involving fraud is a positive aspect for the arbitration in competition disputes. The Supreme Court in *A. Ayyasamy v. A. Paramasivam*, ruled that all fraud disputes were arbitrable unless the dispute dealt with serious allegations of fraud.[9] As competition disputes involve a lot of stakeholders, including it under the ambit of arbitration would require devising a proper mechanism for the same.

[5] Booz-Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.
[6] Kingfisher Airlines v. Prithvi Malhotra Instructor, 2013 (7) Bom. C.R. 738.
[7] Union of India v. Competition Comm'n of India, A.I.R. 2012 Del. 66.
[8] *Id.*
[9] A. Ayyaswamy v. A. Paramasivam, Civil Appeal No. 8245-8246 of 2016.

The paper shall aim to find the right balance for such a mechanism. Competition Advocacy is used to spread light on the possibility of several unexplored and peculiar ideas related to competition law. The possibility of arbitration of competition law disputes, especially in multi-jurisdictional disputes, can be considered as a viable option for dispute settlement. There are several concerns with such an arrangement; as it is believed that those engaged in hard-core cartels will use such private proceedings to prevent national authorities becoming aware of the conduct.[10] This paper will examine the scope of arbitrability of competition disputes in light of the growing use of arbitration to resolves diverse disputes and how competition advocacy can be used to promote its application.

2. ADDRESSING THE MAJOR CONSTRAINTS IN ARBITRATING COMPETITION DISPUTES IN INDIA

Before we delve into the prospect of extending the scope of arbitration to competition disputes, it is important to first lay out the inherent problems that exist in such a mechanism. Historically, most jurisdictions have refrained from allowing technical issues to be arbitrated.[11] The scope of a tribunal's investigation is said to be very different from the investigation carried out by the competition enforcement bodies. The primary issue with regards to arbitration of competition disputes is with the arbitrability of competition law itself. The

[10] Francesca Richmond, *Arbitrating Competition Law Disputes: A Matter of Policy*, KLUWER COMPETITION LAW BLOG (Aug. 2, 2018), http://competitionlawblog.kluwercompetitionlaw.com/2012/02/22/arbitrating-competition-law-disputes-a-matter-of-policy/ (last visited Apr. 9, 2019).

[11] Anshuman Sakle, *Arbitrating Competition Law Disputes in India*, CYRIL AMARCHAND MANGALDAS (July 28, 2018), https://competition.cyrilamarchandblogs.com/2017/12/arbitrating-competition-law-disputes-india/.

Arbitration and Conciliation Act, 1996 doesn't define the kind of cases that can be arbitrated. Section 7 of the Arbitration and Conciliation Act 1996 states that all the disputes arising out of a legal relationship, whether contractual or not are arbitrable. However, the restriction on the scope of the Act can be under Section 2(3) of the Act, wherein it states that the Act shall not affect any law by virtue of which certain disputes may not be submitted to arbitration. Moreover, Section 34(2) (b) and 48(2) of the Act entrust the Courts with the responsibility to set aside an arbitral award or refuse its enforcement in case "the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force" or if the "award is in conflict with the public policy of India."

As there is no conclusive understanding that can be gathered from the Act, the source of inspiration is the case laws that have settled the proposition over the years. The Courts have maintained the stand that disputes that are not arbitrable include disputes pertaining to the rights and liabilities arising out of criminal offences,[12] insolvency and winding up,[13] testamentary issues like grant of probate,[14] succession certificate, admiralty suits,[15] foreclosure of mortgage,[16] and eviction or tenancy matters governed by special statutes.[17] The court in *Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.*, had opined that disputes that deal with '*rights in rem*' are reserved for the exclusive jurisdiction of the public fora i.e. the courts.[18] Therefore, only '*rights in personam*' can be adjudicated by private forums like the arbitral tribunal. The Court further restricted the scope of

[12] State of Orissa v. Ujjal Burdhan, (2012) 4 S.C.C. 547.
[13] Haryana Telecom Ltd. v. Sterlite Indus. (India) Ltd., (1999) 5 S.C.C. 688.
[14] Chiranjilal Goenka v. Jasjit Singh, (1993) 2 S.C.C.507.
[15] Osprey Underwriting Agencies v. O.N.G.C. Ltd., A.I.R. 1999 Bom. 173.
[16] Booz Allen & Hamilton, Inc. v. S.B.I. Home Finance Ltd.
[17] Fingertips Solutions v. Dhanashree Electronics, 2011 Indlaw CAL 805.
[18] A. Ayyaswamy v. A. Paramasivam.

arbitration in *Kingfisher Airlines v. Prithvi Malhotra Instructor*, wherein it held that even '*rights in personam*' shall not be arbitrable if they are reserved for adjudication by a public forum as a matter of public policy.[19]

Therefore, the two questions that arise with regard to the arbitrability of competition disputes are:

1. Whether the competition disputes involve a '*right in rem*'?
2. If, the dispute is involving a '*right in personam*', whether it has been reserved for the specialised public fora?

The arbitrability of competition dispute was looked into by the Court in *Union of India v. Competition Commission of India*.[20] In light of the existing arbitration agreement between the parties, the Railways challenged the C.C.I.'s jurisdiction to hear the dispute. However, the Delhi High Court was of the view that the scope and focus of C.C.I.'s investigation is very different from the scope of an enquiry before an Arbitral Tribunal. It allowed for the C.C.I. to hear the matter notwithstanding a valid arbitration clause. It was further observed that the Arbitral Tribunal would neither have the mandate, nor the expertise to prepare an investigation report which is necessary to decide the dispute in question.[21] Therefore, as it can be inferred, the primary ground of rejecting the arbitrability of competition law disputes was the lack of expertise of the arbitral tribunal to investigate and deal with the technical aspects of competition law.[22] Though these cases discussed the intricacies of allowing arbitral tribunals to decide competition related matters, they do not provide a blanket ban on its arbitrability.

[19] Kingfisher Airlines v. Prithvi Malhotra Instructor.
[20] Union of India v. Competition Commission of India, A.I.R. 2012 Del 66.
[21] *Supra* note 5.
[22] Man Roland v. Multicolour Offset, (2004) 7 S.C.C. 447.

Section 7 of the Arbitration Act provides an Arbitration agreement is a pre-requisite for an Arbitration under the Arbitration Act, 1996. The parties willing to arbitrate their anti-trust disputes must enter into an arbitration agreement. Further, as against the settled proposition that proceedings before the competition commission are "*in rem*", elements of both, private and public claims can be traced in competition law disputes. Section 19(1) of the Competition Act, 2002 allows any person to approach the Commission to inform about any contravention of Competition Act. Section 53 of the Act provides for the exclusive remedy of the aggrieved person. The claim, in that case, involves the resolution of only the determination of the rights and liabilities of the aggrieved person. The right in rem in such a situation is only between two parties and such an arrangement can be settled by resorting to mediums such as arbitration.

The next hurdle is whether the Competition Act provides for exclusive jurisdiction of the Commission. Section 5 of the Arbitration Act, 1996 provides a non-obsolete clause which states that an arbitration agreement eliminates the jurisdiction of any other court. However, the Indian Courts have ruled in exclusion of arbitration in matters where the act provides for the rights of the parties to be adjudicated by specialised tribunals.[23] Moreover, the preamble and Section 61 of the Competition Act, 2002 provide for the exclusion of jurisdiction of civil courts. Therefore, going by the understanding developed by the Courts, arbitration of disputes where a specialised tribunal has been created is not permitted.[24] Therefore, if this analysis of the aforementioned cases is to be extended to the Competition Act, then it would restrict the arbitrability of

[23] Natraj Studios v. Navrang Studios, A.I.R. 1981 S.C. 537.
[24] HDFC Bank v. Satpal Bakshi, (2013) 134 D.R.J. 556; Kingfisher Airlines v. Prithvi Malhotra Instructor.

competition disputes. Despite these constraints, there is a growing consensus in the global community with regard to the resolution of competition matters through arbitration.[25] Therefore, prior to examining the path to moving towards arbitration of competition disputes in India, it is important to see the position in different countries.

3. APPROACH TO ARBITRABILITY OF COMPETITION MATTER IN OTHER COUNTRIES

The position with regard to the arbitrability of competition disputes is clearer and settled in other jurisdictions like the United States and the European Union. After the initial hostility towards arbitration, competition enforcement bodies have become more acceptable of arbitrators handling technical and facts intensive disputes. The pro-arbitration wave has seen more trust being levied on arbitrators in regard to competition disputes being covered under the realm of arbitration agreements. Given below is the approach of different jurisdictions to allow arbitration of competition law issues.

3.1 THE POSITION IN THE UNITED STATES

Historically, the Courts in U.S. had rejected the arbitrability of competition disputes on the grounds that the Sherman Act is designed to promote the national interest in a competitive economy. As antitrust violations can affect millions of people, such issues, which are crucial to the economic base of a

[25] James Segan, *Arbitration Clauses and Competition Law*, 9 J. EUR. COMP. L. & PRAC. 7, 423–30 (2018).

country, cannot be left to the mercy of uncontrolled private arbitral tribunals.[26] However, the trust associated in arbitration has increased and arbitrators today are dealing with highly technical issues. The tide changed direction in the late 20th century and the Supreme Court of United States became open to the prospect of arbitrating competition law issues. The landmark case, *Mitsubishi Motors Corp. v. Sole*r *Chrysler Plymouth* provided the stamp of approval on arbitration of transactions that violated the U.S. anti-trust laws.[27] The Court highlighted the fact that the arbitrators were dealing with complex problems and that arbitrators having expertise in competition law could be selected to adjudicate competition disputes.[28]

The judgement in the *Mitsubishi* case was given in light of *Scherk v. Alberto Culver Co.* ruling, where the Court has ordered arbitration in regard to a claim under the Securities Exchange Act, 1934.[29] Justice Blackmun noted that adaptability and access to expertise were the hallmarks of arbitration and considerations of potential complexity alone could not be a factor to question that arbitral tribunal ability to decide the matter. The most important aspect of the ruling was the dicta of Justice Blackmun, which was later known as the 'second look doctrine'. He stated that the national Courts of the United States will have the opportunity during the enforcement of the award to ensure that the anti-trust laws have been addressed. Therefore, though to ensure the efficacy of the arbitration process, the substantive review of the award shall be minimum,

[26] American Safety Equipment Corp. v. J.P. Maguire, 391 F.2d 821 (2d Cir. 1968); Scherk v. Alberto-Culver Co., 417 U.S. 506, 94 (1974); Jacques Werner, *Application of Competition Laws by Arbitrators: The Step Too Far*, 12 J. INT'L ARB. 21, 23 (1995).
[27] John Beechey, *Arbitrability of Anti-trust/Competition Law Issues - Common Law*, 12 ARB. INT. 2, 179-90 (1996).
[28] Mitsubishi Motors Corp. v. Soler Chrysler Plymouth.
[29] Scherk v. Alberto-Culver Co.

the Courts shall ascertain if the tribunal has taken cognisance of the antitrust claims and addressed them accurately. Presently, the arbitrability of competition disputes is an established practice in the U.S. judicial policy.[30]

3.2 THE EUROPEAN UNION APPROACH

Historically, in E.C.J., the material review of arbitral awards has been limited to public policy considerations.[31] The Regulation 1/2003 lead to the decentralisation of competition law adjudication and the national courts of member states were allowed to hear competition law matters.[32] The modernisation regulation in 2004 further laid down the track of private enforcement of competition disputes.[33] It was in *Eco Swiss v. Benetton* that the European Court of Justice ruled in favour of arbitrability of competition issues.[34] The Court stated that the arbitral tribunal must apply the E.U. competition laws while adjudicating the disputes. Since the Eco Swiss judgment, it has been well-established that European Union competition law pertains to public policy in all Member States and that, accordingly, arbitrators must apply E.U. competition law ex officio whenever it is applicable.[35] Similar principle was used in *E.T. Plus S.A. v. Welter*, wherein claims alleging a breach Articles 82, i.e. in relation to

[30] GKG Caribe, Inc. v. Nokia-Mobira, Inc., 725 F.Supp. 109, 110-13 (D.P.R. 1989); Gemco Latino-America, Inc. v. Seiko Time Corp., 671 F.Supp. 972, 979 (S.D.N.Y. 1987).
[31] Nevin Alija, *To Arbitrate or not to Arbitrate Competition Law Disputes*, 5 MEDITER. J. SOC. SCI. 643 (2014).
[32] Council Regulation (E.C.) No. 1/2003 (Dec. 16, 2002); *see also* Carl Baudenbacher & Imelda Higgins, *Decentralization of EC Competition Law Enforcement and Arbitration*, 8 COLUM. J. EUR. L. 1 (2002)
[33] Council Regulation No.1/2003 on the implementation of the rules on competition laid down in arts. 81 and 82 of the Treaty [2003] OJ L1/1.
[34] Eco Swiss v. Benetton, C-126/97 (June, 1999).
[35] Vincenzo Manfredi v. Lloyd Adriatico Assicurazioni SpA (E.C.J, 200.6).

abuse by an undertaking of a dominant position, are arbitrable if they are covered by the arbitration agreement.[36]

3.3 THE POSITION IN OTHER COMMON LAW NATIONS: NEW ZEALAND, AUSTRALIA AND ENGLAND

After the positive paradigm shift in the United States towards the arbitrability of competition disputes, several other common law nations have inherited the same. The High Court of New Zealand extensively extended the same to New Zealand in its ruling in *Attorney General of New Zealand v. Mobil Oil New Zealand Ltd*.[37] The claim dealt with an agreement being in violation of the Commerce Act, 1986 as it lead to substantially lessening competition in the relevant market. As the agreement contained an arbitration clause, the argument against it was that the High Court must stay it given the public policy objective of the Commerce Act, i.e. to promote competition in the markets of New Zealand. In order to lay down an extensive jurisprudence for the future, the High Court formulated a team of experts in the field of commerce, business, economics, law and accountancy. Thereafter, the court upheld the principles of international arbitration provisions as highlighted by the U.S. judicial policy in the *Mitsubishi* case. The principle upholding arbitrability of competition disputes was that the applicability of the Commerce Act at the time of execution of the agreement with an arbitration clause would be different then its application in a court proceeding.

Australia moved towards this idea two years later in 1991, when the question arose whether claims under the consumer protection provisions of the

[36] E.T. Plus S.A. v. Welter [2005] E.W.H.C. 2115 (Comm.).
[37] Attorney General, New Zealand v. Mobil Oil New Zealand Ltd. [1989] 2 N.Z.L.R. 64d.

Trade Practices Act, 1974 fell under the ambit of the arbitration clause.[38] Justice Handley opined that there was no basis for excluding claims arising under the statutes which grant remedies enforceable in or confer powers on courts of general jurisdiction. He further stated that arbitrator must be authorised to exercise the powers which are conferred on the courts of general jurisdiction by the Act and that the arbitrator must exercise the powers appropriately. As the jurisdiction of competition disputes vest exclusively with the Federal Court of Australia, the use of the word 'appropriate' by Justice Handley point towards the responsibility that the arbitrators would carry while adjudicating upon competition disputes.

The arbitration law of England is completely derived from the UNCITRAL model law and it doesn't limit the arbitrability of any dispute.[39] Section 6(1) Arbitration Act of 1996 a very general definition of the permissible scope of arbitration agreement stipulates that parties may submit to arbitration any "present or future disputes irrespective of whether they are contractual or not".[40] The triggering point of arbitrating anti-trust matters in England took place in *E.T. Plus S.A. v. Welter*.[41] The Court opined that the anti-trust disputes are themselves not non-arbitrable but the arbitration clause must specify that the case is the kind of case covered by it. However, in subsequent case laws, the Court has moved towards a broader interpretation of the arbitration agreements, wherein they have stated that the phrase 'any dispute' in a clause would

[38] BM Australia Ltd. v. Nat'l Distribution Services PTY [1991] 100 A.L.R. 361.
[39] MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION: LAW AND PRACTICE 172 (2d ed. 2001).
[40] TIBOR VARADY ET. AL., DOCUMENT SUPPLEMENT TO INTERNATIONAL COMMERCIAL ARBITRATION: A TRANSNATIONAL PERSPECTIVE 122 (2009).
[41] E.T. Plus S.A. v. Welter [2005] E.W.H.C. 2115 (Comm.).

encompass competition disputes unless it is explicitly excluded.[42] Therefore, post the *E.T. Plus S.A.* case, England has fixed its position and no doubt about the arbitrability of competition disputes.

3.4 FRANCE AND SCANDINAVIAN NATIONS

Article 2060 of the Civil Code restricted the arbitrability of all matter in which there was a public policy consideration. Therefore, prior to the 1981 amendment to the arbitration laws in France, arbitrability had been elucidated in a very restrictive manner, denying arbitration whenever the dispute would touch the aspect of public policy.[43] However, in the later years, the French arbitration regulations moved towards a peculiar continental legal system which favoured a more logical outlook to public policy considerations. The Court established in the *Labinal* case that the mere presence of a public policy consideration did not limit the arbitrability of the matter.[44] The Court of Appeal further strengthened the arbitrability of competition disputes in France by holding that the arbitrators may apply E.C. competition law provisions and, where appropriate, draw the consequences of a wrongful conduct.[45] Moreover, in *Coveme* and *S.N.F. v. Cytec* the arbitrability of competition disputes was finally upheld by the French courts, and it was ruled that the arbitral award on competition dispute would be enforced unless there is a "flagrant" violation of E.U. competition law.[46] The court aimed to create a distinction on the arbitration of competition dispute based upon the

[42] Fiona Trust & Holding Corp. v Privalov [2006] APP.L.R. 10/20; Premium Nafta Products v. Fili Shipping Co. [2007] U.K.H.L. 40.
[43] *supra* note 35.
[44] Labinal v. Mors, 645 Rev. Arb. (1993) (Fr.).
[45] Societe Aplix v. Societe Velcro, 165 Rev. Arb. (1994) (Fr.).
[46] Coveme v. Compagnie Francaise des Isolants, Court of First Instance, Bologna (July 18, 1987); SNF v. Cytec, Cour de Cassation, Chamber Civil 1, No. 06-15320 (June 4, 2008).

degree of violation. Therefore, in France, Arbitration can be resorted by the parties unless there is a blatant or overt violation of competition law such as abuse of dominant position or cartelisation.

Among the Scandinavian countries, both Sweden and Denmark have a strong arbitration culture and provide for arbitration of competition disputes. However, presently arbitration doesn't play a major role in Denmark, in the enforcement of E.C. competition law and national competition law as most claims for damages have been "follow-on" claims based on decisions from the competition authorities.[47] Two recent cases of the Danish Supreme Court and the Swedish Supreme Court have adopted a minimalistic standard as a pro-arbitration measure. The Swedish Supreme Court highlighted an 'area of tolerance' by stating that an award cannot be rendered invalid merely because it violates competition law provisions, if it does not render the award clearly incompatible with the basic principles of the Swedish legal system.[48] The Danish Supreme Court took a similar view wherein it stated that only an extraordinarily grave error, either blatant misapplications of well-defined rules or the failure to apply clear precedent, will lead to a review.[49] Therefore, the Scandinavian countries applied the 'second look doctrine' as developed in the *Mitsubishi* case in a more liberal and pro-arbitration manner.

[47] *IBA Private Enforcement*, INT'L BAR ASS'N (July 23, 2018), https://www.ibanet.org/Document/Default.aspx?DocumentUid=BC705151-ED8A.
[48] Jakob Sorenson & Kristian Torp, *The Second Look in European Union Competition Law: A Scandinavian Perspective*, 34 J. INT. ARB. 1, 35–54 (2017).
[49] *Id.* at 51.

4. ARBITRABILITY OF COMPETITION DISPUTES IN INDIA: SECOND LOOK DOCTRINE AS AN ALTERNATIVE TO NON-ARBITRABILITY

As there is no conclusive determination on the arbitrability of competition disputes in India, there is still scope to bring anti-trust matters within the ambit of the Arbitration Act, 1996. Most countries have seen arbitrating competition matters as a viable option. There are two policy objectives that form the basis of this discussion. Firstly, the need to ensure public interest in competition matters and secondly, to promote arbitration as a preferred medium of dispute resolution. Therefore, there is a need to create a balance between the public interest involved in competition law disputes and creating a strong arbitration culture in the country.

The process of arbitration is highly flexible and is based upon the principle of party autonomy. Therefore, as the Competition Act, 2002 is a public welfare Act and seeks to ensure competition in the market, the primary gap that is needed to be filled is the compliance with the Competition provisions in the arbitral process. The same issue was faced by the Supreme Court of United States and was comprehensively discussed in the *Mitsubishi* case. The Court created a balance between the two laws and allowed anti-trust issues to be arbitrated on the condition that the tribunal applies the anti-trust laws of U.S. Moreover, as discussed earlier, to further ensure its enforcement, the Court brought forward the 'Second Look Doctrine'. This would mean that the tribunal shall decide the matter on the basis of competition laws and the Courts shall verify that the

questions of competition law have been properly addressed.[50] In case of any contravention with the competition laws of the country, the courts shall refuse to enforce the arbitral award. This doctrine has thereafter been applied in several different jurisdictions and is now an accepted practice globally. The Second look shall only come into operation in cases wherein there is an evident need of review by the commission. Such an approach would ensure that the purpose of arbitration i.e. to reduce the burden on the court is not rendered futile. Therefore, the same doctrine can be used in India as a substitute to the non-arbitrability of competition law disputes.

Another problem, in arbitrating competition matters as highlighted by the Delhi High Court in *Competition Commission of India v. Union of India*,[51] is that the tribunals do not have the expertise to decide technical and fact intensive disputes. However, experienced arbitrators all over the world have taken over technical matters and are deciding competition disputes without any problems. The recent positive attitude to the Courts in India in regard to the arbitration of disputes dealing with fraud is an example of the same. Similar to anti-trust issues, fraud allegations also carry both '*right in rem*' and '*right in personam*' as it is a criminal wrong under the Indian Penal Code. Moreover, allegations of fraud are very technical and fact intensive, still the Court in *A. Ayyaswamy v. A. Paramasivam* ruled in favour of the arbitrability of fraud disputes.[52] However, the Court made a distinction between 'Serious fraud' and 'Fraud *Simplicitor*' and stated that cases that are of very serious nature must be adjudicated by the Court. Similar categorisation can also be made in anti-trust matters if the C.C.I. is

[50] Patrick Baron & Stefan Liniger, *A Second Look at Arbitrability – Approaches to Arbitration in the United States, Switzerland and Germany*, 27 ARB. INT'L 19 (2003).
[51] Competition Comm'n of India v. Union of India, A.I.R. 2012 Del. 66.
[52] A. Ayyaswamy v. A. Paramasivam.

sceptical of leaving the entire enforcement of competition law in private hands. An approach that can be adopted by the Commission in disputes of serious nature is to refer the parties to arbitration with regard to the compensation claims based upon the in rem orders by itself.

Moreover, the Commission can play the role of an *amicus curie* or *parens patriae* in the arbitral proceedings and aid the tribunal with any assistance or investigation it needs, to determine any aspect of the competition enforcement.[53] Similar practice is undertaken in the E.C.J. to ensure proper enforcement of E.U. laws. Section 21 of the Competition Act, 2002 allows the Commission to give its reference to statutory bodies in case of any decision that needs to be taken in regard to anti-competitive issues. Also, Section 6 and 27 of the Arbitration Act enables the arbitral tribunal to seek assistance for administrative and evidentiary purposes. Similar help can be sought by the arbitral tribunal while dealing with questions related to Section 27 and 48 of the Competition Act, 2002. Therefore, if the arbitrator feels that any assistance is required, for instance to determine the market share or the relevant market in a dispute, the assistance of the Commission can be taken. Mediation or conciliation, as a practice can also be adopted in the Pre-hearing conferences of the Commission under Regulation 17 of the Competition Commission of India (General) Regulations, 2009. The pre-hearing conference is undertaken by the Commission prior to the hearing to establish whether there is any prima facie case of violation. Therefore, as a practice to resolve issues at a stage prior to the proceedings, conciliation or mediation can be adopted as an effective practice.

[53] Rahul Satyan, *Policing Mergers, Remedies & Procedure*, COMPETITION COMM'N OF INDIA (Oct. 31, 2011) http://cci.gov.in/images/media/ResearchReports/Policing%20Mergers_%20Remedies%20&%20Procedure.pdf.

The assignment member of the tribunal may act as the conciliator or mediator between the parties.

Disallowing arbitration of competition disputes can also lead to parties making frivolous defences of anti-competitive practices, thereby hampering the process and practice of arbitration. Due to the specific jurisdiction of competition Commission in India, the following changes can help promote arbitration as a forum to resolve competition disputes.

1. A judicial pronouncement stating that the jurisdiction of the Competition Commission under Section 61 doesn't not bar the arbitration of competition disputes.
2. An amendment to the Section 61 of Competition Act, 2002 stating that the same does not bar arbitration or removing the exclusivity clause and decentralising the process as seen in E.U..

The advantages of arbitrating competition disputes are the same as the advantages of arbitrating any other dispute. In most case, the orders of C.C.I. are pending before the appellate body or the Supreme Court.[54] Parties are required to wait for long for their private claims to come to a conclusion.[55] Arbitration of disputes would lead to higher compensation for the affecting parties and thereby act as a high deterrent for the anti-competitive practices. Certain adjustments to the confidentiality clauses and the arbitration agreements will also lead to a more business friendly outlook. The arbitration agreements can be made to specify that they shall cover competition disputes as well.

[54] *Most of CCI's penalties are stuck in court*, LIVEMINT (Dec. 14, 2015), https://www.livemint.com/Politics/0lDEKk4J2v5Jah9q2cPYwJ/Most-of-CCIs-penalties-are-stuck-in-court.html.

[55] *Getting the Deal Through: Private Antitrust Litigation*, 1 GLO. COMP. REV. 7, 78 (2014).

For instance, in 2001, in the *DLF* case,[56] C.C.I. had ordered the real estate giants to modify their agreement that consisted of unfair provisions.[57] C.C.I. had ruled that DLF had abused its dominant position to get the members of informant association to sign a highly abusive apartment buyer's agreement. The parties were given the freedom to modify the unjust provisions by the commission. In such a scenario, the arbitration of the dispute could have proven to be a more viable option for the parties. Since arbitration brings with itself flexibility, speed and confidentially for the parties which make the entire process smoother.

5. CONCLUSION

Liberalisation of the economy has brought with itself several new issues relating to the competitive capabilities of the market players. The idea of Consumer welfare is at the forefront of promotion competition law. Free and Fair Competition in the market is essential to ensure technical advancements and innovations. The Competition Act, 2002 replaced the M.R.T.P. Act to cover for the existing gaps and to cater to the new challenges in the open and free market. With the increase in investments and transnational transactions, arbitration has also become as a highly favoured mode of dispute resolution. Following the international trend, India has also seen a drastic increase in the number of disputes that have been referred for arbitration.[58]

[56] Belaire Owners Ass'n v. DLF Ltd., C.C.I. Case no. 19/2010.

[57] Aakanksha Kumar, *The question of CCI's jurisdiction to "modify" apartment buyers agreements – A Review of COMPAT's DLF order*, LIVELAW (June 28, 2014), http://www.livelaw.in/question-ccis-jurisdiction-modify-apartment-buyers-agreements-review-compats-dlf-order/.

[58] Arpinder Singh, *Emerging Trends in Arbitration in India: A study by Fraud Investigation & Dispute Services*, ERNST & YOUNG (July 24, 2018),

The global pro-arbitration attitude has seen the initial hostility of Competition Law and Arbitration Law towards each other is fade in most jurisdictions. The recent study of O.E.C.D. on the arbitrability of competition disputes highlighted the advantages and disadvantages of arbitration and addressed the enforceability of awards that determine competition law claims holistically. Competition law disputes often involve transnational claims and arbitration agreements forms a part of the ease of doing business for the parties. However, having said that it is also important to enforce competition law efficiently to ensure that the public interest is not sacrificed. Therefore, arbitration must not be seen as an alternative to C.C.I. but as a supplement to the objective that C.C.I. aims to achieve. Arbitral tribunal formed by the consent of the parties must work in tandem and seek assistance from the C.C.I. to ensure proper compliance with the Competition law. The 'Second look Doctrine' that oversees the optimum application of competition law shall act as a system of checks and balances for the tribunals.

Creating a balance between the public policy considerations, a distinction similar to fraud cases can be made in competition law. Serious violations and fact intensive disputes such as abuse of power and cartelisation can be restricted from the scope of arbitration clauses. Thus, arbitration of competition claims does not downplay the enforcement of competition law but provides a particularly useful method in resolving competition law claims. It will be interesting to see if India follows the footsteps of other countries by allowing arbitration of anti-trust matters. Ensuring 'jurisprudence *constante*' wherein there is uniformity among arbitral tribunal while dealing with similar subject

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http://www.ey.com/Publication/vwLUAssets/EY-FIDS-Emerging-trends-in-arbitration-in-India/$FILE/EY -Emerging-trends-in-arbitration-in-India.pdf.

matters will be critical. The same is likely because the tribunals shall apply the existing anti-trust laws for the adjudication of the dispute. Similar practice is seen is fact intensive disputes in Investment Arbitration cases between investors and Host States. In any event, we are likely to see an escalation in the use of arbitration, and other alternative dispute resolution mechanisms, to determine competition law matters globally.

MONOPOLISATION OF CRICKET BROADCASTING IN INDIA: IMPLICATIONS, REGULATION AND LESSONS

Ahkam Khan[*] *& Divyansh Prasad*[**]

ABSTRACT

The paper is an attempt to highlight the anti-competitive situation in the Indian sports broadcasting industry and the need for its regulation. With the background of Star India's monopolisation of the Cricket broadcast market in India, with a huge market share of over 80%, the paper sets out the current factual situation of Indian sports broadcasting industry. The Authors then explain how competition watchdogs in the European Union and the United States of America faced, tackled, and won over similar problems in the past. Going into the 'what-if's, the paper provides insights into the implications of the monopolisation of this industry. Imploring the need for regulation, the Authors analyse the two available methods to ensure an efficient broadcasting market and the one that would apply best to this situation. The paper then points out the problems that the competition regulators in the mature jurisdictions have faced while working to ensure an efficient, robust, and competitive sports broadcasting market, while simultaneously calling for the Competition Commission of India's (hereinafter "CCI") pro-active involvement in the

[*] Student, 3rd Year, B.A., LL.B. (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow (ahki98@gmail.com).

[**] Student, 3rd Year, B.A., LL.B. (Hons.), Dr. Ram Manohar Lohiya National Law University, Lucknow (divyanshprasad1398@gmail.com).

industry to ensure better competitiveness and to eliminate any practices causing appreciable adverse effects on competition. The Authors conclude by listing the suggestions, both legislative and regulatory, that might help in ensuring a better sports broadcasting industry for all stakeholders.

1. INTRODUCTION

Sport is getting a financial boost because viewers are ready to shell out a fortune to watch it. The viewers are injecting money into the sports broadcast industry mainly in indirect ways to gain access to the telecast of sports events. This usually happens through the extended time of advertisements spots and the commercials during live matches telecast on business systems; in subscription expenses to join the network of cable or satellite service providers; through taxes to finance public-service television. The financial contribution to the industry in direct form is typically through payment to broadcasters on a pay-per-view basis. 'Pay-per-view' is an arrangement where the viewer's pay a certain amount to the broadcasters to watch a specific sporting event.

In a normal market, the advertisement revenues shall be a function of the number of viewers on the channel and therefore, subject to another consideration of the subscription cost which affects the number of viewers on the channel. To increase the number of viewers, the broadcasters should reduce the subscription cost. With higher number of subscribers, the advertisers would pay a lot more to feature on the valuable commercial breaks between sporting events being watched by millions. As a result, to maximise advertisement revenues, the broadcasters would reduce the subscription cost. However, a peculiar feature of the sports broadcasting

market is the inelastic demand for these events, where the users are ready to subscribe irrespective of the amount charged by the broadcaster, thereby disrupting this mutual regulation of subscription costs and advertisement revenues.

When the demand is high and cost of the services do not vary with the number of subscribers, the cost of access payable by each viewer, when driven by market forces should be less. However, because sports authorities control the supply of Television rights to broadcasters and because the demand for sporting events by viewers is usually not substitutable, these sports authorities charge monopoly prices while selling their broadcasting rights. In turn, the broadcasters making the huge investment on these TV rights demand higher time to recover their investment, which leads to negotiations for long-term contracts. As a result, these broadcasters then become virtual monopolies for the telecast of a specific event and these monopolistic prices trickle down to the viewers who are then required to pay exorbitant amounts to watch their favourite sport. Perfect examples of such trends worldwide would be America's National Football League (NFL), which currently has an eight-year contract worth an aggregate of $15 billion with a couple of American Broadcasters.[1] BSkyB, a British satellite broadcaster, has a contract with the English Premier League for the rights to a number of its matches over four footballing seasons that involves a hefty sum of $1 billion.[2]

Dominance in sports broadcasting industry is a precarious and threatening issue that needs immediate attention through either

[1] *Tackling Monopolies*, THE ECONOMIST (Feb. 5, 1998), http://www.economist.com/node/112929 last visited Jan 15, 2019.
[2] *Id.*

government regulation or supervisory intervention by the CCI. The increase in the cost of watching sports is driving the competition authorities to stock in experts to look at the arrangements between sports bodies and commercial TV rights acquirers. While England's Competition and Markets Authority (CMA) is investigating anti-competitive practices in broadcast contracts for English football, the European Commission has proactive examinations under progress into prohibitive practices, conduct and agreements in European football and Formula 1 racing among various other sports.[3] Though the CCI has a power to direct an investigation on its own motion[4], the regulation part only comes into picture when the anti-competitive practices have hit the market, ergo making the regulatory intervention necessary.

2. THE INDIAN BACKGROUND

Of late, the sports broadcasting scene in India has changed altogether. With more than 675 million viewers, India is the second-biggest market for television media after China. Though the television industry's highest earnings come through advertisements, sports genre can possibly drive subscription revenue over the advertisement income.[5] The Sports industry in India has almost doubled in the past five years from

[3] *Id.*
[4] The Competition Act 2002 § 19(1).
[5] R.S. Sharma, *It's all about watching good TV,* THE ECONOMIST (Dec. 26, 2018), https://economictimes.indiatimes.com/blogs/et-commentary/its-all-about-watching-good-tv/ last visited Jan 15, 2019.

$1.3 billion to $2.7 billion; with expectations to grow four-fold in the next eight years crossing the $10 billion mark.[6]

The two noteworthy telecasters in the nation — Star India and Sony Pictures Networks (SPN) — are contending seriously to procure global games properties. Sony made a major move in August 2016 when it procured Ten Sports from ZEE to expand its portfolio.[7] Sport broadcasting in India has brought another turn with the coming of different sports associations and commencement of national events. This includes the likes of Indian Premier League (Cricket), Pro-Kabaddi League (Kabaddi), Indian Badminton League (Badminton), Indian Super League (Football). While the broadcasters only competed to acquire the established global competitions like English Premier League (Football) or ICC Cricket World Cup earlier, they have now started taking a different approach. An example would be Star India, which launched its own production in the form of Pro-Kabbadi League in association with Marshal Sports that garnered great viewership across the country, second only to Indian Premier League (Cricket).[8] This has led to the broadcasters competing for viewers through both worldwide biggies and home-grown alliances. After the acquisition of Ten Sports by Sony, the sports broadcast industry

[6] *Zee Entertainment completes sale of Ten Sports to Sony*, THE HINDU (Jan. 10, 2018), https://www.thehindubusinessline.com/companies/zee-entertainment-completes-sale-of-ten-sports-to-sony/article9863353.ece last visited Jan 15, 2019.

[7] *The Times of India Global Sports Show 2018*, DAILY HUNT (Dec. 4, 2018), https://m.dailyhunt.in/news/india/english/tvnews4u-epaper-tvnews/the+times+of+india+global+sports+business+show+gss+2018+appeals+international+participation-newsid-103041442 (last visited Jan 15, 2019.

[8] *Pro Kabaddi League viewership second only to IPL*, THE HINDU (Sept. 15, 2014), https://www.thehindu.com/sport/other-sports/pro-kabaddi-league-viewership-second-only-to-ipl/article6413148.ece last visited Jan 15, 2019.

became a duopoly between Star and Sony, following elimination of Zee from this segment.[9]

The major share of sports broadcasting Industry in India belongs to cricket, almost totalling a massive 85% of the market share.[10] Therefore, for reference purposes in this paper, we shall only consider the Cricket Broadcasting Industry in India.

Star TV is the leader in Cricket broadcasting in India, holding exclusive rights to telecast both first-class and international cricket in India including the matches played between Indian national team and England, Australia or Bangladesh. In 2017, the Managing Director of Dish TV had held a press conference and had dispatched a letter informing the Competition Commission of India about Star's potential monopoly in the sports broadcast industry India if it managed to acquire the TV rights for Indian Premier League (to be auctioned then) for the next five years. His letter highlighted that:

> *Once Star acquires the telecast rights for IPL as well, the market share in terms of viewership of Star skyrockets. The distribution platforms such as DTH and Multi System Operators will have no choice but to subscribe the Star Sports channels for cricket content because of Star's monopolistic position as a sole holder of cricket telecast rights.*[11]

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[9] *Sports in India*, ERNST & YOUNG (July, 2017), https://www.ey.com/Publication/vwLUAssets/ey-sports-newsreel/$File/ey-sports-newsreel.pdf last visited Jan 15, 2019.

[10] *Id.*

[11] Harveen Ahluwalia, *Dish TV warns Competition Commission on Star's Monopoly of Cricket*, LIVE MINT (Aug. 23, 2017), https://livemint.com/Consumer/Uu5jTpVkaBnjANU0k4rSIJ/Dish-TV-warns-Competition-Commission-on-Star-Indias-monopol.html last visited Feb 21, 2019.

Star went on to acquire the I.P.L. broadcasting rights in 2017, followed by acquisition of B.C.C.I.'s media rights in 2018 for all cricket matches played by India, where it pipped Reliance Jio and its rival broadcaster Sony in the auction.[12] However, the Competition Commission of India neither treated it as information nor started an investigation taking cognizance of the situation.[13]

With almost the entire cricket kitty in the bag for Star, it boasts of the telecast rights for nearly 76 per cent of all matches played by the Indian Cricket team.[14] However, this tally does not include Star's holding over the International Cricket Council (ICC) events. This includes the Cricket World Cups, the T20 World Cup, the Champions Trophy, and the Youth Category World Cups, which makes their market share in excess of 80% in respect of all the cricketing events in India.[15] This has led to a monopoly of Star in Cricket Broadcast Industry. After shelling out a fortune, Star would definitely look forward to a fair share of return on its investments through coveted spots for commercials and its monopoly would help it unilaterally leverage the bundled prices at which it supplies its sports channel to the Direct-to-Home (hereinafter "DTH") provider, who in turn would pass on the higher prices to consumers.

[12] Tanya Rudra, *Star India bags BCCI Media Rights for a whopping Rs. 6138.1 Crores*, NDTV SPORTS (Apr. 5, 2018), https://sports.ndtv.com/cricket/star-india-bags-bcci-media-rights-for-a-whopping-rs-6138-1-crore-1833325 last visited Jan 15, 2019.
[13] The Competition Act 2002 § 19.
[14] Tanuj Lakhina, *Star Sports bags IPL media rights, in blockbuster deal, but at what cost?*, THE INDIAN EXPRESS (Sept. 6, 2017), http://indianexpress.com/article/sports/sport-others/star-sports-ipl-media-rights-what-cost-monopoly-sky-sports-bcci-4829847/ last visited Jan 15, 2019.
[15] *Id.*

Further, the term of these broadcasting contracts spanning several years virtually eliminates Sony from the Cricket broadcast industry and hence it has to look elsewhere for its revenues. This has led Sony to explore other options, which has now gotten its hands on the second most popular sport in India, i.e. Football.[16] However, the figures still do not come close to Star and Sony is barely keeping up with its rival network after acquisition of rights to telecast several other sporting events like World Wrestling Entertainment (hereinafter "WWE"), Golf, and National Basketball Association (hereinafter "NBA"). This gives rise to yet another problem, which is known as market division, a hard-core restraint in Competition Law. While Section 3 of the Competition Act proscribes agreements that divide markets[17], the problem with its application to our situation is that there is no written or tacit agreement under Section 2 of the Competition Act, 2002 between Sony and Star to share markets. It is the natural course followed by Sony to save its business after Star's monopolisation of the Cricket broadcasting industry and hence the necessary requirement of an agreement under Section 3 is not fulfilled.

Earlier, under the Sports Broadcasting Signals (Mandatory Sharing with Prasar Bharati) Act, 2007, all the private broadcasters had to share their content with Prasar Bharti who could show the live feed and telecast it on the Doordarshan channels. However, a recent Supreme Court ruling allows Prasar Bharti to telecast the live feed only on their terrestrial

[16] Gaurav Laghate, *No India Cricket? No Problem for Sony as it set sights on broadcasting Football*, THE ECONOMIC TIMES (Sept. 8, 2018), https://economictimes.indiatimes.com/industry/media/entertainment/media/no-india-cricket-no-problem-for-sony-as-it-sets-sights-on-the-goalpost/articleshow/65727524.cms last visited Jan 15, 2019.

[17] The Competition Act 2002 § 3(3)(c).

network and free dish and not to telecast it freely on their channels mandatorily aired by all Cable and DTH operators, further restraining access of sporting events to the common people.[18]

In a July 2017 decision,[19] the CCI has ordered an investigation into the Indian Sports Broadcasting market against Star and Sony, taking notice of these facts, in a complaint brought by the Noida Software Technology Park Ltd. The investigation was on the count of refusal to deal with certain distributors and preferential treatment to certain other distributors. While finding a prima facie violation, the CCI dismissed the allegations of monopolisation or abuse of dominance under section 4, which makes the discussion in this paper relevant.

3. SPORTS BROADCASTING REGULATION IN MAJOR ANTITRUST JURISDICTIONS

3.1 U.S.A.

The most popular sports in the United States of America are the sports otherwise considered unconventional worldwide. This list includes Baseball, Basketball, Rugby, and Ice Hockey. There is an increased appetite and consumption of domestic rather than international competitions of these sports because of the national popularity and peculiarity of these professional sports as compared to sports like Cricket or Football, which are enjoyed globally. The most important sporting events for broadcast in America therefore are the Major League Baseball (hereinafter MLB), the National Football League (hereinafter NFL), the

[18] Union of India v. B.C.C.I., (2018) 11 S.C.C. 700.
[19] Noida Software Tech. Park Ltd. v. Star India Pvt. Ltd., Case No. 30 of 2017 (C.C.I.).

National Basketball Association (hereinafter NBA), and the National Hockey League (hereinafter NHL). Every one of these competitions is conducted as a joint endeavour of different teams.

The Sports Broadcasting Act of 1961 exempted the practice of collectively selling the sponsored broadcasting rights of matches played by different teams in a bundle by the leagues from the scrutiny of the American Antitrust Laws.[20] The Act overturned a 1961 decision of an American Court that reiterated the injunction issued in a 1953 antitrust suit against NFL from implementing its existing rules on broadcasting, which were held to be in violation of the Antitrust Laws in the country.[21] As a result, the MLB and NBA changed their policy as per which, the individual teams sold licences to telecast their games to TV 'superstations', which brought the games to United States household through cable systems. Further, the restriction by NBA on the carriage of only a certain number of games through cable systems was found to not be covered under the exemption provided by the Act.[22] Almost all these leagues now telecast to the households through direct broadcast satellite TV, including the NFL and the exemption does not apply because the games are telecasted without any sponsored advertising.[23]

Until the early 1970s, due to the Federal Communications Commission's (hereinafter "FCC") policy on broadcast, there were only three major players in the American broadcasting industry during peak

[20] 15 U.S.C. § 1291–95.
[21] U.S. v. Nat'l Football League, 196 F. Supp. 445 (E.D. Pa. 1961); U.S. v. Nat'l Football League, 116 F. Supp. 319 (E.D. Pa. 1953).
[22] Chicago Professional Sports v. N.B.A., 95 F.3d 593, 596 (7th Cir. 1996).
[23] Shaw v. Dallas Cowboys Football Club Ltd., 172 F.3d 299 (3d Cir. 1999).

viewing hours, which also carried on the telecast of national sporting events as well. However, the broadcasting industry benefited from progression in late 1970s through court decisions and eased FCC norms. With the introduction of newer technology in the form of easy direct-to-home satellite TVs, a number of players entered the industry and the national leagues capitalised on this opportunity through increased competition among the broadcasters to acquire their rights. Hence, this two-way check (a) upon the leagues through Court decisions and antitrust laws (b) upon the broadcasters through intensified competition has thus far ensured no monopoly in sports broadcasting.

3.2 EUROPE

Europe has been a centre of anti-competitive practices related to sports broadcasting. The Commission has been playing a proactive role in identifying and addressing such concerns. The *UEFA Champions League* case,[24] the *German Bundesliga* case,[25] and the *FA Premier League* case,[26] are instances where the Commission has ably assessed and dealt with competition concerns related to the sale of media and broadcasting rights in football leagues. The concern has primarily been the monopolisation of the downstream market of broadcasting where the content is supplied to the TV viewers owing to the exclusivity of rights. Their approach has varied from introducing a 'no single buyer rule' in order to inject

[24] COMP/C-2/37.398, Comm'n Decision of 23 July 2003 relating to Joint Selling of Commercial Rights of the UEFA Champions League, O.J. 2003 L 291/25.
[25] COMP/C-2/37.214, Comm'n Decision of 19 January 2005 relating to Joint Selling of the Media Rights to the German Bundesliga, O.J. 2005 L 134/46.
[26] COMP/C-2/38.173, Comm'n Decision of 22 March 2006 relating to Joint Selling of the Media Rights to the FA Premier League, C (2006) 868 final.

competition in the market to preventing unused rights and pushing forward innovation by introducing a new channel of distribution, i.e., the Internet. The authors have dealt with the practicality of these solutions in the latter sections of the article.

The delineation of European Community law administering the acquisition of broadcasting rights for sports is challenging. The European Union does not have a consolidated law to tackle these violations pertaining to sports broadcasting since these rights are in the form of property rights, which makes them a national subject to be legislated upon discretely by the different member states. This proposition is also sanctioned under Article 295 of the Treaty establishing the European Community (hereinafter EC Treaty), which itself states that "This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership".

Does that mean that the matters relating to sports broadcasting rights are rendered untouchable under the European Law? If the answer to that question were positive, then the agreements involving the acquisition of broadcasting rights would not be liable to Articles 101 and 102 of the Treaty for the Functioning of the European Union.

However, this is not the case and such agreements still need to be in consonance with the European Competition Law.[27] Article 295 merely reinforces the idea that the member states shall be ensured freedom and sovereignty while dealing with their systems for property ownership. However, any act done under those systems of property ownership should

[27] S. WEATHERILL, THE SALE OF RIGHTS TO BROADCAST SPORTING EVENTS UNDER EC LAW 311-77 (T.M.C. Asser Press 2014).

also be acceptable under the minimum standards envisaged under the European Union Trade and Competition rules.[28] Therefore, such a procedure for property ownership should be in consonance with the EU Competition Law. Hence, awarding of these sports broadcasting rights should be compatible with Articles 101 and 102 of the Treaty for the Functioning of the European Union, notwithstanding Article 295 of the EC treaty.

Liberalisation of norms and entry of privately owned commercial networks, together with evolutionary changes in technology over time has led the sports broadcasting industry to become one of the most fiercely competitive markets in the EU. The EU has primarily faced three major issues while dealing with the regulation of the sports broadcasting industry: (a) Exclusivity: how to deal with the offer of exclusive right? (b) Aggregate offering: how to deal with the offer of rights in conditions where the venders consolidate, commonly as individuals from a league? (c) Aggregate obtaining: what is the legitimate way to deal with the securing of rights in conditions where the buyers consolidate?[29]

4. IMPLICATIONS OF MONOPOLIZATION IN INDIA

The EU and the US have consolidated competition in sports broadcasting through development of their antitrust laws governing the industry. However, India has failed to frame rules to regulate such practices; still without a precedent in this regard. There have been limited enquiries by the Competition Commission of India with regard to

[28] Kieninger, *Securities in movable property within the Common Market*, 4 EUR. REV. PRIVATE L. 41 (1996).
[29] WEATHERHIL, *supra* note 20.

disruptive practices in market of sports broadcasting in India, with little to no fruit in the form of guidelines, best practices or precedents to show for it.

The only eye-catching instance certainly remains to be the *Noida Software Technology Park Ltd.* case[30], where the CCI identified a prima facie case pertaining to a constructive refusal to deal by Star India and Sony in the Sports Broadcasting market. The CCI ordered the DG to investigate into the allegations, and the case is still pending adjudication. The most important take away from this section 26(1) order was the virtual labelling of the Indian Broadcast market as a duopoly in the sports genre. These broadcasters (Star and Sony) were alleged to be indirectly related to several distributors and hence, vertically integrated. Although the Commission did not find any case for an abuse of dominant position on technical grounds of the Act not providing for Collective Dominance or cartelisation facilitated by the Indian Broadcast Foundation, it still hinted at unfair practices like refusal to deal being exercised by the broadcasters against the weaker distributors. These revelations should be enough to alarm the regulator and the government to the anti-competitive practices that the attempted monopolisation of sports broadcasting market might bring in the current scenario.

The failure of the competition authority to take notice in this regard may lead to monopolisation of the sports broadcasting sector as explained in the earlier part of the paper. This monopolisation may drive out the competitors and allow the major players to regulate the market on

[30] Noida Software Tech. Park v. Star India Pvt. Ltd.

their whims and fancies with several appreciable adverse effects on competition, which the Competition Act, 2002 aims to prevent.[31]

The possible implications of monopolisation of broadcasting of sporting events include, but are not limited to the following:

4.1 MORE ADVERTISEMENTS

The dominant broadcaster may earn more advertisement revenue through longer and more commercial breaks in telecast. These commercial breaks would not only affect the telecast scenario but in cases of nation-only events, which receive broadcast only in India, it might affect the timing of sports to suit the needs of broadcasters due to its bargaining power. An example would be expansion of commercial breaks for Ranji trophy matches, which would spoil the experience of real-time viewers seated in the stadium because of the longer breaks between two overs to accommodate higher number of advertisements for a longer time.

4.2 EXORBITANT PRICING

The broadcaster may raise the subscription charges of the channel for the DTH and cable operators. Once, the broadcaster is able to eliminate other players in the market, it becomes the only entity supplying the required event to the viewers. Sporting events are natural monopolies; as a result, sporting events are not interchangeable and any operator wishing to telecast a particular event would have to subscribe to that channel necessarily, irrespective of the exorbitant pricing.

[31] Competition Act, 2002, preamble.

4.3 TRICKLE DOWN OF PRICING TO CONSUMERS

The increase in subscription charges of channel will ultimately reflect in the prices paid by the consumer. Consumers would therefore, be paying highly to watch an event, which in ordinary course of competition in the market was available at relatively cheaper rates.

4.4 LEVERAGING THE PROMOTION OF NEW VENTURES

The dominant broadcaster may use that particular non-substitutable sport programme as an aid in promoting new ventures. An example would be Star TV, which has the exclusive rights for the live telecast of the English Premier League (Football) in India, has decided to broadcast the matches only on its newly launched High-Definition channels.[32]

4.5 EXTENSION OF MONOPOLY

Since sports have become an indispensable facet of life, the selling of exclusive rights in all cases leads to massive revenues to the buying operator. This makes the buyer financially stronger and hence monopolistic behaviour is extended to other broadcast sectors. E.g., A sports broadcaster like Star TV, which also has channels pertaining to other genres, might inject the revenue it forms from the sports sector to those sectors (e.g. entertainment) and monopolise the broadcast of entertainment programmes.

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[32] Gaurav Laghate, *Star India to move International Sports to Premium HD Channels*, THE ECON. TIMES (July 12, 2016), https://economictimes.indiatimes.com/industry/media/entertainment/media/star-india-to-move-international-sports-to-premium-hd-channels/articleshow/53163929.cms last visited Jan 15, 2019.

5. METHODS TO REGULATE THE INDUSTRY

The competition law does not prevent creation of monopolies. Monopolies can in fact be conducive to growth of the market due to their economies of scale models, efficient distribution systems, and more revenues leading to a bigger purse for carrying out research and development. The Competition Act, 2002 under section 4 only prevents abuse of this dominant position or monopoly. These monopolies in sports broadcasting can be prevented from abusing their position through one of the following two methods:

5.1 INJECTING COMPETITION

The broadcasters assert that sports already has competition from other programmes aired on television. However, this assertion is completely puerile since cricket supporters are highly unlikely to find football amusing, thereby ruling out competition from other genres. An example would be people preferring to watch a single World Cup every four years because of their curiosity to discover the country with the best team in the world; and any other football tournament would not be able to compete with the World Cup in that sense.[33] Therefore, injecting competition becomes very inconvenient and impractical in the presence of exclusive rights contracts executed by sports federations or authorities with the broadcasters.

[33] *Tackling monopolies*, *supra* note 1.

The broadcasting industry accepts exclusivity as the usual business norm.[34] Exclusivity becomes even more pertinent in sports broadcasting because it ensures that all the viewers interested in the event come to the same network and broadcasters are able to reap returns on the high investment in acquiring rights. Hence, these assured returns make exclusivity gain importance because the value of sports events is only transient.

Exclusivity may give rise to competition problems. However, it should not in itself raise competition concerns when contracted for a short duration. Duration of exclusive broadcasting contract, quantity of matches, and upstream and downstream market power should to be considered while assessing whether the exclusivity cause appreciable adverse effects on competition.[35]

5.2 REGULATING THE MONOPOLY

The latter option of regulating the monopoly is more viable and convenient, as evident from both the US and the EU who have adopted a similar approach. Julian Le Grand and Bill New suggest that governments should set a benchmark for prices charged per viewer for the telecast of every sporting event, such that it ensures a reasonable return to both the team and the telecast network.[36] This would ensure that the broadcasters

[34] A.M. Wachtmeister, *Broadcasting of Sports Events and Competition Law,* THE EUR. COMM'N (June 2, 1998), http://ec.europa.eu/competition/speeches/text/sp1998_037_en.html last visited Jan 16, 2019.
[35] Wachtmeister, *supra* note 26.
[36] Julian Legrand & Bill New, *Fair game?: tackling monopoly in sports broadcasting*, 20 J. POL'Y STUDIES 23 (1999).

only spend such amount on acquiring rights as would allow them to reap a profit on the reduced charges set by the government. This shall ensure both lowering of the cost for acquisition of TV rights and trickling down of the reduced prices for the benefit the customers.

6. PROBLEMS IN REGULATION

6.1 MARKET DEFINITION

The first step in determining whether an entity is dominant[37] or not is the market where the violation is alleged to happen. The relevant market requires delineation of the geographic market[38] where the economic conditions are mostly similar and uniform and a differentiation of product market[39], which includes all those products that are sufficiently substitutable or interchangeable on the demand side. However, one more question that might arise is the correct market delineation. Whether the broadcast of live cricket itself forms a market or the broadcast of live sports is the relevant market remains unanswered? This problem has been very evident even in mature jurisdictions like US and Europe.

The definition of the relevant market will be pivotal to the appraisal of cases concerning the issues alluded to above. In the present atmosphere of rapidly advancing broadcast innovation and methods for distribution, specifically, the improvement of technology and development of new methods like direct to home satellite connections and pay-per-

[37] Competition Act, 2002, § 19(4).
[38] *Id.*, § 19(6).
[39] *Id.*, § 19(7).

view, the nature and extent of the business sectors are continuously evolving.[40]

Additionally, the globalisation of sports industry has led to the geographic market additionally ending up increasingly worldwide. With the rise and developing significance of committed membership to TV networks rising, the larger product market has also broken from a general sport market to a specific market for a few games e.g., 'El-Clasico' derby between Real Madrid and Barcelona would not be substitutable with any other match for a viewer.[41]

Standard market definitions may not have any significant bearing in any geographical area. Further, the business sectors are different in all countries, even different states of a diverse country like India, due to geographical preferences. When delineating the relevant market, demand side substitutability on the side of the final consumer does not paint the complete picture, and other factors like viewers easy access to substitutes, even when they are available should be considered.

The Supreme Court in the US has attempted market delineation is sports broadcasting cases only twice. A 1959 judgment held that the relevant market in a suit related to boxing matches broadcast was restricted to only include 'championship boxing matches'[42] while a 1984 case regarding college football broadcast identified the relevant market as all the 'college football broadcasts'.[43]

[40] Wachtmeister, *supra* note 26.
[41] *Id.*
[42] Int'l Boxing Club, N.Y. v. U.S., 358 U.S. 242, 250 (1959).
[43] N.C.A.A. v. Board of Regents, Univ. of Oklahoma, 468 U.S. 85, 111 (1984).

However, later decisions considered such delineation very narrow and therefore, expanded the definition to include certain substitutes to the relevant sport, which might interfere with the ratings of a particular telecast. Research scholars have often accepted the fact that professional sports do face competition from various unrelated sectors. The Appeals Court judgment laid down that "the NFL contends with different types of excitement for a limited audience (if to a great degree expansive) estimate and the loss of spectators to other types of entertainment essentially impacts the league or team's success."[44] However, whether these factors would lead the Courts to resort to a more open market definition remains unanswered.

A contemporary judgment[45] perfectly captures the significance of the determination of the relevant antitrust issue and delineation of the relevant market pertinent to that issue in professional games. Despite this exercise being part of all antitrust cases, it is particularly important in sports cases where its need cannot be compromised.[46] A sports body can work in different markets with changing economic situations and behave differently with changing trends, ergo the markets that feel the effect of a particular anti-competitive practice is not plainly obvious.[47]

India is still without a solid precedent, which might help in delineating the relevant market in the Sports broadcasting sector. The limited trysts that the CCI has had with the sports broadcasting market in

[44] Am. Needle Inc. v. N.F.L., 560 U.S. 183 (2010); *See also* Chicago Professional Sports v. N.B.A., 95 F.3d 593, 596 (7th Cir. 1996).
[45] Am. Needle Inc. v. N.F.L., 560 U.S. 183 (2010).
[46] North Am. Soccer League v. N.F.L., 670 F.2d 1249, 1260 (2d Cir. 1982).
[47] Los Angeles Memorial Coliseum Comm'n v. N.F.L., 726 F.2d 1381, 1392–94 (9th Cir. 1984).

India have not resulted in any hard and fast rules that might help in the identification of the relevant market in such cases. However, the identification of the relevant market in a couple of sports cases has pointed towards positive trends based on the international best practices as highlighted above, showing promising signs for a nascent competition jurisdiction like India.

In *Zee/Star Den* case,[48] the DG noted that TV channels of one genre are not substitutable with another; there is limited substitutability even within the same genre. However, the case was not concerned with this and the delineation was done at the distributor level identifying the relevant market as the market of aggregating and distribution of TV Channels to MSOs, DTHOs and IPTVOs in India.

The *BCCI* case,[49] is by far the most important precedent for our consideration because the DG, categorically identified that even two sports programmes were not substitutable at the consumer level. Though the core issue was with respect to anti-competitive clauses in the B.C.C.I.'s agreement to sell I.P.L.'s media rights to broadcasters, the DG went on to correctly identify the peculiar dynamics of sports broadcasting with respect to demand substitutability on the consumer side. The relevant market was defined as the 'market for organisation of professional domestic cricket leagues/events in India'. The key observations that come out from this definition include:

i. Two Sports are not substitutable as cricket was identified as a separate market;

[48] Yogesh Somani v. Zee Turner Ltd., Case. No. 31 of 2011 (C.C.I.).
[49] Surinder Barmi v. B.C.C.I., Case No. 61 of 2010 (C.C.I.).

ii. Professional leagues are not substitutable with amateur leagues;

iii. Domestic events and international events may form part of different markets.

In the most recent *Star* case,[50] the abuse of dominance claims were dismissed and hence, an opportunity to define the relevant market went begging. However, the CCI still tried to identify the relevant market while determining whether Star and Sony had significant market power to be able to cause a vertical restraint under section 3(4). It broadly identified the market for TV channels in sports genre as the relevant market. Such identification of relevant market does not help our cause here because:

i. Allegations were at the upstream level of distributor;

ii. Informant's (distributor) demands were with respect to the sport channels as a genre;

iii. There were no allegations for anti-competitive practices with respect to a particular sport or a sporting event, which is the main concern in this paper.

6.2 EXCLUSIVITY OF BROADCASTING RIGHTS

Antitrust laws prohibit arrangements or agreements, which lead to restriction or distortion of competition in the market or foreclosure of the market for the would-be-competitors. There might be confusion in laws that automatically come into play whenever a seller gives exclusive rights to use his product for commercial purposes. The reasoning behind this would be that since the deal creates exclusive rights not available to other competitors, this would distort competition. However, such an argument is

[50] Noida Software Tech. Park v. Star India Pvt. Ltd.

fallacious since it would bring all contracts under the ambit of competition law.

The complete exclusivity, though, is definitely restrictive to competition. A standout amongst the most vital early examinations of the issue is *Nungesser*[51]. Refusing an exclusive permit would take way the hope from entities with licenses, which could sabotage the distribution of data. So the Court inferred that "the grant of an exclusive permit, in other words a permit which does not influence the position of outsiders, for example, parallel merchants and licensees for different domains, is not in itself inconsistent" with the antitrust law.

Therefore, the offer of broadcasting rights on an exclusive premise relies upon the exact terms and the specific market. Close regard for important economic situations is effectively the standard.[52] Under the weights forced by these unpredictable circumstances paving way for market definitions, the Commission set out a clear sign of its approach in a powerful 1998 paper for its emphasis on the focal purpose of proper market examination.[53]

Procuring exclusive rights for the broadcast of a well-watched derby match might require different dealing in contrast to the rights to telecast a game of intrigue just to a minority, for example, squash or gymnastics. The business sectors are unique: along these lines, for instance, a 5-year arrangement would be exceptionally improbable to get

[51] Nungesser v. Comm'n, Case 258/78, (1982) E.C.R. 2015.
[52] Subiotto & Graf, *Analysis of the Principles applicable to the Review of Exclusive Broadcasting Licences under EC Competition Law*, 26(4) WORLD COMP. LAW & ECO. REV. 589 (2003).
[53] Wachtmeister, *supra* note 26.

away from the scanner of the competition watchdog in the case of the match between rival teams yet may possibly do so in normal circumstances. In a case related to the broadcast of the Dutch Eredivise League Football Matches, the European Commission held that exclusivity for seven years leads to anti-competitive effects.[54]

7. CONCLUSION: SUGGESTIONS TO PREVENT MONOPOLIZATION OF BROADCASTING

There should be no bundled selling of rights by the league or the sports authority. Individual teams should sell their home games' broadcasting rights individually. Germany's watchdog for competition regulation recommended the football clubs to follow this practice for international telecast, and is now in line to apply this rule to domestic ones as well.[55] Even in the rare case of bundled selling of rights, the broadcasting rights for the number of matches in the tournament for a particular operator could be capped to a maximum number as per the tournament or the competition.

Aggregate offering has clear financial preferences; however, it has costs as well, particularly in the restrictions on competition on the supply-side. The term of broadcasting rights in the contract should be for a short and limited time-period. The length of the agreement should be closely considered: the open doors for new broadcasters to rise and obtain rights is

[54] Case No IV/36.033, Commission decision of 7 August 1996 on a licensing agreement for the broadcasting of Dutch football matches, O.J. 1996 C 228; *See also* Resolution on the broadcasting of sports events, OJ 1996 C 166/109.

[55] *See* COMP/C-2/37.214, Commission Decision of 19 January 2005 relating to Joint Selling of the Media Rights to the German Bundesliga, O.J. 2005 L 134/46; *See also* Tackling monopolies, *supra* note 1.

a key factor of understanding the entry barriers, particularly in an industry where innovation may lead to significant development that yields both financial and experiential advantages to the buyer. The European Commission as laid down in the *Champions League* case,[56] expects "an open tender; an unbundling of the offer to allow more than a single buyer; no excessive exclusivity – duration of the order of three years will often be acceptable; no automatic renewal, which is often just a disguised extension of the duration of exclusivity".

However, in case of bundled selling of the broadcasting licenses by the sports authorities at exorbitant prices, the broadcasters are left with little discretion on the price. This excessive pricing trickles down to the consumers who in turn have to shell out a fortune while subscribing to these channels. Policy regulation by the government at the licensing level is the only solution to ensure that the broadcasters get the rights at fair prices. The broadcasting rights should be awarded through a fair bidding process. A board that consists of the relevant sports authority, the broadcast authority, and the competition authority of that country should lay down the rules for this bidding process. A delegation of broadcast operators may also be represented in the board to make sure that the interest of all parties is protected through a fair representation.

The competition authority should also work for regulation of the ownership of sports teams by media houses. Although, this phenomenon is rarely seen but it should be regulated since it could lower the bargaining power of other media houses fighting for the broadcast rights of the

[56] COMP/C-2/37.398, Commission Decision of 23 July 2003 relating to Joint Selling of Commercial Rights of the UEFA Champions League, O.J. 2003 L 291/25.

competition where such team participates. E.g., after the competition investigation into BskyB's bid for Manchester United, UK's Merger Authority found that the acquisition would threaten competition, against the interest of the larger public, and would sabotage the standards of British football.[57]

The broadcasting rights for a particular country or area should be awarded as separate rights for different territorial zones. E.g., the broadcasting rights of Olympics (a global event) are awarded to different operators in different countries. This territorial demarcation leads to diffusion of market power of the different operators if a fair bidding process is ensured in every telecast zone of the country.

Further, sub-licensing of rights in order to diffuse the market power due to exclusive arrangements might be sufficient to ensure green signal from competition authorities. However, "sub-licensing should not be regarded as a solution to all the competition issues which arise. In most cases, it will be necessary and sufficient to deal with, for example, exclusivity which is of an excessive duration or scope".[58]

The expected rate of growth of the sports broadcasting industry suggests requirement of immediate safeguards to prevent its monopolisation and subsequent abuse. India should take these lessons early while the industry still grows and nip the problem in the bud. Utilisation of the practices already moulded and tested by mature jurisdictions like EU and US in dealing with the sports broadcasting cases

[57] Janine Gibson & Nicholas Watt, *BSkyB bid for United blocked*, THE GUARDIAN (Apr. 10, 1999) https://www.theguardian.com/football/1999/apr/10/newsstory.sport13 (last visited Jan 16, 2019).
[58] Wachtmeister, *supra* note 26.

should be seen as the guiding light by the Competition Commission of India. However, since majority of the suggested changes would require legislative intervention, the road ahead does not look easy and the foremost need of the hour would be pro-active steps on part of the Competition Commission of India, considering the current market duopoly of Star and Sony and their virtual monopoly in different sub-markets.

THE GST ANTI-PROFITEERING CLAUSE: CURRENT SCENARIO AND WAY FORWARD

Sara Jain[*] & Swapnil Singh[**]

ABSTRACT

India has witnessed significant changes in its taxation regime- the major transformation being the implementation of the Central Goods and Services Tax Act (CGST), 2017. To reap the benefits arising out of the reduced taxes, an anti-profiteering clause was introduced under Section 171 of the CGST Act, 2017. By virtue of this clause, a system of checks and balances has been imposed on the producers. This ensures that the benefits reach the consumers and the surplus does not lead to extra profits for the suppliers. Further, this aspect leads to an interplay between the GST regime and the Anti-trust law that aims at reducing the prices for consumers. This is because GST is expected to eventually bring down prices, but this would not be possible unless there is a check on the activities of the firms. Most businesses would enjoy unjust enrichment in terms of profit arising out of implementation of GST in India and not pass the benefit to the consumers. Though the anti-profiteering measure has been incorporated with the sacred intention of benefiting a customer and monitoring the inflationary impact of GST, it is likely that this may end

[*] Student, 4th Year, B.A., LL.B. (Hons.), Maharashtra National Law University, Mumbai (sarajain191197@gmail.com).

[**] Student, 4th Year, B.A., LL.B. (Hons.), Maharashtra National Law University, Mumbai (swapnil171297@gmail.com).

into an "inspector raj" and unwarranted inspection of business policies. The National Anti-Profiteering Authority has not done anything significant to set up any kind of deterrence. Conversely, it is argued that its very presence is inimical to ease of doing business and a potential source of arbitrariness and harassment of companies. In such a scenario, it is best to rely on the mechanisms of the already established Competition Commission.

INTRODUCTION

Uncertainty is like a necessary evil. It's something that accompanies you when you attempt new things and prime yourself for bigger things.[1]

A speedy growth momentum is succeeded by modifying the taxation structure and enhancing the course of rationalizing the taxes. In the past few decades, India has witnessed significant changes in its taxation regime- the major transformation being the implementation of the Goods and Services Tax Act, 2017 (hereinafter referred to as "GST Act"). GST is a unified tax on the supply of goods and services which ensures uniformity of taxation rate from the producer to the ultimate consumer.

The GST Council, headed by the Finance Minister of India, is the governing body for the implementation of GST.[2] Prior to the enactment of the GST Act, the head of the GST Council, Arun Jaitley had proclaimed that, "once all other taxes are removed, the cascading effect is removed,

[1] Wan Heng Choon, *GST and Anti-Profiteering-Tackling the Pricing Issue*, THE EDGE MALAYSIA (2014).
[2] INDIA CONST. art. 279A.

goods and services will become slightly cheaper"[3]. The Indian economy was also not expected to experience inflationary pressure post-GST implementation, as most items in the Consumer Price Index (CPI) were either exempt from GST or were anticipated to become cheaper. Thus, in order to ensure that the benefits arising out of the reduced taxes reach the consumers, instead of fetching additional profit to the suppliers, the anti-profiteering clause was introduced under Section 171 of the CGST Act, 2017.[4]

This step of introducing an anti-profiteering clause in the GST legislation was inspired by foreign countries like Australia, New Zealand, Canada etc. The rationale behind having the anti-profiteering clause is to prevent businesses from "profiteering" and to ensure that inflation did not exceed expectations given the change in tax systems.[5] Thus, the function of this clause is the same as the Competition Act, 2002 i.e. protecting the interests of the consumers from unfair trade practices.

This research paper is primarily divided into 5 parts. **Part I** provides an overview of the concept of GST by focusing on the aims and objectives of this legislation. **Part II** highlights the interplay between GST and competition law and the aspects that make them dependent on each other. It introduces competition law, its function and objectives and thereby link it with the current taxation system. **Part III** emphasizes upon

[3] *Goods and Services Tax: All You Need To Know About The 'Revolutionary' Bill*, INDIA TODAY (Aug. 17, 2017), https://www.indiatoday.in/india/story/gst-bill-all-you-need-to-know-about-good-and-services-tax-968499-2017-03-30 (last visited Feb. 20, 2019).
[4] R. Nair Sthanu, *Price Monitoring and Control under GST*, 52 ECON. & POL. WEEKLY (2017).
[5] Denis McCarthy, *GST and Anti-profiteering Measures – Challenges for Indian businesses*, GST SUTRA, http://gstsutra.com/experts/column?sid=312 (last visited Dec. 27, 2018).

the situation of anti-profiteering legislations or clauses in Australia where the GST has also been recently implemented. **Part IV** would focus on the expected or probable consequences of the anti-profiteering clause in India while considering the working of the National Anti-Profiteering Authority. **Part V** comprises the researcher's analysis and observation of interlink between competition law and GST. It would also discuss the problems and solutions that would arise due to the anti-profiteering clause.

1. GOODS AND SERVICES TAX: AN OVERVIEW

The concept of Goods and Services Tax was first introduced by France in 1954 and at present it is followed by more than 160 countries.[6]

With the Rajya Sabha unanimously passing the Constitution (122nd Amendment) Bill 2014, on 3rd August 2016[7] the GST regime has also been introduced in India. Undoubtedly, after seventy years of independence, GST is one of the most innovative steps taken by the Government of India in the sphere of indirect taxation. Its introduction has provided a simpler and more transparent taxation system with enhancement of output and productivity of the Indian economy.

1.1 AIMS AND OBJECTIVES OF GST

One of the principal objectives of GST is to eradicate the cascading impact of taxes on production and distribution cost of goods and

[6] *India's GST highest in the world: Here's what some other countries charge*, BUSINESS TODAY (2017), https://www.businesstoday.in/current/economy-politics/indias-gst-highest-in-the-world-heres-what-some-other-countries-charge/story/255583.html (last visited Jan. 18, 2019).

[7] Jaspreet Kaur, *Goods and Service Tax (GST) and Its Impact,* 2 INT'L J. APPLIED RESEARCH, 385-87 (2016).

services.[8] This has been done through the introduction of the concept of 'Input Tax Credit'. Input Tax Credit refers to a mechanism wherein the tax paid at an earlier stage can be utilized in paying taxes later.[9] The effect of GST can be effectively explained through the following table:

Activities	Cost Price	Value Added	Total	Tax @10% (Pre-GST)	Tax @10% with Input Tax Credit (GST)
Raw Material stage	--	100	100	10	10
Manufacturer stage	100+10 = 110	40	150	15	15-10= 5
Wholesaler stage	150+15 = 165	30	195	19.5	19.5-15= 4.5
Retailer stage	195+19.5=214.5	20	234.5	23.45	23.45-19.5= 3.95
Total tax liability				67.95	23.45

Due to the introduction of input tax credit system, the tax required to be paid on the final product under GST regime is only Rs. 23.45 instead of Rs. 67.95. Elimination of such tax on tax effect will dramatically

[8] Rajib Dahal, *Basic Concepts and Features of Goods and Service Tax in India*, SSRN ELEC. J. (2010).
[9] ARUN KUMAR, GROUND SCORCHING TAX 54 (2019).

enhance the competitiveness of original goods and services that would ultimately reflect in the substantial growth in Indian GDP. Moreover, GST would abolish the multiplicity of indirect taxation which would be beneficial for both the manufacturer and the ultimate consumer.

GST will also facilitate the "Make in India" campaign as it is instrumental in unifying the entire taxation system in India. The current structure unmakes India, by disintegrating Indian markets along state boundaries. These falsifications are the result by three features of the current system firstly, the entry tax applicable on inter-state goods sales, secondly, plethora of intra state taxes and thirdly, the extensive nature of countervailing duty exemptions that favor imports over domestic production.[10] Under the GST regime, a considerable amount of clarity has been introduced as majority of indirect taxes such as CST, VAT, Central Excise, Entry Tax etc. have been subsumed under it and the rates are uniform for all the states.

1.2 CHALLENGES TO BE FACED BY GST

Any new legislation suffers a plethora of challenges in its implementation and GST is not an exception. A major challenge in its implementation relates to fixing the 'optimum threshold limit' for turnover above which GST would be levied. If the threshold limit is low, it would impact the small-scale traders and service providers. On the other hand, if this limit is high, it would lead to less revenue to the government as the

[10] B.M. Munde, *Perspective of GST (Goods and Service Tax) in India,* 5 INT'L J. INNOVATIVE RESEARCH IN SCIENCE, ENGINEERING & TECH. (2016).

margin of tax base reduces considerably.[11] However, the 2017 Act has, in a way, overcome this challenge to a great extent by fixing the general threshold limit as 20 Lacs and 10 Lacs for some states.[12] In the 32nd GST Council Meeting, this threshold has been increased to 40 Lacs and 20 Lacs in case of sale of goods w.e.f. April 1, 2019.[13]

Secondly, the taxes that are generally included in GST would be excise duty, service tax countervailing duty, cess and state level VATs among others. However, there are several other state and union taxes that have still not be included within the ambit of GST such as tax on alcoholic liquor, entertainment tax levied by local authorities, electricity tax etc.[14] Thus, this goes against the 'One nation, One tax' concept and creates issues during calculation of input tax credit as well.

2. GST AND COMPETITION LAW: INTERPLAY

Competition can be described as a struggle for dominance, and in the commercial arena, it portrays striving for customers and businesses in the market.[15] The anti-trust law consists of rules that are intended to protect the process of competition in order to maximize consumer welfare. It is presumed that competition between firms will boost the overall efficiency of the economy, thus, resulting in reduced prices for the

[11] Harvinder Bhalla, *Goods and Services Tax (GST): Impact, Challenges and Opportunities*, INT'L J. OF BUSINESS MGMT. & SCIENTIFIC RESEARCH (2017).
[12] Central Goods and Services Tax Act, 2017, § 22.
[13] *Decisions taken by GST Council in its 32 Meeting on 10.01.2019*, TAX GURU (Jan. 11, 2019), https://taxguru.in/goods-and-service-tax/decisions-gst-council-32-meeting-10-01-2019.html.
[14] *supra* note 10.
[15] RICHARD WHISH, COMPETITION LAW 3 (2009).

consumers.[16] It also has the effect of improving the quality of goods because firms will be persuaded to produce more efficiently in order to compete with their rivals.

2.1 IMPOSITION OF GST: ISSUES WITH COMPETITION LAW?

Although GST is expected to eventually bring down prices, it would not be possible unless there is a check on the activities of the firms. As businesses work with the objective of profit maximization, they would enjoy unjust enrichment arising out of implementation of Goods and Services Tax in India[17] and not pass the benefit to the consumers.

For instance, suppose original price of a food item in a non-AC restaurant is Rs. 50, on which its profit was Rs. 20. Before GST, taxes such as VAT, service tax, cess etc. were added and the price reached to Rs. 70. Post-GST implementation, if both CGST and SGST on that food item is 6% (hypothetical), the price of the food item will be Rs. 56, thereby resulting in a Rs. 14 profit to the consumer. However, global experiences from Australia, New Zealand, etc. denote that this does not actually happen. This is due to the fact that all businesses have a tendency of maximizing their profit.[18] Therefore, if instead of keeping the original price as 50, he might increase it to Rs. 60, thereby increasing his profit by Rs. 10. The customers due to lack of awareness or inability to do anything would pay Rs. 67.2 (after charging CGST and SGST on Rs. 60) when they can simply pay Rs. 56.

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[16] Vijay Singh, *Competition Law and Policy in India*, 4 NUJS L. REV. (2011).
[17] *Id.*
[18] Lee Heng, *Anti-Profiteering Clause: Good or Bad*?, SOCIO-ECON. RESEARCH CENTRE J. (2009).

2.2 SOLUTION TO THE PROBLEM

Section 171 of the GST Act provides that it is necessary to pass on the benefit of reduction in tax rate or from input tax credit to the consumers, by means of proportionate reduction in prices. This provision is popularly termed as the 'anti-profiteering clause' of GST. Deriving authority from this clause, a National Anti-Profiteering Authority has been established to ensure that the benefits that accrue to entities due to decrease in costs are passed on to the consumers and the businesses that hike rates enormously, citing GST as the reason are penalized.[19] The National Anti-Profiteering Authority (NAPA) is authorized to take *suo moto* cognizance of the apparent price exploitation done by an entity due to which the benefits of the reduced taxation are not being transferred to the end customer. Thereafter, a detailed investigation is conducted in accordance with Rule 129(6) of the CGST Rules, 2017 and a report is submitted by the Director General of Anti-Profiteering to NAPA.[20] Based on the investigation and applicable law, the National Anti-Profiteering Authority passes an order in the matter. This process is like the mechanism adopted under the Competition Act, 2002.

Several countries such as Australia and Singapore witnessed a substantial rise in inflation immediately after implementing their respective GST laws.[21] However, countries like Malaysia prevented such a

[19] S.K. Lokeshwarri. *All you wanted to know about...anti-profiteering under GST*, THE HINDU BUSINESS LINE (Aug. 20, 2017) http://www.thehindubusinessline.com/opinion/columns/slate/antiprofiteering-under-gst/article9737571.ece.

[20] Central Goods and Services Tax Rules, 2017, rule 129(6),

[21] Abbas Valadkhani, *Quantifying the Effect of GST on Inflation in Australia 's Capital Cities: An Intervention Analysis* 37 AUSTRALIAN ECON. REV. (2004).

surge by implementing anti-profiteering laws, which was later also done by Australia. Thus, with an anticipation of similar results, India has included an anti-profiteering clause in its GST legislation itself. In the next section, the anti-profiteering legislation of Australia has been discussed in order to highlight the significance of the anti-profiteering clause.

3. ANTI-PROFITEERING LEGISLATIONS ABROAD: CASE STUDY OF AUSTRALIA

Australia introduced Goods and Service Tax law in 2000, thereby replacing a number of existing indirect taxes to unify the taxation system into one. The Australian Competition and Consumer Commission was entrusted with the responsibility of overseeing the pricing responses to the GST and acting against businesses on that basis. Thus, the businesses that adjusted prices inconsistent with tax rate changes resulting from the GST implementation were covered in this ambit.[22] The transition period of Australia was three years during which time, the ACCC performed a plethora of functions.

The following were the statutory responsibilities on the ACCC:

1. *Formulating guidelines about what constitutes price exploitation;*
2. *Seeking information from businesses to successfully monitor the movements of prices;*
3. *Issuing notice to the businesses in case they exploit prices for attaining greater benefit;*
4. *Seeking penalties before the federal court for breach of price exploitation provision by businesses and individuals;*

[22] R. Nair Sthanu, *Price Monitoring and Control under GST*, 52 ECON. & POLITICAL WEEKLY (2017).

5. *Accepting undertakings from the businesses which are enforceable in a court;*
6. *Investigating upon complaints and issues of public concern;*
7. *Providing information to both businesses and public on price exploitation provisions.*[23]

Therefore, in Australia, the existing Competition Commission was entrusted with the responsibility of taking care of the anti-profiteering concerns, unlike India, where a separate institution called the NAPA has been established for this purpose.

The Australian Competition and Consumer Commission has taken up a significant number of tasks in order to crystallize the idea of instituting an anti-profiteering clause. Firstly, they defined the ambit of the term 'price exploitation' by enlisting specific criteria for constituting price exploitation.[24] Secondly, in order to check price exploitation, large corporates with turnovers were called forward to offer a Public Compliance Commitment (PCC) to the ACCC on a voluntary basis.[25] The Australian Competition and Consumer Commission gathered information related to prices from the market for numerous goods and services. Thereafter, it compared the prices both prices prior to and subsequent to the introduction of GST, by way of specifically commissioned surveys of retail prices.[26]

[23] Competition and Consumer Act, 2010, Part VB (Australia); ALLAN FELLS, ACCC OVERSIGHT OF PRICING RESPONSES TO THE INTRODUCTION OF THE NEW TAX SYSTEM, Australian Competition and Consumer Comm'n (2003).
[24] *Id.*
[25] *supra* note 22.
[26] REPORT ON ACCC PRICE SURVEYS: PRELIMINARY POST-GST PRICE CHANGES, REPORT ON ACCC PRICE SURVEYS: PRELIMINARY POST-GST PRICE CHANGES 33 (2000).

All these measures led to a strong anti-competitive regime in Australia wherein the benefits of the GST system were accrued by the consumers. According to the GST Final Report titled 'ACCC oversight of pricing responses to the introduction of the new tax system', the Commission obtained refunds of around $21 million for the benefit of around two million consumers in the transition period of three years.[27]

Thus, clarity of the legal position and precisely laying down the definitions of important terms not only indicates superior legal policy, but also helps in the efficient and effective implementation of the letter and spirit of the law.

In India, the National Anti-Profiteering Authority has not carved out the precise meaning and interpretation of 'price exploitation'. Section 171 of the CGST Act, 2017 simply states that any reduction in tax rate or benefit of ITC is required to be passed on to the end consumers through a 'commensurate reduction in prices.' Thus, the culpability of any entity would be dependent upon the interpretation of the term 'commensurate reduction of prices' and the same has not been defined in the Act.[28] Instead, the matters are decided on a case-to-case basis supported by the investigations. Further, inviting large corporates to submit Public Compliance Commitments is a useful mechanism for checking compliance. As observed in Australia, corporates submit PCCs in order to

[27] *supra* note 23.

[28] Shikha Bhardwaj and Aseem Chawla, *India: Anti-Profiteering Mechanism And Commensurate Price Reduction - A Fine Balancing Act*, MONDAQ (Dec. 21, 2017) http://www.mondaq.com/india/x/658356/sales+taxes+VAT+GST/AntiProfiteering+Mechanism+And+Commensurate+Price+Reduction+A+Fine+Balancing+Act.

enhance their public image and reputation, which leads to consumer awareness as well.

4. THE INDIAN REGIME: NAPA AND ITS RULINGS

The primary objective of the GST is to eliminate the cascading effect of the existing tax regime. The continuous credit system has been formulated keeping the consumer in mind and removes inefficiencies in the supply chain.[29] The anti-profiteering mechanism in the GST Act has been incorporated in order to ensure that the profit of the lessor input cost due to tax efficiencies is shared with consumers and not reserved as excess profits.[30] In *Dinesh Mohan Bhardwaj Proprietor, M/S U.P. Sales v. Services Versus M/S Vrandavaneshwree*, the NAA laid down three questions on the basis of which it can be determined by the concerned authority whether contravention of Section 171 has taken place or not - (i) whether rate of tax had been reduced post-GST, (ii) whether there was substantial reduction in the rate of tax and (iii) if yes, whether the benefit was passed on to the consumers.[31]

It is pertinent to note that the success of the GST depends upon the efficiency with which the anti-profiteering clause is implemented in India and the way the National Anti-Profiteering Authority functions for implementing the provision. Having realized the significance of NAPA, a pertinent issue that arises is whether NAPA has been able to fulfil its

[29] Shubhang Setlur, *Behind GST's Anti-Profiteering Provisions, a Legacy of Indian Socialism*, THE WIRE (2017), https://thewire.in/153989/gsts-anti-profiteering-provisions-lndian-socialism/ (last visited Dec. 26, 2018).
[30] *Overview on GST*, KHAITAN & CO., https://www.khaitanco.com/PublicationsDocs/Legal_Era_Magazine_Feb2017.pdf.
[31] Dinesh Bhardwaj v. Services Versus M/S Vrandavaneshwree, 2018 (4) TMI 1377.

functions properly? The answer to this question cannot be affirmative owing to the following problems that have been associated with the NAPA and its working:

- **Absence of procedure and methodology:** As mentioned above, Section 171 does not define the term 'commensurate reduction in prices'. Thus, it is upon the NAPA to interpret the same. Various orders of the authority have been regarded as "arbitrary" as no precise methodology has been determined by it to ascertain whether there is profiteering or not. Pyramid Infratech, Hindustan Unilever and Hardcastle Restaurants Pvt. Ltd. have filed writs challenging NAPA orders due to such arbitrariness.[32]
- **Lack of homogenity in orders:** Not only is there no specific definition of profiteering, reliance cannot be placed on the previous NAA rulings owing to the inconsistency that exists. For instance, in *Ravi Charaya v. Hardcastle Restaurants*,[33] the NAA refused to consider market conditions, rising of input costs, increase in expenditure on electricity, fuel, rent, royalty, commissions, etc. while determining profiteering.[34] However, in *Kumar Gandharv v. KRBL Limited*,[35] the NAA had itself considered the increase in input costs i.e. paddy while determining that the respondent had not contravened Section 171 of the CGST Act.

[32] Sachin Dave, *Pyramid Infra goes to court over GST anti-profiteering mechanism*, ECONOMIC TIMES (Oct. 13, 2018) https://economictimes.indiatimes.com/industry/banking/finance/pyramid-infra-goes-to-court-over-gst-anti-profiteering-mechanism/articleshow/66190024.cms
[33] Ravi Charaya v. Hardcastle Restaurants, (2018) 11 TMI 1073.
[34] *Id.*
[35] Kumar Gandharv v. KRBL Ltd., 2018 (5) Tmi 760.

- **Excessive delegation and constitutional validity:** The principle of excessive delegation as laid down in *Harishankar Bagla v. State of Madhya Pradesh*,[36] is that delegation of authority is valid only where the legislature lays down a principle which is clear and offers sufficient guidance. It is submitted that in the absence of guidance with respect to interpretation of 'commensurate reduction in prices', excessive authority has been delegated to the NAPA. Moreover, recently, Pyramid Infratech has challenged the constitutional validity of the NAPA on the grounds that owing to its arbitrary orders, fundamental rights of citizens are being violated.[37]
- **Excessive control over pricing:** The purpose of the NAA is to ensure the benefit of the consumers. However, in doing so, it is restricting the businesses and the market from setting prices, curbing their freedom of trade.

Thus, the NAPA has been widely criticized owing to the aforementioned defects in its functioning.

5. PROFITEERING THE ANTI-TRUST WAY: THE WAY FORWARD

The shortcomings of the NAPA suggest that it would be best to let competition set pricing, as in the pre-GST regime. It is better to rely on the competitive strength of the economy to let product prices find the levels that consumers and producers find acceptable and on the institution of the Competition Commission of India to ensure that market power is not

[36] Harishankar Bagla v. State of Madhya Pradesh, 1954 AIR 465.
[37] *supra* note 32.

abused to distort competition. The Competition Commission with a mandate to protect the consumer from industry cartelization has been fully functional for eight years now and has earned a good reputation for itself.

The increasing number of complaints in the CCI suggest that entities have faith on the regulator to perform its functions.[38] The competition regulator investigates anti-trust violations in various fields including real estate, education, entertainment, steel, maritime and shipping, travel industry etc.[39] The Commission has been appreciated on various occasions for its approach that has resulted in optimum resource utilization and effectively redressal of market problems.[40]

Owing to such considerations, it is strongly recommended that this anti-profiteering measure should be regulated by the Competition Commission of India, like the case of Australia.

6. CONCLUSION

The Central Goods and Services Act, 2017 is a fundamental and revolutionary modification in the Indian tax regime that is instrumental in unifying the taxation regime in India. Its interface with Competition law is visible through the anti-profiteering clause it holds under Section 171 of the said Act. The principal motive behind the anti-profiteering clause is to

[38] Economic Laws Practice, *Has the Competition Commission of India (CCI) been an effective regulator?,* LEGALLY INDIA (July 18, 2017), https://www.legallyindia.com/home/has-the-competition-commission-of-india-cci-been-an-effective-regulator-20170718-8664.

[39] Preetam Kaushik, *The Importance of Being Competition Commission of India*, BUSINESS INSIDER (Jan. 2, 2015), https://www.businessinsider.in/the-importance-of-being-competition-commission-of-india/articleshow/45728183.cms.

[40] Anshuman Sakle, *CCI's Roulette with Remedies*, CYRIL AMARCHAND MANGALDAS (Apr. 17, 2017), https://competition.cyrilamarchandblogs.com/2017/04/ccis-roulette-remedies/.

ensure that the benefits accruing from GST are brought to the consumers. The GST legislation supports 'profit' but opposes 'profiteering.'

As GST has also been implemented in other countries such as Australia, this research paper highlighted significant aspects of the legislation operating in it. Its structure is different from India to some extent, but its experiences would provide the Indian government a chance to learn from its mistakes. The Australian Government did not create a separate council or institution for GST implementation, but instead entrusted the existing Australian Competition and Consumer Commission with this responsibility. Looking at the success of the ACCC, it is contended that India should adopt the same model as an inexperienced body like NAPA may not be able to perform as efficiently as the Competition Commission of India.

Thus, India believes that implementation of anti-profiteering clause along with GST would curb the inflation or surge of prices that was faced by these nations. However, a principal concern with the GST implementation in India remains that till now only the manner of usage of anti-profiteering clause has been defined and not the manner of identifying the firms which result in this. As mentioned earlier, this has led to a vast array of litigation which may determine the future of the National Anti-Profiteering Authority.

A lot of people have apprehensions regarding the anti-profiteering clause as they believe that it would become a mode of exploitation by the police and other powerful authorities. On the other hand, some consumers appreciate this provision as they believe it is protecting their interests and

welfare. Only the subsequent years will highlight the success or failure of this legislation.

YOUR CELLULAR SUBSCRIPTION HAS BEEN CANCELLED- A CONSPIRACY OF THE TELECOMS

Rajorshi Palit[*]

ABSTRACT

Telecom subscribers across the length and breadth of India have been left dumbfounded for the past few days. The reason for this sudden surprise is not good news this time around. While the customers were anticipating year-end offers by telecoms, they were shocked after receiving texts alerting them of impending cancellation of subscriptions by the country's top service providers. The notification as read verbatim stated that the customers faced probable discontinuation of outgoing call services provided that a certain minimum amount is not paid within a specified period. People at first shrugged these notifications as hoax and pranks, but after witnessing similar phenomenon across the entirety of the country it became fairly evident that the threat was not hollow. Amid growing fears, the telecom authority directed the telecoms not to terminate subscriptions without proper notice. But this matter as it stands can be summed up as being obscure at best. The current state of affairs has posed serious questions to be answered. What does this mean for the average citizen? What were the circumstances under which such dire steps were taken by the companies? Are they even empowered to pass such a

[*] Student, 4th Year, B.B.A., LL.B. (Hons.), Symbiosis Law School, Pune (rajorshi.palit@symlaw.ac.in).

resolution? Is the resolution a mere eyewash and a medium for profiteering by the operators, if so, what are its effects on the market and other competitors? This research paper tries to answer these questions and uncovers the legality of the actions taken by the operators. Reliance has been placed on company disclosures, journals, judicial precedents and legal principles for the purpose of research. The key findings have been extrapolated in analysing the factual matrix and finding a probable solution for the same.

1. THE NOTIFICATIONS IN DISPUTE- WHAT DO THEY MEAN?

In the month of November 2018, two telecom operators, namely Airtel and Vodafone Idea came out with a notification that the facility of outgoing calls provided by the network operators will be discontinued as of 13/12/2018 if not recharged with a plan with a minimum validity of 28 days. It further stated that the users with subscriptions to the unlimited combo pack would not be able to make outgoing calls from the 15th day of the expiry of the pack. This scheme has the further effect of restricting the customers from availing the calling facility even if they possess any amount of talk time balance in their account.[1] In simpler terms, this notification is a compulsion imposed by telecom operators to push forth the subscription of the unlimited prepaid plans which would translate into greater margins in the upcoming quarters. But such a restriction will have an adverse effect on customers especially the ones from the rural

[1] Chakri Kudikala, *Airtel*, *Vodafone Idea Prepaid Users Baffled as They Receive Outgoing and Incoming Voice Calling Expiry Notice*, TELECOM TALK (Nov. 21, 2018), https://telecomtalk.info/airtel-vodafone-idea-outgoing-calling-expiry/183713/.

background because of the increased rates of recharge for incoming calls. Moreover, the fact that a significant part of talk time balance will remain unused is a cause of worry for the average consumer. While it may be interpreted that this move will lead to an increase in revenue, it must also be remembered that the profit comes at the cost of customers.

2. THE RATIONALE BEHIND THE NOTIFICATION

In a statement released post-notification, the companies have imputed their decision on the declining Average Revenue per Unit (hereinafter referred as ARPU), stating further that this move would weed out dormant subscribers and, in turn, increase the ARPU. They have cited intense competition in telecom industry followed by the entry of Reliance Jio as the sole reason for the state of affairs.[2] It remains to be seen that whether the argument presented by Airtel and Vodafone Idea are in-line with the aforementioned treatment. In-depth discussion regarding the veracity of the claim will be done at a later stage in this research paper.

3. IS THE NOTIFICATION *ULTRA VIRES*?

It is imperative to answer the question that whether the telecom operators were empowered to pass the disputed notification. For the furtherance of the aforementioned cause, we must look into the terms and conditions imposed by Airtel and Vodafone Idea.

While Airtel does not explicitly state its intention to terminate or modify outgoing call facility under the ambit of prepaid services, certain

[2] Abhinaya Prabhu, *Yahoo, Airtel and Vodafone to block calls if you don't recharge; 60 million subscribers to be affected*, YAHOO FIN. (Nov. 24, 2018), https://in.finance.yahoo.com/news/airtel-vodafone-block-calls-don-054540150.html.

conditions are led down in case of offers, contests, and post-paid subscriptions. The terms and Conditions for the Secure Offer provided by Airtel empowers it to postpone, modify or cancel the offer partly or to its entirety with or without notice to the customer in case of unforeseeable circumstances inclusive but not limited to acts of god, technical difficulty or business exigency. It further provides immunity to the operator from claims of compensation arising directly or indirectly from the postponement or cancellation of the offer.[3] Moreover, while setting out the terms applicable on Telenor customers (Airtel has merged with Telenor w.e.f. 14 May 2018), Airtel has explicitly expressed its intention to have complete discretion with respect to modification or cancellation of any prepaid/ postpaid offer.[4] The word 'any' used in the terms and conditions can be construed for being applicable to all offers whatsoever, and not limited to the ones issued to the Telenor customers. In a move similar to that of Airtel, Vodafone Idea has also included terms and conditions with regard to the cancellation and modification of offer under its jurisdiction. [5]

Consequently, it can be interpreted from this discussion that these telecom operators are well within their power to deprive the customers of their right to make outgoing calls. They further are not liable to reimburse the subscribers for the loss of any amount of talk time balance.

[3] *Terms and Conditions*, AIRTEL, https://www.airtel.in/airtel-secure-terms.
[4] *Terms and Conditions*, AIRTEL, https://www.airtel.in/mobile/terms-conditions.
[5] *Vodafone*, *Terms and Conditions Governing the Offer "Talk non-stop with Vodafone Unlimited calls"*, VODAFONE, https://shop.vodafone.in/shop/traiDocs/Unlimited%20product%20t&C.pdf.

4. CAN LEGALITY OF A NOTIFICATION BE CONSTRUED FROM THE POWER TO ISSUE NOTIFICATION?

The fact that the operators were empowered to pass the disputed notification is firmly established. But does that prove the correctness of the notification? The test for verifying the validity of the notification hinges on the interpretation of the terms and conditions. While the telecom operators can justify the claim by reiterating their power to enforce such notice vide the terms and conditions, the extent of communication of such conditions to the consumers is important for discussion.

For the purpose of answering the question that whether the terms and conditions were communicated to the consumer, and if so, to what extent, it is imperative to understand the environment in which these telecom providers operate. The total wireless subscriber base over the entirety of India stood at 1,183.41 million as of 31st March 2018. While rural subscribers accounted for 521.3 million people, the number of urban subscribers stood at 662.18 million. Tele-density for the country closed at 91.09%. The market was divided into public and private players, with the majority of the market being controlled by the private players (90.26%) and minority share was held by the public operators (9.74%).[6] Telecom sector, in general, follow a structured supply chain. The offers drafted by telecom operators can be availed by the subscribers via two mediums namely offline and online. The offline mode includes subscription through retail stores engaged in the occupation of selling recharge plans and company produced or sponsored products. While Vodafone Idea hosts

[6] Telecom Regulatory Authority of India, *The Indian Telecom Services Performance Indicators January – March 2018* (June 27, 2018).

9800 stores across the territory of India,[7] its rival Airtel houses a comparable number of stores. Apart from the official stores, thousands of private stores sell recharge subscriptions through registered agents. Online mode, on the other hand, provides options for recharge via official websites.

Having discussed the business environment and the mode of subscriptions, we must now shift our focus on the fundamentals of a cellular subscription itself. A cellular subscription is a contract entered between the subscriber and the mobile operator. Cellular contract per se come under the ambit of a special type of contract namely standard form of contract. These types of contracts take stem from the generic nature. Since telecom offers are meant for a large number of people, they essentially form a similar structure and hence can be a standard contract.[8] The offer and the terms and conditions form the contents of the contract, while the amount to be paid forms the consideration for the same. Moreover, the act of payment of prescribed amount forms implied assent to the contents of the contract. The important requisite for a contract to be enforceable is *consensus ad idem* i.e. meeting of minds. This legal maxim means that parties to a contract must have the same understanding of the terms of the contract. For the purpose of reaching consensus, it is imperative that the parties are aware of the terms and conditions applied to a contract. If either of the party is unaware of a term in the contract, it can

[7] Imon, *Vodafone*, *Vodafone is now one of India's largest retailers with over 9800 retail stores*, TELECOM TALK (Sep. 2, 2018), https://telecomtalk.info/vodafone-is-now-one-of-indias-largest-retailers-with-over-9800-retail-stores/142164/.

[8] Shyama Nair, *Legal Service, Standard Form of Contract-A Comprehensive Analysis*, LEGAL SERVICES INDIA, http://www.legalservicesindia.com/article/1161/Standard-Form-Contract.html.

be concluded that *consensus ad idem* is not reached. A contract that does not fulfil the condition of consensus cannot be held to be a valid contract.

The discussion regarding the telecom environment and fundamentals of a contract has an important bearing in understanding the effect of terms and condition. It further aids in augmenting the case of consumers. For the ease of convenience, the rationale is divided into-

4.1 SUPPRESSION OF MATERIAL FACTS

Brick and mortar stores launched by telecom operators are usually managed by people vying to sell offers and luring new customers. After all, that's what the companies expect from their sales executive. The motive of increasing revenue through sales has been given primary importance by the operators while defining the very purpose of hiring sales personnel.[9] With the entry of Reliance Jio, leading telecom operators have become even more aggressive about acquiring new consumers. This is clear from the move of Vodafone Idea to increase the incentive from measly ₹ 70-80 to ₹ 180-250 for every new customer brought in by retailers.[10] While this may seem to be perfectly rationale given the fact that any company would like to expand, but it has a direct effect on the contract itself. Walking into a telecom shop, it is not uncommon to see retailers jump over customers in order to earn their hefty commission. In an attempt to impress the prospective consumers, they focus on advocating the benefits of the offer and clearly skip out the terms and conditions.

[9] *Vodafone*, *Job Description- Sales Executive*, VODAFONE, vodafone.taleo.net.
[10] Devina Sengupta, *Vodafone*, *Idea throw down the gauntlet at Reliance Jio, Airtel with eye-catching incentive offers*, THE ECON. TIMES (Aug. 16, 2018), www.economictimes.indiatimes.com.

This, in turn, vitiates the concept of consensus in a contract. Moreover, with almost one in two customers hailing from rural background[11] there exist chances of duping. The act of concealment of terms and conditions form the suppression of material facts and is bad under the law. A person who conceals such information leading to the detriment of the parties is liable for committing the offence of fraud.[12] In the present instance, the act of concealment of terms and conditions is injurious to parties because of extinguishment of the right to information. Had it been the case that the customers were informed of the conditions beforehand, they might have chosen not to avail the offer owing to the exclusion of liability of the operators. Furthermore, deceitful acts which lead to the procurement of a thing (in this case, sim card) has been held to be a fraudulent act.[13] Hence the act permeated by the retailer takes away the enforceability of terms and conditions as set by Airtel and Vodafone Idea.

4.2 THE COMMUNICATION OF TERMS AND CONDITIONS

Terms and conditions to a contract are usually mentioned in fine print and in a manner that usually does not pique the interest of the reader. [14] Due to the sole reason of them being illegible, their enforceability is more often than not controversial. Taking this anomaly into account, courts have devised special provisions for the purpose of protection of consumers in case of a standard form of contract. These provisions provide a shield to

[11] *supra* note 6.
[12] A. Ayyaswamy v A. Paramasivam, (2016) 10 S.C.C. 386.
[13] Amit Kapoor v Ramesh Chandar, (2012) 9 S.C.C. 460.
[14] Alex Hudson, *BBC News*, *Is small print in online contracts enforceable?,* BRITISH BROADCASTING CORP. (June 6, 2013), https://www.bbc.com/news/technology-22772321.

the consumer from being harassed by mighty corporations. It further leverages his standing in the perpetually lopsided contract. One such instrument is the act of reasonable notice under which corporation is obliged to notify the consumers about the terms and conditions. In the case of *Henderson v. Stevenson*,[15] it was held that the parties to a contract must be reasonably notified about the conditions for the purpose of making it binding in nature. Such a notice even if not expressed explicitly, shall be construed to have been notified if directions to the terms are mentioned in the contract.[16] Judicial precedents have evolved over the years with the incorporation of stricter tests with respect to the enforceability of terms and conditions. Courts have come down heavily on insurance companies owing to the small print of exemption clauses and non-disclosure by the insurance agents.[17] In the present case, neither do the recharge catalogues of Airtel and Vodafone Idea mention the terms and conditions[18] applied nor are the consumers informed about them by the retailer. Moreover, while dealing with the transactions made via online mode, a quick perusal at the Vodafone Idea webpage brings out the fact that there is no mention of the conditions relating to offers provided by the operator.[19] The facts pertaining to the current situation more than suffice in proving that no notification of terms and conditions whatsoever were provided to the customers. It can thus be construed that the conditions set forth by the

[15] Henderson v Stevenson, [L. R. 2 H. L. 470].
[16] Parker v. South Eastern Railway Co., (1877) 2 C.P.D. 416.
[17] Asha Garg v. United India Insurance Co., 2005 SCC Online N.C.D.R.C. 37.
[18] *NDTV Profit*, *Reliance Jio Vs Airtel Vs Vodafone: Prepaid Recharge Plan With 2GB Per Day Data Compared*, NDTV (Jan. 5, 2018), https://www.ndtv.com/business/reliance-RelianceJio-vs-airtel-vs-vodafone-prepaid-recharge-plan-with-2gb-per-day-data-compared-1796239.
[19] *Vodafone*, *Best Prepaid Recharge Plans*, VODAFONE, https://shop.vodafone.in/shop/prepaid/best-prepaid-plans.jsp#Unlimited.

companies do not form a part of the contract and are not binding on the parties. Hence the act of restraining the customers from making outgoing calls is ultra vires.

4.3 UNILATERAL AGREEMENT

A contract as defined under Indian Contract Act, 1872, is an agreement enforceable by law.[20] Apart from legality, the key requisite for an agreement is the presence of two parties, i.e. the promisor and promisee.[21] Hence, any agreement whatsoever is bilateral in nature and the exit of one party would mean the agreement being non-existent. In the present context, the so-called terms and conditions have the same effect as making the contract unilateral in nature. A quick look at the terms drafted by Vodafone Idea and Airtel brings forth the term "with or without notice"[22] being in common. The clause of revocation of the contract without the notification to the consumer provides unilateral power to the operator. Furthermore, a telecom contract essentially being a contract of sale must be bilateral in nature and not unilateral in nature.[23] Unilateral cancellation of a contract of sale has been held to be invalid.[24] A unilateral agreement if detrimental to the party can be revoked at the option of the aggrieved.[25] As has already been discussed before, the wording used in the terms and condition makes the contract unilateral. Moreover, the immunity from any damages arising out of the conditions increases the

[20] Indian Contract Act, 1872, § 2(h).
[21] *Id.*, § 2(c).
[22] *supra* note 3.
[23] Aloka Bose v. Parmatma Devi, (2009) 2 S.C.C. 582.
[24] Thota Laxmi v. Govt. of Andhra Pradesh, (2010) 15 S.C.C. 207.
[25] Suresh Wadhwa v. State of Madhya Pradesh, (2017) 16 S.C.C. 757.

apprehension of injustice meted out on the consumers. Relying on the judicial precedents, it can be inferred that the terms and conditions are void owing to the unilateral construction. Furthermore, it can be concluded that the action taken by Vodafone Idea and Airtel on the basis of such arbitrary clause must also be not binding on the consumers.

5. FALLING ARPU-ADJUDGING THE VERACITY OF THE CLAIM

The above discussions have focused on the legality of enforcement of notification in relation to the empowering terms and conditions. It has been sufficiently proven that the notification loses its binding power owing to the unjust clause. Now, what needs to be observed is that whether the reason for bringing in the notification was genuine in the first place. For the purpose of adjudging the real intent behind the said action, the purported reason must be analysed in isolation to the law and in conjugation to the telecom market. In an attempt to understand the scenario the question that must be answered is that whether there was a fall in ARPU in the first place, and if so was the decline so steep that it compelled the companies to take such drastic a step?[26] Reliance on key financial statements and company disclosures will be placed for scrutinizing this claim. For the sake of convenience, the analysis is divided into four halves namely-

[26] *supra* note 2.

5.1 BHARTI AIRTEL

The company has experienced lean quarters for the past two financial years. It has been relenting amid the pressure from a reduction in International Termination Rates (ITR) and steep rate cuts due to the disruptive market approach employed by Reliance Jio. The biggest headache for the company though is the failure in the translation of growing customer base into revenue. This has left a dent in the profit margins and free cash flow. While the customer base of the company increased from 355.67 million FY17 to 395.72 in FY18,[27] total revenues registered a dip of 18% from 5,65,511 million to 4,62,639 million in the preceding fiscal year.[28] The Earnings before Interest, Tax, Depreciation, and Amortization (EBITDA) plummeted 34% from 5, 65, 511 million to 462,639 million in the same period. Furthermore, in the quarter ending March 2018, the company saw a fall in ARPU to an all-time low of ₹ 116,[29] from ₹ 123 in the previous quarter.[30] FY19 provided a glimmer of hope for the company with consolidated total revenue on an underlying basis witnessing a surge of 0.5% and closing in at ₹ 20, 422 crores in its

[27] The Statistics Portal*, Number of Bharti Airtel mobile services customers in India from FY 2013 to FY 2018 (in millions),* STATISTA**,** https://www.statista.com/statistics/740370/india-number-of-bharti-airtel-mobile-services-customers/.

[28] Airtel Annual Report, 2018.

[29] *ET Markets*, *Bharti Airtel's India operations post first loss in 15 years*, THE ECON. TIMES (Apr. 25, 2018) https://economictimes.indiatimes.com/markets/stocks/earnings/airtel-consolidated-4q-profit-falls-78/articleshow/63898251.cms.

[30] Danish Khan, *ET Markets*, *Bharti Airtel's blended ARPU to improve in FY19; pressure to ease: Fitch*, THE ECON. TIMES, (Jan. 25, 2018), https://telecom.economictimes.indiatimes.com/news/bharti-airtels-blended-arpu-to-improve-in-fy19-pressure-to-ease-fitch/62603618.

2nd quarter.[31] ARPU, however, painted a grim picture settling in at ₹ 101, four rupees lower than the preceding quarter.[32] Predicting against the flow of the tide, some analysts believe that the average may grow to levels of ₹ 140-145 in the coming year.[33] The financial statements make it quite clear that Airtel is struggling to hold its ground in the volatile market but may witness a recovery in the near future.

5.2 VODAFONE IDEA

The company faced pressure from the volatility in the market and rate cuts due to the rise of Reliance Jio. While service revenue for the company showed a decline of 18.7% from 5,834 million euros in 2017 to 4,643 million euros in 2018, EBITDA regressed from 1596 million euros to 1030 million euros (change-34.5%) in the same period.[34] The ARPU also showed a recession dropping from Rs.114 to Rs.105 QOQ.[35] All was not lost for the company, as it added 0.5% more active customers in Q4FY17 compared to Q3FY17. Furthermore, net debt in India saw a reduction from 8.7 billion euros in FY17 to 7.7 billion euros in FY18 owing to the sale of standalone towers to American Tower Corporation among an array of factors.[36] The company's fortunes did not shine brightly, as service

[31] Bharti Airtel Limited – Media Release October 25, 2018.
[32] *Telecom Services*, *Airtel Capex, Opex, ARPU and revenue and profit for Q2*, TELECOMLEAD (Oct. 25, 2018) https://www.telecomlead.com/telecom-services/airtel-capex-opex-arpu-revenue-and-profit-for-q2-87132.
[33] *supra* note 29.
[34] Vodafone Group Plc- Annual Report 2018.
[35] *ET Markets*, *Vodafone India's service revenue drops to Rs 7,902 crore in Q4, FY 2017-18*, THE ECON. TIMES (May 16, 2018), https://telecom.economictimes.indiatimes.com/news/vodafone-indias-service-revenue-drops-18-9-in-fy-2018/64171921.
[36] *supra* note 34.

revenue eroded 31% closing in at 955 million euros in its first quarter of FY19. The ARPU also marked a shoddy performance followed by a marginal decrease from Rs.105 to Rs.102 in the first quarter of 2019.[37] This index continued its free-fall throughout the fiscal year closing in at Rs.88 at the end of third quarter.[38] On losing ground to other telecom operators, the company merged with third largest telecom Idea in order to maintain a foothold in the industry and to compete with its rivals. While the near-term prospects of the company look bleak, analysts believe that its future is well-secured owing to the merger.

5.3 RELIANCE JIO

A discussion on the finances of Reliance Jio is imperative for better understanding the claim of Airtel and Vodafone Idea. It further would aid in investigating its effect on the purported parties. It is important to mention beforehand that the analysis of the Reliance Jio will be restricted to FY18 and some quarters of FY19 since the company did not post mentionable figures in FY17 owing to its extended free offers until March'18. A perusal at its financial statement highlights the total income at Rs.20158 crores, while the profit before tax closed in at Rs.1109 crores.[39] The ARPU, however, saw a decline from ₹ 157 to Rs.134.50 year-on-year (YOY), while eking out a loss of 2.5 rupees on a quarterly

[37] Devina Sengupta, *ET Markets*, *Vodafone Q1 service revenue falls 31% on year amid tariff wars, cheaper data*, THE ECON. TIMES (July 26, 2018), https://telecom.economictimes.indiatimes.com/news/vodafone-q1-service-revenue-falls-31-on-year-expects-idea-merger-to-close-in-aug/65130608.

[38] *Telecom Services*, *Vodafone Idea revenue, Opex, ARPU, Capex and profit*, TELECOMLEAD (Nov. 15, 2018), https://www.telecomlead.com/telecom-services/vodafone-idea-revenue-opex-arpu-capex-and-profit-87469.

[39] Reliance Jio Infocomm Ltd, Financial Statements, 2017-18.

basis.[40] The fairy-tale run of the company continued in FY19 with a strong showing in the quarter ending July'18. Its net profit increased from Rs.510 crores to Rs.612 crores translating to the gains of 19.9%. There was also a rise in revenue of 14% at Rs.8109 crores.[41] Reliance Jio's second quarter ended on a high note with a profit increase of Rs.681 crores and customer addition of 37 million compared to 28.7 million in the preceding quarter. But amid increased stress, the company's ARPU took a blow and closed in at Rs.131.7.[42] The near-term prospects for the company look strong, but its mettle is surely up for a test in the incoming fiscal years.

5.4 COMPARISON- AIRTEL, VODAFONE VIS-À-VIS RELIANCE JIO

The statistics until now clearly paint a dismal run for Vodafone Idea and Reliance Jio. But a conclusion drawn that the move by the telecoms was genuinely for the increase in ARPU based solely on these financial indicators would be incorrect. There is no denying the fact that the finances of the incumbents look pale in front of the entrant, but certain other factors need to be considered before making an inference. First of all, we must analyse the factors that led to the loss of ARPU in these companies. While it has been already discussed that the steep cost cuts

[40] *ET Markets*, *Reliance Jio net profit up 19.2% in June quarter; ARPU declines*, THE ECON. TIMES (July 28, 2018), https://telecom.economictimes.indiatimes.com/news/reliance-Reliance Jio-net-profit-up-19-2-in-q1-arpu-at-rs-134-5/65166155.

[41] *Reliance Jio Q1 profits rises 20% to Rs.612 crore*, LIVEMINT (July 27, 2018) https://www.livemint.com/Companies/xXKGSBAEcTBBHuZaGbxYKL/Reliance-Reliance Jio-Q1-profit-rises-20-to-Rs612-crore.html.

[42] *Reliance Jio Q2 results 2018: Mukesh Ambani's Reliance Jio posts Rs 681 cr PAT, ARPU at Rs 131.7 per user*, ET NOW (Oct. 17, 2018), https://www.timesnownews.com/business-economy/companies/article/reliance-Reliance Jio-q2-results-2018-mukesh-ambanis-Reliance Jio-posts-rs-681-cr-pat-arpu-at-rs-131-7-per-user/300810.

lead to the decline in revenue, but the focus must also be given on the reduction of Mobile Termination Rates (MTR). In a notification vide September 2017, the TRAI issued a notification slashing the MTR from Rs.0.14 to Rs.0.06.[43] Market leaders Bharti Airtel and Vodafone Idea housing huge subscriber base have perpetually netted a huge profit in interconnection charges. For instance, Airtel earned 75 million dollars from Reliance Jio in the form of interconnection charges in the quarter ending June'17. These earnings were instantly wiped off owing to the cut resulting in pressure on EBITDA, ARPU of 3-6% in between the two companies.[44] Reliance Jio, on the other hand, did not feel the heat owing to the minuscule market share of 13% in February'17.[45] Secondly, it must be noted that every telecom operator faced a decline in ARPU. While the decline for Reliance Jio was 16.11%,[46] it showed negative growth of 17.88%,[47] 24.13%,[48] for Airtel and Vodafone Idea respectively. The percentage of decline in Reliance Jio is lower than the other two operators, but as discussed earlier the decline in ARPU is not affected by MTR cut. Hence it can be construed that the three telecom operators are at comparable terms in terms of decrease in ARPU. As far as the variation in the price of ARPU goes, it is hinged on the fact that Reliance Jio was a 4G

[43] *supra* note 34.
[44] *Intel*, *Fitch: India Teleco Incumbents hit by Mobile Termination Rate Cut*, REUTERS (Sep. 20, 2017), https://www.reuters.com/article/fitch-india-telco-incumbents-hit-by-mobi/fitch-india-telco-incumbents-hit-by-mobile-termination-rate-cut-idUSFitbyVX42.
[45] *ET Markets*, *Airtel leads telecom market with 25.85% share, Reliance Jio sees highest growth in wireless subs: Trai Dec data*, THE ECON. TIMES (Feb. 16, 2018), https://telecom.economictimes.indiatimes.com/news/airtel-leads-telecom-market-with-25-85-share-rReliance Jio-sees-highest-growth-in-wireless-subs-trai-dec-data/62947738.
[46] *supra* note 40.
[47] *supra* note 34.
[48] *supra* note 38.

only service, to begin with, while its peers provided 2G and 3G services as well. The change in technology brought about a shift in people's interest to 4G services, which lead to loss of revenue in 3G contours thus varying the price. The next area of focus is the financial holding of the enterprises. In terms of EBITDA, Vodafone Idea and Bharti Airtel are comfortably placed with showings of Rs.7766 crores,[49] and Rs.18040 crores[50] respectively. Reliance Jio lags in this parameter with a figure of ₹ 2,694 crores in FY18.[51] This factor clearly outweighs in favour of Airtel and Vodafone. In judging the ability to compete, one must look into the prevalent pricing of services offered by the telecoms. In this case, both Vodafone and Airtel have more than fared this test. The affordable tie-in benefits including a subscription to entertainment majors like Amazon Prime, Netflix and Zee 5 are a testimony of the company's ability to shed money to lure in consumers. This has been made possible by Airtel and Vodafone's market standing post-merger. While the Airtel merger gave it additional spectrum and consumers,[52] Vodafone has greatly benefited from being the biggest operator in terms of market share post-merger.[53] The inference that can be drawn from the post-merger standing is that these companies can more than operate in the industry.

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[49] Muntazir Abbas, *ET Markets*, *Vodafone India revenue drops 29% in FY18*, THE ECON. TIMES (May 26, 2018), https://economictimes.indiatimes.com/markets/stocks/earnings/vodafone-india-revenue-drops-29-in-fy18/articleshow/64172503.cms.

[50] https://economictimes.indiatimes.com/bharti-airtel-ltd/yearly/companyid-2718.cms.

[51] *ET Markets*, *Reliance Jio posts profit of Rs 510 crore in Q4*, THE ECON.TIMES (Apr. 27, 2018), https://economictimes.indiatimes.com/markets/stocks/news/reliance-Reliance Jio-posts-profit-of-rs-510-crore-in-q4/articleshow/63942217.cms.

[52] Hitesh Kumar Jain, *Mergers India*, *Airtel Acquires Telenor*, M&A CRITIQUE (May, 2017), https://mnacritique.mergersindia.com/airtel-telenor-merger/.

[53] Merger of Vodafone India and Idea: creating the largest telecoms operator in India, Vodafone India-Idea Press Release, (Mar. 20, 2017).

The above discussion proves beyond reasonable doubt that the telecom bigwigs are at comparable terms on all the counters. It can thus be inferred that these companies can equally battle it out in the telecom sphere. Consequently, the excuse of ailing ARPU for the restrainment of outgoing calls stands negated. A hypothesis for the probable cause of action is explained in detail in the next section.

6. CONCERTED ACTION OF TELECOMS- MISCHIEF IN PLAY

The above discussions have successfully rebutted the claim made by Airtel and Vodafone Idea. But it does raise serious questions that need to be resolved. What was the reason for passing such a resolution if it did not aid in increasing ARPU? Was it a method to consolidate market share? What can be the probable effects on the market? For the purpose of answering this question, the researcher has drafted a hypothesis investigation on the probable intention of telecoms.

Bharti Airtel and Vodafone Idea have been losing ground to the entrant Reliance Jio of late. The statistics justify this trend. While Vodafone registered a market share of 19.2%, Reliance Jio caused an upset in the individual ranking with a share of 22.4% in the quarter ending June'18. Airtel comfortably led the pack with a showing of 31.7% in the same period. It was only after the inclusion of Idea's share at 15.4% that Vodafone could maintain its lead claiming 34.6% of the pie.[54] The

[54] Kalyan Parbat, *ET Markets*, *Reliance Jio inches closer to Bharti Airtel in terms of revenue market share*, THE ECON. TIMES (Aug. 28, 2018), https://economictimes.indiatimes.com/industry/telecom/telecom-news/reliance-Reliance Jio-inches-closer-to-bharti-airtel-in-terms-of-revenue-market-share/articleshow/65556052.cms.

statistics have left these bigwigs in complete disarray. With Reliance Jio breathing down their necks, these telecoms have taken proactive steps like the introduction of tie-in plans, slashing prices existing offers, and continuous increase in capex.[55] While these may look good on paper, even the companies know deep down that it might not be enough to stop the rampaging Reliance Jio. It is obvious that these telecoms would have better prospects without the headache of dealing with Reliance Jio. Since the exit of Reliance Jio is practically impossible given its stature and growth, these enterprises hatched a plan to eventually knock it out of business. The current notification is a medium for these telecoms to achieve this goal. Restraining dormant callers from making outgoing calls to increase ARPU may look good at first, but previous discussions have clearly thrown that claim out the window. What these companies actually intend to do is bring their combined market share of 66.3% into play. By restraining the customers from making calls, the companies leave the consumers with a choice to either recharge or switch operator. With similar plans being offered at a fairly same range by all the operators, the customer has the option to decide for himself. This may look like a gamble at first but it is worth taking given the fact that the companies have tried to lure in consumers with its attractive subscriptions on offer. Furthermore, the companies do not intend to compel the customers to switch to a premium plan, all they require is to recharge with a minimum fee to avail their services. It is interesting to note that the price band set by the telecos is virtually the same, thus raising doubts of a concerted decision. Owing to the prevalent practice that people, in general, prefer having separate

[55] *supra* note 34.

numbers for office and residence, this notification has the effect of either consolidation of business or charging a higher fee to avail subscription for the services. While the former will affect the business of Reliance Jio, the latter is sure to have an adverse effect on the consumers.

The impugned notification is clearly in conflict with the law established by the state. Any action that restrains the free trade and curbs the competition is in violation of the provisions of Competition Act, 2002. This case gives an indication of a cartel between Bharti Airtel and Vodafone Idea. A cartel is an agreement or a collective action to restrain reciprocal business activities among plural independent entrepreneurs competing in the same level in a business industry to prevent competition thereby securing extra profit.[56] The true purpose of a cartel is to prevent competition by means of regulation on production, price fixation etc.[57] Competition per se is important for the markets as it provides quality products at an affordable price to the customer. The provision prohibiting the formation of cartels comes under the ambit of Section 3(3) of Competition Act, 2002. It covers acts done in conjugation with other parties in similar business which has the effect of limiting the production, determination of the price of a product and so on.[58] Since this notification has a multifaceted effect on parties, it is divided into two parts for the purpose of research namely-

[56] J.S. Lee, *Strategies to Achieve a Binding International Agreement on Regulating Cartels*, SPRINGER NATURE SINGAPORE PTE LTD. (2016).
[57] U.S. v. Nat'l Lead Co., 332 U.S. 319.
[58] Competition Act, 2002, § 3(3).

6.1 PRICE FIXATION

In a case of price fixing by a cartel, the prerequisite that must be met is the existence of an agreement either express or implied by the parties.[59] Circumstantial evidence that excludes the possibility of the independent action of parties has been held to be sufficient for the purpose of proving an act of price fixation.[60] Since agreements entailing cartels are often executed behind closed doors, no document to testify the same sees the light of the day. Hence, the actions of parties form the basis for closing in on a cartel involved in anti-competitive trade. Consequently, in the present case, perusal on the actions of Vodafone Idea and Airtel will aid in the construction of a hypothesis regarding the purported agreement and provide circumstantial evidence for price fixation. A look at the recharge plans of the telecoms will aid in substantiating this argument. The lowest price for availing the monthly benefit of making calls in Airtel and Vodafone Idea is set at Rs.35.[61] If that doesn't prove the similarity index between the telecos, then the same price set for talk time offers at Rs.65, Rs.95, Rs.169, Rs.199 does hit the nail in the coffin.[62] Furthermore, it must also be noted that these plans were introduced by telecos in quick succession. While Airtel came out with plans starting at Rs.35 on the 4th of September,[63] Vodafone Idea emulated the same twenty days later.[64] This,

[59] Union of India v. Hindustan Development Corp., (1993) 3 S.C.C. 499.
[60] Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984).
[61] *Vodafone*, *Best Prepaid Recharge Plans*, VODAFONE, https://shop.vodafone.in/shop/prepaid/best-prepaid-plans.jsp#Bonus.
[62] *Airtel*, *Recharge Online*, AIRTEL, https://www.airtel.in/recharge-online.
[63] Sumit Chakraborty, *NDTV*, *Airtel Rs. 35, Rs. 65, Rs. 95 Combo Recharge Packs Offer Up to 500MB Data, 28 Days Validity and Voice Calls to Take on Reliance Jio*, GADGETS

in turn, strengthens the suspicion of background scheming way before the disputed notification was incepted. Coming to the minimum price of the recharge itself, a huge spike of 71.42% from Rs.10 to Rs.35 can be seen.[65] At times of falling call rates, the unreasonable increase does stick out like a sore thumb. Moreover, the increment in rates goes against the obligation of telecom operators to provide services at affordable and reasonable prices under Indian Telegraph Act.[66] The above-mentioned facts and arguments aptly establish a case of price fixing by the telecos.

Courts have heavily come down on cartels involved in price fixation over the past decades. The mere existence of tampering with price is enough to prove an adverse appreciable effect on competition.[67] Moreover, the legislation has been construed in a manner not only to protect consumers from unfair pricing but also to deter enterprises from entering into anti-competitive agreements.[68] Penalization of firms dealing with hiking prices for their benefit leads to a reduction of rates.[69] The present case fulfils the criterion for price fixation. Previous discussions have already proved the existence of an agreement of sorts, with the aid of circumstantial evidence. Given the fact that the price affects the majority of customers, it further increases the gravity of the offence. Hence in light

360 (Sep. 4, 2018) https://gadgets.ndtv.com/telecom/news/Reliance Jio-effect-airtel-rs-35-65-95-combo-recharge-packs-data-validity-voice-calls-1911179.

[64] Sumit Chakraborty, *NDTV*, *Vodafone Idea Launches 6 Combo Recharge Packs With Up to 2GB Data and 84 Days Validity to Take on Jio*, GADGETS 360 (Sep. 25, 2018), https://gadgets.ndtv.com/telecom/news/jio-effect-vodafone-idea-active-recharge-all-round-combo-pack-data-voice-calls-validity-1921730.

[65] *Id.*

[66] Indian Telegraph Act, 1885, § 3(1A).

[67] *supra* note 60.

[68] Excel Crop Care Ltd. v Competition Comm'n of India, (2017) 8 S.C.C. 47.

[69] Rajasthan Cylinders v Union of India, 2018 S.C.C. Online S.C. 1718.

of the facts of the case, this notification must be struck on grounds of affecting prices by the medium of a cartel.

6.2 MARKET SHARING

The price fixation by the firms can be interpreted in a different light in the present case. Apart from compelling the subscribers to pay a higher fee for the services, the same pricing strategy has the effect of monopolizing the telecom industry. In simpler terms, the same price offered by the telecos gives an indication that they do not intend to compete with each other. Airtel and Vodafone Idea have very well realized the fact that the infighting would lead to losses apart from the ones faced by the entry of Reliance Jio. This act would benefit the companies in the consolidation of market share and a decline in losses incurred. While this plan of action entails benefits to the telecos, it is disadvantageous for Reliance Jio because of the probability of stagnation or loss of market share. Reliance on the remarks expressed by Supreme Court in the case of Competition Commission of India v Bharti Airtel[70] will aid in understanding this rationale. The concerned parties, in this case, were the same as in the present scenario. While passing its decision, the court opined that the overall productivity increases with the inclusion of a firm more efficient than the average incumbents. It is quite clear that the entrant referred to in the aforementioned case is Reliance Jio, while Vodafone Idea and Bharti Airtel being the incumbents. Construction of the court's opinion means that the former is efficient than the latter. This has in fact been proven via an array of statistics in the earlier discussions. Being inefficient at the

[70] Competition Comm'n of India v Bharti Airtel, 2018 S.C.C. Online S.C. 2678.

current stage, it is rational enough to surmise that these telecos have decided to combine their forces in a fight against Reliance Jio. Though there is a scope that the customers might switch between the two telecos, the operators are willing to stomach the loss of a handful number of customers in return for restricting the growth of Reliance Jio. Additionally, the increase in capex and bountiful offers offered by both the telecoms can cause an upset for the latter. Moreover, the restraint placed on outgoing calls in lieu of charging higher revenue gives a clear indication of a cartel among operators.

A similar question arose before Competition Commission of India in Re: Alleged Cartelisation in Flashlights Market in India,[71] while adjudging a claim of the existence of a cartel in the zinc cell industry. The Director-General in its investigation found out that that the parties had co-ordinated amongst them to set the maximum retail price for the batteries. The investigation unearthed that generally after agreeing to raise the prices, Eveready, being the market leader would have announced an increase in price. This would be followed by Indo National and Panasonic. It was further uncovered that the Parties co-ordinated regarding trade discounts, retailer margins, promotional schemes, etc., to ensure that the price-fixing arrangement in between the Parties was never rendered ineffective. The Parties were also found to be distributing the market amongst themselves geographically, or in terms of the type of the batteries sold to maximize profit margins. While the commission assented to the probability of collusion between the parties, it could not find evidence on the resultant

[71] *Re:* Alleged Cartelisation in Flashlights Market in India, *Suo Motu* Case No. 01 of 2017.

effect on the price of flashlights. Hence the petition was dismissed.[72] In the instant case, there has been a direct influence of the telecom operators in determining the prices. Moreover, the restraint on outgoing calls is for the sole purpose of hiking prices. It can be reasonably construed that the sole motive of the company was market consolidation at the cost of Reliance Jio. This, in turn, is a restrictive practice. Hence such a notification is liable to annulled and the parties concerned must be penalized at the discretion of the court.

7. CONCLUSION

The in-depth research conducted as a part of the paper has shed light on the impugned notification passed by the telecom operators. For the purpose of analyzing every facet of the notification, the researcher has taken the aid of company disclosures, financial statements, and judicial precedents. While unearthing the truth behind the notification, the empowering provisions, the legality of the contract, financial standing and its effect on the competitiveness in the telecom industry has been scrutinized. All these factors have collectively pointed out the existence of illegality in the notification. The telecom operators have clearly defrauded the consumers with the commission of the notification. Moreover, the impugned act has an adverse effect on the functioning of other players in the telecom industry. The effect of the notification in the fixation of price and market sharing will surely affect the revenue of the other telecos. In the light of the findings and rationale presented by the author, such an

[72] Anshuman Sakle & Soham Banerjee, *Leniency Regime Takes a Step Forward — Reduction in Penalty for Battery Manufacturers*, (2018) PL (Comp. L) June 85.

action must be struck down at the earliest. This will lead to the welfare of people and act as a deterrent for potential miscreants.

DIGITAL ECONOMY: IMPACT ON COMPETITION LAW IN INDIA

Shramana Dwibedi[*] & Shivam Shukla[**]

ABSTRACT

Technology and internet facilities have led to a revolutionary change in the sales and marketing arena globally. This paradigm shift has enabled the creation of a digital economy whereby market and its various entities envision an online presence. The objective of this paper is to assess the changing dimensions of the market in the light of a fast changing digital economy where various competitors are vying for a greater online market share. Given the objective, it becomes important to assess whether the Indian legislation, Competition Act, 2002, designed to cater to offline markets is capable of effectively addressing issues in relation to this newly emerging domain of technology enabled markets. The second assessment question shall relate to the impact that these new digitally operating enterprises have on pre-existing offline competitors. The authors shall also delve into analyzing whether the former leads to causation of any barriers to entry in the market. This paper shall give an

[*] Student, 4th Year, B.A., LL.B., Symbiosis Law School, Hyderabad (shramana.dwibedi@slsh.edu.in).

[**] Student, 4th Year, B.A., LL.B., Symbiosis Law School, Hyderabad (shivam.shukla@slsh.edu.in).

insight into the recent judicial trend in dealing with abusive conduct alleged against such online enterprises.

1. INTRODUCTION

The world has been taken over by a new economy, the e-commerce and digital economy. Digital markets are flourishing globally today and the Indian competition market is no exception. This has been made possible by Internet which provides cost effective global access in no time. At present, digital markets are growing in various sectors like, e-wallets, e-commerce, cab aggregators etc. These mainly draw funding from investor companies. They have distinct methods of business practices from that of offline stores. Their strategies often include anti-competitive pricing and exclusivity agreements. This can potentially eliminate competition in the market. It is important to assess if the Competition Commission of India (CCI) is equipped and empowered by the present provisions of the Competition Act, 2002 to cater to challenges posed by such digitally operating enterprises or if it requires any transformation.

The main purpose of this study is to understand the impact of digital e-commerce industries on offline retail stores in the light of growing competition in the market. The present age can be well termed as one where the evolved technology is changing rapidly. The advent of the Internet has brought about a revolution in traditional business settings. The business transactions in this sector have started operating through digital platforms. The aim of the paper is to assess the impact that such digital

companies have on traditionally operating offline companies and on the competition in the market.

2. TO ASSESS THE IMPACT OF DIGITALLY OPERATING COMPANIES ON PRE-EXISTING MARKETS OF TRADITIONAL OFFLINE COMPANIES

One must first attempt to understand the underlying distinction between a digitally operating online company and the traditional brick and mortar offline retail or service providing companies. In layman's terms, this means, companies operating their business over an online interface without conducting their operations through an established proprietary retail shop are digitally operating companies, whereas the latter are traditional offline retail or service providing entities conducting their business through physical proprietary establishments.

The former sets of online companies have led to the creation of a new wave in trade and commerce in form of e-commerce. As per the definition laid down by Organization for Economic Co-operation and Development (OECD), "ecommerce is the business occurring over networks using non-proprietory protocols established through an open standard setting process."[1] The rising number of such companies has led to the advent of a new economy in India and worldwide. The OECD has described that the term 'new economy' is where the various sectors of the economy produce or intensely use new technologies, with an increasing dependence on

[1] Directorate For Financial, Fiscal And Enterprise Affairs Committee On Competition Law And Policy, *Competition Issues in Electronic Commerce*, DAFFE/CLP(2000)32 (Jan. 23, 2000), *available at* https://www.oecd.org/daf/competition/sectors/1920373.pdf (last visited Apr. 13, 2019).

computers, telecommunications and the Internet.[2] Online businesses primarily conduct their business through sophisticated internet technologies and offer their services and goods through various online applications.[3]

Impact of digitally operating companies on the traditional offline companies:

1. **Vast Consumer Access:** Internet is a boundary-less platform that provides global access and consumes minimal time and cost. The upper edge that digitally operating companies possess is that their consumer access is wider than a traditional retail shop despite the fact that both engage in providing the same services. Such is the benefit of the networking effect on the web that it allows companies to reach out to hundreds of potential consumers in no time at all. While a traditional company's market is limited to regional boundaries as per its location, an online company can reach out beyond such geographical limitations. In this regard, example can be cited of Zesty Bites which is a bakery founded in 2004 situated in Chandigarh. It serves international style baked treats and desserts. By way of adopting digital operation over the last few years, the bakery has seen a growth of 25% and its customer base has increased to six more cities within Punjab and Haryana.[4] Also, 'Metcalfe's Law' proposes that the value of a communication network is proportional to the

[2] New Economy. (2004). In: *Glossary of Statistical Terms*. [online] OECD. *available at* https://stats.oecd.org/glossary/detail.asp?ID=6267 (last visited Apr. 13, 2019).
[3] RICHARD POSNER, ANTITRUST IN THE NEW ECONOMY 4 (2000), *available at* https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1057&context=law_and_economics (last visited Apr. 13, 2019).
[4] Lavanya Chawla, *The Conundrum of Online Retail in Competition Law*, 3 INDIAN COMPETITION L.REV. 44, 49 (2018).

square of the number of participants.[5] This logic is brought to use by social media networks such as Facebook or WhatsApp. Their popularity increases as their consumer base increases, as more and more customers begin to use their services, this proportionally increases their profit value.

2. **Price Comparison Information:** Internet is a medium that allows easy recording and storage of information and data. The same data is easily accessible as well. Technology has also made it easier for firms to obtain information about pricing preferences and buying patterns and create different versions of the product to suit different price points.[6] This significantly favours the online companies as they alter products according to reliable customer preference choices, based on data which they collect via Internet mediums. They also advertise products or services depending upon their internet usage history. These companies are able to track data and therefore show customer specific advertisements. This facilitates them to manufacture more efficient and competitive products to suit the consumer demands. Thus, it may lead to better sales.

3. **Heavy Discounting Policies:** In most cases, digitally operating companies receive funding from investors. They are able to utilize funds to engage in practices like deep discounting, cash-back offers and other such incentivizing schemes designed to attract new customers. This often allows them to further establish their network effect. They engage in such

[5] Bob Briscoe A.O. et al.,, *Metcalfe's Law is Wrong*, IEEE SPECTRUM (July 1, 2006), http:// spectrum.ieee.org/computing/networks/metcalfes-law-is-wrong (last visited Apr. 13, 2019).

[6] GRAHAM C., COMPETITION, REGULATION AND THE NEW ECONOMY 12 (2004).

mechanisms at the cost of substantial losses[7]. Predatory Pricing means the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.[8] This is essentially done with an intention to reduce competition in the market and to eliminate competitors.[9] An example in this regard would be of the global taxi company 'Uber' which made worldwide losses in the first half of 2016 of US$ 1.27 billion (approximately Rs.86.5 billion).[10] Also, the Indian taxi company 'Ola' reported a net loss of Rs.7.96 billion in March, 2015. The firm One97 Communications, which owns 'PayTM', reported a loss of Rs.15.49 billion in March, 2016.[11] Therefore, this clearly shows that they initially provided services to the consumers at a lower price, at the cost of their own losses, in order to attract more consumers. After they were able to build a stronghold in the market, they adopted the practice of surge pricing, so as to recover the losses that they suffered initially. As per the Foreign Direct Investment (FDI) guidelines issued by the Government in March, 2016, the automatic route of foreign investment would be available

[7] SMRITI PARSHEERA et al., COMPETITION ISSUES IN INDIA'S ONLINE ECONOMY 4 (2017), *available at* https://www.nipfp.org.in/media/medialibrary/2017/04/WP_2017_194.pdf (last visited Apr. 13, 2019).
[8] Competition Act, 2002, § 4(b).
[9] *Id.*, § 4(2)(e)(b).
[10] Eric Newcomer, *Uber Loses at Least $1.2 Billion in First Half of 2016*, BLOOMBERG (Aug. 25, 2016), https://www.bloomberg.com/news/articles/2016-08-25/ uber-loses-at-least-1-2-billion-in-first-half-of-2016 (last visited Apr.13, 2019).
[11] Digbijay Mishra , *PaytmRregisters A Four Times Increase In Losses, Rs 1549 Cr For FY'16*, ECONOMIC TIMES (Dec. 13, 2016),http://economictimes.indiatimes.com/articleshow/55951679.cms?utm_source=contentofinterest&utm_medium=text&utm_ campaign=cppst. (last visited Apr. 13, 2019).

only to those e-commerce marketplaces that refrained from influencing sale prices and helped maintain a level playing field.[12]This was an attempt to curb such pricing techniques by the companies. Such lower prices automatically attract the customers to their products which leaves traditional companies in a fix as they tend to lose out on customers due to the attractive offers levied by the former. The latter companies incur heavy expenditure to make available goods and services at offline stores coupled with the standard cost of production.

4. **Pricing decisions backed by intensive capital funding:** As per the CCI's (Determination of Cost of Production) Regulations, 2009, CCI will generally look at the 'average variable cost' as a proxy for marginal cost to assess whether a firm is selling below cost.

The structure of the Internet based industries is different as compared to the offline ones and therefore these businesses adopt innovative pricing strategies.

Online companies adopt several techniques to obtain a first-mover advantage in the market. First mover advantage allows a company to venture into a market as a pioneer, make available its product or service to the consumers, thereby capturing significantly majority of the market share. This may most likely make the prospects of the market tilt towards the company with the largest market share. This may lead the competitors to exit the market. It also may become detrimental for the new entrants to enter the market as they may not be able to compete with the already

[12] Press Note 3, *Guidelines on Foreign Direct Investment on Ecommerce*, (2016), Ministry of Commerce & Industry, *Guidelines on Foreign Direct Investment on Ecommerce,* Press Note No 3 (Mar. 29, 2016), *available at* https://dipp.gov.in/sites/default/files/pn3_2016_0.pdf (last visited Apr. 13, 2019).

existing dominant firm which has a large market share. Therefore, there is a constant bid to capture the largest market share between competing firms.[13] For example, in India, as on the present day, Uber and Ola can be seen competing aggressively to outbid the others, in the mean-time they are doling out exclusive incentives to their drivers and customers to capture the market in their favour irrespective of the fact that such is causing huge losses to them. The companies are heavily relying on their funding capital to provide incentives and deep discounts. This aggressive pricing policy could effectively lead to ouster of competing traditional cab services.[14] These discounting practices sustaining over substantial periods of time has created new barriers to competition.[15]

5. **Rationale behind predatory pricing:** The companies admittedly incur short-term losses in the hope of capturing greater market share. By allowing such attractive discounts, these companies attempt to draw customers, this in turn increases their customer base.[16] In India, several of the top 10 e-commerce companies employ this pricing technique to gain market share and control in the market by capturing larger customer base. It is reported that the combined losses of India's top ten e-commerce companies quadrupled in the financial year 2014-15, standing at a total of

[13] NICHOLAS ECONOMIDES, CONCEPTS IN THE CONTEXT OF MONOPOLISTIC COMPETITION (2004), *available at* http: //www.stern.nyu.edu/networks/Economides_Competition_Policy.pdf (last visited Apr. 13, 2019).

[14] Bharat Budholia, *Digital Disruptions: A Competition Law Perspective*, 3 INDIAN COMPETITION L. REV. 1, 4 (2018).

[15] ANUPAM SANGHI, COMPETITION IN THE DIGITAL ECONOMY 10 (2016).

[16] Daniel L. Rubinfeld, *Antitrust Enforcement in Dynamic Network Industries*, 43 ANTITRUST BULL. 859, 880 (1998), *available at* https://www.law. berkeley.edu/files/dlr_enforcement.pdf (last visited Apr.13, 2019).

Rs.51.5 billion. Leading ecommerce marketplaces bore the highest proportion of these losses, Flipkart at Rs.20 billion, Amazon India at Rs.17.2 billion and Snapdeal at Rs.13.28 billion.[17] During the financial year ending in March 2015, Ola's profit revenue was only Rs.3.8 billion in comparison to their total expenses of Rs.11.2 billion.[18] A huge disparity between expenses and profits earned explain that the company was bearing losses to itself in order to continue providing benefits to customers and their drivers. Their intention might be to capture a greater market share in the long run. Also, e-payment wallets like PayTM, Mobikwik and Freecharge offer attractive cash-back discounts on e-transactions.[19]

6. **Heavy Investor Backing and Fund Capital:** The e-commerce firms have shown exponential growth in a very short span of time. For this reason, they draw substantial investments from investors and this builds up their fund capital. The fund can then be well utilized to recuperate for the losses arising out of predatory pricing and other promotional offers. Money is the prime requirement[20] in today's market structure where constant focus is on innovation and manufacturing improved goods and providing better services than their competitors to capture a greater market

[17] Jharna Mazumdar, *E-commerce firms face new challenge as losses force reality check*, THE INDIAN EXPRESS (Mar. 27, 2016), *available at* http:// indianexpress.com/article/business/business-others/ e-commerce-firms-face-new-challenge-as-losses-force-reality-check/ (last visited Apr. 13, 2019).

[18] Harichandan Arakali, *Ola's ready to race ahead of the curve,* FORBES INDIA (Jun. 20, 2016), *available at* http://www. forbesindia.com/printcontent/43507 (last visited Apr. 13, 2019).

[19] Ajay Shah, *How to make digital payments work*, BUSINESS STANDARD (Nov. 28, 2016), *available at* http://www.mayin. org/ajayshah/MEDIA/2016/digital_payments.html (last visited Apr. 13, 2019).

[20] Ajay Shah, *India's start-ups are lazy businesses*, BUSINESS STANDARD, *available at* https://www.business-standard.com/article/opinion/ajay-shah-india-s-start-ups-are-lazy-businesses-116050100681_1.html (last visited Apr. 13, 2019).

share. Hence, such investors pave an easier way for the online companies. Traditional companies do not see as much investment as in the former category.

7. Common Investors affect competition in the market: The leading technology fund Tiger Global Management LLC (Tiger Global) has invested in both Flipkart and Shopclues. These businesses are in direct competition with each other.[21] Nexus Venture Partners, another major investor in Internet businesses, holds a stake in competing firms Snapdeal and Shopclues. Other examples include the investment by Norwest Venture Partners in Quikr and Sulekha in the same market of online classifieds and Sequoia's investments in Zaakpay and Citrus in the same market of online payment gateways.[22] Such interlocking structure where competing companies happen to have common investors potentially reduces the competition in the market. Such may cause the common investors from discouraging the respective companies to bring out competing or improved products into the market. This reduces competition among rivals significantly.[23]

Therefore, given the above factors which are only a few among several others, one can see that the traditional companies face severe

[21] Itika Sharma Punit, *The new global anti-Uber alliance: Ola, Lyft, Didi Kuaidi and GrabTaxi agree to ride together*, QUARTZ INDIA (Dec. 3, 2015), *available at* https://qz.com/india/564795/a-new-anti-uber-alliance-strengthens-ola-lyft-didi-kuaidi-and-grabtaxi-agree-to-ride-together/ (last visited Apr. 13, 2019).

[22] Mihir Dalal et al., *Sequoia Capital bets big on hyperlocal start-ups in India*, LIVEMINT (Aug. 14, 2015), *available at* http: //www.livemint.com/Companies/L6dVNPtc4PhbadvXeCDY5H/ Sequoia-Capital-bets-big-on-hyperlocal-startups-in-India.html (last visited Apr. 13, 2019).

[23] OECD, *Antitrust Issues Involving Minority Shareholding and Interlocking Directorates*, DAF/COMP/WP3/WD(2008)26 (Feb. 15, 2008).

losses due to heavy discounting and predatory pricing policies adopted by the online companies. The effects are such that at times it leads to elimination of competition from the market. The existing competitors are compelled to exit the market in view of such pricing policies. In the case of MCX Stock Exchange v. Competition Commission of India[24], National Stock Exchange was found to be abusing its dominant position through zero pricing. Through this strategy of zero pricing, NSE had affected competition. CCI ruled that if this would not have been brought under check, it could have led to MCX and other competitors to exit the market, thus leading to elimination of completion and creation of a monopoly.

3. IMPACT OF THE PRACTICES ADOPTED BY ONLINE ENTERPRISES ON NEW ENTRANTS IN THE MARKET

Predatory Pricing is one factor due to which competition in the market is threatened and potential new entrants are sufficiently discouraged from entering the market. Apart from predatory pricing, there are several other factors which affect competition. These factors are discussed below:

Bundling Agreements: Microsoft Company engaged in anti-competitive techniques of tying of products along while selling its operating systems. These are termed as bundling practices which they continued for decades. However, the same was put to a halt after a series of investigations by competition authorities across the world.[25]

[24] MCX Stock Exchange v. Nat'l Stock Exchange of India, 2011 SCC OnLine CCI 52.
[25] Siddharth Jain et al., *E-Commerce And Competition Law Challenges And The Way Ahead*, 3 INDIAN COMPETITION L. REV. 7, 14 (2018).

Exclusivity Agreements: In the recent case of *Mohit Manglani*,[26] the question before the CCI was to investigate into the issue of exclusive distribution agreements between the retailers and the online retail portals. As per the information filed with the CCI, exclusive distribution agreements were entered into by companies such as Flipkart, Snapdeal and Amazon with other retailers to sell their products only on their online platform. Though CCI found nothing ant-competitive in the arrangement, it leads to a grave possibility where such exclusive agreements could oust new entrants into the market or create barriers for them. This issue of exclusivity was largely dealt in the case involving Google where Google was investigated by the competition authorities in several countries for having made its advertising platform, Google AdWords, incompatible for use by other competing ad platforms. This was essentially an attempt to exclude Google's competitors from making use of its advertising platform, as held by the Federal Trade Commission, USA.[27] For instance, in the *Microsoft* case[28], the European Commission held Microsoft guilty of having abused its dominant position in the PC operating system market by refusing to supply interoperability information to its competitors. This did not allow other competitors to use the Microsoft interface. The ratio of the case was based on the essential facilities doctrine which stated that if a company has access to a facility that cannot be duplicated and the use of

[26] http://www.cci.gov.in/May2011/OrderOfCommission/262/802014.pdf.
[27] FEDERAL TRADE COMMISSION, GOOGLE AGREES TO CHANGE ITS BUSINESS PRACTICES TO RESOLVE FTC COMPETITION CONCERNS (2013), *available at* https://www.ftc.gov/news-events/press-releases/2013/01/ google-agrees-change-its-business-practices-resolve-ftc (last visited Apr. 13, 2019).
[28] Case COMP/C-3/37.792 Microsoft, Commission decision dated 24 March, 2004.

the same is essential even for its competitors, the company having control over its access must allow the use of the same. This doctrine was carved out in a case of the Seventh Circuit Court in the United States[29], which explained essential facility to be such, the access of which is required by other players in order to compete effectively in the market. The Court referred to the following elements as being necessary to establish the applicability of the essential facilities doctrine:

1. The monopolist controls access to an essential facility;
2. The essential facility cannot be practically or reasonably duplicated;
3. Denial of the use of the facility by the monopolist; and
4. Feasibility of providing the facility.

Hence, the objective of this issue was to highlight circumstances by way of which new entrants to a particular market are threatened or dissuaded from entering.

4. ANALYZING THE EFFECTIVENESS OF THE COMPETITION ACT, 2002 IN ADDRESSING NEW KINDS OF ANTI-COMPETITIVE CONDUCT IN TECHNOLOGY ENABLED ONLINE MARKETS

Competition Commission of India formed under the Competition Act, 2002 is empowered to try cases involving abuse of dominance by enterprises. The power is given to the CCI under Section 4 of the Act. The Act defines 'dominant position' as a position of strength in the relevant market that allows a firm to: (i) operate independently of prevailing

[29] MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Circuit).

competitive forces; or (ii) affect its competitors, consumers or the relevant market in its favour.[30] The CCI has power to look into both anti-competitive conduct, that is, abuse of dominance and concerted actions through agreements and combinations that cause appreciable adverse effect on the competition in India.

There have been instances in the past where the actions of the Internet based businesses have been questioned before the CCI on the grounds of predatory pricing, exclusivity conditions and discriminatory tactics. Most of these cases relate to e- commerce marketplaces, online taxi aggregators, and online search advertising businesses. The CCI, however in most of the cases did not find sufficient merit to refer the matter for further investigation.

The CCI, in order to find out whether there is abuse of dominance has to go step by step.

The first step that the CCI takes is to determine a relevant market when it deals with a case relating to abuse of dominance. The concept of relevant market includes

1. Relevant Product Market- where the goods and services offered are regarded to be same and substitutes of one another.
2. Relevant Geographic Market- where the conditions in the area in which competition takes place are homogenous.

[30] Competition Act, 2002, § 4(2).

5. RELEVANT PRODUCT MARKET

5.1 E-COMMERCE

In case of e- commerce businesses, CCI observed that the consumers tend to compare price, product quality and other essentials like discount and shopping experience, both online and offline before making a final decision. If there is a significant increase in the price in one segment, it will make the customers to shift to the other segment. Therefore, the CCI opined that these two markets are different channels of distribution of the same product and are not two different relevant markets.[31]

Also, in a case where the informant argued that if a given book is exclusively dis-tributed through an e-commerce firm, it is not substitutable by another book distributed by brick and mortar stores, hence making it a separate relevant market. The CCI disagreed, holding that individual products cannot be construed as a relevant market by themselves. It was of the view that none of the e-commerce platforms were individually dominant in either the overall distribution market or for the online segment, and therefore an assessment of the alleged abuse of dominance by such e-commerce firms was not required.[32]

In several cases filed against Google alleging abusive practices in respect of its online search and advertising business, the CCI has prima facie delineated the market for online search advertising in India as the

[31] Ashish Ahuja v. Snapdeal, 2014 S.C.C OnLine C.C.I 65.
[32] Mohit Manglani v. Flipkart, 2015 S.C.C OnLine C.C.I 61.

relevant market.[33] The CCI in doing so, has distinguished the online search market from the offline forms of advertising.

5.2 TAXI AGGREGATORS IN INDIA

In the case of taxi aggregators, the CCI held that the 'radio cab service' is a relevant market in itself. The CCI gave the reason that these services cannot be said to be substitutable by other modes of transport taking into account the convenience in terms of time saving, point-to-point pick and drop, pre-booking facility, ease of availability even at obscure places, round the clock availability, predictability in terms of expected waiting/ journey time etc. as relevant characteristics which cannot be found in other modes of road transport.[34]

However, in another case filed by Meru Cabs against anti-competitive practices of Uber cabs in Kolkata, the CCI looked at the active presence of yellow- metered taxis and concluded that the radio taxis and yellow metered cabs formed part of the same relevant market.[35] Ease of booking yellow cabs, predictability in terms of availability and low pricing were some of the factors considered by CCI while making such an assessment. In this case, CCI observed that Uber was not in a dominant position because it faced a stiff competition from Ola in Kolkata and that Ola had a larger market share.

[33] Albion InfoTel v. Google Inc., 2014 S.C.C OnLine C.C.I 145.

[34] Fast Track Call Cab Pvt. Ltd. v. A.N.I Tech., 2015 S.C.C OnLine C.C.I 140.

[35] Meru Travel Solutions v. Uber India Systems, Case No. 81 of 2015.

6. RELEVANT GEOGRAPHIC MARKET

A relevant geographic market is one in which the conditions are homogenous in the area in which the competition takes place. For instance, the relevant geographic market for taxi aggregators will be the city where they run because most of them run only in the city and not outside it.

Internet is a wide platform which has limitless boundaries. Defining the geographical market acquires an interesting dimension in cases where Internet platforms use the customer's or merchant's location as a useful matching tool. The conditions of demand and supply of online cab hailing services, will for instance, differ drastically from one area to another. The CCI applied this logic in the taxi aggregation cases, to hold that the relevant geographic market was limited to the specific city in question. This is because the radio cabs operate within the city limits and also their regulation differs from state to state.

Therefore, we see that the use of geo-location tools to ascertain the location of potential users and target services to them can also make such businesses delineated as independent relevant market on the basis that the competitive constraints faced by such businesses are location-specific. This means that small firms providing innovative or unique services, which may often be linked to the consumer's geographic location, could well be designated as a separate relevant market, thus increasing the possibility of them being found to be dominant within that ecosystem.

7. DETERMINATION OF DOMINANT POSITION

The Competition Act under Section 4 defines dominant position as a position of strength in the relevant market that allows a firm to: (i) operate independently of prevailing competitive forces; or (ii) affect its competitors, consumers or the relevant market in its favour. Therefore, according to the wordings of the section, it is clear that the Act prohibits abuse of the dominant position which the enterprise enjoys. No one can be prosecuted just by mere dominance in the market till the time the enterprise doesn't start abusing or misusing its dominant power to cause appreciable adverse effect on competition in the market. The Raghavan Committee which was constituted by the Indian Government to recommend a suitable legislative framework on competition law clearly stated "The law should ensure that only when dominance is clearly established, can abuse of dominance be alleged. Any ambiguity on this count could endanger large efficient firms".

In *Meru Travels Solutions Private Limited v. Competition Commission of India*[36], the Competition Appellate Tribunal (COMPAT) clearly stated dominant position under the Act means a 'position of strength' but it "does not say that this position of strength necessarily has to come out of market share in statistical terms". COMPAT therefore ordered CCI to consider the question of dominance based on the overall picture posed by the taxi market, which would also include the funding status, global developments, network expansion strategies, and associated discounts.

[36] Meru Travels Solutions v. Competition Comm'n of India, Appeal No.31/2016.

The CCI has been very inconsistent in ordering investigation in matters of taxi regulators, which can be gauged from the disparity in its orders in different cases. In Bangalore, CCI adjudged that Ola had dominance based on a market share report made by third party. However, CCI did not find dominance of Ola in New Delhi and Kolkata stating that the third party reports were not authentic. COMPAT pointed out the inconsistency in CCI's approach towards the findings of these analyst reports.

8. CONCLUSION

In the light of the reasons stated in the above chapters, the authors come to the conclusion that the traditionally operating companies are at a disadvantage as against the digitally operating companies due to several reasons. The former lacks the usage of Internet and networking in their traditional retail shops, this results in limiting their market share. The e-commerce firms are heavily dependent on the facilities of the Internet which facilitates easy access to customers, thereby expanding their market access width with little cost and expenses. Also, the e-commerce giants attract sufficient funding from various investor companies, allowing it ready access to available capital for offering discount and incentives to draw consumers. All this is aimed at establishing a loyal customer base. The strategy adopted by such companies is that initial losses can be incurred by allowing below the cost price incentives as long as the end goal is served. The goal is to draw larger percentage of consumers to its products and services. For instance, taxi regulators like Ola and Uber offer

free rides and rides at cheap rates in the beginning when a new consumer makes use of their application. This is done to increase their customer base. After suffering initial losses by offering free rides and their customer base, these companies later surge the prices charged. Therefore, by surging the prices, these companies do good the losses suffered by them in the initial days of their plying. This is termed as 'recouping of losses.' Therefore, it is harmful not just for the competitors but also for the consumers as they are required to pay more than the actual prices. In the long run, the revenue generation from an increased customer base will recoup for the initial losses made. Such predatory pricing is not feasible to be adopted by traditional retail stores as they incur sufficient amounts to operate a brick and mortar retail shop. The premises of the shop, the rent, expenses of running of that shop which includes electricity charges mainly are not borne when conducting business through an online platform. The cost of manufacture of the goods is relatively high in the latter categories therefore. This dissuades customers to avail services from and buying goods from traditional retail shops.

In reference to predatory pricing, the structure of the Internet based industries is different as compared to the offline ones and therefore these businesses adopt innovative pricing strategies. Relatively higher fixed costs and low variable costs, makes it possible for many Internet-based businesses to adopt to a low cost pricing strategy without necessarily being predatory. Also, the CCI will need to take view on whether the average variable cost is an appropriate standard for examining the pricing strategies of businesses with network effects and if not, what the

appropriate standard should be.

Predatory pricing is possible to be carried out for a substantial period of time by companies which are extensively backed by capital funding by investors. This is true in the case of digitally operating companies. Traditional businesses or new start-ups will not be able to yield such discounts that go under the standard cost price of manufacture as they cannot rely on capital funding. Also, these digital firms cash on the popularity of some of their products by selling along with them products for which the market is not good. This essentially means that by way of tying-in arrangements or bundling arrangements, companies often sell their less popular products with their popular products. This mandates the consumers who wish to purchase only the popular product to even buy the tied in product. Exclusive arrangements on the other hand close the market for existing competitors and new entrants to the market. These are essentially detrimental to the thriving of a healthy competition in the market.

The Internet based market is a comparatively new one and more technical. CCI is working hard to tackle the various issues that come up. Much has been achieved, but CCI is still to achieve much more. In many cases, there occurs a scenario wherein more than one firms hold a dominant position in the market. All these firms indulge in anti-competitive acts. The CCI has failed to scrutinize these firms as the chapter on collective dominance is not yet observed in the existing Competition Act. Therefore, these firms though acting in an anti-competitive manner are saved from any action to be taken against them

because of the fact that there is still no provision on collective dominance in the Indian law.

9. RECOMMENDATIONS

9.1 PREDATORY PRICING BY DIGITAL COMPANIES MUST BE PENALIZED

The CCI must understand the underlying differences between a traditionally running offline store and a digital company. The latter is often funded heavily by investors as the profit margin in online operations is comparatively more than traditional retail outlets are able to offer. Cost of production and variable costs for online companies is significantly lower in online companies, therefore, securing steady profit margins for the investors. Hence, investors prefer to invest their capital in such digitally running companies. This ensures a steady flow of cash for these companies. Given this situation, when the digital company is employing deep discounting and incentive pricing to entice consumers, the offline store ends up losing on market share as consumers will definitely purchase the similar products at the lower price. Thus, it is not healthy competition, it is unfair as the offline companies do not possess such deep pockets. Hence, the CCI must penalize such pricing policies, it must not restrict itself to see whether any appreciable adverse effect under Section 19 of the Competition Act is being caused or not.

9.2 COMMITMENT DECISIONS

Commitment decisions must be undertaken by the CCI to check

potential threats to competition in the market. This is a system followed by the European Commission and the Federal Trade Commission in the United States. In this method, the Competition authorities can ask the parties to accept binding 'commitment decisions' even without an infringement having been established by way of cogent proof.[37] The FTC rules allow a party that is called upon for investigation to settle the charges made against it by signing a consent agreement, without admitting its liability. This consent agreement is in the nature of a warranty that the party will not engage in any anti-competitive act or attempt to abuse its dominant position.[38]The benefit of such procedure is that it consumes less time than a detailed investigation into the alleged activity of a firm or enterprise.[39] Even though the law in India does not confer explicit powers on the CCI to enter into such commitment settlements, the observations of the Madras High Court may be reiterated in this regard.

> *In the context of a settlement entered into between the parties pending an investigation before the CCI, the Court held that it is possible within the scheme of the Act to allow settlements and compromises to be reached between parties. This is subject to the Commission finding that such settlements would not (i) lead to the continuance of anti-competitive practices; (ii) allow the abuse of dominant position to continue; and (iii) be*

[37] Article 9, Regulation (EC) No 1/2003 on the implementation of Articles 101 and 102 of the Treaty on the Functioning of the European Union.

[38] FEDERAL TRADE COMMISSION, A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S INVESTIGATIVE AND LAW ENFORCEMENT AUTHORITY (2008), *available at* https://www.ftc.gov/about-ftc/ what-we-do/enforcement-authority (last visited Apr. 13, 2019).

[39] JOAQUIN ALMUNIA, STATEMENT OF VP ALMUNIA ON THE GOOGLE ANTITRUST INVESTIGATION (2012), *available at* http://europa.eu/rapid/press-release_SPEECH-12-372_ en.html (last visited Apr. 13, 2019).

> *prejudicial to the interests of consumers or to the freedom of trade.*[40]

The CCI is vested with wide powers and hence it is competent to assume such power to allow voluntary commitment agreements, this position will only be strengthened if the Parliament expressly codifies such provisions in the Act.[41] In the words of the Supreme Court of India, "In the event of delay, the very purpose and object of the Act is likely to be frustrated and the possibility of great damage to the open market and resultantly, country's economy cannot be ruled out".[42] Keeping this mind, the need of the hour is for the competition authorities to initiate rapid action to check the causation of any damage to the market economy.

The reports being used to assert dominance of an Internet based business should follow a robust and consistent methodology of data collection, scrutiny and analysis.

[40] Tamil Nadu Film Exhibitors Ass'n v. Competition Comm'n of India, High Court of Madras, Writ Appeal Nos. 1806 and 1807 of 2013, decided on March 27, 2015 (India).
[41] Competition Act, 2002, Chapter IV.
[42] Competition Comm'n of India v. Steel Authority of India, (2010) 10 S.C.C. 744..

LITMUS TEST OF COMPETITION LAW: BUYER'S CARTEL

Riddhi Trivedi[*] & Samriddh Bindal[**]

ABSTRACT

'Competition' is mostly a progressive word. It is a critical driver of performance and also gives life to innovation. Competition is beneficial to the society as a whole, at the same time, profit making institutions need to acquire market to earn more profit. Competition generally gives a societal benefit, therefore the consumers must also get adequate benefit of fair trading prevalent in the market. The competition law is intended to protect buyers but the legislation has manifestly lacked in interpreting the buyers' cartel. The previous legislation used to restrict the buyers from entering into such anti- competitive agreements which may eliminate fair competition from the market. However, the Competition Act, 2002 fails to acknowledge the concept of buyer's cartel.

The authors will emphasise on the ability of buyers' to form a cartel and how this practice lead to unfair trade practices. The reason to eliminate such agreements is to promote fair competition as there have been instances where such agreements hamper the economic development. Buyers can also enter into an agreement wherein they fix prices

[*] Student, 3rd Year, B.A., LL.B. (Hons.), University of Petroleum and Energy Studies, Dehradun (ridhirakeshtrivedi@gmail.com).

[**] Student, 4th Year, B.Com., LL.B. (Hons.), University of Petroleum and Energy Studies, Dehradun (samriddhbindal@gmail.com).

beforehand or agree to put such conditions which may jeopardize the rights of the sellers which leads to elimination of competition. The purpose of this article is to show how such agreements can manifestly effect the economic development and must be specifically banned and would be to lay down the intention of the legislation to put an end to such agreements. Further, the authors have considered various instances of Supreme Court, interpreting the Buyers' Cartel which have been analysed in the article. Lastly, a comparison is made with the laws related to buyers' cartel from foreign jurisdictions. *"*A monopsonist buyer who also enjoys monopoly (cartel power) over consumers will sell to consumers at a higher price than a non- monopsonist."[1]

1. HISTORICAL BACKGROUND: THE COMPETITION ACT, 2002

In India, the law relating to 'fair trade' is recognised since the times of *Arthashastra*, written by *Chanakya* in 3rd Century BC.[2] Corporate law is based on the notion of 'shared prosperity', it is nowhere limited to the relation between authority and accountability.[3] Competition law aims to understand the trends of the market by promoting equitable competition in the market.

[1] HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY 256 (3d ed. 2005).
[2] Pradeep Mehta, *Competition policy and governance*, THE FINANCIAL EXPRESS (Oct. 27, 2018), https://www.financialexpress.com/archive/Competition-policy-and-governance/311040/.
[3] Renee Jones, *Legitimacy and Corporate Law: The Case for Regulatory Redundancy*, WASHINGTON UNIV. L. REV., *available at* https://wustllawreview.org/wp-content/uploads/2017/09/1-21.pdf.

The Monopolies and Restrictive Trade Practices Act, 1969 ("**MRTP**") existed before the Competition Act, 2002 ("**Act**"). The MRTP Act authorized the MRTP Commission, in which the Commission can enquire about practices of corporation in the relevant market.[4] However, the Raghavan Committee after the enforcement of Liberalisation, Privatisation and Globalization ("**LPG**") policies recommended repealing of the MRTP Act[5] in order to curb such conducts of the enterprises which were detrimental for competition in a market.[6]

The Act has made the Commission, the authority[7] to promote the fair competition in a market.[8] In a modern society, enterprises often compete internationally, there was a need to enact such legislation which could cope with a critical state of affairs of anti-competitive practices.[9] The Act makes the commission responsible to restrict anti–competitive practices viz., anti- competitive agreements, abuse of dominant position[10] and such combinations which have the power to hinder maintenance of the

[4] Monopolistic Restrictive and Trade Practices Act, § 10, Act No. 53 of 1963.
[5] Indian Competition Law, Report of the High Level Committee on Competition Policy and Law, (October 5, 2018: 3:56 am), https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf; Kerala Bar Hotels Ass''n v. State of Kerala, 2015 SCC Online SC 1385; Udai Dagar v. Union of India, (2007) 10 SCC 306.
[6] Comm'n of India v. SAIL, (2010) 10 SCC 744.
[7] Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 27.
[8] Competition Comm'n of India v. Steel Authority of India, [2010] 98 CLA 278.
[9] Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004); Mondi Ltd. & Kohler Cores and Tubes, Goals of competition Law, [2002] ZACT (LM) at 27 1 87 (S. Afr.), 29 (Daniel Zimmer (ed.), 2012).
[10] Tech. Products v. Bangalore Electricity Supply Co. Ltd., Case No. 58/2011; Nagar Nigam v. Al Faheem Meat Exports, (2006) 13 SCC 382.

competition.[11] The Act aims at sustainability of competition and survival of free trade for new entrants in the market in India[12] by preventing abuse of dominant position.[13]

Section 3 of the Act stipulates that if any agreement[14] between enterprises[15] or association of enterprises or person[16] or association of persons, falls under the category of cartel[17] has an appreciable adverse effect on the competition, then such agreement shall be void.[18] The Section constitutes two types of agreements, namely, horizontal agreements and vertical agreements, and it envisages that if agreement is established between two parties, then it is presumed that such agreement itself has an appreciable adverse effect on the competition.[19] For any agreement to fall under Section 3 or to establish appreciable adverse effect

[11] Director General v. Puja Enter. Basti, [2013] 116 CLA 126 (CCI); Kerela Film Exhibiters Ass'n v. Competition Com'n of India, Appeal No. 100 of 2015 decided on 4-2-2016; Manju Tharad v. Eastern India Motion Picture Ass'n, [2012] 114 SCL 20 (CCI).
[12] Aditya Bhattacharjea, *India's New Competition Law: A Comparative Assessment*, J. COMPETITION LAW & ECON. (Sep. 1, 2008: 2:00 pm), https://doi.org/10.1093/joclec/nhn021; Evenett, Simon J., What is the Relationship between Competition Law and Policy and Economic Development? In Brooks, Douglas H. & Evenett, Simon J. (ed.): Competition Policy and Development in Asia. London: Palgrave Macmillan, 2005, S. 1-26.
[13] S Chakravarthy, *India's new Competition Act, 2002 - A work still in progress*, 5 Bus. L. Int'l 240 2004; Neha Jain,"*Defining Dominance: An Analysis of the Competition Act, 2002*" 8 NUALS Law Journal (2014), (October 26, 2018: 5:00 pm), https://heinonline.org/HOL/P?h=hein.journals/nualsj8&i=185.
[14] Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(b).
[15] *Id.* at § 2(h).
[16] *Id.* at § 2(1).
[17] *Id.* at § 2(c).
[18] Manju Tharad v. Eastern India Motion Pictures Ass'n, [2012] 114 SCL 20 (CCI).
[19] Sodhi Transport Co. v. State of Uttar Pradesh, AIR 1986 SC 1099; R.S. Nayak v. A.R. Antulay, AIR 1986 SC 2045.

on the competition[20], the Commission is required to look at the factors mentioned under Section 19 of the Act.[21]

2. CONCEPT OF ENTERPRISES AND PERSONS UNDER COMPETITION LAW: ECONOMIC ACTIVITY

For the purpose of anti-competitive agreement and abuse of dominant position, the legislation has particularly decided the ambit of the Act. Section 3 clearly says that, any "enterprise" or "association of enterprises" or "persons" or "association of persons", enters into any agreement which has the tendency to cause an appreciable or apprehended danger to the competition within India, then in that case such agreements shall be declared to be void. [22]

Section 2(h) of the Act defines "enterprises" as a person or any department of the government who is engaged in an activity.[23] That activity must be related to production, supply, distribution, or acquisition of goods.[24] On the other hand, Section 2(l) defines person who includes any individual, company or firm or any other person as mentioned under the provision.[25] The Supreme Court of India has interpreted both terms in the case of *Competition Commission of India v. Coordination Committee*

[20] Automobiles Dealers Ass'n, Hathras v. Global Automobiles, 2012 Comp.L.R. 827 (CCI).
[21] Yashoda Hospital & Research Centre v. India Bulls Finan. Services, 2011 Comp.L.R. 324 (CCI).
[22] Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).
[23] Carew & Co. v. Union of India, AIR 1975 SC 2260; Gir Prasad v. Govt. of Uttar Pradesh, [1996] 87 Comp. 623 (MRTPC).
[24] Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).
[25] Global Mail Ltd. v. U.S. Postal Services, 142 F.3d 208; U.S. Postal Services v. Flamingo Indus., 540 US 736 (2004).

of Artists and Technicians of West Bengal,[26] the enterprise and person should indulge in some economic activity.[27] Economic activity[28] is itself defined under the provisions of the Act as activities includes production, distribution, supply, storage and acquisition of articles or goods.[29] If any enterprise or person is carrying out any activity which is related to any service as mentioned above, and if such person or enterprise enters into any agreement or any cartel which has appreciable adverse effect on the competition and such agreement shall be void under Sub-Section 2 of the Section 3 of the Act.[30]

Section 3(3) of the Act states the instances where if any person or enterprise or their associations, if enters into any such cartel to attain any of the instances mentioned under the said Act, then such cartel or act will be illegal per se. To come under the ambit of Section 2(h), as "enterprises", any person or department of governments need to undertake any economic activity but as for the purpose of defining "person" under Section 2(l), anyone or any individual will fall under such category and need not carry out any economic activity.

Sellers, producers, distributers, or any other person can fall into such categories either in Section 2(h) or 2(l) of the Act and the judiciary has recognized this aspect. However, the activity of 'buying' cannot be

[26] Competition Comm'n of India v. Coordination Comm. of Artists & Technicians of West Bengal, (2017) 5 SCC 17.
[27] Hofner & Elser v. Macroton, (1991) ECRI-1979/ (1993) 4 CMLR 306.
[28] Dalton Indus. Properties v. Else, 2 All ER 30 QBD; Kottayam Co-operative Land Mortgage Bank v. CIT, [1988] 172 ITR 443 (Ker.).
[29] ARIJITI PASAYAT & SUDHANSHU KUMAR, GUIDE TO COMPETITION LAW (6th ed. 2016).
[30] Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(1).

included in such economic activity[31] thus, it does not come under the ambit of Section 3(1). It is now well-established by the Supreme Court in *C.C.I. v. Coordination Committee*,[32] that the consumers or any person who do not carry any "economic activity" are not in the purview of anti-competitive practices under the Act.

Buyer's cartel, as will be further discussed, is an important aspect of looking at how such anti-competitive practices can occur.[33] Although, the Supreme Court has not been able to justify this beyond doubt, thereby making the interpretation ambiguous.[34] The intention of the legislature has been the protection of investors and consumer's welfare but how buyers can also establish monopoly and harm investors as well as competition in the market. This has not been recognised in its full sense. Such cartels can equally harm competition and economy as it is done with the intent to gain strong market position by other market players.[35]

Moreover, the major point is to note that **a buyer can be anyone who buys or purchases a product or a service. Importantly, the end use of that product or service will be irrelevant. Buyers' cartel can be made not only by the consumers but even by the market players. The**

[31] Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316-17 (6th Cir. 1989).

[32] Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal and others, (2017) 5 SCC 17.

[33] Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316-17 (6th Cir. 1989).

[34] Suhail Nathani & Ravisekhar Nair, *Has the Competition Commission of India (CCI) been an effective regulator?* Legally India, (October 22, 2018: 2:00 pm), https://www.legallyindia.com/home/has-the-competition-commission-of-india-cci-been-an-effective-regulator-20170718-8664#liprefbox; Also, some major cases will be discussed below where the court included buyers' cartel under section 3 of the Act.

[35] Novus IP User, Transcript of the VIII NLSIR Symposium on Competition Law, NLSIR, Page no. 5 & 6, 2015.

buying cartels by the other market players can only be made when they are carrying out the activity of purchasing. The cartel must be specifically related to the 'activity of purchase'. Even then the scope under which such cartels still exists and must equally be restricted, is still alive in the present provision of Section 3 of the Act.

3. BUYER'S CARTEL: POSITION UNDER COMPETITION LAW

The unusual question is, if sellers, distributors, traders can form a cartel and establish their monopoly in market, then why not buyers? It will be incorrect to say that buyers can never make any such agreements where they decide the purchasing prices or they can never make any such group and agree not to bid above a certain limit or not bid at the same price and the same quantity. Nor can it be said that they cannot establish such monopoly which can harm competition within an economy.[36] These concept of Buyers' cartel[37] or buyer power are faced by the general public but still not recognized as an important area for making stringent laws.[38] There may be instances where buyers can collude to make such cartels

[36] John Asker, *A Study of the Internal Organization of a Bidding Cartel*, AM. ECON. REv. (forthcoming), (October 22, 2018: 3:00 pm), http://pages.stern.nyu.edu/-jasker/stamps070628.pdf; Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001); Fleischman v. Albany Med. Ctr., No. 1:06-CV-165, 2008 WL 2945993; Del. Health Care, Inc. v. MCD Holding Co., 893 F. Supp. 1279 (D. Del. 1995); All Care Nursing Serv. Inc. v. High Tech Staffing Servs., Inc., 135 F.3d 740 (11th Cir. 1998).

[37] Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARv. L. REv. 1521, 1569-70 (1982).

[38] Natalie Rosenfelt, *The Verdict on Monopsony*, 20 LOY. CONSUMER L. REv. 402, 405-06 (2008); Robert Lande & Howard Marvel, *The Three Types of Collusion: Fixing Prices, Rivals, and Rules*, Wis. L. REv. 941, 951-53 (2000).

which results in the elimination of the competition within India,[39] or institute control and monopoly over the sellers or distributors or producer or can even resell it to the consumers at higher prices.[40] There are also other such instances where buyers, using their buying power have misused the unintended protection given by the legislation, and decided the purchasing prices and fixed the quantity to be purchased by each buyer in a group.

It is a felony and unacceptable for the market economy, if the agreement between only the sellers, distributors, traders, make such anti-competitive agreement but not between buyers. In other words, the important point pertinent to note here is that any such anti-competitive agreements if entered by the seller, distributors, traders or any other person as mentioned in Section 3 of the Act, shall be void, and in the context of such agreement of buyers', nothing has been specified in the legislation.[41]

The buyers can, through different ways harm the economy and perform such anti-competitive practices, as not yet restricted by the present laws. In several cases in EU[42] and USA[43], such instances have occurred and

[39] Vogel v. Am. Soc. of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984).
[40] Peter C. Carstensen, *Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitve Realities, and Antitrust Policy*, 1 WILLIAM & MARY BUS. L. REV., (Oct. 23, 2018: 2:00 am), https://pdfs.semanticscholar.org/d28a/a317f5ce9ca49768a1ce6916f02935674f70.pdf.
[41] Balmoral Cinema, Inc. v. Allied Artists Pictures Corp., 885 F.2d 313, 316-17 (6th Cir. 1989).
[42] Dobson, P.W., Clarke, R., Davies, S. et al. Journal of Industry, Competition and Trade (2001) 1: 247. https://doi.org/10.1023/A:1015268420311.
[43] Michael C. Naughton, *Buyer Power Under Attack: Recent Trends In Monopsony Cases*, Antitrust, Summer 2004, at 81; Scott Kilman, Tyson Loses Cattle-Price Lawsuit, WALL ST. J., Feb. 18, 2004; Clarett v. NFL, 369 F-3d 124 (2d Cit. 2004).

even also in India, several investors and market service providers are facing such difficulties.[44] The buyers can also make such arrangements between them during an auction to not bid against each other or to bid at the same price for a fixed quantity.[45] This is a concept called "bidding ring". Such a practice will defeat the very purpose of an auction or bid process and is harmful for the economy. Apart from this, a buying group can also enter into any agreement for the purpose of establishing monopsony in a market.[46]

For the purpose of examining, it is pertinent to note that such cartels are recognized and included in the anti-competitive practices and are prescribed by law in foreign countries. Competition Law has evolved and adopted from the concept of antitrust law as given under the Sherman Act, 1890. It was the first law talking about the concept of anti-competitive practices, and firstly this concept of buyers' cartel was questioned and de-emphasized.[47] it was later realized that such cartel exist and there is a need to curb such cartels. The Sherman Act strictly prohibits such type of cartels, either formed by buyers' or sellers'. Blair and Harison (1993)[48] also deal with such issues of monopsony and buyers' power and how these

[44] United States v. Romer, 148 F.3d 359; Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292.

[45] Knevelbaard Dairies v. Kraft Foods Inc., 232 F.3d 979 (9th Cir. 2000); *see supra* note 11.

[46] Lee McGowan, Buyer Power and Competition in European Food Retailing, (Edward Elgar Publishing, 2002)

[47] Thomas A. Piraino, Jr., *Identifying Monopolists' Illegal Conduct Under the Sherman Act*, 75 N.Y.U. L. REv. 809, 828-44 (2000); Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Collaborations Among Competitors, 86 IowA L. REv.* 1137, 1144-45 (2001): "In section 1 of the Sherman Act, on sellers were restricted to enter into such cartels.

[48] *Id.*

can be curtailed and seeks to address such issue in economy theory.[49] This buyer's power has given rise to such law relating to buyers' cartel in European Union and Japanese laws[50] and several other countries.

As it has been rightly said, "Every coin has two faces". Likewise, there are two faces of any market economy[51], one side there are market service providers, who includes sellers distributors, producers, traders, or any other person who contributes in the supply chain of the market. On the other side, there are those who avail such services like buyers or consumers. The legislation has focused on the first part, to protect investors and service providers and on the second part to protect the consumers, but only in restricted way. One aspect was taken into consideration but the other way of thinking is still in question.[52]

The need for having such regulations which can restrict such abuse of buyer power is of much significance. Buyers includes any person who buy or purchase the product.[53] The use of that product is not relevant. Therefore, such buyers includes the classes of consumers, the traders or distributors or any other person who purchases goods, and the use of that good either for commercial purpose or for personal use is irrelevant. A perfect example is of U.S., Walmart which is the largest company in the

[49] 10 Roger Clarke, Buyer Power and Competition in European Food Retailing, 24 (2002).
[50] Mel Marquis & Shingo Seryo, *The 2013 Amendments to Japan's Anti-Monopoly Act: Some History and a Preliminary Evaluation*, COMPETITION POLICY INTERNATIONAL (2014).
[51] Thomas A. Piraino Jr., *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, HASTINGS LAW JOURNAL (2005)
[52] Chloé Binet, *Buyer Power in EU Competition Law,* Université Catholique de Louvain Fonds de la Recherche Scientifique - FNRS, (2014)
[53] Competition Act, 2002, Act No. 12, Acts of Parliament, 2003, § 2(f).

world with 8.5% of the retailers[54] faced such a situation. It was alleged that these retailers formed a buyers' cartel and tried to eliminate other buyers from the market. They colluded and formed an agreement only regarding the purchase of goods from the Walmart.[55] The agreement was for purchase and not for sale, and therefore it was considered a buyers' cartel. Although Walmart benefitted in one way by this cartel[56] but other retailers in the competition faced many hindrances and were eliminated from competition because of this cartel.[57] Apart from this, other behaviour of buyers can harm competition and establish monopsony in the market.

However, it is not necessary that agreements between buyers are always harmful. They can be made for the economic benefit of the firm or the society.[58] Thus, the concept has to be made clear between such agreements as entered by the buyers' for economic growth and such agreements made for the purpose of cartel, which have appreciable adverse effect on competition. Such agreements which are not injurious to the competition within India are known as "buying group". There is a thin

[54] Ann Zimmerman, *Wall-Mart Loses Discount Edge in Sluggish Early Holiday Sales*, WALL ST. J., (Nov. 30, 2004).
[55] Steve Lohr, *Is Wal-Mart Good for America?,* N.Y. TIMES, Dec. 7, 2003; John R. Wilke, Bully Buyers: How Driving Prices Lower Can Violate Antitrust Statutes, WALL ST. J., Jan. 27, 2004.
[56] William J. Holstein, *First Corporate Scandals, Then Tough Competition*, N.Y. TIMES, Nov. 7, 2004, at BU9.
[57]Wal-Mart Tops Fortune 5oo List, CHATTANOOGA TIMES FREE PRESS, Mar. 23, 2004, at C2. In 2004.
[58] Robert Pitofsky, *Entering the 21st Century: Competition Policy in the World of B2b Electronic Marketplaces*, Executive Summary, (October 23, 2018, 3:00 am), https://www.ftc.gov/sites/default/files/documents/reports/entering-21st-century-competition-policy-world-b2b-electronic-marketplaces/b2breport_0.pdf.

line gap between "Buying Group" and "Buyers' Cartel".[59] Thus, if a group of bidders collude at an auction, and make an agreement to negotiate the prices for the inputs they seek, even if they will use and bill the products separately.[60] Such kinds of agreement or collusion is valid in the eyes of law. However, other types of collusion which has appreciable adverse effect on the competition are restricted and are known as buyers' cartel.

4. RECOGNITION OF BUYERS' CARTEL UNDER COMPETITION LAW IN INDIA

For instance, one such cartel was recognized in the MRTP Act, where the legislation restricted such kinds of anti-competitive practices by the buyers. Before Act came into force, in the Case of *Haridas Exports v. All India Float Glass Manufacturers' Ass'n*,[61] the court discussed this matter and decided the ambit of Section 33(1) (d) of MRTP[62] and held that this section implies two categories of agreements. The first is of the buyers' cartel, where buyers collectively form an agreement to purchase or tender goods and services and the second one is sellers' cartel, where sellers' collectively participate in the formation of the such anti-competitive agreement for the purpose of sale. That section does not talk about an agreement of buyer's cartel and seller's cartel.[63]

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[59] Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & M. L. REv. 65, 142-43 (2002);
[60] David J. Teece & Mary Coleman, *The Meaning of Monopoly: Antitrust Analysis in High.Technology Industries*, 43 ANTITRUST BULL. 801, 809 (1998).
[61] Haridas Exports v. All India Float Glass Manufacturers' Assn., 2006 SCC 600.
[62] Monopolistic Restrictive and Trade Practices Act, 1969, Act No. 53, Acts of Parliament, § 33(1)(d).
[63] Mel Marquis & Shingo Seryo, *supra* note 50.

The concept of monopsony or buyer's power to control the economy has been recently discovered by the courts. As the Commission or the courts have recently interpreted these sections in reference to the buyers' cartel, it is important for them to look for some strict restrictions which can be imposed on buyers.[64] The need to have such cartels is crucial, as discussed above, and it should also be recognized under Competition Law of India.[65]

5. INSTANCES WHERE BUYERS' CARTEL IS RESTRICTED BY THE COMPETITION COMMISSION OF INDIA

The Competition Commission of India proved itself to be an effective and efficient regulator. The need to consider buyers' cartel as an anti-competitive practice is recognized by the Competition Commission of India which can also be seen in the cases discussed below.[66] However, the author is of the view that these judgments are still not sufficient to interpret such cartels and restricts them under the Act. The author has criticized the view of the Supreme Court in the recent judgements relating to buyers' cartel. In the recent case of *Rajasthan Cylinders & Containers Limited v. Union of India*,[67] the Supreme Court defined the concept of monopsony.[68] The court recognized that such kinds of market where the

[64] "*Transcript of The VIII NLSIR Symposium On Competition Law*." in National Law School of India Review, vol. 27, no. 2, pp. 5-6 (2015).
[65] Dobson, *supra* note 42; Michael C. Naughton *supra* note 43.
[66] Sunipun, *Development of Competition Law in India*, IPLEADERS (October 5, 2018 5:00 pm), https://blog.ipleaders.in/competition-law-india/.
[67] Rajasthan Cylinders and Containers Limited v. Union of India, 2018 SCC OnLine SC 1718.
[68] GEORGE STIGLER, THE THEORY OF PRICE 216-18 (1987).

power is vested with buyers can lead to adverse effect on the economy. The court pointed out that there was a monopsony/oligopsony market, where there were three buyers who were vested with all the powers. The Apex Court mentioned that in such kinds of markets the probability of having collusions and anti-competitive agreement is very less because the competition does not exist. The need to restrict such cartels was not looked into. In fact, monopsony/ oligopsony market is one of those markets in which the possibility of infringement of anti-competitive policies can take place.[69] Such markets have received meagre attention all over the world for the sole reason that these markets does not harm the competition in the market[70] but they ignore the fact that this market can be equally harmful.[71] In the above case cited, the court though considered that such kinds of markets do exist, but neither did they interpret that cartel to be restrictive under Section 3 of the Act, nor did they recognize the need for stringent laws for such cartels. The interpretation of the court is limited to the justification that such markets are less harmful for competition policies making them ignorant that there is the high possibility for such cartels to take place.[72]

Another recent Supreme Court judgment interpreted buyer's cartel, and restricted such cartels under section 3(3) of the Act. Although this interpretation is still in question. In the recent judgement of *XYZ v. Indian*

[69] Roger D. Blair & Jeffrey L. Harrison, *Antitrust Policy and Monopsony*, 76 CORNELL L. REV. 297 (1991), http://scholarship.law.cornell.edu/clr/vol76/iss2/1.
[70] HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW, 17-18, (Hornbook Series Lawyer's Ed., 1985).
[71] Vogel v. Am. Soc'y of Appraisers, 744 F.2d 598, 601 (7th Cir. 1984).
[72] Balmoral Cinema v. Allied Artists Pictures, 885 F.2d 313 (6th Cir. 1989).

Oil Corporation Ltd.[73], the court interpreted that the term "buyers' cartel" and included and restricted it under Section 3 of the Act. It was held that the provision says that "No enterprises or persons shall enter into any agreement related to production, supply, distribution, storage, **acquisition**, or control of goods and services in India." The court emphasized on the term 'acquisition' and concluded that if Section 3(1) read with Section 3(3)(a) which talks about the prix fixation of purchase prices, then it would include the restrictions on buyers cartel.

Making reference to *Coordination committee* case[74] will be of much relevance, the court held that the enterprise and person should indulge in some "economic activity" as described in the Act and those activities must be related to offering of products. The main loophole here is that the consumers[75], as per coordination committee case does not come under the purview of Section 3 but the judgement given in XYZ's case depicts a different picture. One more point was highlighted by the court that the buyers' cartel cannot be treated at par with sellers' cartel.

Just as sellers can form a market power and disrupt the economy, buyers can also do the same. For every seller, there is a buyer therefore, sellers' cartel and buyers' cartel must be treated at par, the theories of harm must be considered in analysing the same. The buyers have equal opportunity to form anti-competitive agreements. Many Indian as well as foreign examples through above cited cases and reasons can show the importance to have equal restrictions on such cartels.

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[73] XYZ v. Indian Oil Corporation Ltd., 2018 SCC OnLine CCI 55.
[74] Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal and others, (2017) 5 SCC 17.
[75] *Id.*

But the question of whether the activity of "purchasing" is covered under the ambit of economic activity, thus, covering buyers' cartel under the said Section remains unanswered. This is still ambiguous and not clearly interpreted by the court itself. Though they recognized that such cartels may exist but there still remain loopholes and questions on to whether the provision "actually" includes buyers' cartel or whether the purchasing activity can be covered under economic activity, moreover, whether consumers can also equally be held liable under this section of the Act if they violate or indulge in any anti-competitive practices under the Act.

6. ASSESSMENT OF DIFFERENT JURISDICTIONS ON BUYERS' CARTEL

In the contemporary times, the law has been under pressure to adapt as per the changing circumstances of the world. The law must adapt as per the changes in social and economic habitat and modify itself for being just and equitable for each sector of the society. The new and alternate need of models can be easily construed from the laws of foreign jurisdictions. Comparison with other jurisdiction presents a kind of idea that may not be found in legal history or jurisprudence.[76]

During the 1890 debates in both the houses of the US the congress raised concerns regarding the excessive power of buyers or sellers against

[76]Ault, Hugh J., & Mary Ann Glendon, "*The Importance Of Comparative Law In Legal Education: United States Goals And Methods Of Legal Comparison*" 27 JOURNAL OF LEGAL EDUCATION 4, 599, 599–608 (1976).

sides of the market.[77] This resulted in the enactment of the Sherman Act which is "aimed at preserving free and unfettered competition as the rule of trade."[78] As per the Sherman Act, the buyers' cartel are illegal *per se* and are liable to be criminally prosecuted. Any agreement between buyers which creates market power on the buying side of the market,[79] the Sherman Act treats buyers cartels same as it treats seller cartels.[80] The rule of interpreting cartels per se illegal came from judicial decisions.[81] The US Supreme Court in 1948 has dealt with the issue of price fixing by the buyers.[82] It is said in the US that all such activity of entering into agreements and making cartels is "threat to the central nervous system of the economy."[83]

In the case of *United States v. Adobe Systems*, five companies having place of effective management in the US, entered into an agreement to not to 'cold call' employees of each other firms.[84] Through this, the five major companies formed a cartel due to which the ability of employees to get better job opportunities significantly decreased as there was not much competition left between employers to attract the most

[77] Jon P. Nelson, *Comparative Antitrust Damages in Bid-Rigging Cases: Some Findings from a Used Vehicle Auction*, 38 ANTITRUST BULLETIN 369 (1993).
[78] National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma, 468 U.S. 85, 104 n. 27 (1984).
[79] Competition Committee, *Roundtable on Monopsony and Buyer Power*, Directorate for financial and enterprise affairs, https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/monopsony.pdf.
[80] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
[81] United States v. Joint Traffic Ass'n, 171 U.S. 505 (1898); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 331 (1897).
[82] Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).
[83] United States V. Socony- Vacuum Oil Co. 310 US 150, 226 n.59 (1940).
[84] United States v. Adobe Sys., Inc., No. 1:10-cv-01629 (D.C.C. Sept. 24, 2010), ECF No. 1, Complaint 2, at 2.

valuable talent.[85] Therefore, Judge Lucy Koh of the Northern District of California approved a $415 million settlement in March 2015.[86]

European Directive says that:

> *Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.*[87]

> *The European law says that any form of cartel reduces revenue and is hence illegal per se. Recital 43 of the Directive qualifies the lower price paid by the buying cartel as actual loss, that is the harm to the supplier corresponding to the difference between the competitive price and the price actually paid by the cartelists.*[88]

For example, EU's Competition watchdog found that three companies who were acting as buyers formed a cartel and were reducing

[85] United States v. Adobe Sys., Inc., No. 1:10-cv-01629 (D.C.C. Mar. 18, 2011), ECF No. 17, Final Judgment § 4.
[86] Order Granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement with Defendants Adobe Sys., Inc., Apple, Inc., Google Inc., and Intel Corp., Approving Form and Manner of Notice, and Scheduling Final Approval Hearing, In re High-Tech Emp. Antitrust Litig., No. 1:11-cv-02509 (N.D. Cal. Mar. 3, 2015), ECF No. 1054.
[87] Directive 2014/104/EU of the European Parliament and of the Council (26 November 2014), art. 2 (20).
[88] https://core.ac.uk/download/pdf/46117303.pdf.

the purchase price of the scrap lead acid automotive batteries intentionally. The companies eventually had to pay 67 Million Euros.[89]

7. CONCLUSION

The authors explain the current situation of Competition law in India, the significance of cartels and how their formation may adversely affect the economic structure of the country. It is suggested through this paper that Act must not limit the interpretation of 'Cartels' to sellers but also to 'buyers'. The author proposes the interpretation of Competition law through various case laws and other authorities.

The economists are trying to understand the factors that may change the buying pattern of a certain product in the market. The countervailing buying power is also a certain factor that may affect the buying pattern of a particular good, directly or indirectly. Therefore, in a welfare state it is suggested that naked restraints put by the buyers must be per se illegal. On the other hand, the formation buyer cartels provide a transactional efficiency in the market, which in turn helps smaller buyers to develop their business. Therefore, Competition law must develop in a manner where it lays down a set of guidelines to form cartels so that the parties can avoid the use of the cartels in a way that adversely effects competition. The opinion that the buyers' cartel help consumers is simply an incorrect proposition.

[89] Malina McLennan, *DG Comp fines battery recycling buyers' cartel*, Global Competition, (October 24, 2018: 3:00 am), https://globalcompetitionreview.com/article/1081052/dg-comp-fines-battery-recycling-buyers-cartel.