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On

**EMERGING TRENDS AND FUTURE
CHALLENGES IN COMPETITION
LAW: NATIONAL AND
INTERNATIONAL PERSPECTIVES**

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**EMERGING TRENDS AND FUTURE CHALLENGES IN
COMPETITION LAW: NATIONAL AND INTERNATIONAL
PERSPECTIVES**

15th – 16th December, 2024

**SCHOOL *OF* LAW, CHRIST (DEEMED TO BE UNIVERSITY),
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EMERGING TRENDS AND FUTURE CHALLENGES IN
COMPETITION LAW: NATIONAL AND INTERNATIONAL
PERSPECTIVES

Organized by School of Law in Collaboration with Competition Commission of India (CCI)

Editors: Dr. V. Gopi Ranganath, Dr. Shibu Puthalath

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We are grateful to all the people who have contributed and helped in different capacities to organize this Two-day National Conference on "Emerging Trends and Future Challenges in Competition Law: National and International Perspectives" from 15th to 16th December 2024. At the very outset, we would like to thank the University Authorities for their overall support at each and every juncture in this endeavour.

We would like to thank the Vice Chancellor Dr Fr. Joseph C C, Registrar- Dr Anil Joseph Pinto, Dr. Thomas T V, Director, School of Law, Dr. Shoney Sebastian, Director, Centre for Research, Dr Sapna S, Dean in charge and HoD, School of Law, Dr. Shibu P, Associate HoD Dr. Shampa Dev, Academic Coordinator, School of Law, Dr. Shibu P, Sachin Menon, Faculty Coordinators Conference Committee 2025-26, School of Law. Dr. Shibu P, Dr. V. Gopi Ranganath, Faculty Coordinators of Conference Committee 2024-25 for their constant guidance, encouragement and support in making this conference a success. We would further like to extend our gratitude to the authors and the delegates for their rich academic contribution to the conference. We also thank Competition Commission of India (CCI) for their support throughout the entire process.

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Message from the Director



**Director
School of Law,
CHRIST (Deemed to be University), Bangalore**

It gives me immense pleasure to present to you the E-Book for the XV National Conference on “Emerging Trends and Future Challenges in Competition Law: National and International Perspectives”, organized by the Conference Committee, School of Law, CHRIST (Deemed to be University), Bengaluru, to be held on the 15th and 16th of December 2024. This year’s conference aspires to bring together distinguished academicians, research scholars, practitioners, and enthusiastic young minds to deliberate upon the dynamic contours of competition law.

In an era marked by digital transformation, cross-border mergers, technological innovation, and increasing regulatory scrutiny, the need for a robust and adaptive competition law framework has become more significant than ever. The XV Conference seeks to create a platform for meaningful engagement on these pressing national and international concerns. The themes and sub-themes have been thoughtfully conceptualized to encourage critical examination of contemporary issues such as consumer protection, digital market regulation, intellectual property and antitrust intersections, merger control, and global enforcement challenges.

Through these deliberations, we aim not only to foster discussions on existing legislative and regulatory frameworks but also to inspire participants to propose well-reasoned, research-driven perspectives. The scholarly submissions compiled in this E-Book reflect the intellectual rigor and analytical depth that the School of Law consistently strives to promote, and stand as a testament to our vibrant academic culture of inquiry and debate.

I hope this E-Book offers readers an insightful glimpse into the discussions the conference promises to unfold and encourages continued engagement with the emerging challenges and future directions of competition law. I extend my best wishes to all participants and hope that you find the proceedings enriching and intellectually rewarding.

Message from the HOD



Dr. Sapna S
Associate Dean and HOD,
School of Law,
CHRIST (Deemed to be University), Bangalore

It is a matter of great pleasure to note that the XV National Conference on “Emerging Trends and Future Challenges in Competition Law: National and International Perspectives”, organized by the School of Law, CHRIST (Deemed to be University), is being conducted for the academic year 2024–2025. The consistent dedication and vision of the Conference Committee in conceptualizing and executing this flagship event reflect the academic vibrancy and research-oriented culture of the institution.

It is indeed a matter of pride that within a short span of time, the organisers have successfully created a significant academic impact among students, research scholars, academicians, and practitioners across the country. The overwhelming response and the diversity of scholarly contributions received from various institutions stand as a testimony to the relevance and timeliness of the chosen theme. Such participation not only strengthens academic discourse but also fosters a spirit of rigorous legal research among young scholars.

The launch of the E-Book comprising selected research papers during the inaugural ceremony of this two-day National Conference is a commendable achievement. It showcases the intellectual depth and analytical acumen of the delegates while providing a platform for meaningful deliberations on contemporary issues in competition law, digital markets, consumer protection, and global regulatory challenges.

On behalf of the Department and on my own behalf, I extend my sincere appreciation to the organisers for their untiring efforts, meticulous planning, and steadfast commitment in ensuring that the Conference and its proceedings continue to scale greater academic heights and set new benchmarks of excellence. I wish the XV National Conference every success and hope that it continues to inspire informed dialogue and scholarly engagement in the years to come.

Message from the Associate **HOD**



Dr. Shibu Puthalath
Associate HOD,
School of Law,
CHRIST (Deemed to be University), Bangalore

The XV National Conference on “Emerging Trends and Future Challenges in Competition Law: National and International Perspectives”, organized by the School of Law, CHRIST (Deemed to be University), has witnessed the submission of numerous scholarly articles that critically engage with some of the most pressing issues in contemporary competition law. The contributions not only examine evolving challenges within domestic regulatory frameworks but also explore significant international developments shaping antitrust jurisprudence and policy discourse.

The Conference seeks to analyse the dynamic interface between consumer protection and competition law, the delicate balance between intellectual property rights and antitrust regulation, and the regulatory complexities surrounding mergers and acquisitions in an increasingly globalized economy. Further, it aims to evaluate the impact of digital markets, big-tech platforms, algorithms, and artificial intelligence on market structures, while encouraging thoughtful deliberation on the need for adaptive and innovation-friendly regulatory responses.

Through this E-Book, we aim to offer readers a meaningful insight into the diverse, research-driven perspectives of our delegates. The selected papers demonstrate rigorous scholarship, critical analysis, and a strong grasp of the economic and legal foundations of competition law, contributing to informed dialogue on fair market practices, consumer welfare, and innovation.

I congratulate all delegates whose insightful papers are featured in this compilation and hope it encourages deeper appreciation and continued engagement with the evolving landscape of competition law.

Message from the Faculty **Coordinators**



Dr. V. Gopi Ranganath
Professor
School of Law,
CHRIST (Deemed to be University), Bangalore



Dr. Shibu Puthalath
Associate HOD,
School of Law,
CHRIST (Deemed to be University), Bangalore

The XV National Conference on “Emerging Trends and Future Challenges in Competition Law: National and International Perspectives,” organized by the School of Law, CHRIST (Deemed to be University), was envisioned as a platform for scholars and practitioners to deliberate on contemporary issues within its sub-themes. This E-Book, documenting the proceedings, offers insights into the deliberations, analyses, and critical questions raised during the two-day academic engagement.

The Conference theme was structured into sub-themes, namely Consumer Protection and Competition Law; Innovations and Intellectual Property and the balance with Antitrust Regulation; Mergers and Acquisitions and recent trends and challenges; Adapting Competition Law to the Digital Era with global perspectives; and other emerging issues in modern competition law. These sub-themes captured national and international viewpoints, reflecting the evolving landscape of market regulation.

The Conference featured well-researched and analytically grounded papers examining questions on digital markets, regulation of large technology enterprises, cross-border mergers, consumer welfare, and innovation policy, enriching contemporary competition law discourse.

The objective of this E-Book is to present these discussions and share ideas that merit reflection in today’s regulatory environment. It aims to encourage critical thinking and academic inquiry into challenges confronting competition regimes across jurisdictions.

We hope that readers, particularly students and emerging scholars, are inspired to pursue independent research and continue nurturing analytical rigour and meaningful legal scholarship.

About School of Law



School of Law, CHRIST (Deemed to be University) is a premier legal institution dedicated to the continuous and dynamic process of creating legal minds who are par excellence professionals imbued with a profound sense of social responsibility. With over 1,500 students from all over the nation and abroad, its diverse student community is supported by world-class infrastructure.

We are home to one of the most resourceful law libraries in South India, complemented by information centres with 24/7 internet connectivity, state-of-the-art classrooms, conference halls, and a mini-auditorium, establishing it as a premier legal educational institution. The dedicated and meritorious faculty maintains the best faculty-student ratio in the country. Students are presented with 60 wide-ranging elective subjects, providing the ideal platform to diversify their legal acumen and expertise.

Through a wide array of initiatives, SLCU facilitates a continuous industry academia institution interface. It ensures exposure to a treasure trove of extra-curricular activities such as sports, cultural activities, and co-curricular activities including moot court competitions, debate & ADR competitions, and legal aid cell. The students are provided with a time-fluid internship schedule to hone their necessary practical legal skills.

About Conference Committee



The Conference Committee aims at promoting academic excellence and providing a platform for intellectual engagement through seminars, conferences, workshops, and panel discussions. The Committee is committed to organizing diverse academic events that encourage research, dialogue, and critical thinking on contemporary legal and interdisciplinary issues.

The Committee also aspires to spread awareness and foster informed discussions on significant developments in law, policy, and society. The SLCU Conference is conducted with the aim of providing the student community and legal scholars with an opportunity to exchange ideas, present research, and engage in meaningful debate on pressing legal issues.

In fulfilment of such a goal, the School of Law, CHRIST (Deemed to be University), Bengaluru, through its Conference Committee, cordially invites law students to participate in its XVI SLCU Conference on “Digital Rights, Real Lives: Navigating Tech Law in Everyday Society”, conducted from 12-13 December 2025. The Conference seeks to develop future members of the Indian legal fraternity and academia by equipping them with analytical, research, and presentation skills essential for contributing to the dynamic Indian legal system.

About Competition **Commission of India (CCI)**



**Competition
Commission of India**

Competition is the best means of ensuring that the ‘Common Man’ or ‘Aam Aadmi’ has access to the broadest range of goods and services at the most competitive prices. With increased competition, producers will have maximum incentive to innovate and specialize. This would result in reduced costs and wider choice to consumers. A fair competition in market is essential to achieve this objective. Our goal is to create and sustain fair competition in the economy that will provide a ‘level playing field’ to the producers and make the markets work for the welfare of the consumers.

The Competition Act, 2002, as amended by the Competition (Amendment) Act, 2007, follows the philosophy of modern competition laws. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations (acquisition, acquiring of control and M&A), which causes or likely to cause an appreciable adverse effect on competition within India.

The objectives of the Act are sought to be achieved through the Competition Commission of India, which has been established by the Central Government with effect from 14th October 2003. The Commission shall consist of a Chairperson and not less than two and not more than six other Members to be appointed by the Central Government.

It is the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade in the markets of India.

The Commission is also required to give opinion on competition issues on a reference received from a statutory authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issues

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THEME 1

**BALANCING COMPETITION AND CONSUMER PROTECTION:
STRENGTHENING LEGAL FRAMEWORKS IN INDIA'S DIGITAL
MARKETPLACE**

- Chaitanya Krishna Talapoola¹

- Preet Samaiya²

ABSTRACT

With more than half a billion internet users, India is one of the largest and fastest-growing markets for digital consumers; however, business adoption remains varied. The relationship between competition law and consumer protection law is becoming increasingly important in this evolving landscape, particularly when significant digital platforms like Google use their market dominance to influence prices and consumer choices. Google's business practices have seriously threatened market integrity and consumer welfare, highlighting the need for robust regulatory frameworks that prevent unfair trade practices and deceptive advertising while addressing potential anti-competitive behaviour. In this research paper, we aim to address three main research questions: (1) How do the Consumer Protection Act, 2019, and the Competition Act, 2002, address deceptive advertising, and what reforms can improve consumer protection, (2) How do Google's targeted advertising and market dominance affect digital competition, and what competition law frameworks could be enhanced to protect consumer rights, and (3) How do Google's bundling strategies and restrictive trade practices impact consumer welfare, and what competition law measures could be enhanced to curb these practices? This paper aims to suggest legal frameworks and analyse effective measures from various jurisdictions that can be adopted in India to strengthen existing laws and curtail unfair trade practices. Our methodology will be based on doctrinal methods, analysing various laws and policy frameworks worldwide, relevant case studies, judicial pronouncements, current regulations on unfair trade practices, competition and consumer laws, and literature from authoritative sources in this field. Through this research, we aim to underscore the necessity of robust legal frameworks to protect consumer rights and ensure fair competition, particularly in digital platforms such as in the case of Google.

Keywords: Deceptive advertising, market dominance, unfair trade practices, consumer protection, Competition Act, 2002, anti-competitive behaviour

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I. INTRODUCTION

Have you ever wondered why Android phones come pre-installed with Google apps, such as Google Maps, Google Search, and Google Ads, and why these apps cannot be deleted?³ Have you noticed that when you search for something on Google, such as maps, location, or ads, Google's own services like Google Maps and Google Ads appear first? This happens because Google has been using various strategies, such as bundling and tying, to maintain its market dominance. By making its services the default on Android devices and ensuring its own products appear first in search results, Google restricts consumer choice and stifles competition.⁴ This practice raises important questions about the fairness of its dominance in the market. In this research paper, we will examine how Google has used strategies like tying and bundling to maintain its market dominance, and how this affects consumer choice and competition in the digital marketplace. We will also analyze the role of competition law in curbing monopolistic practices, particularly focusing on the effectiveness of the competition laws in India, the European Union, and the United States. Additionally, we will briefly explore the Consumer Protection Act, 2019, to understand its role in safeguarding consumer rights.

The objective of this paper is to evaluate Google's strategies to preserve its dominance and assess their impact on competition. We will analyze the effectiveness of current competition laws in addressing these practices, and propose recommendations for reducing Google's market power to foster a more competitive environment. Ultimately, this paper seeks to explore whether the existing legal frameworks are sufficient to counteract Google's monopolistic behavior and ensure fair competition in the market.

II. RESEARCH METHODOLOGY

The study adopts a qualitative and doctrinal approach to analyze India's digital market and its interaction with competition law. It reviews statutory frameworks, case laws, scholarly articles, and reports to identify gaps in addressing issues like abuse of dominance, predatory pricing, and self-preferencing, as seen in cases involving Google. Comparing antitrust frameworks in the U.S., EU, and India, the study examines laws like the Sherman Act and India's Competition Act, 2002, focusing on challenges such as tying, bundling, creating its

³ Travis Clark, *Google v. Commissioner: A Comparison of European Union and United States Antitrust Law*, 47 SETON HALL L. REV. 1021 (2017).

⁴ Benjamin Edelman, *Does Google leverage market power through tying and bundling?*, *Journal of Competition Law & Economics*, 11(2), 365–400 (2015).

market dominance and data privacy. It critically evaluates the Digital Competition Act (DCA) proposal, exploring its potential to enhance consumer welfare by addressing systemic anti-competitive practices. Insights from the Competition Commission of India (CCI) and the EU's Digital Markets Act (DMA) support this analysis.

The study concludes with policy recommendations tailored to India's digital market, emphasizing the balance between innovation, consumer welfare, and competition to address the evolving nature of digital markets effectively.

III. OVERVIEW OF DIGITAL MARKET IN INDIA

India's digital market is one of the fastest-growing in the world, driven by rapid technological advancements, increasing internet penetration, and the rise of mobile devices. As of recent years, India has witnessed a significant digital transformation, with the government promoting initiatives like "Digital India" to boost online access to services and create a favorable environment for startups. The rise of e-commerce platforms, digital payments, and online services such as food delivery, ride-hailing, and entertainment has led to a highly competitive digital landscape.

The Indian digital market includes global tech giants like Google, Amazon, and Facebook, along with local startups such as Flipkart, Zomato, and Paytm, which have rapidly gained market share.⁵ These platforms benefit from network effects, where the value of the service increases with more users, creating significant barriers to entry for smaller competitors. This dynamic often leads to winner-takes-all outcomes, where a few dominant players control the market, creating potential concerns for anti-competitive behavior.

With more than half a billion internet users, India is one of the largest and fastest-growing markets for digital consumers; however, business adoption remains varied.⁶ The relationship between competition law and consumer protection law is becoming increasingly important in this evolving landscape, particularly when significant digital platforms like Google use their market dominance to influence prices and consumer choices. Google's business practices have seriously threatened market integrity and consumer welfare, highlighting the need for robust regulatory frameworks that prevent unfair trade practices and deceptive advertising

⁵ Nisha Kaur Uberoi *et al.*, *India: Nurturing competition in a rapidly evolving digital space*, *Global Competition Review*. Available at: <https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/india-nurturing-competition-in-rapidly-evolving-digital-space> (Last Accessed: 06 December 2024).

⁶ Noshir Kaka *et al.*, *Digital India: Technology to transform a connected nation* McKinsey & Company (2019), <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/digital-india-technology-to-transform-a-connected-nation> (last accessed : Dec 11, 2024).

while addressing potential anti-competitive behaviour, impacting consumer choices too to a large extent.

Competition law in India, primarily governed by the Competition Act of 2002, has faced challenges in regulating digital markets due to their complexity. Issues like data privacy, self-preferencing, and predatory pricing in the digital space have prompted calls for more robust regulations. The Competition Commission of India (CCI) is actively working to address these issues, though challenges remain in keeping up with the rapid pace of digital market evolution. The proposed Digital Competition Act (DCA) is expected to tackle these emerging issues more effectively, offering a regulatory framework that can accommodate the unique characteristics of digital platforms.

IV. LITERATURE REVIEW

A. T. K Dayitha, Charting the Digital Frontier: Decoding India's Path to Digital Competition Law, 4 JUS CORPUS L.J. 199 (March-May 2024).

The Competition Act of 2002, while effective in traditional markets, has struggled largely to regulate the complexities of the digital economy, necessitating the proposed Digital Competition Act (DCA). The DCA seeks to address the shortcomings in the current framework, focusing on fair competition and consumer welfare.⁷ A key feature is the introduction of ex-ante regulations for Systemically Important Digital Intermediaries (SIDs), proactively preventing anti-competitive practices like self-preferencing and predatory pricing, thus shifting from reactive to preventive regulation. Consumer protection in digital markets is another critical gap. The DCA aims to enhance transparency in digital advertising, ensuring it is free from deceptive practices, while also addressing data misuse and privacy concerns.⁸ By integrating competition law with data protection regulations, the DCA strives for a comprehensive framework to safeguard consumer rights and maintain fair competition. However, directly adopting elements of the European Union's Digital Markets Act (DMA) without considering India's unique market conditions—such as diverse structures, varying digital literacy, and socio-economic disparities—risks creating ineffective regulations. Crafting locally tailored solutions that engage stakeholders is essential for the DCA's success. The challenges of digital market regulation are exemplified by Japan's Fair Trade

⁷ Marjolein De Backer et al., Sustainability and Competition Policy (2023), <https://www.concurrences.com/en/review/issues/no-1-2023/on-topic/sustainability-and-competition-policy> (last accessed : Dec 8, 2024).

⁸ Roberto Augusto Castellanos Pfeiffer, Digital Economy, Big Data and Competition Law, 3 MKT. & COMPETITION L. REV. 53 (April 2019).

Commission (JFTC) in its scrutiny of Google's acquisition of Fitbit. Concerns over Google's increased market power in health tech led the JFTC to impose remedies like ensuring interoperability and access to health data for competitors.⁹ These measures highlight the need for adaptable frameworks to address network effects and data control, ensuring competitive dynamics are preserved in digital ecosystems. The case also reflects a global trend of heightened scrutiny of tech mergers, with regulators focusing on long-term impacts on competition, innovation, and consumer choice. By fostering competition, such measures allow smaller players to thrive, benefitting consumers with greater choice and innovation. The DCA's emphasis on proactive regulation and integrated approaches holds promise for fostering equitable digital markets. However, its success hinges on adapting to India's specific needs, ensuring it addresses exclusionary and exploitative practices effectively.

A forward-looking framework that prioritizes consumer welfare and innovation is essential for navigating the complexities of an evolving digital economy. The DCA seeks to introduce proactive regulations for Systemically Important Digital Intermediaries (SIDs), which will aim to prevent anti-competitive practices before they occur. By enhancing consumer welfare and addressing gaps related to exploitative practices, the DCA could foster a more equitable digital marketplace that supports innovation while safeguarding consumer interests. As digital markets continue to evolve, it is essential for competition authorities to develop comprehensive frameworks that address both exclusionary and exploitative behaviours. Focusing on consumer welfare and adapting regulatory approaches to the complexities of digital ecosystems will better safeguard competitive markets.¹⁰ This ensures that consumers benefit from healthy competition and innovation in an increasingly digitized economy.

B. Nishtha Chopra, 'Google Abusing Its Dominant Position': The Competition Commission of India, 6 INT'L J.L. MGMT. & HUMAN. 1026 (2023).

This literature discusses the impact of competition laws, particularly the **Competition Act, 2002**, in fostering healthy market practices and preventing anti-competitive behavior in India. The **Competition Act, 2002** aims to promote competition, prevent anti-competitive agreements, and regulate the abuse of market dominance. The literature focuses on a case filed against **Google LLC** and **Google India Private Limited** by informants under the Act.

⁹ Japan Fair Trade Commission, The JFTC reviewed the proposed acquisition of Fitbit, Inc. by Google LLC The JFTC Reviewed the Proposed Acquisition of Fitbit, Inc. by Google LLC | Japan Fair Trade Commission, <https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114.html> (last accessed: Dec 6, 2024).

¹⁰ Enforcing competition law in digital markets and Ecosystems, https://unctad.org/system/files/non-official-document/ccpb_IGECOM2024_contribution_digital_markets_SA_en_0.pdf (last accessed : Dec 8, 2024).

The informants accused Google of **abusing its dominant position** in the mobile operating system market, specifically with Android devices, and **restricting competition** through practices like mandatory pre-installation of Google services and preventing the development of competing Android versions. These practices, according to the informants, violated provisions of the Competition Act, particularly Sections 4 (related to abuse of dominance)¹¹ and Section 3 (related to anti-competitive agreements)¹². The **Competition Commission of India** (CCI) agreed with the allegations, finding that Google's actions were detrimental to competition. The CCI's investigation revealed that Google had violated several provisions, leading to the imposition of a **Rs. 1337.76 crore fine** and a **cease and desist order**. The Commission also required Google to modify its conduct in compliance with the Act.

The CCI's decision underscores the importance of scrutinizing the practices of dominant digital platforms, particularly in emerging markets like India. The case highlights the potential for abuse of dominance when a company controls essential infrastructure, such as a mobile operating system. By mandating the pre-installation of its search app, Google effectively denied consumers the opportunity to choose alternative search engines and limited the ability of competitors to gain market share. The CCI's findings have broader implications for competition law enforcement in the digital age. The case demonstrates the need for regulators to adapt existing legal frameworks to address the unique challenges posed by digital platforms. It also highlights the importance of considering the dynamic nature of digital markets and the potential for anti-competitive effects to arise from seemingly innocuous practices, such as pre-installation agreements.

C. Benjamin Edelman, Does Google leverage market power through tying and bundling?, *Journal of Competition Law & Economics*, 11(2), 365–400 (2015).

The examination of Google's practices reveals a pattern of leveraging its market dominance through tying and bundling strategies. This literature review synthesizes key findings from various excerpts to highlight the implications of these practices on competition and consumer choice. Tying occurs when a seller conditions the sale of one product (the "tying" product) on the purchase of another (the "tied" product).

Google has implemented tying strategies across its services, compelling users to adopt additional Google products to access its core offerings. For instance, users were required to create Google+ accounts to comment on YouTube videos, illustrating a strategic move to

¹¹ Section 4 of the Indian Competition Act, 2002.

¹² Section 3 of the Indian Competition Act, 2002.

integrate its social network with its video platform. Google holds significant market power in the search engine sector, with a U.S. market share exceeding 67%¹³ and over 95% in many European countries.¹⁴ This dominance raises concerns regarding its ability to manipulate market conditions through tying.

The article assesses Google's tying practices under U.S. and EU antitrust laws, concluding that these tactics are likely to violate competition laws due to their exclusionary effects on competitors. Google's tying practices have been shown to hinder competition in various markets. By requiring manufacturers to pre-install Google services on devices, competitors struggle to gain visibility and market share. Tying can lead to reduced consumer choice and higher prices. For example, when Google prioritizes its own services in search results, it diminishes the likelihood of users discovering and using competing services. The literature outlines how U.S. courts have applied a strict approach to tying, requiring proof of market power and substantial commerce impact in the tied market. In contrast, the EU has focused on the effects of tying on competition, as seen in the Microsoft case involving Windows and Windows Media Player.

The proposed test (Rule of Reason Test) for evaluating tying arrangements considers factors such as market power, product distinctiveness, and potential consumer harm. This framework aims to balance the anticompetitive effects of tying with any potential efficiencies it may create. Google's tying practices raise significant antitrust concerns and highlight the complexities of regulating dominant firms in the digital marketplace. The literature suggests that while tying can enhance consumer convenience, it often comes at the cost of competition and consumer choice, necessitating careful scrutiny from regulatory bodies.

Google operates a dominant advertising service known as AdWords, which allows advertisers to place text ads adjacent to search results. This service has attracted over one million advertisers, making it a primary revenue source for Google. Google has been criticized for tying additional advertising services to AdWords, requiring advertisers to accept these services to continue using AdWords. Google has implemented automatic opt-in practices for various advertising services, such as AdSense and placements on parked domains. Advertisers often find themselves enrolled in these services without explicit consent,

¹³ Press Release, COMSCORE RELEASES DECEMBER 2013 U.S. SEARCH ENGINE RANKINGS COMSCORE, INC., <https://www.comscore.com/Insights/Press-Releases/2014/1/comScore-Releases-December-2013-US-Search-Engine-Rankings> (last accessed : Dec 8, 2024).

¹⁴ Go Desktop Search Engine Market Share Worldwide, STATCOUNTER GLOBAL STATS, <https://gs.statcounter.com/search-engine-market-share/desktop/worldwide> (last accessed: Dec 08, 2024).

complicating their ability to opt out. For example, in 2003, Google launched AdSense, automatically enrolling AdWords advertisers, which raised concerns about inflated costs due to click fraud. Google holds significant market power in the search advertising sector, with a market share exceeding 70% in the U.S.¹⁵ and over 90% in Europe¹⁶. This dominance raises antitrust concerns regarding its tying practices. The tying of products, such as requiring advertisers to accept unwanted placements to access AdWords, is viewed as a violation of antitrust laws. Advertisers face increased costs as they are compelled to purchase additional advertising services they did not request. This practice not only inflates their advertising expenses but also stifles competition from other vendors. The lack of transparency in Google's practices further complicates matters, as advertisers often struggle to keep up with frequent changes and updates to the services.

Google ties its mobile operating system, Android, to various services, requiring manufacturers to preinstall Google apps to access the Play Store. This practice limits competition from other app developers and services. The Mobile Application Distribution Agreements (MADAs) mandate that manufacturers preinstall all specified Google applications, effectively excluding competitors from the market. Google's tying practices suppress competition by forcing manufacturers to adopt its services, which can lead to reduced innovation and higher prices for consumers. The lack of viable alternatives for consumers and manufacturers due to Google's dominance creates a market where competition is stifled, leading to potential long-term harm to consumer choice and market health. Google's advertising practices, particularly its tying of services, raise significant antitrust concerns. The implications of these practices extend beyond advertisers to consumers, potentially leading to higher prices, reduced choice, and slower innovation in the digital marketplace.

V. CASE STUDY: GOOGLE'S ANTI-COMPETITIVE PRACTICES

This case study examines two significant legal cases involving Google that highlight its alleged anti-competitive behaviour in the digital marketplace. The focus will be on the European Union's antitrust actions and the U.S. Department of Justice lawsuit against Google.

¹⁵ US Department of Justice, Yahoo! Inc. and Google Inc.. abandon their advertising agreement #08-981: Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement (2008-11-05), <https://www.justice.gov/archive/opa/pr/2008/November/08-at-981.html> (last accessed : Dec 9, 2024).

¹⁶ Alex Funk, Fourth Quarter Global Search Advertising Finished Strong available at http://www.covario.com/wp-content/uploads/2014/01/rpt_gpssa_q413_fnl.pdf[2014]

A. Case Law 1: United States v/s Google LLC¹⁷

In 2020, the U.S. Department of Justice (DOJ), along with several states, filed a lawsuit against Google, alleging violations of antitrust laws under Section 2 of the Sherman Act. The case centred on Google's practices in maintaining its monopoly over general search services and general text advertising. The DOJ argued that Google engaged in exclusive distribution agreements with major companies like Apple and Samsung, effectively locking in its position as the default search engine on their devices.

The primary legal issue was whether Google illegally maintained its monopoly through exclusive dealing arrangements that restricted competition in the search engine market and general text advertising. The relevant law is Section 2 of the Sherman Antitrust Act, which prohibits monopolization, attempted monopolization, or conspiracy to monopolize any part of trade or commerce in the United States

Judge Amit Mehta of the U.S. District Court for the District of Columbia found that Google had indeed violated Section 2 of the Sherman Act. The court established that *“Google held a dominant market share exceeding 89% for general search services. Its exclusive agreements with device manufacturers had anticompetitive effects, including market foreclosure and diminished incentives for rivals to innovate. Google failed to provide valid procompetitive justifications for these agreements.”*¹⁸

The court acknowledged that while Google initially achieved its dominant position through competitive means, its subsequent actions constituted an abuse of that power. The court ruled against Google, affirming that it had acted as a monopolist to maintain its dominance in search services and advertising markets. The decision marked a significant moment in antitrust enforcement against major tech companies and set the stage for potential remedies to restore competition in these markets.

B. Case Law 2: Google Shopping antitrust case¹⁹

The Google Shopping antitrust case centres on the European Commission's investigation into whether Google misused its dominant position in the search engine market by favouring its own comparison shopping service, Google Shopping, over its competitors. In 2017, the

¹⁷ *United States v. Google LLC*, 661 F. Supp. 3d 480 (E.D. Va. 2023)

¹⁸ Sucheta, Ridhi, Google has monopoly over relevant product markets for general search services and general search text advertisements: US District Court, available at <https://www.scconline.com/blog/post/2024/08/07/google-monopoly-general-search-exclusive-deals-product-market-amit-p-mehta-us-district-court-legal-news/> [Last accessed: 9 December, 2024]

¹⁹ *Google and Alphabet v Commission (Google Shopping)*, judgment in Case T-612/17

Commission ruled that Google had violated EU antitrust laws and imposed a fine of €2.42 billion.²⁰

Google holds a dominant market share in general search, exceeding 90% in several EU countries.²¹ The Commission accused the company of manipulating search results to prioritize Google Shopping, which disadvantaged competing services and limited consumer choice. A critical aspect of the case was the Commission's market definition, which distinguished between general search services (like Google Search) and comparison shopping services (such as PriceRunner or Shopzilla).²² This differentiation was crucial because it established that these are distinct markets serving different needs—general searches provide a wide range of information, while comparison shopping focuses specifically on product searches and price comparisons. The Commission viewed Google's promotion of its own service as anti-competitive due to its detrimental impact on rivals in the comparison shopping sector.

In defence, Google argued that its algorithm changes aimed to enhance user experience by delivering more relevant content. However, the Commission concluded that these actions effectively stifled competition.

This case illustrates the complexities of regulating digital platforms, where dominant companies like Google can significantly influence markets through their algorithms. The Google Shopping case is a pivotal example of how competition law is applied to digital markets, highlighting the necessity of ensuring fair competition even when traditional metrics like price are not directly applicable.²³

VI. COMPARATIVE FRAMEWORK

Digital platforms, such as Facebook, operate on a multi-sided market model where different user groups interact. Facebook users form one side of the market, exchanging content, while advertisers constitute another, paying to promote products and services. This dual-revenue model is akin to credit card companies, which charge both cardholders and merchants. However, in many cases, one side (usually the users) is exempt from direct fees, leading consumers to perceive these services as "free."

²⁰ Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, European Commission - European Commission, https://ec.europa.eu/commission/presscorner/detail/en/ip_17_1784 (last accessed : Dec 8, 2024).

²¹ Google Shopping Case, chapter 6.2

²² Google Shopping Case, note 154.

²³ Nils Renstrom, Online challenges for EU competition policy, Faculty of law, Lund University, 22-40, 2018

Despite this perception, consumers incur indirect costs. Advertisers pass on their expenses to consumers by embedding advertising costs in the final price of goods and services. Furthermore, consumers provide valuable personal data in exchange for access to these platforms. The extent of data collection and its transparency vary across services, but it is integral to the perceived quality of the service. This dynamic raises questions about the true cost of "free" services and emphasizes the need for competition authorities to consider both direct and indirect costs to consumers when evaluating market practices.

The competition law frameworks in the EU, USA, and India highlight different regulatory approaches to digital markets.²⁴ The EU has adopted a proactive strategy with both ex-post and ex-ante measures to address anti-competitive behaviour. The Treaty on the Functioning of the European Union (TFEU) prohibits practices that restrict competition, and companies like Google have faced significant fines for anti-competitive actions. Additionally, the EU has introduced key regulations such as the General Data Protection Regulation (GDPR) and the Digital Markets Act (DMA), which specifically targets large digital platforms designated as "Gatekeepers." The DMA aims to prevent anti-competitive practices before they occur, offering a forward-thinking approach to maintaining fair competition in digital markets.

In contrast, the United States has traditionally relied on an antitrust framework focused on consumer welfare, primarily through price effects. Although the U.S. system is evolving, there are ongoing discussions about adapting enforcement strategies to better address the complexities of digital ecosystems. India's Competition Commission (CCI), operational since 2009, has been developing its regulatory approach, leaning on global jurisprudence while tailoring it to local market conditions. Recent cases show a shift toward more robust enforcement in digital markets, balancing competition concerns with consumer benefits.

As digital markets continue to grow and evolve, global competition law frameworks must adapt. A balanced approach combining ex-post and ex-ante measures will be crucial for protecting consumer welfare while fostering innovation and ensuring fair competition. India, for example, could benefit from adopting proactive frameworks like the DMA to prevent systemic dominance. A dynamic and adaptive regulatory approach is necessary to balance innovation and consumer protection, especially as data becomes an increasingly important competitive asset.

²⁴ Report of the Committee on Digital Competition Law, Ministry of Corporate Affairs, Government of India , <https://www.mca.gov.in/bin/dms/getdocument?mds=gzGtvSkE3zIVhAuBe2pbow%3D%3D&type=open> (last accessed: Dec 9, 2024).

VII. WAY FORWARD

The examination of Google's anticompetitive activities across regions such as the EU, US, India, and Japan highlights significant deficiencies in existing legal frameworks that inadvertently facilitate its market dominance. To effectively address these challenges, a comprehensive strategy is required.

India should work with international regulators to align its competition laws with global standards, like the EU's Digital Markets Act (DMA), to address cross-border anti-competitive behaviour. Sharing knowledge with other countries facing similar issues will help India learn best practices for managing digital markets. To promote innovation and competition, India can create incentives for new businesses, such as tax breaks or grants for startups, allowing them to compete with major players like Google. It's also important to encourage policies that ensure major platforms share essential services and APIs with smaller competitors. A dedicated monitoring body within the Competition Commission of India (CCI) should oversee digital market practices to ensure the effectiveness of regulations. Regular assessments of major tech mergers should be done to understand their impact on competition and consumer choices. Lastly, proactive regulations for large digital platforms can help prevent anti-competitive practices before they start, benefiting both the market and consumers.

VIII. CONCLUSION

In conclusion, the findings presented in this paper shed light on the pervasive anticompetitive practices employed by Google across various global markets, including the EU, US, India, and Japan. These practices reveal significant gaps in existing legal frameworks that fail to adequately address the challenges posed by digital monopolies. The analysis demonstrates that strategies such as bundling and tying not only limit consumer choices but also hinder competition. To create a fairer digital marketplace, it is crucial to implement robust regulatory measures, including proactive ex-ante regulations and enhanced consumer protections. Strengthening competition laws will ultimately foster innovation and protect consumer welfare in an increasingly digital economy.

PHARMACEUTICAL TRADE AND COMPETITION COMMISSION OF INDIA : A
STUDY ABOUT THE COMMISSIONS' OCTOPUS CATCH OF ANTI-
COMPETITIVE PRACTICES

- Gokul R²⁵

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ABSTRACT

In an era of consumerism, markets play an important role in driving the economic landscape of a country. These markets, when distorted by bad business practices adopted by enterprises to stay in a superiority position than others, produce unfavourable outcomes which are detrimental to the interests of various stakeholders. To keep a check on these practices, in India, the legislature has enacted the Competition Act, 2002, which is the law of the land and the Competition Commission of India (CCI), the authority established thereunder, plays a pivotal role in curbing such practices. This study uncovers the investigative mechanisms adopted by CCI with respect to pharmaceutical sector and various anti-competitive trade practices adopted by the businesses / associations involved in that sector. As part of this study, a detailed analysis of decided cases by the CCI is carried out to understand the evidentiary values adopted, factors considered by the Director General (DG) during investigation of anti-competitive practices by enterprises, examination of agreements in the light of competitive principles, and accrual of benefits to the overall welfare of the markets and seeks to provide suggestions which can further enrich the working horizons of the Commission.

Keywords: Consumerism, Consumers, Practices, Competition Act, Competition Commission, India

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I. INTRODUCTION

Human health is of paramount importance. Healthy individuals create healthy families. Healthy families create healthy societies. Healthy societies lead to improved efficiencies and standard of living. These in turn lead to nations rising and breaking barriers to progress. Health commands such a potential and is indispensable for human survival. But, at times, health deteriorates and causes concerns to individuals. Starting from mild fever to clinical cancers, deteriorates the well being of individuals and affects the families.

In this era of rapid growth of science and technology, human suffering due to deterioration of health is limited to a considerable extent. Thanks to the pharmaceutical sector, the miseries of people are reduced due to development of inventions and innovations which keep happening on a continuous basis in that sector. The growth of this sector is of pivotal importance to Indian economy and has risen to such an extent that global markets are influenced by the pharma industry in India. In the words of K Raja Bhanu, director general of the Pharmaceuticals Export Promotion Council of India,

“.....India's role in the global pharmaceutical landscape is not only pivotal but also transformational, underscoring the nation's contributions to healthcare advancements and economic growth....Indian medicines are not just affordable; they are essential to global healthcare, providing significant savings to economies worldwide.....”²⁷

In India, pharmaceutical sector consists of multitude of businesses ranging from pharma companies which manufactures and sells the medicines to Carrying and Forwarding (C&F) agents of pharma companies, stockists, wholesalers and retailers. This entire chain of businesses constitutes the pharmaceutical sector. To ensure the welfare and growth of this sector, individuals belonging to this chain of businesses form voluntary associations. These associations aim to safeguard the general business wellbeing of the constituents of such associations and provide a platform for members to discuss and voice their concerns.

At times, these associations, instead of securing the orderly and healthy growth of pharma sector, does certain practices which produce anti-competitive effects in the markets. These practices are aimed at establishing a monopoly power and leads to foreclosure of competition in the markets. Ultimately, it affects the existing individuals like stockists who are driven out of pharma business and prospective individuals who wish to foray by creating

²⁷ Shardul Nautiyal, *Indian pharma industry to play a crucial role in global market: Raja Bhanu*, Pharmabiz.com (Dec. 06, 2024, at 11.33 AM) <https://www.pharmabiz.com/NewsDetails.aspx?aid=172200&sid=1>.

entry barriers and the end consumers by way of limiting the supply of medicines and at higher price.

To keep a check on these anti-competitive practices, in India, the legislature thought it fit to enact a renewed and pro-consumer, pro-business Competition Act, 2002. The motive behind the enactment of the law is to prevent bad practices of businesses and promote the competitive spirit. The authority – CCI, established under the said central legislation, aims to safeguard the competitive business landscape in India and in particular, has at various times, investigated the anti-competitive trade practices of constituents of pharmaceutical businesses namely associations and its office bearers. In the words of Ashok Chawla,

“Competition law applies to all enterprises...it is ownership neutral and size neutral. It applies to all sectors.”²⁸

The growing investigation and penalization of persons involved in anti-competitive conducts in pharma trade is reverberates even in Parliamentary debates and discussions. Replying in Parliament, the then Minister in charge of the affairs related to company matters, Nirmala Sitharaman said –

“...from financial year 2016-17 to 2018-19, a total fine of Rs 11,939.26 lakh was imposed on various pharma companies by the Competition Commission of India (CCI).... In 2016-17, a penalty of Rs 7,296 lakh was levied while in 2018-19, Rs 4,643.26 lakh was imposed as fine on various pharma firms....”²⁹

This research paper makes a detailed examination of investigative mechanisms adopted by the CCI with respect to pharmaceutical sector and various trade practices which have a direct bearing on the competition ethos of the country adopted by the businesses / associations involved in that sector. As part of this study, a detailed analysis of decided cases by the CCI is carried out to understand the evidentiary values adopted, factors considered by the investigative arm of CCI, the Director General (DG), which he incorporates with respect to conduct of enquiry pertaining to anti-competitive practices by enterprises, examination of agreements in the light of competitive principles, and accrual of benefits to the overall welfare of the markets and seeks to provide suggestions which can further enrich the working horizons of the Commission.

²⁸ PTI, *Implementation of competition law face challenges, says CCI chairman Ashok Chawla*, The Economic Times (Dec. 06, 2024, at 11.53 AM) <https://economictimes.indiatimes.com/news/economy/policy/implementation-of-competition-law-face-challenges-says-cci-chairman-ashok-chawla/articleshow/36482481.cms?from=mdr> .

²⁹ PTI, *CCI imposes Rs 11,939 lakh fine on pharma firms in last 3 years: Nirmala Sitharaman*, money control (Dec. 06, 2024, at 11.56 AM) <https://www.moneycontrol.com/news/business/cci-imposes-rs-11939-lakh-fine-on-pharma-firms-in-last-3-years-nirmala-sitharaman-4157131.html>.

II. ANTI-COMPETITIVE PRACTICES IN PHARMACEUTICAL TRADE IN INDIA

Pharmaceutical trade in India is characterized by the presence of various stakeholders. The business chain includes pharmaceutical companies, stockists, wholesalers and retailers. The members of this chain merge together and establish associations / federations to safeguard and promote their commercial interests. Some notable associations currently functioning in India at national, state and district levels (illustrative examples) are –

- Functioning at the national level is “*All India Organisation of Chemists and Druggists (AIOCD)*”, which is the nation-wide body consisting of chemists and druggists; Promoting and defending the interests of the drug trade sector and its allies in India, as well as the individuals involved, is one of the goals of the AIOCD, an organization established under the Societies Registration Act. The AIOCD, which affiliates several State Associations, is the All India body that has total authority over drug and medication stockists in the nation.
- Functioning at State level are – with respect to Gujarat – “*Federation of Gujarat State Chemists and Druggists Association (FGSCDA)*”;
- “*All Kerala Chemists and Druggists Association (AKCDA)*” – state level;
- “*Chemists and Druggists Association, Goa (CDAG)*” – state level;
- “*Belgaum District Chemists and Druggists Association (BDCDA)*” – district level;
- “*Chemists and Druggists Association of Baroda (CDAB)*” – district level;

District associations are affiliated to state level associations which make up their membership. These state level bodies are in turn affiliated to AIOCD. These voluntary groups are formed for securing the welfare of its members like stockists, wholesalers and retailers. But, at times, they adopt anti-competitive trade practices which distorts market competition and hence calls for investigation by the CCI, the apex competitive investigation regulator.

III. AN EXPERT VIEW

Abir Roy, a renowned expert in the field of practicing and propagating the jurisprudence related to competition law, presently associated with Khare Legal Chambers, opined about the enforcement and regulatory regime and mechanisms of the CCI. Accordingly,

“CCI has become a very aggressive regulator and have already levies multiple headline fines. The CCI has also reviewed the conduct of Chemist and Druggist

Associations in the pharma sector under Section 3 of the Act, which prohibits anti-competitive agreements (particularly cartels) and declares them void. The CCI has broadly held that the following practices of such Chemist and Druggist Associations are anti-competitive:

- *Non-appointment of a stockist or a wholesaler from amongst the non-members of the respective trade association;*
- *Requirement of a NOC from the association for appointment of a stockist or wholesaler.*
- *Associations fixed trade margins below which the stockists were not allowed to sell;*
- *The distributors/retailers were not allowed to give discounts to customers;*
- *Compulsory approval from the trade association for introduction of drugs in the market; and*
- *Requirement for routing bids for supply of drugs to the government and the hospitals through authorised stockist only.*

The CCI has held that the above terms and conditions amounted to the restriction of the ability of enterprises to supply and sell drugs in the market.”³⁰

IV. KARNATAKA CHEMISTS AND DRUGGISTS ASSOCIATION (KCDA) CASE³¹

A. Parties to the Case and the Allegations

The Informant in the present case is a Bangalore based Maruti & Company. The Opposite Parties are “Karnataka Chemists & Druggists Association (KCDA), Mr. K.E. Prakash, President, KCDA, The Regional Sales Manager/State Incharge, Lupin Diabetes Care Unit of Lupin Ltd.” and Lupin Ltd. An allegation was made in the information that the Opposite Parties had violated the law by refusing to provide the Informant with medication because they did not have a No Objection Certificate (NOC) from KCDA. On June 5, 2013, the Informant was hired in Bangalore to function as a stockist taking forward the business associated with Lupin. In that business, he was entrusted with respect to the business focusing on caring and remedying the ailment associated with diabetes. Nonetheless, it is said that the Informant was not provided with medication in spite of an August 2013 order it placed with Lupin as it was unable to secure a NOC from KCDA.

³⁰ Guest, *Competition issues in the Indian pharma sector*, FINANCIAL EXPRESS (Dec. 06, 2024, at 11.59 AM) <https://www.financialexpress.com/india-news/competition-issues-in-the-indian-pharma-sector/10983/>.

³¹ Case No. 71 of 2013, Competition Commission of India, Order Dated 28/07/2016.

According to the informant, the President of KCDA told him to get a NOC from KCDA before starting business, after he questioned the organization about why drugs were not supplied over the phone. It is therefore said that in order for the Informant to receive a drug supply, KCDA and its President, as well as Lupin and its official, insisted that the Informant first obtain a NOC from KCDA.

B. DG Investigation

The Informant has requested an investigation which can be entrusted and taken care by the DG to bring out and lay bare the truth. The Informant requested that the said investigation is proceeded against the “*Opposite Parties*” for violating the statutory provisions regarding the competition law provisions, based on the aforementioned charges and averments. Upon reviewing the relevant documentation, the Commission concluded that there was a preliminary indication of a violation of rules pertaining to horizontal agreements of the law. The DG was therefore instructed by CCI to cause an investigate into the issue and produce a report.

Following a thorough examination of the material, including the exchanged emails and letters, meeting minutes, witness depositions, etc., the DG discovered that “*KCDA is continuing its policy of requiring NOC before a company can supply drugs to its recently appointed stockists. The DG claims that this practice of KCDA's amounts to restricting and managing the availability of medications and medicines in Karnataka and that it violates the Act's Section 3(3)(b) read in conjunction with Section 3(1).*” The DG, acting as per the directions issued by CCI has also held that, despite designating the Informant as its distributor, Lupin refused to provide supplies to the Informant at the request of the KCDA.

C. Findings of the Commission

The information on file has been discovered to support the Informant's accusation that Lupin refused to supply because of the NOC procedure used by KCDA. “*The practice of requiring NOCs prior to stockist appointments, according to the Commission, amounts to an anti- competitive activity that violates Section 3(1) read with Section 3(3)(b) of the Act by restricting and controlling the supply of medications in the market. So, taking into account everything mentioned above, the Commission determines that KCDA has violated the Act's Section 3(1) read with Section 3(3)(b).*”

D. Order Passed by the Commission

When the law related to agreements and dominance are violated, the Commission may impose any further order or direction it deems appropriate, pursuant to the law related to the

Competition Act, 2002. Furthermore, the Commission may proceed to find and punish the persons guilty of the aforementioned infringement where the violation is committed irrespective of it being a company, firm or other organization of individuals.

“Given the conclusions discussed in the preceding section of this order, the Commission orders KCDA, Lupin, and their office bearers/officials—who have been found accountable under Section 48 of the Act—to stop requiring NOCs, as this practice has been determined to be anti-competitive under Section 3 of the Act.”

It has been discovered that associations – be it formed at district level or state level are still engaging in anti-competitive measures, such as requiring NOC to nominate stockists, in spite of multiple directives from the Commission outlawing such behavior. Therefore, it is imperative that this anti-competitive behavior be punished in order to both discipline the offending party for the specific violation and serve as a deterrent to stop such violations in the future.

“Accordingly, the Competition Commission of India (CCI) penalised KCDA (Rs. 8,60,321) and Lupin (Rs. 72.96 crore).³² Various office bearers of both KCDA and Lupin were also penalized for their anti-competitive conduct.”

E. Lupin Response

Lupin commented to CCI order of imposing monetary penalties –

“We, at Lupin, are looking at all legal recourses, including filing an appeal vis-a-vis the order issued by the Competition Commission of India having considered merits, facts and circumstances associated with the case”³³

Immediately, the CCI order against Lupin reflected in the share markets which saw the share prices of Lupin down by 0.76%.³⁴

³² Dipak Mondal, *CCI imposes Rs 73-crore fine on Lupin for anti-competitive practices*, Business Today (Dec. 06, 2024, at 12.08 PM) <https://www.businesstoday.in/industry/pharma/story/cci-imposes-rs-73-crore-fine-on-lupin-anti-competitive-practices-147000-2016-08-01>.

³³ BS Reporters / Press Trust of India, *Competition Commission slaps Rs 73 cr fine on Lupin*, Business Standard (Dec. 06, 2024, at 12.08 PM) https://www.business-standard.com/article/companies/competition-commission-slaps-rs-73-cr-fine-on-lupin-116080200014_1.html.

³⁴ Tejal Yerunkar, *CCI slaps fine of nearly Rs 73 crore on Lupin; Stock down 0.76%*, ZEE BUSINESS (Dec. 06, 2024, at 12.16 PM) <https://www.zeebiz.com/companies/news-cci-slaps-fine-of-nearly-rs-73-crore-on-lupin-stock-down-076-4426>.

V. ALL KERALA CHEMISTS AND DRUGGISTS ASSOCIATION (AKCDA) CASE³⁵

A. Parties to the Case and the Allegations

The Informants in the present case are Sudeep PM, KA Sundaran, Undisclosed Informant No. 3 and Giri Nair. “*All Kerala Chemists and Druggists Association (AKCDA)*” is the Opposite Party in the present case. It is alleged that “*AKCDA and its district level associations were requiring a No Objection Certificate (NOC) prior to the appointment of any stockists, in violation of Section 3 of the Competition Act, 2002 (the "Act").*” It was claimed that, in order to avoid facing consequences under the Act, the aforementioned NOC practice just switched from verbal threats to written authorization and was also issued in the guise of letters of congratulations or admiration. Based on the complaint of the Informants to the CCI took cognizance and directed the Directed General (DG) level investigation.

B. DG Investigation

The DG used the data, declarations, records, and other materials that the Informants and a few other parties—such as pharmaceutical companies and wholesaler distributors—provided to carry out its investigative work. Based on the previously mentioned details and supporting documentation gathered throughout the inquiry, the DG came to the conclusion that AKCDA has been offering NOCs through a variety of channels, including the issuance of letters of congratulations or verbal consent before pharmaceutical companies appoint stockists. Additionally, the DG noted that occasionally, a NOC has been granted to specific AKCDA office bearers in exchange for monetary payments. AKCDA had published a list of stockists to whom distributorship of a pharmaceutical company's other division may be granted. These instances were also discovered.

Thrissur and Kasargod, two district units of AKCDA, were found to have violated Section 3(3)(b) and Section 3(1) of the Act, according to the investigation's findings, which were based on the aforementioned facts. The DG additionally named President and various others associated individuals concerning these entities as being accountable. The DG's inquiry report was reviewed by the Commission, which noted that, in addition to AKCDA, the report highlighted the roles of two AKCDA district units: Kasargod District and Thrissur District. Because of this, the Commission decided to send the investigative report to each of them for their replies.

D. Findings of the Commission

Although they were not directly participating in the NOC practice, several pharmaceutical

³⁵ Case No. 54 of 2015, Competition Commission of India, 31/10/2017.

corporations were found to be passively collaborating with the associations of erring chemists and druggists, as reported by the Commission in its examination into this problem. They were consulted over the investigative report that was provided to them. With all due technicality, the majority of them argued before the Commission that they had nothing to contribute to the investigation report in its current form as the DG had not discovered any violations against them. A few of them expressed a desire to collaborate with the Commission to prevent anti-competitive behaviours that are common in the States and Districts where they get their medications.

Since the relevant Act provision pertaining to horizontal agreements was notified, the CCI has received a growing number of cases pertaining to anticompetitive actions by associations representing chemists and druggists. Because there is a greater public interest in certain matters, the Commission has been vigorously pursuing them. Several cases have demonstrated how common it is for pharmaceutical corporations to require a NOC in one form or another before appointing stockists. The NOC was formerly official; later, it took the medium pertaining to letters of congratulations or gratitude; in certain situations, however, it was found that verbal directives were sufficient to guarantee compliance.¹³

E. Orders Passed by the Commission

After taking into account the conclusions presented in the previous section, the Commission concludes that *“the AKCDA and its district associations, Kasargod and Thrissur, have engaged in anti-competitive behaviour that violates Section 3 of the Act. Moreover, Section 48 of the Act holds their office bearers accountable for the anti-competitive behaviour of their individual associations. The actions determined to be anticompetitive under the terms of Section 3 of the Act in the preceding paragraphs of the order are directed to be stopped by these Opposite Parties and their office bearers mentioned above.”*

The Commission penalized *“AKCDA Rs. 4,78,545. A penalty of Rs. 59,434/-, calculated at the rate of 10% of the average income of Thrissur District Unit of AKCDA, was imposed on it. Similarly, a penalty of Rs. 53,889/-, calculated at the rate of 10% of the average turnover of Kasargod District Unit of AKCDA, was also imposed on it”*.

II. FINDINGS AND CONCLUSION

Trade associations are forums used by participants in a certain sector to exchange ideas, address shared issues, and decide on industry-wide policies. There is no questioning the importance of trade groups in the economy and in any business. A single corporation is unable to

perform some functions, thus these groups or unions help with collective decision making. These groups support the industry in maintaining standard operating procedures, which eventually benefits the customer. Furthermore, these organizations support the industry's interests when interacting with government bodies, encourage moral and ethical business conduct, and help standardize the quality of products.

To date, the vast majority of cases before the CCI have dealt with pharmaceutical companies appointing stockists based on "No-Objection Certificates (NOC)" which stem through pharma trade associations. The CCI has consistently ruled that these actions are anti-competitive and fined the pharmaceutical industry as well as trade associations and their erring officials. In an interview, Ashok Chawla, former Chairperson of CCI held that –

“Rather than being party to a cartel, the trade associations should encourage their members and constituents to follow competition compliance norms at the corporate level.”³⁶

With regard to pharma sector, he has in particular emphasised on numerous aspects concerning that sector –

“There are a number of cases, which have been dealt with. There are some (more) cases in the pipeline.... That is an important area from our point of view because pharmaceutical retail and prices at the consumer end impact a very large number of the population... That is something which is critical from both the competition law point of view and also the socio-political point of view”³⁷

As an encouraging development, CCI in numerous cases, apart from condemning the said bad business practices, issued cease and desist orders and monetary penalties, have ordered the erring associations organize competition compliance seminars / conferences so that its members are made vigil about the competition principles to be followed and the consequences of non-compliance. As a consequence of CCI's orders proscribing Association's anti- competitive conducts, the intended results are beginning to materialise. Ashok Chawla, former Chairperson of CCI remarks –

“The study made an attempt to gather feedback from industry participants on the current state of affairs vis-à-vis these practices. A majority of the respondents informed that the mandatory requirement of obtaining NOCs no

³⁶ Chandra, K., Chawla, G., & Bose, M., *CCI reiterates its stand on trade associations' conduct*, Law.asia (Dec. 06, 2024, at 12.29 PM) <https://law.asia/cci-reiterates-its-stand-on-trade-associations-conduct/>.

³⁷ PTI, *Unfair practices in pharma sector under CCI scanner*, THE ECONOMIC TIMES (Dec. 06, 2024, at 13.26 PM) <https://economictimes.indiatimes.com/industry/healthcare/biotech/pharmaceuticals/unfair-practices-in-pharma-sector-under-cci-scanner/articleshow/23404797.cms?from=mdr>.

longer exists. On the issue of PIS charges, the responses were relatively more diverse; however, a majority stated that it was being now levied on a voluntary basis. The association representatives, while confirming compliance with CCI orders, put forth their perspectives in favour of these practices. According to them, these practices arose from the requirement for trade bodies to act as watchdogs against the supply of sub-standard and spurious drugs into the market. With regard to PIS charges, their arguments centred on the benefits of a centralised information dissemination system to both retailers and pharmaceutical companies. However, this view was refuted by some stakeholders, who considered the charge as a kind of market-access fee imposed by associations and serving no meaningful purpose.

Weeding out spurious drugs from the ecosystem and information dissemination on new drugs have significant pro-competitive benefits. However, these are amenable to be addressed through appropriate regulatory mechanisms. Trade associations perform many valuable functions and undertake legitimate activities, which can significantly increase the efficiency and performance of this sector. It is only when they provide a platform for competitors to collaborate and collectively create and enforce norms that have a direct impact on entry, supply, and therefore, on competition, that such conduct warrants antitrust scrutiny.

The Commission shall complement its enforcement with proactive engagement with associations across India to create awareness and prevent violation of the Competition Act, 2002.”³⁸

It is suggested that the Competition Commission of India (CCI) further undertakes numerous market studies to analyze the level of competition in the pharmaceutical sector in India. To step up the vigil mechanism, it is further suggested that whistleblowers are adequately rewarded for bringing to light the anti-competitive trade practices of pharma sector associations / federations. The Government is also advised to evolve suitable guidelines for pharmaceutical companies to deal with competition issues they face by not compromising their business interests at the cost of threats issued by these associations and federations.

³⁸ Ashok Chawla, *Speech of Chairperson*. Competition Commission of India, (Dec. 06, 2024, at 13.32 PM) <http://164.100.58.95/sites/default/files/speeches/Speech-pharma.pdf?download=1>.

A STUDY ON HOW PREDATORY PRICING BY MONOPOLIES CAN DRIVE OUT COMPETITORS AND HARM CONSUMERS

- Khushi Verma³⁹

- Amogha Varsham⁴⁰

ABSTRACT

Predatory pricing is a well-documented strategy employed by some of the companies in the market to eliminate competition by putting prices below the cost of production. Such strategies pose enormous threats to the market structure and consumer welfare. Consumers may enjoy low prices for some time, benefiting from penetration. However this is rarely the case since after the monopolistic tendencies set in the prices go up, the options available to consumers become fewer and the quality of products suffers after competition leaves the playing field. We seek to understand the predatory pricing account of monopolies vis-a-vis its effects on competitors and customers, focusing on the legal provisions of Indian competition law, especially the Competition Act, 2002 and the Consumer Protection Act, 2019.

The Competition Act of 2002 provides for the prohibition of the abuse of dominance bears the element of predatory pricing focused on preventing anti-competitive practices. Overhand, the Consumer Protection Act 2019 purports to deal with relationship between consumers and traders, especially consumers from traders' unfair marketing and pricing practices, though it does not specifically provide for predatory pricing. Further, the study examines landmark cases including Competition Commission of India (CCI) cases. This research highlights the inherent challenges in substantiating claims of predatory pricing, particularly regarding the establishment of intent and evidence of below-cost pricing. It also addresses the complexities involved in enforcing these regulations across both digital and traditional marketplaces. The study advocates for enhanced collaboration between the Competition Commission of India (CCI) to effectively combat predatory pricing practices. Additionally, it recommends bolstering consumer education and implementing more robust regulatory measures to mitigate long-term adverse effects. Ultimately, this research underscores the necessity for a balanced approach that protects both market competition and consumer welfare from monopolistic practices.

Keywords: Competition, Consumer, Monopolies and Predatory Pricing

³⁹ Student, St Joseph's School of Law, Bangalore

⁴⁰ Student, St Joseph's School of Law, Bangalore

I. PREDATORY PRICING AS A COMPETITIVE STRATEGY

The emergence of predatory pricing as a competitive strategy has significant implications for market dynamics and consumer welfare, particularly in rapidly evolving sectors such as transportation and telecommunications. This research paper delves into two prominent case studies in India: Uber India Systems Pvt. Ltd. versus the Competition Commission of India (CCI) and the allegations against Reliance Jio by Bharti Airtel. Both cases exemplify the challenges regulators face in distinguishing between aggressive pricing strategies aimed at market expansion and anti-competitive practices that undermine fair competition.

In the Uber case, the Supreme Court of India focused on the issue of market dominance rather than solely on the allegations of predatory pricing, ultimately dismissing the appeal due to insufficient evidence of anti-competitive behavior. Similarly, in the Jio case, while accusations of predatory pricing were raised, the court found that Jio did not hold a dominant position in the market at that time. These cases underscore the necessity for a nuanced understanding of market structures and competitive practices, highlighting the role of regulatory bodies in ensuring fair competition while safeguarding consumer interests. This paper aims to analyze these landmark cases within the framework of Indian competition law, exploring their implications for future regulatory approaches to predatory pricing and market dominance.

II. LITERATURE REVIEW

A. Predatory Pricing by J.A. Ordover

Source: The New Palgrave Dictionary of Economics (2008)

This chapter discusses the economic rationale behind predatory pricing, highlighting that it involves sacrificing short-term profits to eliminate competition, ultimately leading to monopoly profits. The presence of network effects complicates the identification of legitimate versus exclusionary pricing behaviors, suggesting that traditional market models may not adequately capture the dynamics of predation⁴¹

B. Predatory Pricing in the Presence of Network Effects by Ruben van Oosten and Sander Onderstal

Source: Amsterdam Business School (2023)

⁴¹ J.A. Ordover, The Encyclopedia of Political Communication (L. A. Smith ed., 2020), https://link.springer.com/referenceworkentry/10.1057/978-1-349-95121-5_1778-

This paper explores predatory pricing within experimental markets characterized by network effects. It finds that predatory pricing is more prevalent in such markets compared to those without network effects. The study suggests that network effects can act as barriers to entry, reinforcing monopoly power and complicating the competitive landscape⁴²

C. The Myth of Predatory Pricing by Thomas J. DiLorenzo

Source: Cato Institute

This critique argues against the rationality of predatory pricing as a strategy for monopolization, asserting that no clear cases exist where it has successfully led to lasting monopolies. It posits that claims of predation often stem from competitors unable to compete effectively on price⁴³

D. Case Analysis Of Bharti Airtel Ltd. V. Reliance Industries Ltd. And Reliance Jio Infocom Ltd. by Tejaswa Mishra & Punyashree S. Biswal

Source: Indian Journal of Integrated Research in Law Volume II Issue V

The paper analyzes the case of Bharti Airtel Ltd. v. Reliance Industries Ltd. and Reliance Jio Infocom Ltd., where Airtel alleged anti-competitive practices by Jio under Sections 3 and 4 of the Competition Act, 2002. The Competition Commission of India ruled that Jio's market share and actions were not intrinsically anti-competitive, rejecting allegations of predatory pricing and abuse of dominance. The decision is criticised in the paper for its narrow definition of dominance and failure to consider market effects. It criticises the regulatory framework's ineffectiveness in preserving fair competition while acknowledging Jio's contribution to the advancement of digital access in India.⁴⁴

E. Overall Impact of Jio on the Telecom Industry of India - A Study on Reliance Jio by Md Irshad Ali Tanwar

Source: ResearchGate

The study investigates how Reliance Jio has revolutionised the Indian telecom sector. With its free voice calls, reasonably priced data plans, and cutting-edge 4G LTE technology, Jio upended the market and made rivals like Vodafone and Airtel adjust. The study

⁴² Ruben van Oosten & Sander Onderstal, *Predatory Pricing in the Presence of Network Effects: Evidence from the* Lab, (Feb. 24, 2023), <https://congresscreator.org/system/files/papers/Predatory%20pricing%20in%20the%20presence%20of%20net%20work%20effects%20%5BEARIE%5D.pdf>.

⁴³ DiLorenzo, Thomas J. *The Myth of Predatory Pricing*. Cato Institute, February 28, 1992. <https://www.cato.org/sites/cato.org/files/pubs/pdf/pa169.pdf>.

⁴⁴ Mishra, T. and Biswal, P. (n.d.). *Indian Journal of Integrated Research in Law*. <https://ijirl.com/wp-content/uploads/2022/09/CASE-ANALYSIS-OF-BHARTI-AIRTEL-LTD-V-RELIANCE-INDUSTRIES-LTD-AND-RELIANCE-JIO-INFOCOM-LTD.pdf>.

emphasises Jio's advantages, such as its broad digital network and competitive pricing, which changed customer perceptions and sped up India's digital revolution. Jio made internet access more accessible and boosted the economy, but it also made it harder for rivals to compete, which hurt their earnings and market share. Even though it comes at the expense of market consolidation, the analysis highlights Jio's critical role in promoting competition and digital inclusion.⁴⁵

III. PREDATORY PRICING IN INDIA

A. Uber India Systems Pvt Ltd v.Competition Commission Of India on 3 September, 2019⁴⁶

Why did the supreme court of India dismiss Uber's appeal against an order of the COMPAT? On 3rd September 2019, the Supreme Court of India ('SC') dismissed an appeal filed by Uber India Systems Pvt. Ltd. ('Uber') against the order of the erstwhile Competition Appellate Tribunal ('COMPAT') dated 7th December 2016.⁴⁷

B. Proceedings before the CCI:

Meru Travel Solutions Pvt. Ltd. ('Meru') filed the information⁴⁸, claiming that Uber was using predatory pricing by giving drivers excessively high incentives to stay in its network and offering huge discounts on top of the already lowered tariffs to customers. Based on its earlier rulings on radio taxi services, the Commission defined the relevant market as the "market for radio taxi services in Delhi." Uber's market dominance was established by the informant using a TechSci report. Given that the Uber group did not receive any communication during the data collection process and that the Commission had previously received a research report with a different conclusion, the Commission noted that the TechSci report lacked credibility.

The Commission noted that there was fierce competition in Delhi's radio taxi market, at least between Ola and Uber. The Commission also noted that Uber did not have a dominant position in the relevant market, indicating that the market for radio taxi services in Delhi was competitive due to the varying market shares of various competitors. Thus, in accordance

⁴⁵ Tanwar, Md & Mittal, Akhil. (2020). *Overall Impact of Jio on the Telecom Industry of India - A Study on Reliance Jio*. RESEARCH REVIEW International Journal of Multidisciplinary. 5. 26-30. 10.31305/rrijm.2020.v05.i12.005.

⁴⁶ Uber (India) Systems (P) Ltd. v. CCI, (2019) 8 SCC 697

⁴⁷ *Ibid*

⁴⁸ In Re: Meru Travel Solutions Private Limited (MTSPL) v Uber India Systems Pvt. Ltd., Case No. 96 of 2015.

with section 26(2) of the Competition Act, 2002⁴⁹ (the "Act"), the Commission closed the case.

C. Proceedings before the COMPAT (Competition Appellate Tribunal):

Meru challenged the Commission's decision in an appeal⁵⁰ filed under Section 53B of the Act. The COMPAT pointed out that although the data demonstrated that Delhi NCR was the relevant market, the Commission deemed Delhi to be the relevant market based on cases that had been decided, whereas the Commission had decided that the market conditions for radio taxi services are uniform only within a city or state. The Commission made a mistake in defining the geographic market, according to the COMPAT. It was noted that the Commission's distinction between the Delhi and NCR regions was not applicable in either a practical or regulatory sense.

The COMPAT noted that since consumers are unaffected by political boundaries, a smooth transition between two locations within the NCR was a more practical approach to any transportation regulation from their perspective. Additionally, the COMPAT noted that taxi services like Ola and Uber operate outside of municipal boundaries thanks to tourist taxi permits. As a result, the COMPAT noted that the market for "radio taxi service in Delhi NCR" must be the appropriate marketplace in this case.

In addition, according to the COMPAT, the TechSci Report contained statistical reporting that the respondents had not substantively contested, aside from casting doubt on the report's credibility. The information, facts, and materials provided should have been sufficient for the Commission to form an opinion, as the purpose of Section 26(1) is to establish a prima facie view. Furthermore, the Commission may have had good reason to order an investigation in order to make a decision on a matter that has sparked a lot of interest in the Indian market place, given that two reports with contradictory findings were being referred to.

The COMPAT also noted that the informant's claims should be viewed in light of the larger picture of the radio taxi service market, including funding status, worldwide developments, statements made by industry leaders, the fact that aggregator-based radio taxi services are essentially a result of network expansion, and sufficient evidence from the respondent that network expansion was one of the main goals of its business operations.

Although it is impossible to say with certainty that there was abuse in the business practices used by operators like Uber, the COMPAT noted that the magnitude of the discounts and

⁴⁹ The Competition Act , 2002, No. 12, Acts of Parliament, 2003

⁵⁰Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016

incentives indicates that either there are incredible efficiency improvements that are replacing the old business models with the new ones, or there may be an anti-competitive stance to it.

Therefore, within the time frame specified by the Act, the DG was instructed by the COMPAT to investigate the claims made in the information submitted by the Meru and report back to the Commission.

D. Order of the Supreme Court of India:

The judgment delivered by Justice R.F. Nariman⁵¹ addresses appeals concerning the competitive practices of Uber in the market, particularly focusing on allegations of anti-competitive behavior under the Competition Act, 2002. The court, after hearing extensive arguments from both sides, concluded that there is no need for interference in the appeals. This decision is primarily based on the evidence presented, which indicates that Uber's business model may involve offering significant incentives to drivers that are not sustainable and could potentially harm competition in the market.

The judgment highlights a specific statement regarding Uber's financial practices, revealing that the company incurs a loss of Rs. 204 per trip while providing substantial incentives to drivers. This financial information raises concerns about Uber's intent to eliminate competition by engaging in practices that could be classified as predatory pricing. The court noted that such actions could lead to an infringement of Section 4 of the Competition Act, which prohibits abuse of a dominant position in the market.

Section 4 defines "dominant position" as a state where an enterprise can operate independently of competitive forces or affect competitors and consumers favorably. The court emphasized that if Uber's operational losses per trip are factual, they would likely attract scrutiny under the provisions that address unfair pricing and market manipulation. The judgment underscores the necessity for a thorough investigation into these practices to determine if they indeed constitute an abuse of dominant position.

In conclusion, the court dismissed the appeals without imposing costs and requested that the Director General complete an investigation within six months. This ruling reflects a significant stance on maintaining competitive integrity within the market, especially concerning large entities like Uber, which have substantial influence over pricing and market access for smaller competitors.

IV. CASE-STUDY OBSERVATION AND COMMENTS:

⁵¹ Uber (India) Systems (P) Ltd. v. CCI, (2019) 8 SCC 697

- According to the COMPAT's ruling, the CCI would have to make the mistake of opening an investigation rather than rejecting a complaint at the prima facie level because of the purported inaccuracy of a market research study.
- The CCI was essentially placing a heavy burden of proof on informants by rejecting complaints due to the inaccuracy of the evidence at the prima facie stage.
- By endorsing the COMPAT's ruling, the SC has essentially reversed its stance. According to the COMPAT, if the defendant attempts to disprove the informant's testimony at the prima facie determination stage and seeks a Section 26(2) order dismissing the complaint, it would be wise to present counter-evidence wherever feasible.
- The Supreme Court's ruling favours an examination into the issue of dominance when a prima facie case of predatory pricing, and maybe other forms of abusive behaviour, is established - without needing dominance to be proven at that time.
- However, it specifically stated that, under Section 26(2), "Closure of the case causes the determination of rights and affects a party, i.e. the informant". As a result, the CCI may be required to provide a greater level of reasoning when rejecting a complaint under Section 26(2).
- For this reason, as previously stated, potential defendants at the prima facie stage seeking to have a charge dismissed must be prepared to go beyond simply alleging the lack of evidence provided by an informant.

V. INVESTIGATION REPORT⁵² SUMMARY

Uber contended that its market share, along with that of its competitor Ola, is subject to constant fluctuations, which negates the assertion of Uber's dominance in the market. The company further explained that both Uber and Ola employ a below-cost pricing strategy primarily aimed at expanding their customer bases and enhancing their operational networks. This strategy is not unique to Uber but is a common practice among cab aggregators seeking to capture a larger share of the market.

The Commission's observations indicated that cab aggregators like Uber and Ola do not adequately consider the competitive constraints imposed by alternative transportation modes when making pricing or commercial decisions. Consequently, the Commission rejected Uber's argument that other forms of transport should be included in the same market category

⁵²Meru Travel Solutions Pvt. Ltd. (Meru) vs Uber India Systems Pvt. Ltd. And Others on 14 July, 2021

as radio taxis. As a result of this analysis, the Commission concluded that Uber does not hold a dominant position in the relevant market, which precludes any examination of potential abuse or scrutiny of its pricing strategies under the Competition Act.

The investigation revealed complexities surrounding the business models employed by cab aggregators and traditional taxi operators. While radio taxi companies typically own their vehicles, aggregators like Uber and Ola rely on a network of driver-partners who use their own cars to provide services. The distinct operational models highlight the competitive dynamics within the market, necessitating a nuanced understanding to avoid misinterpretations that could undermine the objectives of competition law.

Ultimately, the Commission determined that Uber's fluctuating market share does not indicate dominance or market power. The analysis showed that while Uber has experienced periods of growth, particularly in terms of trip size, it has also faced significant competition from Ola and other players in the market. The findings underscored that financial resources and funding patterns are essential indicators of competitive strength, but they must be assessed within the context of the evolving nature of the radio taxi industry. Therefore, without evidence of dominance or anti-competitive behavior, the case against Uber was closed, affirming that its business practices do not constitute an infringement under Section 4 of the Competition Act.

VI. JIO'S IMPACT IN THE TELECOMM INDUSTRY

Reliance Jio Infocomm Ltd, famously known as Jio, is India's leading company in the telecommunication sector with a market share of 37.61 percent and a subscription base of 430.23 million⁵³ as of march 2023. Jio is regarded as the company that revolutionized the telecom industry with new and blooming technologies and strategies that disrupted its competitors and took over its subscription bases. Jio reshaped the telecom industry by debuting in the Indian market in 2016. Jio as a strategy kept its pricing significantly lower than that of its competitors, initially, it provided services free of cost to attract a large customer base, this strategy of Jio is usually considered predatory pricing.

Jio provided free voice calls, free data, and several free digital services for the first six months. After that, it offered incredibly cheap plans. Customers were compelled to switch to Jio due to the aggressive pricing, which made them re-evaluate their loyalty to their current service providers. Its services' accessibility and low cost made it possible for millions of new

⁵³ Telecom Regulatory Authority Of India, 26th Annual Report 2022-23, November 2023

internet users to connect, closing India's digital divide. However, competitors were under tremendous pressure from this disruptive strategy. Companies like Bharti Airtel, Vodafone, and Idea Cellular had to cut down their prices and match Jio's offers to maintain their market share. Smaller businesses exited the market due to their inability to handle the financial strain. The industry consolidated as a result of fierce competition, with Vodafone and Idea merging to form Vodafone Idea Limited and other operators like Aircel ceasing their operations.

Reliance Jio's use of predatory pricing redefined India's telecom industry, giving rise to a digital revolution while simultaneously changing the competitive dynamics of the market. Though Jio was instrumental in making India one of the world's biggest internet economies, the strategy has faced a lot of criticism as it affected the rivals and consumers. To safeguard consumer interests and preserve market health, regulators must continue and improve to strike a balance between promoting competition and guaranteeing affordability.

A. The effects on the Market share and Subscription base of the competitor after the entrance of Reliance Jio.

Telecom customers in India used to pay an outrageous amount of Rs.255 for 1GB⁵⁴ of 4G data services from major telecom providers. But now, telecoms have combined internet, unlimited calls, and SMS perks into a single plan, and 1GB of data for an average cost of Rs.250. These changes occurred due to the extremely low prices offered by Jio making its competitor slack their prices and changing strategies to attract and preserve their consumers. It pertains to looking into the reports and data given out by the TRAI regarding the market share before and after the entry of Jio to analyze how it disrupted other companies and became India's largest shark in the telecommunication industry.

In 2015, Before Jio entered the market Bharti Airtel, Vodafone, and Idea were the leading players with a market share base of 23.30, 18.95, and 16.27⁵⁵ percent respectively and subscription base of 226.02, 183.8, and 157.81 respectively.

In September 2016, Jio was launched fashionably with attractive offers to acquire customers all over India. Within six and half months it grew to more than half of the players in the telecom industry with a subscription base of 108.68⁵⁶ million and a market share of 9.29⁵⁷ just below Bharti Airtel, Vodafone, and Idea. Also, at the same time, the service of Quadrant

⁵⁴ Chakri K, From Rs 255 for 1GB of Data Two Years Ago, Airtel and Other Telcos Now Offering 500MB Data at Rs 28, TELECOM TALK,

⁵⁵ Telecom Regulatory Authority Of India, 19th Annual Report 2015-16, December 2016

⁵⁶ Telecom Regulatory Authority Of India, 20th Annual Report 2016-17, December 2017

⁵⁷ *Ibid*

Televentures Ltd. had to be discontinued as it couldn't match the market expectations and the prices in the market.

As of March 2023, Jio is India's largest mobile network operator with a market share of 37.61 percent and a subscription base of 430.23⁵⁸million with a growth rate of 6.50⁵⁹. Whereas, the top two players Vodafone and Idea before the entry of Jio had to merge to survive in the market. Airtel is still strong holding the second place with a market share of 32.42 and growth of 2.94. The market share, subscription share, of the years 2015-16, 2016-17, and 2022-23, and the growth rate in 2023 can be observed in Table-1 and Graph-1 given below.

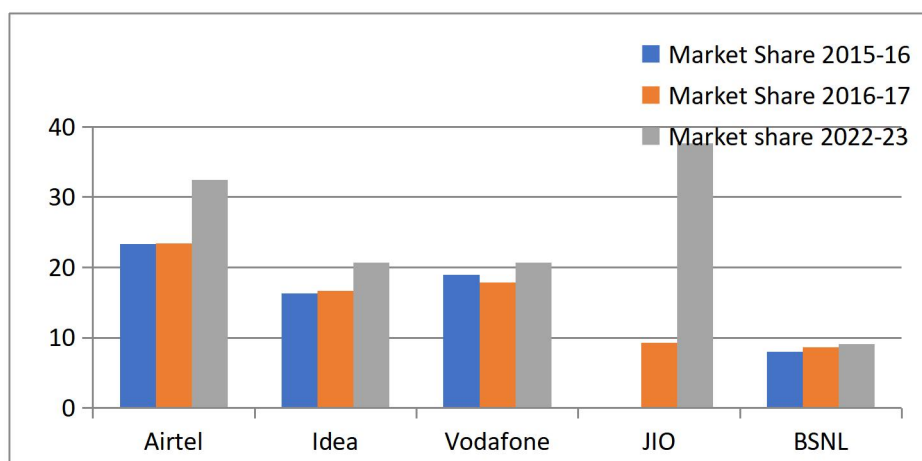
Table No-1: Subscription share, of the years 2015-16, 2016-17, and 2022-23 (in millions), and the growth rate in 2023

Service Provider	Subscription base 2015-16	Subscription base 2016-17	Subscription base 2022-23	Growth Rate in 2023(in %)
Reliance Jio	-	108.68	430.23	6.50
Bharti Airtel	251.24	273.65	370.91	2.94
Vodafone	197.95	209.06	236.75	-9.21
Idea	175.07	195.37	236.75	-9.21
RCOM	102.41	83.50	0.0027	-0.19
BSNL	86.35	100.99	103.68	-8.84
Quadrant	3.16	-	-	-

Graph-1: Market share of the year 2015-16, 2016-17 and 2022-23 (in percentage),

⁵⁸ *supra* note 13, at 9

⁵⁹ *supra* note 13, at 9



Through the data reported by the TRAI, presented in Graph 1 and Table 1, It is observed that Jio's entrance disrupted the market at its launch as it acquired almost 10 percent of the market in the initial stages which had not been possible by well-established companies such as Airtel and Quadrant. Today due to Jio's predatory pricing strategy as attained 37.61 percent of the market share and in the course has eliminated seven of its competitors from the market. By March 2018, India's telecommunications companies had a cumulative debt of over \$75 billion, or roughly Rs 500,000 crores, but only \$27.6 billion, or about Rs 180,000 crore in revenue, a level that many telecom insiders worry has troubling implications for the broader economy⁶⁰. Further Vodafone and Idea had to merge to sustain in the market and to cover their debts. This trend shows that the strategy used by Jio is benefiting the consumers for now, but eventually, it will lead to a monopoly in the telecom industry leaving the consumers with no choice other than bowing down to the unfair trade practice and price fixing by Jio.

B. Jio's Strategy disrupting the competitors eventually violating the consumer's rights

Jio has a responsibility to maintain fair competition in the market as per the Competition Law, 2002, and also the responsibility not to exploit the consumers as per the Consumers Protection Act, 2019. Jio through its Predatory pricing strategy has sailed to the top of the chart in the telecommunication industry by eliminating, forcing mergers and debt creation among its competitors. This practice of the company is injurious to the consumers in the long run as it leaves them to stick with the same company and doesn't give them multiple choices of services to choose from in the market. Jio, As of today is the dominant position in the

⁶⁰ Daniel Block, *How government decision are helping Reliance Jio monopolise the telecom industry*, CARAVAN MAGAZINE, 1st February 2019, <https://caravanmagazine.in/reportage/government-helping>

market which can be used to manipulate the market very easily and it is growing very rapidly in taking over more than half of the market share of the telecom industry.

This Predatory pricing was observed by Jio's close competitor Bharti Airtel and a case for the same was filed in the Competition Commission. Airtel accused Jio and Reliance of infringement of Sections 3 and 4 of the Competition Act, 2002 regarding the occurrence of an anti-competitive agreement and abuse of dominant position through predatory pricing. The court in this case held that Jio is a newly launched company that doesn't not possess the dominant position in the market and further was just a new player backed by reliance for the footing into the industry⁶¹. The Court in this case has failed to consider and analyze the facts of the case in depth. As in The case of *MCX Stock Exchange v. National Stock Exchange of India Ltd. & Ors* It was observed by the court that "The first one being demonstration that the scheme could drive the competitor out of the market the second one being that there must be evidence that the surviving monopolist could then raise prices to consumers long enough to recoup his cost without drawing new entrants to the market"⁶²

Similarly, as seen in Table-1 and Graph-1 Jio's Strategy drove out the competitor from the market and it can raise the prices of the services at any once it holds the dominant position in the market. In August 2024, Jio increased the prices of its pre-paid and post-paid services plans by about 12-25 percent. Simultaneously to match their prices Airtel increased their services about by 11-21 percent⁶³. Through this, it can be observed that Jio is manipulating the pricing in the telecom industry affecting the consumers and its competition

Reliance Jio's predatory pricing strategy, while initially beneficial to consumers, poses significant risks to the health of the telecom market and consumer welfare in the long run. Consumers are ultimately harmed by the elimination of competitors, decreased innovation, and the possibility of monopolistic practices. To protect the interests of Indian consumers, regulators must take action to guarantee fair competition in the telecom sector by striking a balance between affordability and long-term viability.

VII. CONCLUSION

In conclusion, the case studies of Uber and Reliance Jio highlight the courts' focus on assessing market dominance rather than solely addressing allegations of predatory pricing. In

⁶¹ Bharti Airtel Ltd. v. Reliance Industries Ltd. and Reliance Jio Infocom Ltd. (2017 SCC OnLine CCI 25).

⁶² MCX Stock Exchange v. National stock exchange of India Ltd. & Ors. (2011 SCC OnLine CCI 52).

⁶³ ET Online. "Jio, Airtel Tariff Hikes: Users Can Still Avoid Increased Prices. Here's How" *The Economic Times*, July 2024, economictimes.indiatimes.com/industry/telecom/telecom-news/jio-airtel-tariff-hikes-users-can-still-avoid-increased-prices-heres-how/articleshow/111395028.cms?from=mdr.

the Uber case, the Supreme Court dismissed appeals, emphasizing the need for a thorough investigation into anti-competitive behavior without immediate proof of dominance. The court concluded that fluctuations in market share among competitors do not necessarily indicate dominance, leading to the closure of the case against Uber. Conversely, in the Jio case, while Bharti Airtel accused Jio of predatory pricing to gain market control, the court found that Jio, as a new entrant, did not possess a dominant position. Nonetheless, concerns about Jio's pricing strategies raised potential long-term monopolistic implications.

Together, these cases underscore the importance of regulatory vigilance in monitoring competitive practices and ensuring fair competition within rapidly evolving markets. They highlight the need for ongoing scrutiny to protect consumer interests and maintain market integrity in India's dynamic economic landscape.

ONLINE CONSUMER RIGHTS IN DIGITAL MARKETS: ENSURING FAIR PRACTICES AND REDRESS MECHANISMS

- Kalpanaa Chawla A.S⁶⁴

- Harini A⁶⁵

ABSTRACT

Paper deals with Online Consumer Rights in Digital Markets by Ensuring Fair Practices and Redress Mechanisms. Online consumer rights include the right to be informed, the right to choose, the right to be heard, and the right to redressal. These rights are important to ensure that consumers are protected from unfair trade practices and exploitation. The research method used in this research is empirical research method. The sample method used here is simple random sampling. The sample size is 200. The statistical tool used here is SPSS. This paper delves into the evolving landscape of online consumer rights, examining the unique vulnerabilities faced by consumers in the digital age. It explores the critical need for robust legal frameworks and effective redress mechanisms to ensure fair practices and protect consumer interests in this dynamic environment. The study will analyse the key issues such as data privacy, transparency in online transactions, and the challenges in enforcing consumer rights across borders. It will also propose policy recommendations to strengthen consumer protection in digital markets, including the role of technology in empowering consumers and facilitating dispute resolution. By understanding the complexities of online consumer rights, this research aims to contribute to the development of a more equitable and consumer-friendly digital marketplace.

Keywords: Digital marketing, Consumers, Redress Mechanism, Transactions

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I. INTRODUCTION

The topic of Online Consumer Rights in Digital Markets: Ensuring Fair Practices and Redress Mechanisms is increasingly relevant in today's rapidly evolving digital landscape. As digital markets expand, they bring unique challenges that necessitate a robust framework to protect consumer rights and promote fair practices. This introduction outlines the critical dimensions of this research topic, emphasizing the need for effective regulatory mechanisms and redress systems. Digital markets have transformed the way consumers interact with businesses, enabling unprecedented access to goods and services. However, this transformation has also led to significant concerns regarding anti-competitive practices, data privacy, and consumer exploitation. Major platforms often exert considerable power over consumers, leading to asymmetries in bargaining power that can result in unfair treatment and limited recourse for grievances. Regulatory Frameworks are In response to these challenges, various jurisdictions have begun implementing regulatory frameworks aimed at ensuring fair practices in digital markets. For instance, the European Union's Digital Markets Act (DMA) introduces rules for "gatekeeper" platforms to prevent exploitative behaviors and promote competition. Similarly, discussions surrounding an ex-ante competition law in India highlight the need for proactive measures to address potential anti-competitive conduct before it occurs. These frameworks are essential not only for safeguarding consumer rights but also for fostering a competitive environment that encourages innovation. Consumer Rights and Redress Mechanisms: Ensuring consumer rights in digital markets involves establishing clear redress mechanisms that empower individuals to seek justice against unfair practices. This includes defining consumer rights explicitly within digital transactions and providing accessible channels for complaint resolution. Effective redress mechanisms are crucial for building trust in digital platforms and ensuring that consumers feel protected against malpractices. As digital markets continue to evolve, the protection of online consumer rights must remain a priority for policymakers and regulators. By developing comprehensive frameworks that address both fair practices and robust redress mechanisms, stakeholders can create a more equitable digital environment that benefits consumers and businesses alike. This research aims to explore these themes further, analysing existing frameworks and proposing enhancements to ensure that consumer rights are upheld in the digital age.

II. OBJECTIVES

- To Investigate the specific challenges consumers face in digital markets, including issues related to data privacy, misleading advertising, and unfair trading practices such as subscription traps and fake reviews.
- Explore existing redress mechanisms available to consumers, assessing their accessibility, effectiveness, and ability to resolve disputes arising from unfair practices in digital markets.
- Evaluate existing laws and regulations, such as the Digital Markets Act (DMA) and the Digital Markets, Competition and Consumers Act, to understand their effectiveness in protecting online consumer rights and promoting fair competition

III. REVIEW OF LITERATURE

- A. (Cortes 2010)** Researcher reports that the book argues that many consumer redress systems, and in particular publicly certified Alternative Dispute Resolution (ADR) entities, are more than a mere dispute resolution mechanism as they provide a public service for consumers that complements, and often replaces, the role of the courts. In examining the current redress models (i.e., public enforcement, private enforcement and other market options), the book calls for greater integration amongst these various redress options. It also advocates, inter alia, for processes that encourage parties to participate in ADR processes, settle meritorious claims and ensure extrajudicial enforcement of final outcomes.
- B. (Rajiv Khare 2013)** Researcher says that In e-commerce transactions, it is suggested that a right to the period of reflection ("warming up") before agreeing to a contract (consumers would have to be informed 'a priori' of the contractual terms and conditions proposed by the supplier, who would have to maintain these terms for a period); must be recognized which will allow consumers to compare various offers and examine the contract adequately before giving their consent.
- C. (UNCTAD 2020)** Researcher reviews emerging issues in consumer protection in electronic commerce (e-commerce), in particular related to legal and policy frameworks, consumer empowerment and business guidance, enforcement and dispute resolution and redress. With regard to competition, it focuses on digital platforms and examines ways to restore competition in these highly concentrated markets, through a review of legal and policy frameworks, enforcement and regulation. Finally, it highlights the role of UNCTAD in promoting international cooperation and provides some policy .

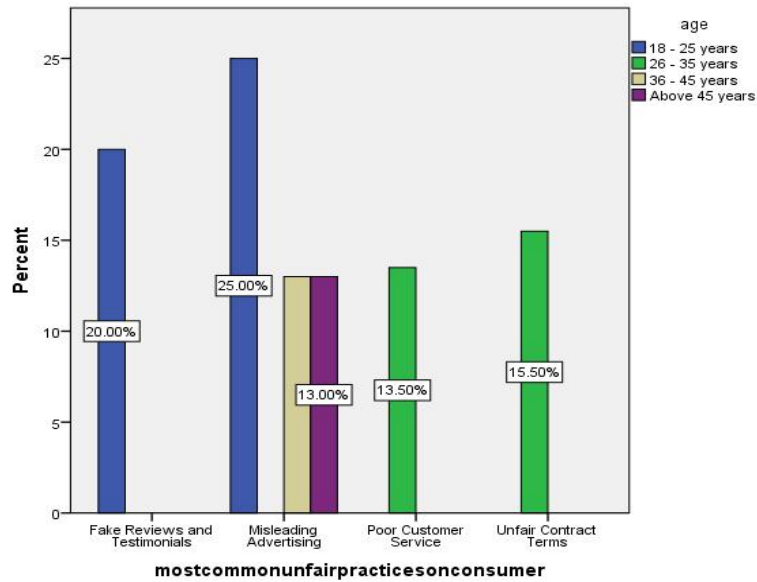
- D. (A. Fletcher, GS Crawford, J Crémer, D Dinielli 2023)** This Article has outlined eleven key features of online markets that might necessitate standards additional to or different from those that are applicable offline. In online markets, for example, consumers generally do not interact face- to-face with sellers. This suggests that online sellers should be required to disclose more information about themselves (location and contact information, for example) than offline sellers. Similarly, online consumers generally are unable physically to evaluate products before purchase. This suggests that online quality indicators (product reviews and ratings, for example) take on heightened importance online and ought to be policed with heightened scrutiny.
- E. (Babayev, 2023)** The article highlights the need for a more harmonized legal framework and enhanced international cooperation to effectively safeguard consumer rights in the digital age. The article offers recommendations for policymakers and businesses to strengthen consumer rights protection and proposes future directions for legal research and policy development in this context. The findings of this research contribute to the ongoing discourse on consumer rights in the digital age and provide valuable insights for legal practitioners, academics, and policymakers.

IV. METHODOLOGY

- Research method: Empirical research
- Sampling size: 200
- Sampling method: Convenient sampling
- Sample frame: In and around Chennai

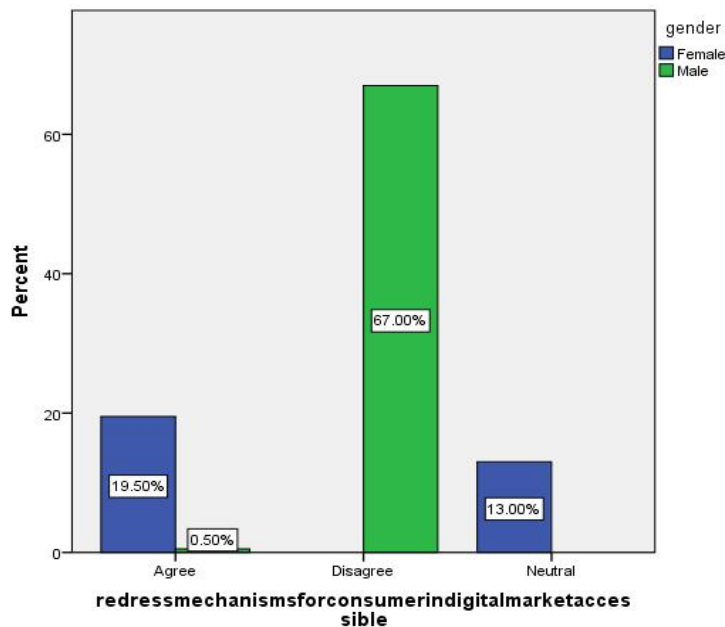
V. ANALYSIS

A. Figure: 1



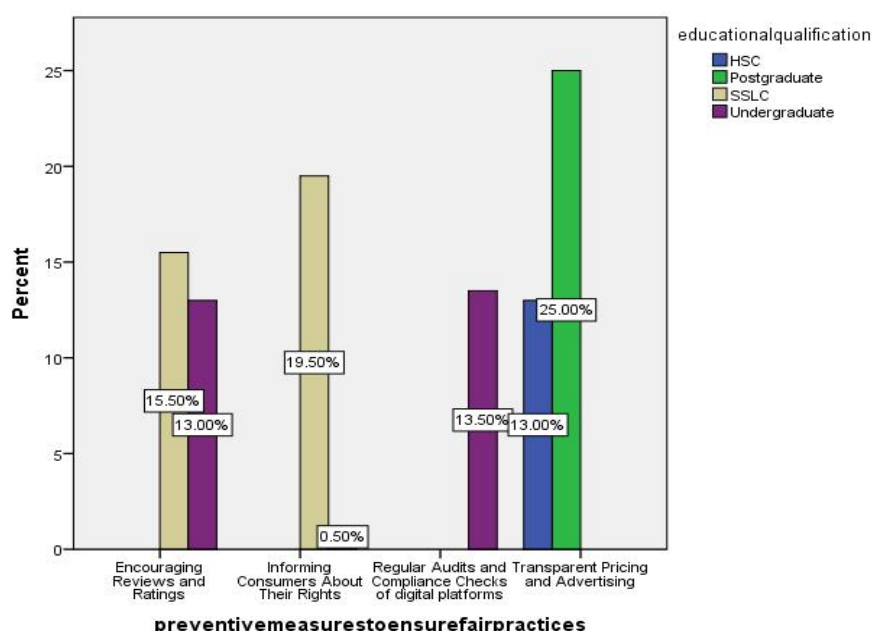
LEGEND: Figure 1 shows the distribution between age and What are the most common unfair practices consumers face in digital markets.

B. Figure: 2



LEGEND: Figure 2 shows the distribution between gender and existing redress mechanisms for consumers in digital markets always accessible, effective, and capable of resolving disputes arising from unfair practices.

C. Figure: 3



LEGEND: Figure 3 shows the distribution between educational qualification and Suggest any one preventive measure to ensure fair practices and effective redress mechanisms in digital markets

VI. RESULT

A. Figure 1:

It is regarding what are the most common unfair practices consumers face in digital markets here 20% responded for fake reviews and testimonials and 25% responded for misleading advertising and 13.50% responded for poor customer service and 15.50% responded for unfair contract terms.

B. Figure 2:

It is regarding are existing redress mechanisms for consumers in digital markets always accessible, effective, and capable of resolving disputes arising from unfair practices here 19.50% responded for agree and 67% responded for disagree and 13% responded for neutral

C. Figure 3:

It is regarding suggest any one preventive measure to ensure fair practices and effective redress mechanisms in digital markets here 15.50% responded for encouraging reviews and ratings and 19.59% for informing consumers about their rights and 13.50% for regular audits and compliance checks of digital platforms and 25% for transparent pricing and advertising.

VII. DISCUSSION

A. Figure 1:

In this figure most of them are responding to fake reviews and testimonials because Promoting products with exaggerated or untrue statements about their benefits or features. Displaying an initial low price that increases significantly at checkout due to hidden fees. Advertising a product that is unavailable, then pressuring consumers to purchase a more expensive alternative. Like false claims, hidden costs, bait and switch.

B. Figure 2:

In this figure most of them respond to disagree because of the complexity of Processes many redress mechanisms involve navigating technical, legal, or administrative processes that are difficult for the average consumer to understand. In Awareness Gaps the consumers are often unaware of the existence of these mechanisms or how to use them. The Digital Divide are those without access to technology or the internet face barriers in utilizing online redress mechanisms.

C. Figure 3:

Digital platforms should clearly display pricing structures, additional fees, and terms of service. This can prevent deceptive practices, especially in sectors like transport services, where surge pricing or hidden fees often lead to consumer dissatisfaction.

VIII. SUGGESTION

With the exponential growth of e-commerce and digital marketplaces, safeguarding consumer rights has become a critical priority. Governments and regulatory bodies must establish clear frameworks to ensure fair practices in these digital ecosystems. Key aspects include transparent pricing, robust data protection measures, and the prevention of deceptive advertising. The new Digital Markets, Competition and Consumers Act (DMCC) 2024 gives the Competition and Markets Authority (CMA) new powers to enforce consumer protection laws and regulate large businesses in digital markets. Platforms should also be required to provide accessible and efficient redress mechanisms, enabling consumers to resolve disputes swiftly, such as through alternative dispute resolution systems or platform-specific grievance portals. Additionally, consumers must have the right to easily access and port their data between platforms, ensuring fair competition and preventing monopolistic practices. By implementing these measures, policymakers can foster trust and accountability, ensuring that

digital markets remain equitable and consumer-centric.

IX. CONCLUSION

In conclusion, the evolving digital marketplace necessitates robust frameworks to protect consumer rights, ensuring fair practices and access to effective redress mechanisms. As businesses increasingly leverage technology to engage with consumers, transparency, accountability, and ethical standards must be prioritized to foster trust and safeguard users from exploitation. Policymakers, regulators, and industry stakeholders must collaborate to address challenges such as data privacy, deceptive practices, and unequal bargaining power, ensuring that digital markets remain inclusive and equitable. Ultimately, the focus must remain on empowering consumers with the knowledge, tools, and legal support needed to make informed choices and seek justice when their rights are infringed upon. New legislation is being enacted to regulate competition in digital markets. For example, the Digital Markets, Competition and Consumers Act (DMCC) gives the Competition and Markets Authority (CMA) new powers to enforce consumer protection laws and regulate large businesses in digital markets.

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2. <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18328/Consumer%20Protection%20for%20Online%20Markets%20and%20Large%20Digital%20Platforms.pdf?sequence=1&isAllowed=y>
3. https://www.researchgate.net/publication/382849320_Safeguarding_Consumer_Rights_in_the_Digital_Age_Challenges_and_Strategies
4. https://www.elevenjournals.com/tijdschrift/ijodr/2017/2/IJODR_2352-5002_2017_004_002_018.pdf
5. https://unctad.org/system/files/official-document/tdrbpconf9d4_en.pdf

**A STUDY ON THE EFFECT OF COMPETITION LAW ON CONSUMER
PROTECTION IN E-COMMERCE WITH SPECIAL REFERENCE TO CHENNAI**

- S.Pa.Vaishali⁶⁶

ABSTRACT

This study explores the impact of competition law on consumer protection in the e-commerce sector, with a specific focus on Chennai. E-commerce has transformed traditional shopping practices, providing consumers with increased convenience, diverse product options, and competitive prices. The rapid expansion of online platforms also raises concerns about anti-competitive practices such as market monopolisation, cartelization, predatory pricing, and unfair trade practices that could harm consumer interests. Effective competition law plays a crucial role in ensuring a fair marketplace by regulating these practices and fostering healthy competition. The research aims to examine how competition law frameworks are applied to the e-commerce sector, analyze their effectiveness in protecting consumer rights, and identify gaps and challenges in enforcement, especially in a local context like Chennai. Through a combination of doctrinal and empirical research, the study investigates key areas such as platform dominance, price-fixing mechanisms, consumer data exploitation, and misleading advertisements. Primary data collection through surveys or interviews with consumers, legal experts, and e-commerce stakeholders in Chennai will complement secondary data from legal statutes, case laws, and policy documents. The findings of this study will highlight the extent to which competition law ensures transparency, choice, and fair pricing for consumers, and how well regulatory bodies address violations in e-commerce. Additionally, it will assess consumer awareness and trust in the existing legal framework. The study aims to offer practical recommendations to strengthen competition law enforcement, promote fair business practices, and enhance consumer protection in the e-commerce landscape. The focus on Chennai provides localised insights, contributing to the broader discourse on digital market regulation in India.

Keywords: Competition Law, Consumer Protection, E-commerce, Digital Market Regulation, Online Consumer Rights

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I. INTRODUCTION

The digital marketplace has grown, so too have concerns about consumer protection, fair competition, and market monopolization. Competition law—designed to promote fair competition and prevent anti-competitive practices—has become a critical tool for ensuring that e-commerce businesses do not exploit their market power to the detriment of consumers. This intersection of competition law and consumer protection is especially significant in the e-commerce sector, where digital platforms, data-driven decision-making, and cross-border transactions have altered traditional competitive dynamics. The study of competition law's effect on consumer protection in e-commerce involves examining how regulatory frameworks address issues such as price fixing, market dominance, deceptive advertising, and data privacy. In e-commerce, market leaders can have vast control over data and influence consumer choices through algorithms and targeted marketing. Governments worldwide have implemented various initiatives to protect consumers in the e-commerce sector. In the EU, for example, the Digital Markets Act (DMA) and the Digital Services Act (DSA) are designed to enhance consumer rights and promote transparency among digital platforms. These initiatives highlight the efforts to enforce competition law in a way that keeps pace with rapid e-commerce growth and innovation. Several factors affect the relationship between competition law and consumer protection in e-commerce, including market concentration, technological innovation, data privacy concerns, and global regulatory differences. Additionally, data collection practices and targeted advertising raise concerns about transparency and fairness, making it essential for competition law to address these evolving challenges. The EU has stringent data protection laws under the General Data Protection Regulation (GDPR), the U.S. has a more fragmented approach to data privacy and consumer protection in e-commerce. By comparing various international frameworks, it becomes possible to identify effective regulatory strategies and understand the unique challenges that different regions face in harmonising competition law with consumer protection goals in the digital marketplace. The study aims to offer practical recommendations to strengthen competition law enforcement, promote fair business practices, and enhance consumer protection in the e-commerce landscape.

II. OBJECTIVES

- To understand the role of competition law in promoting fair competition in the e-commerce sector.

- To explore the adequacy and limitations of current competition laws in addressing issues unique to e-commerce.
- To analyse specific challenges consumers face in e-commerce due to anti-competitive practices.

III. REVIEW OF LITERATURE

VIJAY KUMAR SINGH (2024), Consumer Protection Under Competition Law. Protecting the interest of consumers is one of the common goals of consumer protection and competition laws. At the root of both consumer protection and competition policy is the recognition of an unequal relationship between consumers and producers. **DILSHAD SHAIK (2021)**, A Legal and Compliance Framework in the Digital Market. The consumer and merchant protection in business to consumers or business to business under E-Commerce has numerous serious threats viz., privacy, infringement of Intellectual Property Rights, Online Piracy, unsolicited commercial electronic advertisements and spamming, free speech and censorship and other fraudulent activities. **CHAHAT WALIA (2020)**, Competition Law in the Context of the Indian E-retail Market: A Case of an Antitrust Paradox. The paper tries to establish that the current concentrated structure of the Indian e-retail market- in terms of the bulk of the e-retail market being captured by two players namely, Flipkart and Amazon India- has been paradoxically aided by India's antitrust law. **NIKITA KORADIA (2021)**, Algorithmic Collusion and Indian Competition Act: Suggestions to Tackle Inadequacies and Naivety. The debate around algorithmic collusion has gained substantial momentum leading to divergent views amongst economists. **GOURI (2023)**, Dynamics of Competition: Dominance, Platforms and Antitrust Abuse. This chapter is on ex-post dominance and its changing contours from traditional product markets to platform markets. Selective cases in real estate, sports, binary monopolies of traditional product markets moving on to emerging platform markets which covers the stock exchange and Google are analyzed in the framework of the Competition Act, 2002. **MUHAMMAD SARMAD (2016)**, The limitations connected with analysis area unit acknowledged. There must to be more study on this subject to know the connection between these factors and their impact on one another. This analysis was on little scale, the sample size was also little. So, the study should conducted on large scale area along with larger sample size. This study is very helpful to see the effect of customer satisfaction toward insurance sector. Policies makers should developed the strategies for also those person whose income level is low. **SHIREESHA (2024)**, The rise of e-commerce has

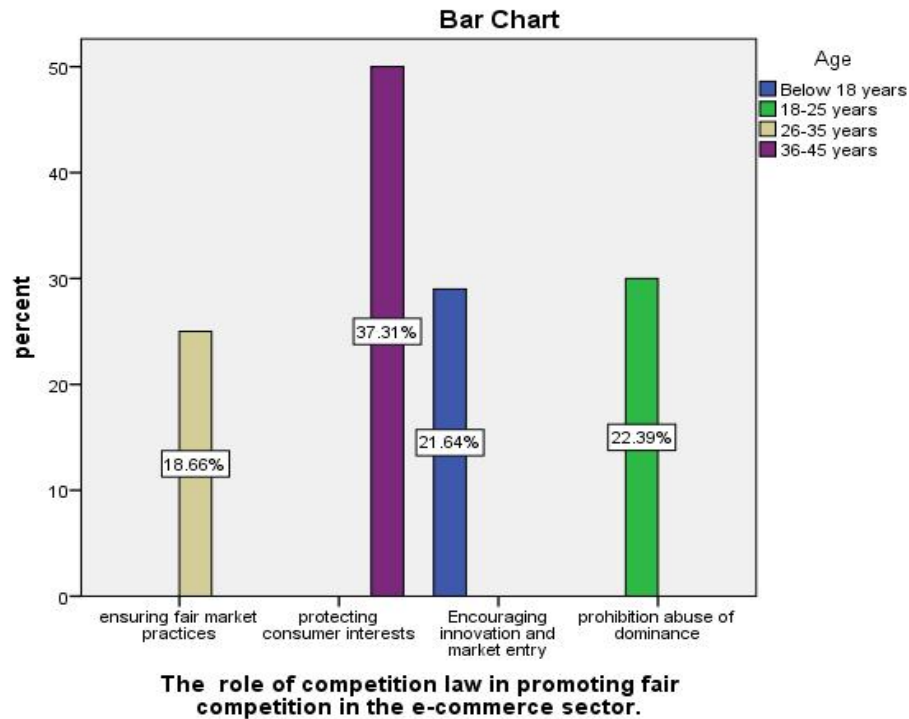
completely changed how companies run, giving them the ability to transact business easily and reach a worldwide customer base. Digital payment factors—such as perceived security, ease of use, and affordability—are essential to this expansion because they have a significant impact on customer behaviour and the success of e-commerce. Businesses must comprehend the effects of these elements. **ALESSIO FACCIA (2023)**, Innovation and e-commerce models are essential in sustainable development globally. They are among the most important technology and innovation catalysts of Dubai's pillars. Technologies are essential parts of the strategic approach that aims to become a completely paperless city through digitalisation. **ANITHAH (2022)**, These days, with the fast advancement of Internet innovation, purchasing through online is getting normal and even inexorable among individuals in a different age. Internet is most common stands for people to do online purchase even for grocery products. **CORLISE LIES ROUX (2023)**, Innovation and e-commerce models are essential in sustainable development globally. They are among the most important technology and innovation catalysts of Dubai's pillars. Technologies are essential parts of the strategic approach that aims to become a completely paperless city through digitalisation.

IV. METHODOLOGY

The primary source of data was obtained by empirical study on seeking responses from the general public based on questionnaires and also relied on secondary sources of data such as books, journals, e-sources, articles and newspaper descriptive research methodology. The present research is conclusive, descriptive and based on empirical design. Descriptive research methodology: It was collected from all the people through the sampling method and the sample size is 204. The tool used for the study is a structured questionnaire. The survey was taken in online. The independent variables included in the study were age, gender, occupation, educational qualifications, place of living, and the dependent variables used for the study the role of competition law in promoting fair competition in the e-commerce sector, the adequacy and limitations of current competition laws in addressing issues unique to e-commerce, specific challenges consumers face in e-commerce due to anti-competitive practices. The sampling method used is convenient sampling. The statistics tools used for analysis is graph

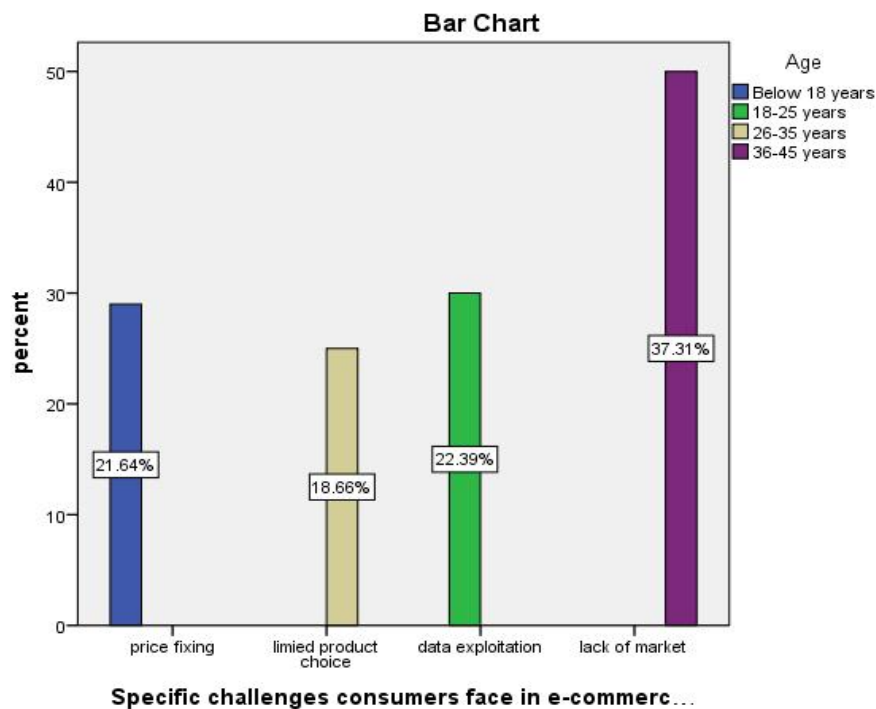
V. ANALYSIS:

A. Figure 1



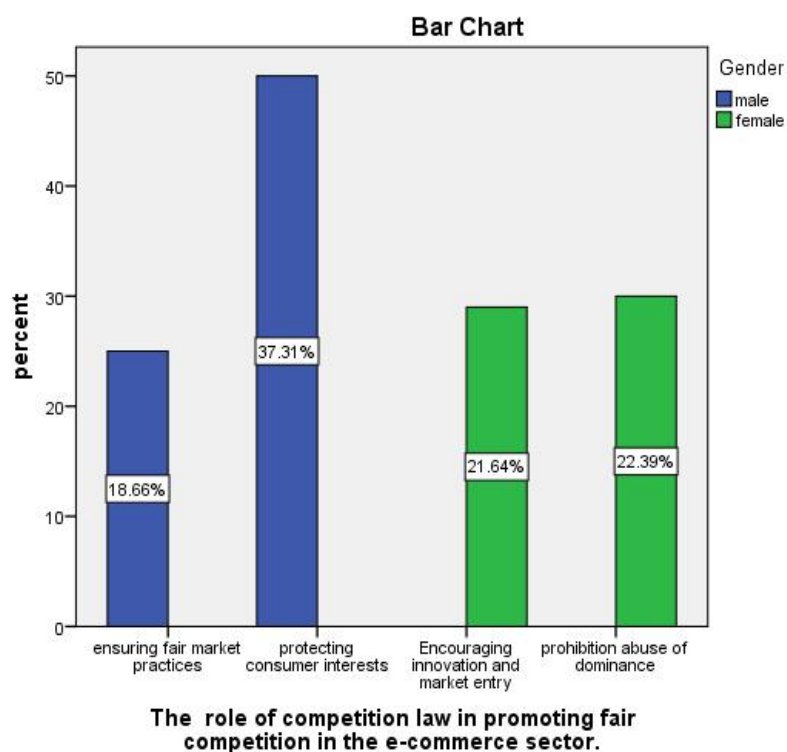
LEGEND: Figure 1 represents the opinion of the respondents on the role of competition law in promoting fair competition in the e commerce sector and age.

B. Figure 2



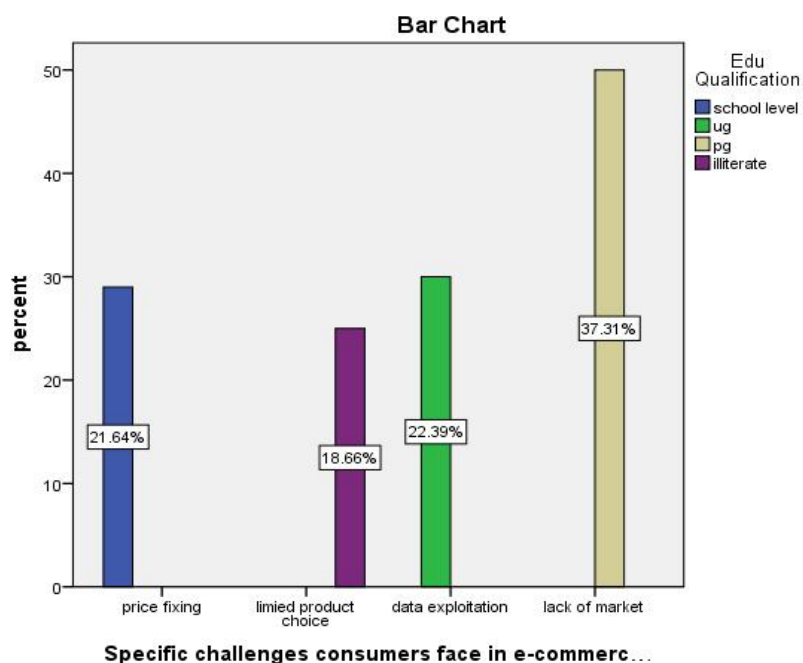
LEGEND: Figure 2 represents the opinion of the respondents on the specific challenges consumers face in commerce and age.

C. Figure 3



LEGEND: Figure 3 represents the opinion of the respondents on the role of competition law in promoting fair competition in the e-commerce sector and gender.

D. Figure 4



LEGEND: Figure 4 represents the opinion of the respondents on the specific challenges consumers face in commerce and educational qualifications.

VI. RESULTS:

- Figure 1 represents the opinion of the respondents on the role of competition law in promoting fair competition in the e-commerce sector and age. The major responses are from protecting consumer interests which is 37.31% by the 36-45 yrs and less responses are from ensuring fair marketing practices which is 18.66% by the 26-35 yrs.
- Figure 2 represents the opinion of the respondents on the specific challenges consumers face in commerce and age. The major responses are from lack of market which is 37.31% by the 36-45 yrs and less responses are from limited products which is 18.66% by the 26-35 yrs.
- Figure 3 represents the opinion of the respondents on the role of competition law in promoting fair competition in the e-commerce sector and gender. The major responses are from protecting consumer interests which is 37.31% by the males and less responses are from ensuring fair marketing practices which is 18.66% by the males.
- Figure 4 represents the opinion of the respondents on the specific challenges consumers face in commerce and educational qualifications. The major responses are from lack of market which is 37.31% by the pg and less responses are from limited product choice which is 18.66% by the illiterate.

VII. DISCUSSIONS

- (Figure 1) Here the major responses are from promoting fair interests this shows that the respondents were aware about the fair competition and they were more involved in the e-commerce and online platforms and this might be the reason for majority of the responses.
- (Figure 2) Here the major responses are from lack of market by the 36-45 yrs this indicates that the respondents there will be larger gap or maybe less availability of market. So this might make them choose this option as a majority.
- (Figure 3) Here the major responses are from males particularly they have said that protecting consumer interests this indicates that they were well aware about the market and their interests.

- (Figure 4) Here the major responses are from lack of market by the PGs this shows that they were aware about the markets and their needs. So the major responses are from them.

VIII. SUGGESTIONS

The suggestion to this study is to Strengthening collaboration between regulatory bodies, fostering transparency in digital commerce practices, and continuously updating competition policies will be vital for sustaining a fair and consumer-friendly e-commerce environment in Chennai.

IX. CONCLUSION

The study will conclude with a summary of the effectiveness of competition law in Chennai's e-commerce sector, providing recommendations for enhancing consumer protection. It may suggest specific amendments to existing laws, propose stricter enforcement measures, or advocate for supplementary consumer protection laws tailored to the unique nature of e-commerce.

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A CRITICAL STUDY OF COMPETITION LAW IN REGULATING ANTI-COMPETITIVE PRACTICES: THE EVOLVING LANDSCAPE OF INFLUENCER MARKETING

- Sophia Jeyakar⁶⁷

ABSTRACT

In recent years, influencer marketing has emerged as a powerful tool for promoting products and services, particularly in industries such as beauty and wellness. However, the rapid rise of this marketing strategy has brought new challenges in regulating false advertising and anti-competitive practices. This study critically examines the role of competition law and the Consumer Protection Act, 2019, in addressing anti-competitive practices within the context of influencer marketing. The study explores the intersection of competition law, which aims to prevent market distortions, and consumer protection laws, which safeguard consumers from deceptive practices such as false advertising by influencers.

Influencers, often acting as intermediaries between brands and consumers, have a significant impact on consumer decisions. While their endorsements can drive consumer behaviour, there is an increasing risk of misleading or false claims, which can distort competition by promoting certain brands unfairly or manipulating consumer perceptions. The Consumer Protection Act, 2019, addresses these concerns by holding influencers accountable for misleading advertisements and imposing penalties on both brands and endorsers. This study examines how the Act functions alongside competition law to prevent market dominance and price manipulation, thus ensuring a level playing field for all market participants.

By analysing specific case studies and enforcement mechanisms, this study aims to assess the effectiveness of the current legal framework in regulating influencer marketing. It also explores potential gaps in enforcement, particularly in the context of the rapidly evolving digital market. The study concludes by proposing recommendations for strengthening regulatory oversight to protect consumers and promote fair competition in influencer marketing, while ensuring that both laws work in synergy to address emerging challenges.

Keywords: Competition law, Consumer Protection Act 2019, influencer marketing, anti-competitive practices, false advertising, beauty and wellness industry, digital marketing

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1. INTRODUCTION

Influencer marketing leverages endorsements and recommendations from individuals with loyal and engaged audiences, often regarded as authorities within specific niches. Its effectiveness is rooted in the trust influencers build with their followers, providing social proof that enhances brand credibility. While the concept is not new, the rise of social media platforms like Instagram, YouTube, and TikTok has amplified its impact. These platforms have created opportunities for individuals to influence global audiences, leading to the emergence of micro- and nano-influencers alongside traditional celebrities and macro-influencers. This evolution has democratized influencer marketing, enabling businesses of all sizes to engage with targeted audiences.

The growth of influencer marketing has been substantial. Spending on influencer marketing was estimated at \$13.8 billion in 2021 and is projected to reach \$22.3 billion by 2024.⁶⁸ This rapid expansion underscores brands' confidence in influencers as effective channels to reach their target demographics. However, the rise of this strategy has also given way to anti-competitive practices that harm market fairness. These practices include exclusive agreements between brands and influencers, coordinated campaigns to suppress competitors, and misleading endorsements that distort consumer perceptions.

Anti-competitive practices undermine fair competition by enabling dominant players to monopolize influencer partnerships, leaving smaller brands struggling to compete. For example, exclusive agreements with prominent influencers can block competitors from accessing valuable promotional channels. Additionally, new entrants face significant visibility challenges when influential voices in their industry are inaccessible, limiting innovation and market diversity. Regulatory oversight is essential to ensure equitable access to influencer marketing and foster a competitive environment.

Transparency is critical in influencer marketing to protect consumer interests. Undisclosed financial relationships, fabricated reviews, and deceptive endorsements can mislead consumers, resulting in misguided purchasing decisions or harm from unsafe products. Regulations, such as the U.S. FTC's requirement for influencers to disclose paid partnerships, aim to combat these issues. Globally, similar frameworks are emerging to enforce ethical advertising standards, ensuring audiences are informed and able to make confident decisions. Unethical practices, including spreading false information about competitors or inflating credibility through fake reviews, also distort market trends and erode consumer trust.

⁶⁸ The Rise of Influencer Marketing, Bannari Amman Institute of Technology (<https://www.bitsathy.ac.in/the-rise-of-influencer-marketing/>).

Regulatory measures can help curb these actions, maintaining fairness and integrity in the industry. Additionally, dominant brands may exploit smaller influencers through unfair contracts or restrictive exclusivity clauses, limiting their growth and potential. Ensuring fair treatment and equitable compensation for influencers through regulation can contribute to a balanced and sustainable influencer marketing ecosystem.

Jurisdictions worldwide are increasingly adopting measures to regulate influencer marketing and counter anti-competitive practices. These efforts aim to uphold transparency, safeguard consumer trust, and promote a fair, competitive marketplace that benefits all stakeholders.

II. RESEARCH PROBLEM & OBJECTIVES

A. Research problem

The research problem in this paper revolves around the growing challenges posed by influencer marketing in the context of competition law and consumer protection, particularly in the face of misleading advertising and anti-competitive practices. While influencer marketing has become a significant driver of business growth, it has simultaneously created issues such as market manipulation, false advertising, and unfair dominance by large brands. The paper seeks to examine how existing legal frameworks, particularly competition law and consumer protection regulations, can address these emerging concerns and ensure a level playing field in the rapidly evolving digital marketing landscape.

B. Objectives of the study

- a. To critically analyse the role of competition law in curbing anti-competitive practices in influencer marketing, including exclusive agreements, market manipulation, and brand dominance;
- b. To evaluate the effectiveness of the Consumer Protection Act, 2019, in addressing deceptive practices, false advertising, and influencer accountability;
- c. To explore the intersection of competition law and consumer protection laws, focusing on their combined impact in promoting fair competition and protecting consumer rights.
- d. The study aims to propose actionable recommendations to enhance regulatory oversight, bridge gaps in enforcement, and develop a future-ready legal framework that adapts to the dynamic challenges of influencer marketing.

III. THE EVOLUTION AND ROLE OF INFLUENCERS IN DIGITAL MARKETING

Influencer marketing, rooted in traditional celebrity endorsements, has evolved significantly with the rise of social media. While early endorsements by celebrities lacked authenticity due to evident financial incentives, social platforms like Instagram, YouTube, and TikTok introduced influencers everyday individuals with niche expertise and relatable experiences who connect with audiences on a more personal level.

Micro-influencers have transformed the digital marketing landscape by engaging smaller but highly loyal and niche audiences. Their recommendations, rooted in personal passion and authenticity, resonate with followers as trusted advice rather than sales pitches. Brands quickly recognized the value of this approach, leveraging micro-influencers to achieve higher engagement and credibility.

Modern consumers demand authenticity and transparency. Influencers now share real-life moments, including struggles, creating relatable connections with their audiences. Regulatory measures, such as the Federal Trade Commission's (FTC) disclosure requirements, have emphasized transparency by mandating clear labelling of paid partnerships. This fosters respect and trust between influencers and their followers, enabling informed consumer decisions.

The evolution of influencer marketing has also amplified diverse voices, promoting inclusivity in areas such as body positivity, LGBTQ+ representation, and cultural identity. Influencers now represent not just themselves but entire communities, enabling brands to engage with specific audiences through shared values and experiences. This shift underscores the power of community-building in creating loyal and meaningful connections. Data-driven tools, artificial intelligence, and machine learning have revolutionized how brands identify influencers and measure campaign success. Platforms like TikTok and emerging spaces such as Clubhouse and BeReal have introduced innovative ways for brands to engage with audiences through real-time interactions and creative content strategies.⁶⁹

The future of influencer marketing is shifting toward long-term partnerships, with influencers becoming brand ambassadors who align with a company's mission and values. These sustained relationships build deeper trust and loyalty, ensuring a stronger impact on consumer behaviour. As influencer marketing faces growing scrutiny over ethics and authenticity, brands must innovate to maintain relevance. Interactive content, live events, and immersive experiences are emerging as key strategies to engage increasingly discerning audiences without overwhelming them. Influencer marketing has become a pivotal strategy for brands

⁶⁹ Chopra, Anjali & Avhad, Vrushali & Jaju, and. (2020). Influencer Marketing: An Exploratory Study to Identify Antecedents of Consumer Behaviour of Millennial. Business Perspectives and Research.

across numerous industries, leveraging the trust, reach, and authenticity of influencers to engage targeted audiences effectively. The industries most significantly impacted by influencer marketing include; Beauty and Cosmetics, Fashion and Retail, Health and Wellness, Technology and Gadgets, Travel and Hospitality, Food and Beverage, Gaming and Esports, Home and Lifestyle & Education and Online Learning.

The beauty and cosmetics industry has been at the forefront of influencer marketing. Social media platforms like Instagram, YouTube, and TikTok host a large number of beauty influencers who create tutorials, product reviews, and “get ready with me (GRWM)” content. These influencers significantly influence purchasing decisions by demonstrating the effectiveness of products and sharing authentic experiences. Brands like Fenty Beauty and Kylie Cosmetics have successfully collaborated with influencers to launch products and boost sales. The health and wellness industry, including fitness, nutrition, and mental well-being, has seen a surge in influencer-driven campaigns. Fitness enthusiasts, yoga instructors, and wellness coaches often promote dietary supplements, fitness equipment, and self-care routines. Their endorsements lend credibility to products, making them appealing to health-conscious consumers.

A. Regulatory framework for influencer marketing

Influencer marketing has become a powerful tool for brands, but it has raised concerns regarding transparency and fairness, particularly due to the rise of misleading advertising and anti-competitive practices. To address these concerns, India has introduced a regulatory framework involving several key guidelines and laws. The Advertising Standards Council of India (ASCI) established guidelines in 2021 for influencer advertising in digital media. These guidelines require clear and prominent disclosures for paid content, including labels such as “Ad” or “Sponsored.” Influencers must disclose material connections, such as payments or free products, to maintain transparency with their audiences. ASCI has expanded these guidelines, including new provisions in 2023 for health and financial influencers, who are required to have appropriate qualifications. Moreover, the Central Consumer Protection Authority (CCPA) enforces penalties for misleading advertisements, with fines of up to INR 50 lakh for repeat offenders.

India also utilizes the Consumer Protection Act, 2019 (CPA 2019), which holds influencers accountable for deceptive advertisements. The CCPA enforces compliance by fining and imprisoning those who fail to meet transparency standards. Additionally, the Competition Act,

2002 targets anti-competitive practices like price manipulation, exclusive agreements, and market dominance by influencers promoting one brand over others. Section 3⁷⁰ and Section 4⁷¹ of the Act address these issues, prohibiting market distortions and abuse of dominance. Influencer agreements that promote monopolistic behaviour or create artificial demand may face scrutiny.

B. International perspective – influencer marketing

The international regulatory landscape for influencer marketing highlights the growing recognition of challenges associated with anti-competitive practices and the need for transparency and accountability. In the United States, the Federal Trade Commission (FTC) enforces its Endorsement Guides under Section 5 of the FTC Act, mandating clear disclosures for sponsored content. Influencers and brands are jointly held accountable for misleading endorsements. Guidelines for digital platforms emphasize the use of explicit hashtags like #ad or #sponsored to ensure transparency. Enforcement actions, such as those against Lord & Taylor for undisclosed influencer payments and Teami LLC for failing to disclose material connections, underscore the FTC's proactive stance on consumer protection.

In the European Union, the Unfair Commercial Practices Directive (UCPD) prohibits misleading advertising, requiring influencers to disclose sponsored content as non-organic. Landmark cases, such as the German Federal Court's decision in *Influencer v. Medienanstalten (2021)* ⁷², established precedents for enhanced transparency. Additionally, the General Data Protection Regulation (GDPR) governs the use of consumer data in

⁷⁰ *Anti-competitive agreements-*

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which--

(a) directly or indirectly determines purchase or sale prices;

(b) limits or controls production, supply, markets, technical development, investment or provision of services;

(c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;

(d) directly or indirectly results in bid rigging or collusive bidding,

shall be presumed to have an appreciable adverse effect on competition

⁷¹ *Abuse of dominant position-*

.1[(1) No enterprise or group shall abuse its dominant position.]

(2) There shall be an abuse of dominant position 2[under sub-section (1), if an enterprise or a group],--

(a) directly or indirectly, imposes unfair or discriminatory--

(i) condition in purchase or sale of goods or service; or

(ii) price in purchase or sale (including predatory price) of goods or service.

⁷² Influencer Marketing. Case law of the Federal Court of Justice, (Mar. 18, 2022), <https://www.hoganlovells.com/en/publications/influencer-marketing-case-law-of-the-federal-court-of-justice>.

influencer marketing, ensuring compliance with data protection and consent standards for targeted campaigns.

The United Kingdom relies on the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) and oversight from the Advertising Standards Authority (ASA). The ASA actively enforces disclosure requirements, as demonstrated in rulings against influencers like “*Molly-Mae Hague*” for inadequately labelling promotional posts⁷³. This highlights the U.K.’s emphasis on consumer transparency and fair competition.

In Australia, the Australian Competition and Consumer Commission (ACCC) regulates influencer marketing under the Australian Consumer Law (ACL), which prohibits misleading conduct. While not influencer-specific, cases like *Thermomix v. ACCC* emphasize the ACCC’s rigorous enforcement of advertising standards.⁷⁴ The ACCC also warns influencers and brands about penalties for non-disclosure.

Globally, these frameworks share a commitment to transparency, consumer protection, and accountability, though enforcement approaches vary. For example, the FTC in the U.S. focuses on monetary fines and public warnings, while Indian laws under the Consumer Protection Act (CPA) include provisions for imprisonment. The dual application of India’s CPA and Competition Act provides a broader framework than the FTC’s centralized approach, although Indian regulations are still evolving to address influencer marketing nuances. By examining international practices, India can strengthen its regulatory mechanisms. Aligning domestic laws with global standards while tailoring them to local market dynamics can ensure that influencer marketing evolves responsibly, safeguarding consumer interests and promoting fair competition.

C. Anti-competitive practices in influencer marketing

Influencer marketing, a powerful strategy for shaping consumer behaviour, has also given rise to anti-competitive practices that challenge market fairness. One significant issue is price manipulation, where influencers create artificial demand or promote misleading price advantages, distorting consumer perceptions. Such practices contravene laws like Section 3

⁷³ Sarah Dennis, Prettylittlething.com Instagram Story rapped for failure to disclose ad status, <https://www.performancemarketingworld.com/article/1793058/prettylittlethingcom-instagram-story-rapped-failure-disclose-ad-status>.

⁷⁴ Australian Competition and Consumer Commission V. Thermomix in Australia Pty Limited, [2018] FCA 556; 360 ALR 676

of India's Competition Act, 2002, and Section 5 of the U.S. FTC Act⁷⁵, as exemplified by the FTC's action against Lord & Taylor for deceptive "limited-time offers."⁷⁶

Preferential promotions involve exclusive collaborations that undermine competitors and limit consumer choice, violating competition laws like India's Competition Act and the EU's Unfair Commercial Practices Directive. Similarly, dominant brands leverage their position to monopolize top influencers or suppress smaller competitors, a practice prohibited under Section 4 of the Competition Act, 2002. The FTC's case against Teami LLC illustrates how misleading claims amplified by influencers can distort competition.

False claims and deceptive practices by influencers, such as endorsing unverified product benefits, erode consumer trust and distort fair competition. These practices are addressed by laws like Section 21 of India's Consumer Protection Act, 2019⁷⁷, and Section 5 of the FTC Act. For example, the FTC penalized Teami LLC for unsubstantiated health claims promoted by influencers. Collusion among influencers to disparage competitors or amplify demand for specific products also violates competition laws, as does the manipulation of consumer reviews, highlighted in the FTC's case against Sunday Riley for fabricating positive reviews.

The Consumer Protection Act, 2019 (CPA 2019) in India addresses issues of misleading advertisements and holds both influencers and brands accountable. Influencers are required to ensure endorsements are truthful and disclose material relationships, such as sponsorships or gifts. Violations under the CPA 2019 can lead to penalties up to ₹10 lakh for first-time offenders and ₹50 lakh or imprisonment for repeat offenders. The Central Consumer Protection Authority (CCPA) is empowered to enforce these provisions, including issuing cease-and-desist orders for misleading advertisements.

Misleading advertisements through influencer marketing pose significant risks to consumer trust and market competition. The CPA 2019, alongside global regulations, provides a robust framework to ensure accountability and transparency in influencer marketing. However, consistent enforcement and increased consumer awareness are essential to addressing these challenges effectively and fostering a fair marketplace.

⁷⁵ prohibits "unfair or deceptive acts or practices in or affecting commerce." The prohibition applies to all persons engaged in commerce, including banks.

⁷⁶<https://fastercapital.com/content/Aggressive-Marketing--Navigating-the-Waters-of-Aggressive-Marketing--Strategies-and-Ethics.html>.

⁷⁷ *Power of Central Authority to issue directions and penalties against false or misleading advertisements.*

(1) Where the Central Authority is satisfied after investigation that any advertisement is false or misleading and is prejudicial to the interest of any consumer or is in contravention of consumer rights, it may, by order, issue directions to the concerned trader or manufacturer or endorser or advertiser or publisher, as the case may be, to discontinue such advertisement or to modify the same in such manner and within such time as may be specified in that order,

IV. INTERFACE BETWEEN COMPETITION LAW AND CONSUMER PROTECTION

The intersection of competition law and consumer protection laws is increasingly relevant in the context of influencer marketing. These legal frameworks, while distinct in their objectives, often complement each other in promoting fair markets and safeguarding consumer rights. This interface is particularly significant in addressing the challenges posed by deceptive practices and anti-competitive behaviour in influencer-driven promotions. Competition law aims to preserve market integrity by preventing practices that distort competition, such as monopolistic behaviour, cartels, and market manipulation. Consumer protection laws, on the other hand, focus on safeguarding consumers from unfair trade practices, including misleading advertisements and substandard products. In influencer marketing, these areas overlap when deceptive practices also impact market competition.

Influencers can inadvertently contribute to anti-competitive practices by promoting products in ways that mislead consumers or restrict competition. For example, exclusive agreements with dominant brands might reduce consumer choice while potentially violating competition law. Both legal regimes aim to ensure transparency and accountability in business practices. Misleading advertisements can harm consumers and create market inefficiencies, prompting the simultaneous application of competition and consumer protection laws. Influencer marketing poses unique challenges in balancing competition law and consumer protection. Regulating practices that distort markets while protecting consumers from exploitation requires a nuanced approach. The global nature of digital platforms presents significant challenges in regulating influencer activities. Influencers often operate across jurisdictions, promoting products in multiple countries, making enforcement of local laws complex. Different nations have varying regulations for advertising and competition, creating a regulatory vacuum in cross-border cases. Platforms like Instagram and TikTok amplify this complexity by hosting content that transcends geographic boundaries, making it difficult to ensure uniform compliance. Furthermore, the anonymous or pseudonymous nature of many influencers complicates tracking and holding violators accountable.⁷⁸

Monitoring influencer compliance with disclosure norms and advertising standards poses a significant hurdle for regulators. The sheer volume of content generated daily across platforms makes manual oversight impractical. Automated tools for monitoring, while helpful, are not always equipped to identify nuanced violations, such as subtle non-disclosures or misleading claims embedded within personal narratives. Additionally, influencers and brands

⁷⁸ <https://www.oecd-ilibrary.org/docserver/clp-11>

may employ tactics like ephemeral content (e.g., Stories) or disclaimers buried in hashtags to circumvent scrutiny. These challenges hinder the consistent application of consumer protection and competition laws. Existing laws often fail to address the unique nuances of digital influencer marketing. Loopholes include vague definitions of “material connections” and inadequate enforcement mechanisms for ephemeral or indirect promotional content. Many laws were drafted before the rise of social media, making them ill-suited for today’s rapidly evolving digital landscape. Emerging technologies, such as artificial intelligence and virtual influencers, further complicate regulation, as traditional frameworks struggle to apply to non-human endorsements or algorithm-driven promotions.

V. ANALYSIS OF NOTABLE CASES AND GUIDELINES RELATED TO ANTI-COMPETITIVE PRACTICES AND MISLEADING ADVERTISING BY INFLUENCERS

A. *FTC v. Teami, LLC* ⁷⁹

High-profile cases such as *FTC v. Teami, LLC* and the CCPA’s actions against misleading advertisements highlight the challenges and outcomes of regulating influencer marketing. In the Teami case, the FTC addressed false health claims and inadequate disclosure of sponsorships by influencers, resulting in significant fines and refunds. Another example is India’s crackdown on misleading advertisements by fitness influencers promoting unverified health products. These cases underscore the need for proactive enforcement and robust regulatory frameworks, as well as the importance of holding both influencers and brands accountable.

B. *Marico Limited v. Abhijeet Bhansali (2020)* ⁸⁰

In *Marico Limited v. Abhijeet Bhansali*, the Bombay High Court addressed the responsibilities of social media influencers in maintaining ethical practices. The case involved a YouTube video where the influencer disparaged Marico’s Parachute Coconut Oil, using dubious techniques to claim it was not 100% pure while promoting competing products. The Court found the influencer's actions to be reckless, malicious, and misleading, as he cited unreliable internet sources, blurred distinctions between different types of coconut oil under the Food Safety and Standards Regulations, 2011, and linked alternative products in the video description. These actions were deemed to constitute commercial speech, governed by stricter standards under Article 19(2) of the Constitution.

⁷⁹ *FTC v. Teami, LLC*, Adi Halevy, and Yogev Malul, Case No. 6:20-cv-00481, U.S. District Court for the Middle District of Florida, FTC Matter/File Number 182 3174 (2020).

⁸⁰ 2020 (81) PTC 244 (Bom)

The Court applied the principles of law on disparagement, establishing that the influencer's statements were false, malicious, and caused special damages to Marico, evidenced by consumer comments indicating a shift away from the product. Defences raised, including freedom of speech and bona fide intent, were rejected, as the content was found to mislead under the guise of impartial reviews. The Court granted an injunction to remove the video, emphasizing influencers' responsibility to ensure accuracy and transparency in their content. This case underscores the need for stricter regulations and greater accountability in the growing realm of influencer marketing.

C. Advertising Standards Council of India (ASCI) Guidelines:

ASCI updated its influencer advertising guidelines in 2023, mandating clear disclosure labels to ensure transparency. Influencers endorsing health or financial products must now demonstrate relevant qualifications and disclose affiliations prominently. This move reflects the increasing importance of accountability in influencer marketing in India.⁸¹

D. SEBI's Regulation on "Finfluencers":

The Securities and Exchange Board of India (SEBI) has been scrutinizing financial influencers ("finfluencers") who provide investment advice without proper qualifications. Recent guidelines ensure that only certified individuals can offer such advice, aligning with the ASCI's broader mandate on influencer endorsements.⁸² Current laws often lack clarity on the responsibilities of influencers, brands, and platforms. For instance, while the Consumer Protection Act, 2019 mandates truthful advertising, it does not provide comprehensive guidelines on monitoring influencer activities or addressing cross-border issues. Similarly, competition laws need clearer provisions on handling exclusive agreements or monopolistic practices facilitated through influencer endorsements.

To address these gaps, clearer and more detailed guidelines are necessary. Regulators must define "material connections" comprehensively and establish standards for disclosure across all digital formats. Accountability mechanisms should be strengthened, with explicit roles for platforms in monitoring and reporting non-compliance. Collaborative efforts between governments, international bodies, and platforms can create a harmonized framework to address the unique challenges of influencer marketing in the global digital economy. The enforcement of competition and consumer protection laws in influencer marketing faces numerous challenges, from cross-border complexities to outdated regulatory frameworks.

⁸¹ <https://www.ascionline.in/the-asci-code/>

⁸²SEBI amends rules to regulate finfluencers The Economic Times,<https://economictimes.indiatimes.com/markets/stocks/news/sebi-amends-rules-to-regulate-finfluencers/articleshow/112921759.cms?from=mdr>

Addressing these issues requires a combination of legislative updates, technological tools for monitoring, and international collaboration to ensure transparency, accountability, and fair market practices in this dynamic landscape.

VI. SUGGESTIONS

- Mandate clear, consistent, and visible disclosures across all types of influencer content (e.g., posts, videos, stories) and extend disclosure requirements to virtual influencers and clearly label them as non-human entities, maintaining transparency in all marketing efforts.
- Foster partnerships between international regulatory bodies to address the challenges of cross-border influencer marketing, ensuring global standards and develop a unified framework for influencer disclosures and accountability standards that can be adopted internationally, enabling consistency in enforcement.
- Invest in artificial intelligence tools to monitor influencer content in real-time across various digital platforms, improving the ability to detect non-compliance.
- Establish accessible whistleblower channels to allow consumers and industry stakeholders to report misleading content or violations of advertising standards and clearly define "material connections" between influencers and brands to ensure that both parties are jointly liable for deceptive or misleading practices.
- Implement stricter penalties for repeated violations, including more severe fines and potential legal consequences for influencers and brands that consistently fail to comply.
- Launch campaigns to educate consumers on how to identify promotional content, thereby empowering them to make more informed purchasing decisions and increase public awareness of their rights under consumer protection laws, helping consumers recognize and avoid misleading advertisements.
- Introduce regulations that prevent dominant brands from monopolizing influencer relationships, ensuring that small businesses also have access to influencer marketing opportunities.
- Provide legal frameworks to support smaller influencers, helping them negotiate fairer contracts and ensuring that they are not exploited by larger brands and continuously revise laws to address new challenges, such as AI-driven endorsements and new digital marketing platforms.

VII. CONCLUSION

Influencer marketing has revolutionized digital marketing, creating both opportunities and challenges for businesses, consumers, and regulators alike. The growing concerns over anti-competitive practices and misleading advertisements highlight the urgent need for a more robust regulatory framework. While competition law and consumer protection laws in India and globally have made strides in addressing these issues, there remain significant gaps, particularly in ensuring transparency and preventing market manipulation. By implementing stronger guidelines for disclosure, fostering international collaboration, and enhancing monitoring and accountability, regulators can create a more ethical and equitable environment for both consumers and businesses. These measures will help maintain consumer trust, ensure fair competition, and promote responsible marketing practices in the influencer-driven digital economy.

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BALANCING INNOVATION AND FAIR COMPETITION: REGULATING DATA DRIVEN MARKER DOMINANCE IN INDIA'S DIGITAL ECONOMY

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-Vaibhaw Raj⁸⁴

ABSTRACT

The surge of digital platforms in India, driven by innovative business models and technological advancements, presents unique challenges to competition law and consumer welfare. As Indian companies like Jio, Flipkart, and Paytm continue to innovate, concerns around data privacy, market dominance, and fair competition are escalating. With the advent of the Digital Personal Data Protection (DPDP) Act and amendments to the Competition Act, the regulatory mechanism is evolving to curb monopolistic practices such as data hoarding and market manipulation. These practices, including restrictive data sharing and self-preferencing, hinder fair competition and repress smaller competitors. In an era where data has become synonymous with power, monopolies over user data are increasingly becoming a tool for market dominance. The proposed Digital Competition Act in India seeks to address the challenges posed by digital platforms, aiming to foster a competitive and innovative ecosystem while ensuring data privacy. This paper critically examines how the Indian legal framework, in comparison with global standards like the EU Digital Markets Act 2022, aims to regulate data-driven market dominance and protect consumer welfare. Through an analysis of contemporary regulatory measures, including the Competition (Amendment) Act 2023, the paper discusses the balance between promoting innovation and preventing anti-competitive behaviour. While innovation drives economic growth, unchecked monopolies can undermine market fairness, reducing consumer choices. Stricter scrutiny of digital platforms and their practices is necessary to ensure that innovation coexists with healthy competition. The paper concludes by advocating for a nuanced regulatory approach, one that simultaneously encourages innovation and safeguards consumer interests, without compromising on data protection.

Keywords: Competition Law, Consumer Protection, Data Hoarding, Data Privacy, Digital Platform

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I. INTRODUCTION

India's digital economy has grown exponentially over the last decade thanks to digital platforms, innovative business models, the rapid expansion of internet connectivity, and the increasing penetration of smartphones. The shift towards a cashless economy, where digital transactions replace conventional cash-based ones, has been a significant carrier of this development. Millions of people in the country can access digital services because of this. Significant research findings showed that the association between macroeconomic indicators and cashless payment methods shows that digitalisation plays an important role in inducing economic growth and financial inclusion in India.⁸⁵ The digital economy is not a sector but an all-pervasive influence transforming many dimensions of life, including commerce and governance.

Data has emerged as one of the principal elements that have formed the foundation of this ever-growing digital economy, which is believed to fuel innovation and competition further. The processes involved in data collection, analysis, and usage enable businesses to individualise offers, enhance customer experiences, and optimise operations; however, the change in the movement towards a cashless economy brings in data security and privacy issues that would require proper dealing to stimulate consumer confidence and healthy growth.⁸⁶

Despite all promising futures awaiting India's digital economy, scholars, policymakers, and investors are witnessing many concerns today regarding data privacy market dominance and anti-competitive behaviour and witnessing how Jio, Flipkart, and Paytm have led market conduct to make competition worry about their monopolistic behaviour which hinders innovation. Mukherjee explains how entry by Reliance Jio that disrupts the telecom space becomes one example of what happens in such markets of market dominance through making others learn to compete very fast before facing risks of obsolescence.⁸⁷ The disturbance that started it all not only modified market dynamics but also inspired further questions concerning the long-term viability of these practices.

⁸⁵ N. A. Zargar, B. Niroula, N. Fatimah, A. A. Kenanga Arif, U. Ali & S. K. Singh, Towards a Digital Revolution: Investigating the Impact of GDP, Tax Collection, and Interest Rates on Cashless Economy in India, 4 J. POPULATION & DEV. 91, 111 (2023), <https://doi.org/10.3126/jpd.v4i1.64243>.

⁸⁶ Nammuni Arachchige Nuwan Janaka Maduwansha & Ekanayake Mudiyanseelage Gimhani Prarthana Bandara Boyagoda, Review the Behaviour of Cashless Transactions Regarding Economy of Sri Lanka (2010-2020), 10 OPEN J. SOC. SCI. (2022).

⁸⁷ R. Mukherjee, Jio Sparks Disruption 2.0: Infrastructural Imaginaries and Platform Ecosystems in 'Digital India,' 41 MEDIA, CULTURE & SOC'Y 175, 195 (2019), <https://doi.org/10.1177/0163443718818383>.

Indian law, for example, appears to struggle to bridge the nexus between fair competition and innovation. According to Gouri, "the converging worldview of data privacy regulation and competition law is a massive challenge in India." This pertains to the increasingly overlapping worlds of consumer data protection and fair competition law. This research critically examines the delicate balance between innovation and equitable competition in the Indian digital economy.

Underpinning this are acute needs for modern regulatory structures that could address data-driven monopolistic practices appropriately while simultaneously giving birth to competitive markets. The challenge lies in balancing the public interest in data privacy with the market forces that drive innovation and competition.⁸⁸ The cases concerning platforms in India immediately reveal this regulatory imperative.

This paper will discuss how the analysis of Indian competition law, especially in light of recent amendments, might evaluate the adequacy of the policy framework for dealing with growing digital market power. It will also address some of the challenges regulators are experiencing in navigating through the complicated terrain of data privacy and competition issues, enhancing understanding of the regulatory framework in India's digital economy.

II. LEGAL FRAMEWORK GOVERNING COMPETITION IN INDIA

This means that competition law in India has evolved dramatically from the MRTP Act to the sturdier Competition Act of 2002. The MRTP Act, enacted to prevent monopolistic practices, found itself limited in scope and hence ineffective; thus, the birth of the CCI in a new body occurred. The Competition Act followed a more holistic framework to regulate anti-competitive practices by focusing on fair competition and consumer interest.⁸⁹

Significant changes in the Competition Act have made facing issues that arise in digital economies more potent. The newly formed Competition (Amendment) Act of 2023 has presented some vital changes to enhance the capabilities of the CCI in dealing with the anti-competitive practices of the digital market. Of course, these are to acknowledge special issues posed by this model so that studies conducted argue on the necessity of being adaptable

⁸⁸ G. Gouri, Convergence of Competition Policy, Competition Law and Public Interest in India, 6 RUSSIAN J. ECON. 277, 293 (2020), <https://doi.org/10.32609/j.ruje.6.51303>.

⁸⁹ S. S. Kunder, B. Ronald & S. Rajesh, Consumer Protection Under Competition Law Highlighting Relevant Market Issues Under Digital Market, 6 INT'L J. HEALTH SCI. S5, 11752–11762 (2022), <https://doi.org/10.53730/ijhs.v6nS5.11054>.

regarding regulation in light of an accelerating landscape of rapid shifting through a digitising market.⁹⁰

The DPDP Act is one such landmark in the Indian regulatory landscape because it identifies a few of the pressing concerns pertinent to data privacy in the digital economy. The legislation creates a structured framework for collecting, storing, and processing personal data while protecting consumer rights and promoting responsible data management practices among businesses. The relationship between the DPDP Act and competition law is of utmost importance because, though both regulatory frameworks aim to safeguard consumer interests, they may sometimes cause issues regarding enforcement and compliance.⁹¹

Thus, the Competition (Amendment) Act, 2023, together with the DPDP Act, is a proposed Indian government action aimed at balancing the regime of regulations which promotes innovation while keeping it under check the anti-competitive practice. However, its performance would solely depend upon its performance and the regulatory agencies can manage to imbibe the complexities of the digital marketplace.⁹²

The regulation of digital markets is quite different, considering the challenges it poses as a combination of competition law and data privacy regulations. Furthermore, a more extensive study shows that the rapid development of the digital economy requires much more complex regulation that considers the dynamic nature of online platforms and their impact on market competition.⁹³ A lack of guidelines on the use and sharing of data will lead to data hoarding and impede competition and innovation.

The global nature of digital markets also complicates regulatory efforts because firms operate in jurisdictions with different legal regimes; thus, this situation calls for collaborative regulators to share best practices and work on common challenges as recommended by researchers and field experts who suggest adaptive governance strategies as a response to the complexities of digitalisation.⁹⁴

⁹⁰ J. S. Saini & N. Kumar, Issues Pertaining to Growth of Digital Economy: An Arduous Challenge Before CCI, 20 J. PUB. AFF., e2301 (2020), <https://doi.org/10.1002/pa.2301>.

⁹¹ "Economic Growth Unleashed: The Role of Digitalization in India's Ascent to \$5 Trillion," INT'L J. MULTIDISC. RES. (2023), <https://doi.org/10.36948/ijfinr.2023.v05i06.9162>.

⁹² K. M. Mahesh, P. S. Aithal & K. R. S. Sharma, "Open Network for Digital Commerce - ONDC Infrastructure: To Promote SME/MSME Sector for Inclusive and Sustainable Digital Economic Growth," 7 INT'L J. MGMT., TECH., & SOC. SCI. 320, 340 (2022), <https://doi.org/10.5281/zenodo.7141841>.

⁹³ A. Neshcheret, A. Sherstobitova & T. Zhuravleva, Leading Trends in Regulation of Digital Economy: Best World's Practices, PROCEEDINGS OF THE 4TH INT'L CONF. ON SOCIAL, BUS., & ACAD. LEADERSHIP (ICSBAL 2019) 250, 255 (Atlantis Press 2019), <https://doi.org/10.2991/icsbal-19.2019.43>.

⁹⁴ B. Trump, K. Poinssatte-Jones & M. V. Florin, Governance Strategies for a Sustainable Digital World, 10 SUSTAINABILITY (Feb. 10, 2018), <https://doi.org/10.3390/su10020440>.

III. DATA-DRIVEN MARKET DOMINANCE: PRACTICES AND CHALLENGES

Digitalisation is considered a significant source of competitive advantage in the digital economy because firms can gather insights into the behaviour and preferences of their consumers. This data-driven approach makes companies stronger market players by tailoring their offerings and improving the customer experience. However, as the studies point out, in so doing, concentrating data in the hands of a few dominant players may undermine market equity and consumer welfare by allowing monopolistic practices to be followed.⁹⁵

Data monopolies have deep-ranging implications that go much beyond what has been mentioned here, going all the way ahead to critical issues about consumer and data security privacy. Companies can compile vast amounts of personal data because they can collect and assess them and, in extreme cases, create exploitative conditions where consumers' information is used without adequate permission or transparency. This means a need for a multilateral regulatory framework that promotes fair competition but protects consumer rights in the digital era.⁹⁶

Different manifestations of anti-competitive practices in the digital markets include data hoarding, restricted data sharing, and self-preferencing. Data hoarding refers to collecting and retaining important data from others, creating entry barriers for new market participants. This could strangle the innovation process, further limiting consumer choice, according to Chawla and Kumar, who refer to a need to create a competitive climate fertile for cooperation and information exchange between firms.⁹⁷

This primarily includes self-preferencing behaviour, where leading firms are believed to prefer their product or service more than others and wherein the same can further deviate market equilibrium through less variety of products offered by the customers. In addition, preferential products through algorithms in searching activities is another aggravation in this issue, wherein researchers state that such practice violates the very fundamental concept of fair competition.⁹⁸

⁹⁵ R. Singh & G. Malik, Impact of Digitalization on Indian Rural Banking Customer: With Reference to Payment Systems, 5 EMERGING ECON. STUD. 31, 41 (2019), <https://doi.org/10.1177/2394901519825912>.

⁹⁶ S. S. Kunder, B. Ronald & S. Rajesh, Consumer Protection Under Competition Law Highlighting Relevant Market Issues Under Digital Market, 6 INT'L J. HEALTH SCI. S5, 11752–11762 (2022), <https://doi.org/10.53730/ijhs.v6nS5.11054>.

⁹⁷ N. Chawla & B. Kumar, E-Commerce and Consumer Protection in India: The Emerging Trend, 180 J. BUS. ETHICS 581, 604 (2022), <https://doi.org/10.1007/s10551-021-04884-3>.

⁹⁸ S. S. Kunder, B. Ronald & S. Rajesh, Consumer Protection Under Competition Law Highlighting Relevant Market Issues Under Digital Market, 6 INT'L J. HEALTH SCI. S5, 11752–11762 (2022), <https://doi.org/10.53730/ijhs.v6nS5.11054>.

Analysis of Indian and international-level case studies provides many important lessons regarding the issues arising from monopoly strategies. For example, Amazon and Google have raised questions regarding their monopoly situations and implications for competition along with the welfare of consumers; in the Indian context, Flipkart is a typical similar case which has become one of the focal points under Walmart's acquisition of the company as well, bringing debates about its impact on local retailers and the broader market situation.⁹⁹

These case studies indicate the need for regulatory interventions for anti-competitive practices to have a level playing field in the digital economy. According to a prominent study, "such frameworks as Open Network for Digital Commerce (ONDC) are to be established to enhance the inclusiveness and sustainability of the digital marketplace and overcome many issues that have arisen from the dominance of markets".¹⁰⁰

IV. COMPARATIVE ANALYSIS: INDIA AND GLOBAL STANDARDS

China and other countries have existing AI provisions that are enforceable.¹⁰¹ There is a requirement to strengthen the Competition Commission of India investigative powers so that it can properly address the digital duopoly. Amazon, a e- shopping conglomerate had challenged the CCI in 2021 which further necessitates the need for clarity and improvements in the regulatory powers.¹⁰²

India is a developing economy which is growing rapidly day by day. The market economy is India needs to be balanced since powerhouses often try to take over the market. Cross- border transactions also have to be taken into consideration in this regard. Countries which have a dominant global economy like USA and China have existing antitrust laws that have been implemented properly.¹⁰³ In order for India to excel at a global level, there is a requirement for the government to balance the needs of the consumers as well as that of the competitors.

⁹⁹ S. K. Majumdar, A. P. Sarma & S. Majumdar, E-Commerce and Digital Connectivity: Unleashing the Potential for Greater India-ASEAN Integration, 2 J. ASIAN ECON. INTEGRATION 62, 81 (2020), <https://doi.org/10.1177/2631684620910524>.

¹⁰⁰ K. M. Mahesh, P. S. Aithal & K. R. S. Sharma, "Open Network for Digital Commerce - ONDC Infrastructure: To Promote SME/MSME Sector for Inclusive and Sustainable Digital Economic Growth," 7 INT'L J. MGMT., TECH., & SOC. SCI. 320, 340 (2022), <https://doi.org/10.5281/zenodo.7141841>.

¹⁰¹ Lu Ming Yu & Yongyeh Ngalim Elizabeth, A Comparative Study of China's Competition Law and Cameroon's Competition Law; with Specific Regards to Challenges in the Implementation of Competition Law in China and Cameroon, 15 J. POL. & L. 34 (March 2022).

¹⁰² Amazon, Flipkart breached antitrust laws: CCI. (n.d.). The Hindu. <https://www.thehindu.com/sci-tech/technology/amazon-flipkart-breached-antitrust-laws-cci/article68637232.ece>

¹⁰³ Wendy Ng, Changing Global Dynamics and International Competition Law: Considering China's Potential Impact, 30 EUR. J. INT'L L. 1409 (November 2019).

V. ROLE OF THE PROPOSED DIGITAL COMPETITION ACT

The novel Digital Competition Act (DCA) makes an attempt to address the unique challenges that the online marketplace poses.¹⁰⁴ The Competition Act 2002 does provide a comprehensive framework for antitrust laws in the country but there are some challenges which the DCA aims to resolve. The crux is that the DCA aims to regulate the behaviour of huge digital platforms, increase and encourage innovation and make sure that there are no data leaks ensuring data privacy.

Furthermore, the DCA addresses the power that big digital companies wield over the smaller digital platforms.¹⁰⁵ Big digital platforms have enormous financial resources that help them gain a fiscal advantage over the smaller companies. There is a disbalance of economies of scale since smaller companies fail to match the resources of the larger companies. Transparency and accountability form a cornerstone for the DPA.

The use of data has become imperative during this day and age. Some form of data struggle tends to get created when it pertains to digital markets. User data and its accessibility has been made easily available especially on the dark web. Competition laws aim to ensure a level playing field for competitors. In the 2022 case of CCI v. Google, Google¹⁰⁶ had to pay fines and money since it took unfair advantage of its market position. Google exercised its power over Android.

This is one instance where the DCA can be applied and it can prevent unnecessary data transfer and usage. Currently, there are multiple ecosystems which exist and the DPA ensures that. A balance can be formed between the demands of data protection and inventions. Standalone laws such as the General Data Protection Regulation (GDPR) 2022 and the EU Digital Markets Act (DMA) 2022 aim to bridge the gap between user data accessibility and privacy.

The DCA has tried to embody and inculcate provisions aligning with its objectives. Some illustrations are criminalization of anti- competitive hoarding of data.¹⁰⁷ This means companies that use data for their own purpose and to increase their own market power. An

¹⁰⁴ India: nurturing competition in a rapidly evolving digital space . (n.d.). Global Competition Review. <https://globalcompetitionreview.com/guide/digital-markets-guide/fourth-edition/article/india-nurturing-competition-in-rapidly-evolving-digital-space>

¹⁰⁵ Singh, V. J., & Sharma, A. (2024, May 16). A Deep Dive into India's Digital Competition Bill, 2024. Lexology. <https://www.lexology.com/library/detail.aspx?g=5722a078-1839-4ece-aec9-49336ff53b6c>

¹⁰⁶ Google LLC v. Competition Commission of India, <https://crclp.nliu.ac.in/google-llc-v-competition-commission-of-india/> (last visited Dec. 8, 2024).

¹⁰⁷ Shramana Dwivedi & Shivam Shukla, Digital Economy: Impact on Competition Law in India, 6 RGNUL FIN. & MERCANTILE L. REV. 147 (2019).

illustration could be user preferences being tracked by a digital platform. Section 4¹⁰⁸ of the Competition Act of 2002 aligns with this. Data sharing between enormous data giants and smaller companies is a middle ground that can be taken.

Data sharing enables other companies to be aware of the user data other companies have. Section 6¹⁰⁹ (12) of the DMA has been referred to here. This is also called the gatekeepers provision where the gatekeepers are required to report any performance data to users. It is a form to bridge the gap. There are specific algorithmic equations which companies use to process and formulate user data. These algorithms vary from company to company. There should not be the use of any discriminatory algorithmic equation.

The expected results from the DCA are the realization of a more competitive and innovation-driven digital economy. By eliminating the discriminatory practice and encouraging balanced competition, the Act is designed in a manner that will open entry for smaller market entrants as well and develop an innovation-fostering ecosystem. Additionally, all data portability and interoperability will allow seamless platform switching of consumers so that functionality is not affected, nor any data. All these targets perfectly converge with the superordinate aims of consumer welfare and technical efficiency contemplated within the framework of the Competition Act, 2002.

Implementation challenges shall form a part of every legislation, even if it is well drafted.¹¹⁰ Firstly, there needs to be an equilibrium between enforcement and encouraging innovations. Constricting and restricting could curb investment and technological process, particularly in digital markets where novel ideas are critical.¹¹¹ An illustration of the same shall be USA, where various critics have expressed their opinion and consensus on the ill effects of overregulation. There have been instances where due to legal regulations, innovation has been curbed.

There cannot be a fixed requirement for algorithmic transparency as well as obligations to share data.¹¹² This will likely require significant technical know-how and resources to enforce, potentially too heavy a burden for bodies like the CCI to carry. The DCA must balance its data privacy obligations with competition ones in a tricky way, particularly in India, given the

¹⁰⁸ The Competition Act (2002), § 4.

¹⁰⁹ The Digital Markets Act (2022), § 6(12).

¹¹⁰ Vijay Kumar Singh, Competition Law and Policy in India: The Journey in a Decade, 4 NUJS L. REV. 523 (October-December 2011).

¹¹¹ Parnika Jain, A Look into Private Enforcement under Competition Law in India, 4 INDIAN J.L. & LEGAL RSCH. 1 (2022).

¹¹² Changing Dynamics of Algorithmic Collusion: An Analytical Study, SCC Times, <https://www.sconline.com/blog/post/2023/05/18/changing-dynamics-of-algorithmic-collusion-an-analytical-study/> (last visited Dec. 8, 2024).

looming Digital Personal Data Protection Act. It is incumbent on the DCA to ensure that provisions regarding the sharing of data are effective but also mindful of considerations related to privacy for the digital economy. But it will depend on the regulatory agencies capacity to cope with the difficulty of enforcing, to provide an environment for innovation.

VI. STRIKING A BALANCE BETWEEN INNOVATION AND COMPETITION

Innovation is a cornerstone of economic growth, particularly in the digital economy, where platforms play a pivotal role in driving technological advancement and creating new markets. Digital trading platforms, for example, Google, Amazon, and Meta, provide the conduit for innovation as they put services on an unprecedented scale in front of businesses and consumers.

Their strength often is founded in the network effects, data aggregation, and economies of scale, all of which can at the same time be barriers to entry. Overregulation will pose a risk in these contexts and will deter investment and creativity. Hence, critics of harsh antitrust action in the U. S. For instance, actions in *United States v. Microsoft Corp.*¹¹³ misnamed restrictions may actually come at the expense of technological advance by favoring and/or limiting innovation-based companies.

In order to have that fostering innovation, powerful platforms should not go at the expense of market fairness and consumer welfare. In fact, they use certain behaviours anti-competitive which include: self-preferencing predatory pricing, using control over data to disadvantage rivals. These behaviours undermine consumer choice and distort market dynamics. As per the Competition Act, 2002, and in particular Section 4¹¹⁴, the prevention of abuse of dominant position has been embodied by India when taking an avowedly fair competition into account. Additionally, the Commission regulatory proposal to the EU Digital Markets Act (DMA), 2022, grants gatekeepers the duty to prohibit impermissible practices, including preferential treatment to products of the company's own company over those of competitors. All these acts call out for consumer protectiveness as the foundation principle against anti-competitive conduct that was long acknowledged in the case of *CCI v. Google LLC*¹¹⁵ and which has also

¹¹³ U.S. V. Microsoft: Court's Findings Of Fact, Department of Justice | Homepage | United States Department of Justice, <https://www.justice.gov/atr/us-v-microsoft-courts-findings-fact> (last visited Dec. 8, 2024).

¹¹⁴ The Competition Act (2002), § 4.

¹¹⁵ Padmakshi Sharma, *Google v CCI* | Supreme Court Lists Matter For Final Disposal On October 10, 2023, Supreme Court News, Latest India Legal News, Supreme Court Updates, High Courts Updates, Judgments, Law Firms News, Law School News, Latest Legal News (July 15, 2023), <https://www.livelaw.in/top-stories/google-v-cci-supreme-court-lists-matter-for-final-disposal-on-october-10-2023-232774>.

been the basis of Google LLC being fined for its anti-competitive behaviours involving the Android market.

Therefore, the need for the occurrence is a balanced regulatory framework which allows innovation and competition to thrive. An approach that encourages innovation but, for the sake of fair market, also tackles monopolistic behaviours must be taken. Policymakers should strive for interoperability, transparency of algorithms, and data-sharing mandates that will help smaller participants, yet protect users' privacy. Specific examples include provisions akin to Article 6(9)¹¹⁶ of the DMA, namely, data portability provisions, which can be assimilated into India's regulatory framework for more consumer empowerment and entry barriers reduction of competitors. The Digital Competition Act above can provide for mechanisms to encourage innovation by incentives and joint work as well as discourage anti-competitive behaviour.

One of the key features of this platform is close examination of information platforms to prevent abuse of a dominant position. In other words, such regulatory bodies must be provided with the necessary man and material power and technical expertise in order to ensure effective mechanisms of compliance. More accountability with regard to applications of data and algorithms may come through the issuance of sector-specific guidelines, as in China's Provisions on the Administration of Algorithm Recommendation Services (2022). Nonetheless, regulators must take their step with caution lest unnecessary strict requirements unduly strangle innovation. This is an ongoing challenge in areas like the United States, whose debates on AICOA discuss the acceptability of a proper regulatory body.

There has to be a balance formed between innovation and competition law. Competition law strives to protect the marketplace while innovation fosters novelty and ideas. There has to be substantial growth and steady growth in the digital economy if India has to reach new heights. A law which aims to foster innovation shall lead to newer ideas that shall aid in evolving competition law. India can improve its position in the competition law landscape provided it takes the right steps by adopting practices from developed countries. This shall lead to benefit for consumers and businesses both.

VII. CONCLUSION

Data is now a crucial source of competitive advantage in the digital economy because firms can extract insights regarding the behaviours and preferences of their consumers. This

¹¹⁶ The Digital Markets Act (2022), § 6(12).

approach, underpinned by data, enhances companies' positions as market players because they can customise offerings while improving customer experience. More importantly, the balance between innovation and fair competition in India's digital economy calls for a multi-dimensional approach that has robust regulatory frameworks, strong enforcement mechanisms, and consumer rights placed at the forefront. Therefore, the harmonious development of competition law with data protection legislation is a welcome step toward that end.

However, the constantly changing challenges surrounding the regulation of digital markets, coupled with the occurrence of anti-competitive practices, necessitate agility and cooperation from relevant stakeholders. The Indian digital economy can hence be duly exploited to create a competitive environment that encourages innovation while at the same time protecting consumer interests. The interplay between innovation and competition within the digital economy calls for a fine-grained regulatory framework capable of countering the challenges presented by dominant digital platforms.

The proposed Digital Competition Act represents a critical advancement in India's efforts to regulate the digital marketplace while encouraging innovation and maintaining market fairness. In augmenting the provisions of the Competition Act, 2002, the DCA seeks to counterbalance the power asymmetry between large digital conglomerates and smaller market participants. Central to the objectives of the DCA is control of anti-competitive conduct such as self-preferencing, predatory pricing, and data hoarding. Such practices not only prevent competition but also reduce choice for consumers, as seen with *CCI v. Google* (2022), whereby Google exploited its dominance over the Android ecosystem.

It further visualizes mechanisms like algorithmic transparency, data-sharing mandates, and interoperability provisions, which are consistent with the international regulatory frameworks being used in the EU, including the Digital Markets Act and GDPR. More importantly, they ensure that consumer welfare and data privacy are upheld in the pursuit of innovation. However, this balance would be very challenging to achieve. Overregulation risks keeping investment away and hindering technological progress, as some of the debates surrounding some of the U.S. antitrust actions, especially *United States v. Microsoft Corp.*

The DCA needs to walk down this tightrope; it should adopt a supple and dynamic approach where it gives more importance to sector-specific guidelines, along the lines of China's Provisions on the Administration of Algorithm Recommendation Services issued in 2022 for

addressing industry-specific needs. Further, the Act should clearly mark out boundaries so that the CCI and other regulatory bodies are not unnecessarily burdened with complex provisions that the technical resources of the organizations may not be able to enforce effectively.

Data portability, algorithmic neutrality, and enhanced accountability mechanisms are key to delivering the DCA's aims. They will not only break entry barriers for smaller competitors but also empower consumers by allowing them to switch platforms with ease and protect the integrity of their data. In conclusion, the DCA presents a visionary approach to the digital economy of India - fostering innovation while curbing monopolistic behaviours. Yet, it will succeed only if the enforcement is properly calibrated and informed by international best practices adapted to the particular market dynamics of India. And so, this delicate balancing act will ensure that India becomes a digitally empowered, competitive economy, both beneficial to consumers and businesses alike.

HEALTHY MARKET CONDITIONS THROUGH CONSUMER PROTECTION AND COMPETITION LAWS: A DOCTRINAL RESEARCH ANALYSIS

- B Rathish¹¹⁷

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ABSTRACT

The presence of trade and commerce has been a constant across all time periods, with consumers purchasing products and services from sellers. While consumers prioritize quality, sellers and producers focus on profit, often leading to a conflict of interest. This tension can result in various forms of malpractice within the market. To address these challenges and protect consumers, countries have enacted laws like the Consumer Protection Act (2019) and the Competition Act (2002) in India, Which surfs into article 14,19,21 and chapter-VIII of the constitution. This paper uses doctrinal research the reason being analyse the reports submitted by the consumer redressal commissions and authorities. This paper examines two key questions: (1) whether consumer protection and competition laws promote healthy market conditions, and (2) whether consumer protection laws effectively ensure consumer safety. With the main objective of this paper is to analyse and understand how consumer protection laws and competition laws help in establishing healthy market condition and practices ensuring safety of the consumers and their rights. Healthy competition promotes efficiency and better service standards in the market, benefiting both consumers and sellers. The regulatory frameworks established by laws like the Consumer Protection Act and the Competition Act aim to strike a balance between consumer rights and market efficiency. This paper makes a comparison between the provision other countries with specific interest towards U.S.A, Australia etc.

Keywords: Consumer, Market, Malpractice, Competition. Redressal

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I. INTRODUCTION

“Consumer protection is a very vital part of social justice. With the proliferation of goods and services, the challenge is greater than ever before.” – Justice D.P. Wadhwa.

The Competition act 2002, Consumer protection act 2019 and such other consumer protection acts were enacted to protect consumers from being deceived from the market. In Issues like Unfair Trade practices of goods and service. Every developing and developed countries has their own profound laws to promote their economy and consumer safety. As the society and its economy changes there is pivotal need for the law to keep up with it. Which is ensured by the system of the country.

II. RESEARCH METHODOLOGY

This article is made with the help of doctrinal method of researching as it contains secondary resources.

III. CONSUMER PROTECTION LAWS IN INDIA

In India, the relationship between consumer and the market is shaped by the rapid growth of technologies and social media. Which drives the people to consume more beyond necessity by consuming advertisements and online promotions. The consumers are striven to buy products based on the reviews and promotions which raises concerns on the authenticity and credibility of the marketing practices.

To overlook such misleading endorsements Indian legal system has The Guidelines for prevention of misleading advertisements and endorsements for misleading advertisements act 2022. This act regulates the misleading advertisement by pointing out the means of misleading advertisements. Such misleading advertisements are penalised by Section 89¹¹⁹.

Constitutional Provisions On Trade And Business In India:

The Indian constitution doesn't impose any restrict on free and fair trade¹²⁰. However, there are restrictions on based on greater public interest¹²¹.

IV. LEGAL BODIES IN INDIA (To safe Guard consumer safety):

There 3 main statutory bodies:

1. Central Consumer Protection Authority,

¹¹⁹ Consumer Protection Act, 2019, § 89, No. 35, Acts of Parliament, 2019 (India)

¹²⁰ INDIA CONST. art. 301,

¹²¹ INDIA CONST. art. 302,

2. Consumer Disputes Redressal Commissions and,
3. Consumer Protection Councils.

These three bodies have the duty to prevent, protect and promote consumer safety. Which derives its powers and functions from consumer protection act 2019. 3 bodies has distinct powers and functions as follows:

- i. Central Consumer Protection Authority:
 - This authority is established under chapter III section 10-27 of CPA.
 - To protect and promote the consumer safety by vesting the powers to investigate products, recall products, providing compensations to the consumers, spreading awareness to the consumers and complying consumer protection acts by filing cases in the interest of the consumers¹²².
- ii. Consumer Dispute Redressal Commissions:
 - Chapter IV section 28-73 of the consumer protection act derives the establishment, jurisdiction and vesting of powers of the commissions,
 - It has a three-tier body consist of district, state and central consumer dispute redressal commissions,
 - Under section 35 of CPA a complaint shall be raised against any unfair trade practice.
 - It has the duty to hear out complaints regarding unfair trade practices raised by the consumers and issue orders accordingly.¹²³
- iii. Consumer protection councils:
 - Being a three-tier advisory body consist of district, state and central level which is established under chapter II section 3-9 of Cpa.
 - which advices on the protection measures, policies and promote awareness¹²⁴.

These three bodies are aided by other regulating laws like the consumer protection (e-commerce) rules, 2020, the central consumer protection authority (annual report), the consumer protection (central consumer protection council) rules 2020.., in order to carry the objectives of the consumer protection act 2019.

¹²² Consumer Protection Act, 2019, §10-27, No. 35, Acts of Parliament, 2019 (India)

¹²³ Consumer Protection Act, 2019, § 28-73, No. 35, Acts of Parliament, 2019 (India)

¹²⁴ Consumer Protection Act, 2019, § 3-9, No. 35, Acts of Parliament, 2019 (India)

V. COMPETITION LAW IN INDIA

Competition act 2002 prevents dominance in the market by taking preventive measures in mergers, anti-competitive agreements, etc. By establishing competitive commission of india as body to promote competition among companies. Promoting a healthy competition among market is the pivotal objective of the act which will promote the production of healthy and quality products among the members of the market.

A. Competition law contains the following

- i. Anti- competitive agreement,
The competition act prohibits any agreement made against the competition of the market either directly or indirectly¹²⁵.
- ii. Regulation on mergers,
The combination of companies or acquisition of companies into one company shall go through an inquiry by the competition commission of india¹²⁶,
- iii. Abuse of dominance in the market,
Any company being in a dominant possession shall not discriminate or restrict any company which is inferior to such company¹²⁷.
- iv. Competition commission of India,
It is established under chapter III section 7- 17 of competition act and its functions are derived in chapter IV section 18-40 of competition act.

VI. TWO WINGS OF A BIRD

Consumer protection act regulates the quality of the goods and services provided by the market. Whereas competition law mandates and promotes the healthy competition in the market. These Two acts aim for the safety of the consumers in its own way. So, these two acts are known to be the wings of the bird i.e a fair market.

VII. EUROPEAN UNION AND INDIA:

The European union sets a standardized mark for the quality of the products being traded across nations to ensure fair trade practices among countries. India is one of its members India being one of the countries to enact its consumer protection law after one year of the

¹²⁵ Competition Act, 2019, § 3, No. 12, Acts of Parliament, 2003 (India)

¹²⁶ Competition Act, 2019, § 6, No. 12, Acts of Parliament, 2003 (India)

¹²⁷ Competition Act, 2019, § 4, No. 12, Acts of Parliament, 2003 (India)

issuance of UN guidelines on consumer protection issued on 1985. Also having Bureau of Indian Standards Act 1986 (BIS) to standardize the quality of the product by the help of several labs constructed under it. established eight laboratories in the country to cater to the testing need of samples generated from Product Certification Scheme, beginning with the establishment of Central Laboratory at Sahibabad in 1962.

Subsequently, four regional laboratories at Mohali, Kolkata, Mumbai and Chennai and three branch office laboratories at Patna, Bangalore and Guwahati were established. BIS laboratories have facilities for testing of products in chemical, microbiological, electrical and mechanical discipline. BIS labs have complete test facilities for 391 Indian Standards and partial test facilities for 358 Indian Standards. During the year, the BIS laboratories tested 16936 samples of various products covered under BIS Certification. In addition, the Gold Referral Assaying Laboratory at Chennai has issued 3450 test reports during the year. being said that in the recent test conducted by EFSA on various food products during 2020-2023 in India 527 products were found containing cancer causing chemicals in it. This raised the concerns of exported products and around 87 consignments were rejected for the same.

To ensure that the laws enacted alone is not the solution, continuous implication of law in the practical world is pivotal to attain the consumer safety accompanied with healthy social and economy's development.

In **Lucknow Development Authority v. M.K. Gupta**

- The Supreme Court, in its judgment, stressed that **consumer protection laws should be dynamic and continuously evolve** to meet the changing needs of society. Justice P.B. Sawant, writing the judgment, observed:
- *"The purpose of the law is to protect the common man from exploitation. The Consumer Protection Act, being a beneficial piece of legislation, must be interpreted in a manner that provides relief to consumers in a just, reasonable, and expeditious manner."*
- The court emphasized that **consumer law must be proactive** in addressing the grievances of consumers, considering that market conditions and the nature of consumer interactions with businesses evolve over time. It noted that **with technological advancements and increasing complexity of services**, consumer protection laws must **continuously improve and adapt** to provide effective safeguards¹²⁸.

¹²⁸ Lucknow Development Authority v. M.K. Gupta, AIR 1994 SC 787.

VIII. COMPARISON OF INDIAN AND FOREIGN CONSUMER PROTECTION LAWS

A. Consumer Protection in USA:

- Federal Trade Commission Act 1914 is the central consumer protection authority in USA. Accompanied with other state authorities for each federal members of united states.
- Federal Trade Commission is responsible for investigating cases, hearing complaints, improving rules and promoting consumer rights and safety.
- With courts such as small claims court and class action lawsuits as its redressal bodies.

B. Consumer Protection in Australia:

- Australian consumer law 2011 under competition and consumer act 2010 governs consumer protection in Australia through Australian competition and consumer commission along with its state level bodies.
- It has the similar rights as India with stronger provisions as to digital transactions under the privacy act. With state level tribunals as its redressal commissions.
- misleading conduct in e-commerce and the Privacy Act for securing the privacy of consumers.

C. Consumer Protection in England:

- Consumer safety is governed by Consumer rights act 2015 and consumer protection from unfair trading regulations. Being Competition and market authority as its central authority which governs along with local trading standards authorities in England.
- Includes similar rights such as right to goods of satisfactory quality, fit for a particular purpose, right to fair terms in contract etc... with extensive privacy protections under general data protection regulation and stronger consumer rights in digital economy and data privacy. With ombudsmen system and alternate dispute resolutions are widely the redressal system and small claims court for minor grievances.

To conclude, Law between these countries and India remains similar. However, the implication of law and appointment of authorities varies between the countries. Which shows that Indian system is less effective compared with other foreign countries.

IX. OTHER CONSUMER RELATED LAWS IN INDIA

A. Bureau of Indian Standards (BIS) Act, 2016

- Ensures the safety, quality, and reliability of goods by standardizing products.
- Mandatory BIS certification for specific products.
- A framework for **product recalls** to protect consumers from hazardous goods.

B. Drugs and Cosmetics Act, 1940

- Ensures the safety and efficacy of drugs and cosmetics in India.
- Regulates the import, manufacture, and sale of drugs and cosmetics to ensure they meet safety standards.

C. Food Safety and Standards Act, 2006

- Ensures food safety and regulates food production and sale.
- Establishment of the **Food Safety and Standards Authority of India (FSSAI)** to oversee food quality and prevent adulteration.

D. Essential Commodities Act, 1955

- Controls the production and supply of essential commodities to prevent shortages and black marketing.
- Regulation of essential goods to ensure their safety and availability, including price control and distribution.

E. Cigarettes and Other Tobacco Products Act (COTPA), 2003

- Regulates the sale and distribution of tobacco products to ensure public safety.
- **Health warnings** on tobacco packaging and prohibitions on smoking in public spaces.

F. Legal Metrology Act, 2009

- Regulates the accuracy of weights and measures to protect consumers from being cheated.
- Standardization of weights and measures in all transactions, ensuring consumers receive the correct quantities of products.

G. Motor Vehicles Act, 1988 (Amended in 2019)

- Ensures road safety and regulates motor vehicle standards.
- Mandates safety features in vehicles and imposes **higher penalties** for traffic violations to protect road users.

H. Insecticides Act, 1968

- Ensures the safe use of insecticides to protect consumers and the environment.
- Regulation of the sale and use of insecticides, ensuring they are safe for human use.

I. Explosives Act, 1884

- Regulates the handling and use of explosives to ensure public safety.
- Guidelines for the safe manufacture, storage, and sale of explosives to prevent accidents.

X. CONCLUSION

Consumer protection and competition laws are crucial for maintaining a healthy market environment. In India, the **Consumer Protection Act, 2019** and **Competition Act, 2002** play a pivotal role in safeguarding consumer rights and promoting healthy competition. The **Consumer Protection Act** ensures product safety and fairness in the marketplace, while the **Competition Act** aims to prevent market dominance and monopolistic practices, ensuring that consumers benefit from quality products and services at fair prices.

The establishment of regulatory bodies like the **Central Consumer Protection Authority (CCPA)** and **Consumer Disputes Redressal Commissions** in India emphasizes the government's commitment to consumer welfare¹²⁹. Similarly, international consumer protection frameworks, such as those in the **USA**, **Australia**, and **England**, provide consumers with robust rights and remedies, often with more advanced systems of enforcement and redressal mechanisms.

However, the comparison reveals that while India's consumer laws are comprehensive, the **implementation and effectiveness** of these laws remain less efficient when compared to foreign systems. Countries like the **USA** and **UK** have stronger enforcement bodies, better redressal systems like **class-action lawsuits**, **ombudsman services**, and extensive **data privacy laws** under regulations like the **GDPR**.

For India to further protect consumers and maintain healthy market conditions, it is essential to continually update and enforce these laws, addressing emerging challenges such as misleading digital advertisements, data privacy, and the safety of e-commerce platforms. As the **Supreme Court of India** observed in the **Lucknow Development Authority v. M.K. Gupta** case, consumer protection laws must evolve with societal changes and technological advancements to ensure effective safeguards. Only through continuous improvement can consumer protection laws serve their purpose in protecting consumers from exploitation, ensuring fair trade, and fostering a healthy market for all.

¹²⁹ Consumer Protection Act, 2019, No. 35, Acts of Parliament, 2019 (India)

BALANCING ECONOMIC GROWTH AND COMPETITION: A LEGAL ANALYSIS
OF PRICE PARALLELISM AND CARTELIZATION IN THE INDIAN TELECOM
SECTOR

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- Shreyanshu Kumar¹³¹

ABSTRACT

The three leading telecommunications service providers in India, Airtel, Jio, and Vodafone Idea hiked prices of its prepaid tariffs in July 2024. They have had some disadvantages such as concern over cartelization and the absence of network regulation. The Ministry of Communications defended the increase by arguing that India has some of the lowest tariffs in the world due to progressive policies in the last decade. Of Course, the Ministry also pointed out that the telecom sector must be financially sustainable for 5G and 6G and sectoral growth. To this end, this paper seeks to understand and analyze the legal and regulatory nature of this hike and deconstruct the thin line between price parallelism and cartelization in the telecommunications industry. In some others, it showed signs of coordinated pricing but failed to act which brings out the major challenge of discerning between normal market activity and cartel conduct. It also analyzes the existing regulatory environment, the functioning of TRAI, and its progressive transformation to ensure competition, establish transparency, and protect consumers. The paper also challenges the rationale for the price increase and the sustainability of the matter for financial gain against the legal requirement to champion the interest of the consumer. As illustrated by the hike set for July 2024, this research explores legal requirements for anti-competitive behaviour, and challenges in regulating cartelization, choice, entry, and fairness. Lasting, it contributes to the constant discussions about how competition law enforcers in the telecom sector are to foster the economy without skewing the market. To assess the legal frameworks for anti-competitive behaviour, the legal obstructions to addressing cartel conduct, and the general impact on competition, consumer options, market access, and equity, this research explores the price increase that was implemented in July 2024.

Keywords: Cartelization, Price Parallelism, Competition Law, Telecom Regulation, Consumer Protection

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I. INTRODUCTION

The Indian telecom sector plays a vital role in the development of the nation's digital economy through services aimed at providing connectivity and advancement. It also carries major drawbacks in terms of promoting equal competition and protecting consumers. In particular, the three main telecom operators—Airtel, Jio, and Vodafone Idea—have increased the prepaid tariffs in unison in July 2024, which led to concerns regarding cartelization and price coordination among the major operators. However, critics argued that price increases concern the sector's financial sustainability and its preparedness for 5G and 6G technology, the affordability question, and the question of consumer choice and fair competition.

This development has highlighted the relationship between market behavior, regulatory authorities, and competition law. The Indian Competition Act of 2002 protects against anti-competitive practices, wherein parallel prices are distinguished from cartels, although proving collusion is difficult. The failure of CCI to act in this case brings out the challenges involved in dealing with such matters.¹³²

Expanding on the instances of price parallelism and cartelization, this paper is devoted to the legal and regulatory aspects of the matter with reference to the case of the tariff increase as of July 2024. It considers issues of financial regulation and consumer protection and the efficacy of the current institutional structure and identifies ways to maintain the efficient functioning of the competition law while not negating the market equilibrium.

II. RESEARCH METHODOLOGY

This study uses a doctrinal research approach, aiming to review the current law on price parallelism and cartelization in India's telecommunications industry, judicial decisions, policy documents, and literature. Through the analysis of certain provisions of the Competition Act of 2002, the works and functions of the regulatory bodies, namely TRAI and CCI, and a case study of the tariff hike of July 2024, this research aims to highlight how regulatory action balances growth and competition law. In the case of secondary sources, reports, journals, and legal commentaries are used significantly to give a broad perspective on the topic.

¹³² Srivastava, Sanjana, and Arjun Gupta. "A Paradigmatic Analysis of Anti-Competitive Agreements and Cartelization-How India's Antitrust Watchdog Has Retaliated." *Issue 4 Indian JL & Legal Rsch.* 4 (2022)

III. HYPOTHESIS

While a free competitive market characteristic that contributes to economic growth and the development of new technology is essential for the telecom's financial health, the sector cannot execute practices that are detrimental to competition and consumers. The current legal regime poses a problem with the definition of legal acts within the market and illegitimate cartelization work. Thus, by following the Competition Law's fresh principles, coupled with better coordination of TRAI and CCI, the existing regulatory vacuum can be effectively filled, and sectoral development and consumer protection can reach reasonable adaptation.

IV. PROBLEM STATEMENT

The telecom sector is one of the key promoters of digitalization and economic progress in India; however, it is experiencing emerging issues of anticompetitive conduct, including price parallelism and possible cartelization. The recent hike in prepaid tariffs by key operators in India, including Airtel, Jio, and Vodafone Idea, where they increased their uniform tariffs that will be effective from July 2024, has given rise to debate as to whether the current regulatory system in India is capable of differentiating between market behavior and cartel. Although the Ministry of Communications attributed the change as necessary for sustainable business operations and to adapt to technology, the increase has been met with concerns regarding decreased options of service providers, barriers to entry, and affordability.

This exhibits regulatory gaps where the Competition Commission of India (CCI) has not been proactively enforcing necessary measures to counter such issues. More specifically, the objective of this paper is to review the applicable legal provisions concerning actions depriving markets of competitive structure, analyze the function of regulatory authorities, and assess the impact of achieving proper financial performance on competition and consumer interests considering the organizational setting of the Indian telecom sector.

V. SCOPE AND LIMITATIONS

This analysis is also confined to the Indian telecom sector, and the tariff hike decision taken in July 2024 is considered as a case to examine the aspects of price parallelism and cartelization. It analyzes the current laws and policies, especially the Competition Act of 2002, together with the responsibilities of TRAI as well as CCI. The study looks into national legal standards but does not examine comparative international antitrust laws.

The limitations of the research are related to the factors in cartel investigations and industry pricing strategies that are publicly available. However, the doctrinal nature of the study excludes the view of the consumer or industry relative to the case. Nevertheless, the present study offers a strong legal approach and viable solutions to preventing and managing competition issues in the telecom sector.

VI. LITERATURE REVIEW

Scholars have already established and analyzed the literature on anti-competitive practices and their regulation in the telecommunications sector from a variety of perspectives. In one study, the existence of elements differentiating price parallelism from cartelization is noted (Smar et al., 2021¹³³); the authors observe that in order to provide evidence for collusion under competition law, mere price resemblance among competitors is not enough. It states that to provide proof of intent, regulators depend on behavioral evidence and an economic approach while balancing competition and financial viability of large capital-intensive industries such as telecommunication.

Another type of study is devoted to the interaction of competition authorities with anti-competitive behavior and the challenges they encounter. It examines how competent the Competition Commission of India (CCI) is in implementing the Competition Act 2002, more so in difficult color cases due to high concentration (Mishra et al., 2015¹³⁴). This study points to the desirability of enhanced cooperation between CCI and sector-specific regulators like the Telecom Regulatory Authority of India (TRAI) to foster a strong offensive while sustaining competitive neutrality.

A third paper focuses on the economic effects of price fixing in an oligopolistic structure with an emphasis that it is detrimental to the buyers. Consumer welfare argues that in concentrated markets, standardization of prices leads to higher prices and less choice available to consumers (Nathani et al., 2017¹³⁵). The study also reveals long-term deleterious effects that might arise through market distortions such as entry barriers for small firms, thereby hampering innovation. In this case, the author urges the authorities to institute tighter control measures in order to eliminate disguises of collusion in the name of financial credibility.

¹³³ Samar, Rohan, and Subham Saurabh. "Cartelization: A Critical Study with Special Reference to the Covid-19 Pandemic." *Issue 3 Int'l JL Mgmt. & Human.* 4 (2021).

¹³⁴ Mishra, Aswini Kumar, and Ganesh Rao. "Analysing Anti-competitive Behaviour: The Case for Indian Telecom Industry." *Science, Technology and Society* 20, no. 1 (2015).

¹³⁵ Nathani, Suhail, and Pinar Akman. "The interplay between consumer protection and competition law in India." *Journal of Antitrust Enforcement* 5, no. 2 (2017): 197-215.

Another assessment probes into the legal and regulatory Elizabeth Gonzales's environment for anti-competitive conduct in Indian telecoms. It discusses the weakness of the legal framework provided by the Competition Act of 2002 and points out the lacunae, making it difficult to detect and prosecute capitalistic conduct (Amarnath & Avinash, 2013¹³⁶). The paper also reveals the problem of proving the collusion of operators by regulators, where elements of pricing strategies can be justified based on market factors. The study suggests increasing the authority of regulatory bodies to investigate and fine-tune legal terminology to reflect new market trends.

Lastly, a comparative study explores how other jurisdictions address similar competitive challenges in the telecom sector. This is an approach borrowed from jurisdictions with a mature competition law regime, including the use of complex techniques such as statistical analysis and econometric modeling to identify collusion (Bhattacharjea, 2008¹³⁷). The study also underscores the need to focus on consumer-sensitive policies, which guarantee that costs remain low and services delivered actively reach out to the vital sectors in the socio-economic framework.

VII. UNDERSTANDING PRICE PARALLELISM AND CARTELIZATION IN THE INDIAN TELECOM SECTOR

The Indian telecom sector, which contributed to the digital revolution of the country, has been criticized over the years for its tariff policies. The recent increase of prepaid tariffs by the leading telecom operators, such as Airtel, Jio, and Vodafone Idea, in July 2024 has again raised the issues of price parallelism or cartel. What this means is that price parallelism connotes a case where prices are adjusted in similar ways by competitors but not in collusion. However, this practice may not necessarily be anti-competitive; it can stem from the current market trends or a consistent strategy. Whereas cartelization occurs when competition law principles are violated and firms engage in formal agreements to set prices or reduce the availability of goods or share markets.¹³⁸

As a result of the tariff hike, several aspects were raised, including the timing and fairness of the implementation of the hike. Both operators submitted similar by-range or price

¹³⁶ Amarnath, Avinash B. "The oligopoly problem: Structural and behavioural solutions under Indian competition law." *Journal of the Indian Law Institute* (2013): 283-306.

¹³⁷ Bhattacharjea, Aditya. "India's New Competition Law: A Comparative Assessment." *Journal of Competition Law and Economics* 4, no. 3 (2008): 609-638.

¹³⁸ Tripathi, Mr Alok And Isha Malhotra. "Project report on price parallelism and tacit collusion with respect to practices under Indian Competition Law." *Competition Commission of India* (2012).

adjustments of similar plans, which may raise concerns about anticompetitive coordination. Such homogeneity triggered concerns about anticompetitive collusion, where firms coordinate their affairs, though not in a legal manner. However, the lack of direct proof made it even more difficult for those monitoring the act, like the Competition Commission of India (CCI), to act. The CCI's failure to intervene in such cases deals with the proof of intent and agreement in price parallelism, which strictly falls between legal competition and unlawful cartelization.

The case also brings into focus the dynamics of competition in the telecommunication industry. The transformation of the industry from a highly pluralized market with a plethora of uncoordinated players to one that is more centralized has provided a suitable environment for price parallelism. Concentration has led to enhancements of scale economies, eradicating the steepness of the downward-sloping demand curve while evoking concerns in regards to market power abuse. This tariff increase came at a time when the government was seeking to make the sector more financially sustainable to make way for 5G and 6G networks. The justification for this policy, supported by the Ministry of Communications, contended that India continues to have one of the lowest tariffs worldwide. However, it seems that the Ministry has a mixed position regarding the balance of the financial interest and consumer interest.¹³⁹

It also shows that there are scopes of many existing regulatory frameworks in controlling and managing such problems. As an independent regulator, TRAI's role is to promote transparency and protect the consumers' interest, but the matter relating to anti-competitive practices cannot be investigated by TRAI, and it is the subject matter of CCI only. This separation of regulation hampers efforts that would address issues related to price parallelism and cartel-like situations.

The increase in the tariffs that were taken in July 2024 shows that this issue involves various market factors, relevant regulations, and the existence of policy goals. While the hike did not lead to an actual enforcement action, it revealed that the legal and regulatory system has a significant problem in defining what is acceptable business conduct and what constitutes a violation of antitrust laws. From the consumers' side, it gave limited options and brought the question of equity to a sector that is crucial to India's digital economy.

VIII. LEGAL FRAMEWORK AND REGULATORY OVERSIGHT

¹³⁹ Mishra, Aswini Kumar, and Ganesh Rao. "Analysing Anti-competitive Behaviour: The Case for Indian Telecom Industry." *Science, Technology and Society* 20, no. 1 (2015): 21-43.

Rules regulating the telecommunications sector in India are primarily based on the principles of competition, transparency, and protection of consumers' rights. The Competition Commission of India (CCI) and the Telecom Regulatory Authority of India (TRAI) are both crucial players in this context, though they work at different levels. TRAI operates mainly in areas related to tariff issues, consumer protection, and service quality, while the CCI's role involves investigating anti-competitive activities such as cartelization, abuse of dominance, and other issues that distort the market.

In the assessment of anti-competitive practices in the telecom sector, certain sections of the Competition Act of 2002, including Section 3 and Section 4, are relevant. Section 3(1) also prohibits agreements that knowingly harm or are intended to harm competition, which is reflected by the term appreciable adverse effect on competition (AAEC). Notably, Section 3(3) affects cartels where parties engage in price-fixing, bid-rigging, and output restriction agreements. However, the existence of a cartel under this section is only established where there is evidence of an actual or an inferred understanding of collusion in line with section 188, which may not always be evident where there is parallel pricing.¹⁴⁰

Even though TRAI is involved in tariff-related issues, competition aspects come into the picture. The Telecom Regulatory Authority of India Act, 1997 empowers TRAI with the authority to regulate tariffs, maintain fairness in competition, and safeguard consumer interests. Although TRAI has powers to act under Section 36 to rectify unfair pricing issues, it exercises no jurisdiction as far as assessing anti-competitiveness or apprehending cartel operations is concerned. This jurisdictional limitation underlines the necessity of cooperation between TRAI and the CCI, which signed a memorandum of understanding in 2011¹⁴¹. Still, the absence of a sequential approach undermines the efficiency of enforcement by delaying or even halting the process.

Again, the July 2024 proposed increase of the prepaid tariff shows how this dual structure can be difficult to navigate. The same can be said for TRAI, which admitted to the rising tariffs but was keen to justify this, citing that it will facilitate the funding of 5G and 6G networks to boost the industry. At the same time, apprehensions over the collusive actions of Airtel, Jio, and Vodafone Idea captured public attention but never went to the CCI for investigation. The failure of the CCI to take action indicated the difficulties of proving collusion under Section 3(3) of the Act where there is no direct proof of an agreement between the firms.

¹⁴⁰ Srivastava, Sanjana, and Arjun Gupta. "A Paradigmatic Analysis of Anti-Competitive Agreements and Cartelization-How India's Antitrust Watchdog Has Retaliated." *Issue 4 Indian JL & Legal Rsch.* 4 (2022): 1.

¹⁴¹ Kathuria, Vikas. "Conflict between regulation and competition law in the Indian telecom sector." *Economic & Political Weekly* 53, no. 38 (2018): 39.

Besides, coupled with the deficiency of proactive regulatory measures, more obstacles influence the enforcement. Tariff regulation at TRAI is mostly ad hoc in nature, and the investigative jurisdiction of the CCI is constrained by proof standards and a lack of resources. This is akin to the complete lack of comprehensive data-sharing rules and protocols that are specifically tailored to cater to sector-based, anti-fraud enforcement efforts.¹⁴²

Thus certain reforms are required to bolster the CCI-TRAI interface, which I explain as follows: The following recommendations for improvement of market intelligence sharing, use of new analytical tools to identify out-of-bounds pricing, and fulfilling the need for training of schedulers can help to overcome the gaps: Effective enforcement measures for avoiding anti-competitive behavior meant establishing strong cooperation with other relevant regulators and improvement of the necessary approaches to the development of a competitive environment in the telecommunications market. Such balance is important in safeguarding an equitable manner of market conduct, consumers' interests, and sound economic development in the country.

IX. CHALLENGES IN DISTINGUISHING LEGAL MARKET BEHAVIOR FROM CARTELIZATION

Legal market behavior and cartelization are some of the difficult areas of competition law enforcement, especially in a sector such as telecom, where price parallelism can be the result of market forces. The future Airtel, Jio, and Vodafone Idea prepaid tariff hike in July 2024 shows the problem of even defining anti-competitiveness in such circumstances. While similar price determination by these operators might have aroused the cartelization fear, establishing the cartel is not always easy as it is accompanied by evidentiary and enforcement challenges.

Cartelization refers to anti-competitive agreements in terms of section 3(3) of the Competition Act 2002 of formatting price, production, or market. But often just with price parallelism, this does not necessarily mean a cartel exists.¹⁴³ Direct evidence of communication is the evidence that establishes communication between two or more parties, conduct incompatible with the exercise of separate discretion, and the parties' designs to act in concert. It becomes quite a tremendous task to gather such evidence in industries where

¹⁴² Chaudhuri, Manas Kumar, Sagardeep Rathi, and Anisha Chand. "The genesis and ailments of cartel regime in India: a critical analysis." *Indian Law Review* 4, no. 3 (2020): 358-389.

¹⁴³ Singh, Madhavi. "The competition for India's antitrust jurisdiction: Competition Commission versus sectoral regulators." *Journal of Antitrust Enforcement* 11, no. 1 (2023): 91-113.

there are few players, such as the telecom industry, given that cartel agreements these days are more covert than overt.

The evidentiary standard requisite to proving cartelization is a third considerable hurdle. The opportunities for private enterprises in Karnataka 75 The evidentiary standard requisite to proving cartelization is a third considerable hurdle. Directly to Section 19(3) of the Act, the regulators have to prove the existence of the agreement or concerted practice. This means exploring other related factors such as price information, structures within the market, and communication transcripts. For instance, when the operation of 5G and 6G technologies was debated in 2024, the operators justified the resource utilization based on financial feasibility considerations only. All such reasons, while they may sound reasonable, may help mask potential collusion.¹⁴⁴

Market concentration also poses additional difficulties to the enforcement of the laws. In the case of a structured industry like Indian telecom, where a few players control the market, many similarities in pricing reflect interdependence and competitive intelligence. One kind of ‘coordinated’ pricing behavior is ‘conscious parallelism,’ where the pricing decisions of several firms just happen to be the same when everyone is trying to achieve the most profit. The CCI has always been of the view in similar situations, as in *Builders Association of India v. Cement Manufacturers Association*¹⁴⁵, that mere awareness that competitors are each likely to engage in similar tactics, without coordination or collusion, does not contravene competition law.

The enforcement of regulation is also hampered by a lack of resources and sometimes a lack of jurisdiction. The investigations by the CCI are not efficient because they lack measures for active market investigation. Though TRAI sets tariffs, it does not investigate anti-competitive intentions, so when it comes to complex matters such as price parallelism, there is a regulatory gap.

X. BALANCING ECONOMIC GROWTH, FINANCIAL VIABILITY, AND CONSUMER PROTECTION

The telecommunication sector in India plays an important role as one of the key drivers of change for the economy, information technology, and socio-economic development. Many policymakers are always in a dilemma about how they are going to ensure that telecom

¹⁴⁴ Parsheera, Smriti. "Challenges of competition and regulation in the telecom sector." *Economic & Political Weekly* 53, no. 38 (2018): 45-52.

¹⁴⁵ Case No. 29 of 2010

operators are commercially successful while at the same time protecting the consumers in the market. The recent prepaid mobile tariff revision done by the major operators like Airtel, Jio, and Vodafone Idea during July 2024 helps in assessing these competing considerations and rationalizing the policies affecting the sector.

A. Reasons for Policies Towards Financial Sustainability

However, the Ministry of Communications attributed the tariff adjustment to the need to provide the necessary financial base for the sector in 2024. The telecom industry as a whole is highly capital-intensive and demands significant investment to support the development and deployment of 5G infrastructure and the expected 6G networks in the future. There has been severe pressure on the operating margin, a factor attributed to the cutthroat pricing adopted during the tariff wars of the last decade, only compounded by the spectrum prices, regulatory fees, and operations expenses.¹⁴⁶

This is based on economic reasons where the government notes that sustainability is a guarantee to funding operational research, expansion of infrastructure, and a sustainable market for new technologies in the future. By permitting the operators to raise tariffs, the Ministry intends to mobilize the much-needed capital to fund technologies critical for realizing other macroeconomic visions like Digital India and Atmanirbhar Bharat. However, this rationale poses more concern about the degree to which financial sustainability offsets consumers' best interests.

B. Implication of Tariff Increases in the Market

The last one has important consequences from a market point of view because it means that their tariffs have to be uniform. While averting high tariffs might increase revenue for telecom operators, it may also denigrate the accessibility and affordability of services. Given that telecom penetration is a factor of socio-economic mobility, costs could be higher for the less privileged, leading to further isolation.

Further, the precise timing of the hike by all the key participants has led to concerns over declining fragmentation in the sector. This suggests that while aggravated prices are justified on the argument of sectoral health, they may also point to a tendency towards oligopolism whereby a handful of players exercise significant influence over the price-setting process.

¹⁴⁶ Gouri, Geeta. "Economic Analysis of Horizontal Agreements and Vertical Agreements (Section 3)." In *A Commissioner's Primer to Economics of Competition Law in India*, pp. 75-144. Singapore: Springer Nature Singapore, 2023.

Such outcomes not only limit consumer sovereignty but may also dissuade potential entrants into the market, hindering creativity and innovation.

C. Striking a Balance between Profit and Consumer Imperative

An important role is attributed to the regulatory framework of the industry as it defines the sufficient margin between profitability and consumer risk levels. India's Telecommunications Regulatory Authority (TRAI) is mandated to protect the interests of the consumer and needs to provide for a precise condition that any change in tariffs is based on actual cost structures and not collusive tariff shocks. The tariff review process at TRAI needs to include a subjective assessment of the impact of tariffs on consumers, especially the lower-income consumers, to prevent affordability problems.

However, the Competition Commission of India (CCI) should also be vigilantly keeping tabs on market behaviour to ensure that an entity or a group of entities does not indulge in abuse of dominance or cartelization. It is therefore important that TRAI and the CCI work closely together to ensure that the financial stability objectives are taken alongside competition law to ensure that operators and consumers are provided with a level playing ground.

Thus, to address the points, the government may further consider intermediaries such as differential pricing for targeting different consumers. For example, subsidies or universal service obligations could provide fair and economical access while allowing the various operators to recover their costs. Transparency in setting tariffs and implementation of early indicator strategies in the detection of market disturbances will enhance the relationship between economic development and consumer satisfaction.

**EQUITABLE MARKET PRACTICES WITH CONSUMER WELFARE AND
ANALYSIS OF THE CONSUMER PROTECTION ACT 2019 AND COMPETITION**

LAW 2002

-Fathima Thuzara¹⁴⁷

ABSTRACT

Consumer Protection Act 2019 and Competition Law 2002 play a pivotal role in ensuring fair market and consumer rights in Indian economy. Consumer Protection Act 2019 was replaced by Consumer Protection Act 1986. The emergence of the digital era and new set of challenges was the need for the emergence of the new act. The Competition Law 2002 replaced the Monopolies and Restrictive Trade Practices Act, 1969. The aim of these acts was to curb unfair trade practices, deceptive advertising, and monopolistic behaviour. This article focuses on the importance of these two acts in unfair trade, monopolistic market and challenges in this digital era. Identifying and analysing how these two frameworks work together for equitable market practices with consumer welfare. In this article Doctrinal Research Methodology is used. Here legislative frameworks are considered, regulatory frameworks in India and globally are focused. The legislative frameworks of EU and US are also considered for comparison and to understand which is the best practice. The regulatory authorities like Competition Commission of India (CCI) and the Central Consumer Protection Authority (CCPA) are also considered to know their contribution. The preliminary analysis shows that both the acts overlap in their working to protect customer and create fair markets especially tackling deceptive practices and abuse of dominance. Many case laws identified the overlap between the two. However, there are challenges in addressing emerging issues like algorithmic collusion, greenwashing, and exploitative practices in the digital economy. This research recommends strategies to strengthen collaboration between the CCI and CCPA to address the emerging issues in the Indian economy.

Keywords: Monopoly, Unfair Trade Practices, Deceptive Advertising, Cartelization and Robust Frameworks

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I. INTRODUCTION

The modern economy of India is shaped by globalization, technological advancements and increased consumer awareness. This changed economy also increased the importance of the Consumer Protection Act, 2019 and Competition Act, 2002. These two acts are distinct in their primary objective but the goal of these two are: ensuring fair and equitable market environment. Consumer Protection Act, 2019 protect the interest of the consumers by preventing them from exploitation, ensuring quality standards and providing platform for redressal of grievances. While Competition Act, 2002 promote healthy competition by restricting monopolistic practices, promoting innovation and preventing abuse of dominance. For the smooth functioning of markets these two legal frameworks are important to enhance the consumer trust and economic growth.

The Consumer Protection Act, 2019 replaced by the Consumer Protection Act, 1986. To address the economic and social changes a modernized legal framework was a necessity. This act modernized the consumer law in India. The act introduced many features like it enumerates six fundamental consumer rights, enhanced the redressal mechanism comprising District, State and National Consumer Disputes Redressal Commissions, introduced Central Consumer Protection Authority (CCPA) to investigate unfair trade practice, initiate class-action suits and impose penalties on violators, made manufacturers, service providers and sellers liable for the products, brought regulation of E- Commerce mandating transparency, grievance redressal and compliance with fair trade practice and made penalties for misleading advertisements. The new act made the consumer more empowered, E-Commerce regulations and the establishment of the CCPA facilitates actions against violations that leads to reducing dependency on lengthy judicial processes.

The Competition Act, 2002 replaced by the Monopolies and Restrictive Trade Practices Act, 1969. The new act replaced the focus from curbing monopolies to promote competition. The act focuses on maintaining market equilibrium for that it regulates anti- competitive agreements, regulates mergers and acquisitions, and addressing abuses of market power. The key sections of the act are: section 3 Anti – Competitive agreements¹⁴⁸, section 4 abuse of dominant position¹⁴⁹, section 5 and 6 regulations of combinations, and the most important introduction of Competition Commission of India (CCI) for investigating anti-competitive practices, imposing penalties and promoting competition advocacy. ¹⁵⁰The introduction of the

¹⁴⁸ Competition Act, 2002, No. 12, § 3, Acts of Parliament, 2003 (India).

¹⁴⁹ Competition Act, 2002, No. 12, § 4, Acts of Parliament, 2003 (India).

¹⁵⁰ Competition Act, 2002, No. 12, §§ 5–6, Acts of Parliament, 2003 (India).

new act develops market efficiency, comprehensive coverage of anti- competition practices and the CCI has actively investigated and penalized the violators.

The ultimate goal of both the acts is promoting fair market practices. When business engage in any kind of anti-competitive behaviours the consumers are also held to bear the brunt. The mechanism of competition act to curb such practices indirectly contributing to consumer welfare. Likewise, the consumer act also indirectly ensures that business do not exploit their market position through unfair trade practices and thus enable a trust in the market system. It is evident here that fair competition inherently leads to better consumer protection. Good competitive markets compel the businesses to innovate, improve products quality and offer best goods and services at reasonable and affordable rates. This not only benefits the consumers but also develop the economy of the country. Vice versa, the consumer protection laws strengthen the competition by ensuring that no business practices fraudulent activities for unfair advantage.

The integration of Consumer Protection Act, 2019 and Competition act, 2002 is not only a legislative necessity but also a socially and economically relevant too. Both these laws equally contribute to create an environment of sustainable development and equitable growth. The interplay of these acts is very important for the functioning of modern markets. Consumer Protection Act focus on safeguarding individual rights while competition Act focus on issues that affect the market. India is a developing country which is ready to evolve as a global economic powerhouse there the relevance of these laws cannot be ignored.

II. INTERSECTION OF CONSUMER PROTECTION AND COMPETITION LAW

Both laws main aim is to protect consumers through different mechanisms. But consumer protection law directly protects the consumers while competition law supports healthy competitions which indirectly benefits the consumers. The unfair trade practices like deceptive advertising, predatory pricing and tie-in arrangements violate both the laws. Like: A monopolistic company engaging in misleading advertisements not only harms the trust of the consumer but also it is a harm to the competition of that market.

The Competition Commission of India (CCI) under the Competition Act, 2002, and the Central Consumer Protection Authority (CCPA) under the Consumer Protection Act, 2019, plays a significant role in regulatory mechanism and coordination.

A. Competition Commission of India (CCI):

Prevents anti-competitive agreements by prohibiting cartels, price- fixing and bid rigging and monitoring the agreements that harm competition

Regulates abuse of dominance

Regulates mergers and acquisitions that adversely affect competition

Promotes awareness about competitive practices and their benefits

B. Central Consumer Protection Authority (CCPA):

Addressing unfair trade practices by investigating cases of false advertising and take actions against them.

Make manufacturers and service providers accountable for defective goods and services.

Ensures consumer safety.

C. Coordination between CCI and CCPA

CCI and CCPA have overlapping jurisdiction in many ways:

False Advertising CCI addresses anti-competitive effects of deceptive practices that harm competition. While CCPA addresses consumers who are directly affected by misleading advertisements.

Unfair Trade Practices CCI focus on practices that distort competition and CCPA focus on individual consumer grievances.

Product Quality and Safety CCPA looks into cases related to consumer safety and CCI intervene in substandard products resulted from cartel-like behaviour or abuse of dominance.

D. In the case of Dhanraj Pillay & Others v. Union of India (1997)¹⁵¹ the impact of monopolistic practices on both market competition and consumers are highlighted. This case extended the principles of competition law to a different domain like sports. It demonstrates that there is an interplay between monopolistic practices, individual rights and public interest. This case was brought by Indian Hockey players including Dhanraj Pillay. The case was an allegation against Indian Hockey Federation for unfair practices. The monopolistic control exercised by the federation over the sport which harmed the players opportunity and violated their rights. The case also pointed that how the monopolistic practices affect the sports development and limited the players opportunity to participate in international leagues and tournaments.

E. Cartels and anti-competitive practices in the automobile sector have been a notable point in many cases. Cartels in the automobile industry includes agreements between manufactures, suppliers or dealers to fix price, limit production, allocate markets and restrict

¹⁵¹ Dhanraj Pillay & Others v. Union of India, (1997) 1 SCC 1 (India)

technological advancements. These activities distort competition and harm market and consumers because these may lead to artificially inflated prices and reduced choices. Auto Parts Cartel are series of lawsuits related to auto part industry, where the CCI fined many automobile companies for participating in anti-competitive practices related to the supply of spare parts and after sales services. Tyre Manufacturers Cartel (2021)¹⁵² CCI penalized five major tyre manufacturers for cartelization. In the case of Maruti Suzuki India Limited (2021) Maruti Suzuki was penalized for Resale Price Maintenance (RPM) here they imposed restrictions on dealers by preventing them from offering discounts beyond a fixed limit.¹⁵³

F. Modern day problems like algorithmic collusion, exploitative data usage and manipulation of search results directly and indirectly affects both competition and consumer rights.

Algorithmic Collusion means setting of prices or coordinate actions using algorithms by the company without explicit agreements. This can distort market dynamics and enable companies to act as cartel without direct human intervention this leads to violation of provisions of Competition Act, 2002. Algorithmic collusion also harms consumers by compelling them to pay more for goods and services.

Exploitative Data Usage is a platform which collect vast amounts of consumer data and use it to influence the purchasing behaviour of the consumer. Dominant platforms with vast amounts of consumer data exploit their data and exclude the entry of competitors leading to abuse of dominance. This can also lead to misuse of consumer data.

Platforms tweak algorithms to promote their own products is called manipulation of search results. The main aim of this is to suppress the visibility of the competitors and creates a lot of disadvantages to the smaller or independent competitors. Also creates a misconception in the mind of the consumers that promoted goods are the best options. This practice violates both competition law and consumer protection law.

Platforms like Amazon or Flipkart prioritizing their private –labelled products in search results are an issue of competition law because here smaller sellers are excluded which leads to reducing market competition. Also, it is a concern of Consumer issue because these search results are misleading the consumers by believing promoted goods are the best actually which is not.

¹⁵² All India Tyre Dealers Federation v. Tyre Manufacturers, 2013 COMP LR 92 (CCI), MRTP Case - RTPE No. 20 of 2008 (Oct. 30, 2012) (India).

¹⁵³ Competition Commission of India, Suo Moto Case No. 01 of 2019, CCI (2021).

Another example can be seen in the Ride-Sharing Apps like Uber or Ola. They use algorithms for pricing which can lead to surge in pricing during peak times. This reduces price competition among drivers and consumers face inflated fares without alternatives.

G. EU Microsoft Case (2004)¹⁵⁴ is a landmark example for both market harm and consumer harm. The European Commission accused Microsoft for abusing its dominant market position for bundling its Windows Media Player with its Windows operating system which cause harm to other rival media player developers. Non sharing of interoperability information leads to difficulty for their server software to function effectively with windows. Microsoft's bundling practices was an abuse of dominance in the PC operating system market under Article 102 of the Treaty on the Functioning of the European Union (TFEU) which is actually a market harm. This also leads to reduced consumer choice and innovation stifling which is a consumer harm. The decision of the case reinforced the principle that dominant companies should have a "special responsibility not to distort competition" and highlighted those anti-competitive practices not only harm competitors but also consumer with fewer choices.

III. ADDRESSING UNFAIR TRADE PRACTICES, DECEPTIVE ADVERTISING AND PRICE FIXING

A. Deceptive advertising

With the intention of misleading consumers make false, misleading or exaggerated claims about a product or service is called Deceptive advertising. Deceptive advertising involves: Misrepresentation of the product quality, characteristics or benefits, advertising a product at a low price but not intending to sell it at that low price called Bait Advertising, Omissions of critical information about the product or service like terms and conditions. Legal frameworks in India to protect consumers from deceptive advertising are Consumer Protection Act, 2019 and The Advertising Standards Council of India (ASCI).

B. Unfair Trade Practices (UTPs)

Unethical or fraudulent business practices that deceive or harm consumers are called unfair trade practices. UTPs involves false representation or misleading statements about the quality, warranty or affiliation of the product or services, coercive selling, offering returns based on recruitment rather than product sales called pyramid schemes. Legal frameworks in

¹⁵⁴ Commission Decision of 24 March 2004, Case COMP/C-3/37.792 Microsoft, C (2004)900 final

India to protect consumers from UTPs are Consumer Protection Act, 2019 and Competition Act, 2002.

C. Cartelization

When businesses collude to control prices, supply or markets, undermining fair competition there occurs cartelization. It involves price fixing, market allocation and output limitation. Legal framework in India to control cartelization is Competition Act, 2002. Section 3 of the act prohibits anti-competitive agreements. The act also provides Competition Commission of India (CCI) to investigate and penalizes the cartels.

D. Identifying False Claims in Advertisements

By critically evaluating the content of advertisements false claims in advertising can be identified. Principles of fair market practices is violated, and consumer perceptions are manipulated through false claims. There are different modes of false claims like puffery, omission of material facts and bait-and-switch tactics. It is necessary to identify and verify these through different mechanisms of verification like consumer surveys and third-party audits.

E. Puffery in Advertisements

Exaggerated, hyperbolic or boastful statements made in advertisements that are not intended to be taken literally. These are subjective opinions rather than objective facts. These statements are used to attract consumer attention and create a positive impression about the product or service among the consumers, e.g. “The best coffee in the world!”. Puffery is non-actionable because it is opinions rather than facts. But there are situations when puffery crosses the limit of mere opinions into false factual claims then it becomes deceptive. So, it becomes a big challenge to distinguish between permissible exaggeration and deceptive misrepresentation.

F. Omission of Material Facts

Business intentionally fails to disclose significant information which is very essential for a consumer to decide about selection of the product or service is called omission of material facts. Omission of relevant information may mislead consumers by presenting an incomplete picture of the product or service which results in unfair trade practices, e.g. Hidden terms and conditions like warranties with unmentioned exclusions, non-disclosure of the side effects of health-related products. Section 2(28) of the Consumer Protection Act, 2019 defines misleading advertisements.

G. Bait-and-Switch Tactics

It is a kind of deceptive marketing practice where sellers advertise a product or service at a very attractive price called “bait”. After that when the consumer expresses interest in the product or service the seller redirects them to buy more expensive or less favourable option called “switch”. This type of tactic used by the business to manipulate consumer by exploiting their initial interest them by seeing the advertisement is called Bait-and-switch tactics. The main excuses they use to manipulate the consumer are advertised product is unavailable, limited stock, inferior quality e.g. an electronics store advertises a laptop at very discounted rate but upon inquiry they claim that it's sold out and insist on higher-priced models. Consumer Protection Act, 2019 and CCI's oversight under the Competition Act, 2002 prohibits this practice as an unfair trade practices.

There are different mechanisms for substantiating the claims like, consumer surveys where they gauge the impressions of an average consumer to understand that whether an mislead the benefits and third-party audits to ensure objectivity and credibility in validating claims like ISO labels or government endorsements. Another mechanism is comparing the advertised product against the competitors.

H. Case Study

i) Cement Cartelization

Cement cartelization has become a global issue addressing unfair trade practices, deceptive advertising and price fixing. There are many cases let us discuss some among them.

Indian Cement Cartel Case (2012)¹⁵⁵

Here, the cement companies intentionally restrict the production of cement even though they have enough manufacturing capacity to create scarcity which leads to increase in price and exploiting both consumers and other industries related to cement industry. Which is an unfair trade practice. The companies also portrayed cement as readily available concealing the scarcity they created through advertisements which leads to deceptive advertisements. The cement manufactures and Cement Manufacturers Association (CMA) decided to standardize the prices across the market for the purpose of eliminating competition and keep prices high. The Competition Commission of India (CCI) imposed penalty for cartel's anti-competitive behaviour.

ii) South Africa Cement Cartel Cases (2008–2012)

¹⁵⁵ Builders Association of India v. Cement Manufacturers Association & Ors., Case No. 29 of 2010, [2012] CompLR 350 (CCI).

Here also the key issues addressed were unfair trade practices, deceptive advertising and price fixing.¹⁵⁶

iii) European Cement Cartel Case (2000)¹⁵⁷

The same kind of unfair trade, deceptive advertising and price fixing were also followed here. The European Commission imposed fines exceeding 250 million Euro.

These are examples to show recurring challenges in addressing cartel behaviour in the cement industry. Unfair trade practices like artificial scarcity, market division and entry barriers, Deceptive advertising like misrepresentation of prices and market conditions to maintain consumer trust and coordination through associations to undermine competition are the common types of challenges.

IV. ENHANCING CONSUMER WELFARE THROUGH ROBUST FRAMEWORKS

A strong, well-designed and reliable systems that are adaptable to changing conditions and challenges are called robust frameworks. To enhance consumer welfare a well-structured, effective and regulatory legal system which ensures fair market practices and healthy competition is needed. Key elements of Robust frameworks are laws must comprehensively cover unfair trade practice, effective enforcement mechanism, consumer empowerment, market oversight, accountability, adaptability to the modern market, should strike a balance between innovation and protection of consumers, judicial and quasi-judicial support needed for effective functioning.

A. The Federal Trade Commission (USA) guidelines to enhance consumer welfare and fair competition

The Federal Trade Commission regulates consumer protection and competition laws in the US. It enhances competition by preventing anti-competitive practices like mergers, monopolization, predatory pricing and encourage innovation. For consumer welfare FTC restricts deceptive practices, fraud, data privacy and online scams.

The Federal Trade Commission has worked to regulate Big Tech companies like Facebook now Meta, Google, Amazon compliance with data usage, monopolistic practices and transparency. FTC demands transparency in data collection, storage and use, limitation on data misuse. Enhanced enforcement of laws like COPRA (Children's Online Privacy

¹⁵⁶ Competition Comm'n of S. Afr., "South Africa Cement Cartel Case (2008–2012)," available at https://unctad.org/system/files/information-document/ccpb_Summary_Cement_Cross_Border_Cartel_SACU_en.pdf.

¹⁵⁷ Cimenteries CBR and Others v. Commission, Joined Cases T-25/95, T-26/95, T-30/95, T-32/95, and T-33/95, [2000] E.C.R. II-491.

Protection Act) for protection children's data. Investigating anti-competitive behaviour and regulating mergers and acquisitions e.g. Facebook acquisition of Instagram and WhatsApp. Ensuring that algorithms are not misusing consumers and competitors. AI is the emerging trend now, so there are guidelines addressing AI and Algorithmic practices like AI transparency, fairness in algorithms.

Some of the actions of FTC against Big Tech are mentioned below:

1. Facebook was held liable to pay a \$ 5 billion fine for privacy violation. FTC has filed a suit against Facebook after acquisition of Instagram (2012) and WhatsApp (2014) alleging it as an act to suppress competition.¹⁵⁸
2. Google was scrutinized for its search engine dominance which disadvantaged its competitors. Google prioritized its own services e.g. google maps over competitors in search engine which reduced consumer choice and disadvantaged the smaller businesses.¹⁵⁹

B. EU Guidelines (European Union) guidelines to enhance consumer welfare and fair competition

EU enforces consumer and competition law through the European Commission (EC) and legislations like The General Data Protection Regulation (GDPR) and Digital Markets Act (DMA) these are landmark legislations to address the influence of digital platform in Consumer and competition laws. The role of EU in consumer protection are, prohibits misleading advertisements through Unfair Commercial Practices Directive (UCPD), ensure transparency in transactions and regulates data privacy.

Treaty on the Functioning of the European Union (TFEU) is one among the primary treaties that governing EU. It includes competition policy, internal market rules and consumer protection. Article 101 TFEU prohibits anti-competitive agreements, article 102 TFEU regulates abuse of dominant market positions. Guidelines of EU also put merger regulations to ensure that competitors are not harmed. Recently, Digital Services Act (DSA) and Digital Markets Act (DMA) are introduced to consumer protection and competition in digital platforms. EU fined Google €4.34 billion for abuse of dominance in the Android Market. Google required manufactures to pre-install Google apps in the device which limited consumer choice and competition. This was one among the act of EU under DSA and DMA to prevent monopolistic behaviour in the digital economy.

¹⁵⁸ Federal Trade Commission (FTC) v. Facebook, Inc., Case No. 19-2183, 2020 WL 2832078 (D.D.C. May 12, 2020).

¹⁵⁹ European Commission, Google Search (Shopping), Case AT.39740, Decision of June 27, 2017, C(2017) 4444 final, available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_3964_5.pdf.

C. Competition Law Frameworks Globally

i) Antitrust Laws in the US

The Sherman Act (1890), the Clayton Act (1914) and the Federal Trade Commission Act (1914) are the foundational laws of the Antitrust Laws in the US. The success factors of these laws are strong enforcement mechanisms like the Department of Justice (DOJ) and the Federal Trade Commission (FTC) to actively investigate and prosecute anti-competitive behaviours. These laws are well updated and adapted to modern markets which is evident in its actions against big tech like Google, Meta and Amazon for monopolistic practices in the digital economy. Landmark cases like *United states v. Microsoft Corp. (2001)*¹⁶⁰ the case which prevented monopolistic practice in the software market and *FTC v. Qualcomm (2020)*¹⁶¹ which addressed the abuse of dominance in licencing for essential patents.

ii) EU Competition Law

The EU Competition Law is governed by Article 101 and Article 102 of the Treaty on the Functioning of the European Union (TFEU) with the assistance of the Digital Markets Act (DMA) and the Digital Services Act (DSA). The main highlight of these laws is the harmonized consistent enforcement across the EU member states. Notable cases of EU Competition Law are against Google in 2018 for abusing its dominance by insisting its manufactures to pre-install google apps on android devices and another case against Microsoft in 2013 for failing to offer users a choice of web browsers.

Indian Competition Act, 2002 enforced by the Competition Commission of India (CCI). United Kingdom Competition and Markets Authority (CMA) governed by The Competition Act 1998 and the Enterprise Act 2002.

Australian Competition and Consumer Commission (ACCC) key framework is the Competition and Consumer Act 2010.

Canada Competition Act, 1985 enforced by the Competition Bureau.

These are the other notable laws globally.

V. CONCLUSION

In conclusion we can understand that Indian laws lack specific laws or provisions for digital monopolies like the EU's DMA which are efficient in addressing tech giants and gatekeeping practices. Data protection in India is still developing and lagging behind the EU's General

¹⁶⁰ 253 F.3d 34 (D.C. Cir. 2001)

¹⁶¹ *F.T.C. v. Qualcomm Inc.*, 411 F. Supp. 3d 658 (N.D. Cal. 2019), available at [Leagle.com](https://www.leagle.com)

Data Protection Regulation (GDPR). Many countries nowadays use Alternative Dispute Resolution for enforcement of laws, this makes India slower in enforcement of consumer rights. International cooperation like the UNCTAD (United Nations Conference on Trade and Development)¹⁶² an intergovernmental body in Geneva aims to support developing countries to integrate into global economy. It also states that India's domestic policies are effectively engaging in global regulatory forum like UN, WTO, WHO, UNFCCC etc. India participates in global discussions data protection, its domestic Digital Personal Data Protection Act, 2023 is still evolving to balance global best practices and local needs.

By inspiring lessons from EU and FTC India can develop its competition and consumer protection laws. Introducing digital market regulations like EU's DMA for addressing monopolies and gatekeeping practices, data privacy protection laws like GDPR, ensure Digital Personal Data Protection Act, 2023 are enforced constantly, ensure coordination between state and central authorities for uniform enforcement of consumer laws, increase funding of Competition Commission of India.

Robust competition law frameworks are essential for enhancing consumer welfare. By ensuring fair prices, encouraging innovation and increasing the availability of different choices to the consumers helps for efficient laws for the market economy in India. Successful examples from EU, US and India are evident for the importance of adaptability, strong enforcement and balance of consumer and competition goals. So, dynamic, consumer friendly markets are the aim of this research paper. The comparative analysis of Consumer Protection Act, 2019 and Competition Act, 2002 shows the intersection and ultimate goal of these laws. Several robust frameworks globally are discussed here. At last, recommendations for the development of Indian laws to high standard are also discussed.

¹⁶² United Nations Conference on Trade and Development (UNCTAD), available at <https://unctad.org/>.

LEGAL STRATEGIES TO COMBAT UNFAIR TRADE PRACTICES

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ABSTRACT

Unfair trade practices, deceptive advertising, and price fixing are a very common illegal business practices which leads to the violation of consumer rights. This paper emphasizes on the analysis and the need to strengthen legal frameworks, promotion of consumer awareness, international cooperation enhancement, foster competition, encouraging self-regulation, leverage technology, and support class action lawsuits. Specifically, the paper proposes to modify the legislation to align with contemporary business practices, imposition of substantial penalties for violations, and expanding the enforcement powers of regulatory agencies. It also advocates for educating consumers about their rights and providing accessible resources to report violations. Additionally, the paper emphasizes the importance of harmonizing standards and facilitating cross-border investigations and prosecutions to address the global nature of unfair trade practices. To foster competition, the paper suggests to minimise barriers for start-up businesses, limiting market concentration, and promoting market entries. It also encourages self-regulation through the development and adoption of industry-specific codes of conduct and peer review mechanisms. Furthermore, the utilisation of data analytics and artificial intelligence should be integrated for identification of patterns of unfair trade practices and detection fraudulent activities. Encouragement and use of class action lawsuits must be practiced as a medium to facilitate collective action by consumers against companies engaging in unfair practices. By implementing these strategies, the government, regulatory agencies, and businesses can work together to create a fair and competitive marketplace that benefits consumers and promotes honest business practices.

Keywords: Legal frameworks, Consumer awareness, international cooperation, foster competition, Self-regulation, Technology, Class action lawsuits

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I. INTRODUCTION

Unfair trade practices pose significant challenges to consumer rights, market fairness, and economic integrity. These practices, ranging from deceptive advertising to anti-competitive behaviours, undermine trust in commerce and disadvantage both consumers and ethical businesses. As the global economy evolves, especially with the rise of digital platforms and cross-border trade, traditional regulatory frameworks often struggle to keep pace with emerging complexities. The rapid integration of technologies, such as artificial intelligence and data-driven analytics, has introduced new dynamics that require adaptive and robust measures to address.

To effectively combat unfair trade practices, a multifaceted approach is essential. Strengthening legislative frameworks provides the foundational basis for regulating market behaviour, while consumer awareness and education empower individuals to recognize and resist exploitation. International cooperation ensures that regulatory gaps across borders are minimized, fostering consistent global standards. Promoting healthy competition by encouraging new market entrants and preventing monopolistic dominance further discourages unethical practices. At the same time, fostering industry self-regulation and leveraging technological advancements enable proactive and innovative responses to emerging threats. Finally, supporting mechanisms such as class action lawsuits ensures that consumers can collectively seek justice, even against powerful corporations.

This comprehensive strategy emphasizes the importance of collaboration among governments, businesses, and civil society to create an equitable marketplace. By integrating legal reforms, consumer empowerment, and technological innovation, we can establish a system where fairness and accountability become the norm, ultimately benefiting consumers and promoting sustainable economic growth.

II. ENHANCING EXISTING LAWS AND REGULATIONS

Addressing unfair trade practices requires a strong legal foundation. Strengthening legislative frameworks is the cornerstone of tackling unfair trade practices. Modern business dynamics, particularly those involving e-commerce and global trade, demand laws that are both adaptive and enforceable. Effective laws, combined with strict enforcement, create an environment where unethical business practices are deterred and consumers are protected.

A. Updating Legislation

Existing laws governing unfair trade practices often fail to encompass the complexities of modern commerce. The rapid growth of digital platforms, artificial intelligence in pricing algorithms, and cross-border e-commerce have created new avenues for exploitation. Legislation must be updated to explicitly cover these scenarios. Additionally, modern laws should address deceptive practices specific to the digital age, such as fake reviews, misleading website interfaces, and hidden terms in digital contracts. The legislative reforms must focus on

- **Explicit Provisions for Digital Markets:** Laws should address issues such as dynamic pricing algorithms, misleading digital advertising, and fraudulent online reviews. For instance, the European Union’s Digital Markets Act represents a step forward in regulating online platforms.
- **Consumer Protection in E-commerce:** Rules ensuring transparency in online transactions—such as mandatory disclosure of data collection practices—can prevent businesses from misleading consumers.
- **Sector-Specific Reforms:** Industries with unique challenges, like pharmaceuticals or financial services, may require tailored legislation to address specific forms of unfair practices.

By modernizing laws, governments can ensure they remain effective in safeguarding fair competition and consumer rights.¹⁶⁵

B. Increasing Penalties

Penalties for violations should be severe enough to dissuade companies from engaging in unfair practices. Currently, fines imposed on corporations are often absorbed as a cost of doing business rather than serving as a deterrent. For instance, a company earning billions annually may not be deterred by a fine amounting to a fraction of its profits. To enhance deterrence,

- **Graduated Penalties:** Imposing fines proportionate to a company’s revenue ensures that penalties are impactful.
- **Non-Monetary Penalties:** Temporary operation bans, license revocations, and executive accountability can add a personal and organizational cost to violations.
- **Reputational Consequences:** Publicizing penalties can act as a deterrent by impacting a company’s brand image and consumer trust

¹⁶⁵ Kumar, S. (2020). *Updating Legal Frameworks for E-Commerce*. Journal of Cyber Law, 19(3), 88-102

Implementing a sliding scale for penalties based on the revenue of the violating entity can ensure proportionality and effectiveness. Beyond financial penalties, sanctions such as suspension of licenses, public disclosure of violations, and restrictions on participating in government contracts can reinforce accountability and discourage malpractice.¹⁶⁶

C. Expanding Enforcement Powers

Regulatory agencies often lack the authority or resources to thoroughly investigate and address unfair trade practices. This lack of capacity enables companies to exploit regulatory gaps with minimal risk. Key reforms include

- **Enhanced Investigative Authority:** Agencies should have access to company records, whistleblower protections, and advanced tools for digital surveillance.
- **Proactive Monitoring:** Periodic audits, especially in high-risk sectors, can identify and address issues before they escalate.
- **Cross-Agency Collaboration:** Collaboration between competition authorities, consumer protection agencies, and tax authorities ensures comprehensive enforcement.

Expanding enforcement powers allows agencies to investigate proactively, conduct audits, and access relevant business data, ensuring timely interventions. In countries where regulators operate independently of political influence, these expanded powers can significantly enhance their effectiveness. However, safeguards against abuse of power, such as judicial oversight and transparency requirements, are equally essential to maintain public trust.¹⁶⁷

III. PROMOTING CONSUMER AWARENESS AND EDUCATION

Empowered consumers are a cornerstone of a fair marketplace. Knowledge about their rights and the ability to identify and report violations enable consumers to resist exploitation.

A. Informing Consumers

Consumer education campaigns are critical for raising awareness about unfair trade practices. Informed consumers can recognize tactics like bait-and-switch advertising, misleading discounts, and exploitative contracts. Governments, businesses, and civil society organizations can work together to disseminate information through various channels, including traditional media, social media platforms, and community workshops. Some of the strategies for effective consumer education are

¹⁶⁶ Doherty, J. (2018). *Impact of Penalties on Corporate Behaviour*. Journal of Corporate Law, 9(2), 150-163

¹⁶⁷ White, D. (2021). *Challenges in Regulatory Enforcement*. Business Law Review, 11(4), 132-148

- **Multimedia Campaigns:** Using television, radio, social media, and community programs to reach diverse audiences.
- **Tailored Education:** Programs targeting specific demographics, such as online safety tips for seniors or financial literacy for students.
- **Integration in Curricula:** Introducing consumer rights education in schools and colleges ensures long-term awareness.

For example, online videos demonstrating how to identify fake product reviews or understand fine print in contracts can be highly effective. Schools and colleges can also incorporate basic consumer education into curricula, ensuring that future generations are equipped to navigate the marketplace.¹⁶⁸

B. Providing Resources

In addition to education, consumers need access to resources that empower them to act. Easy-to-use tools, such as mobile applications or helplines, can simplify the process of reporting violations. Furthermore, creating centralized online platforms where consumers can view reported violations and outcomes of regulatory actions can increase transparency.

Certain suggestions that can be enforced are

- **Reporting Platforms:** Easy-to-use apps or websites where consumers can lodge complaints with regulatory agencies authorized by the Government. For instance, a government app could allow users to upload evidence, such as photos of misleading advertisements or receipts, directly to regulatory agencies.
- **Legal Assistance:** Free or subsidized legal aid for consumer disputes ensures access to justice.
- **Knowledge Repositories:** Online databases of case studies and FAQs on common unfair practices can help consumers identify issues. For instance, referring websites like Quora to clarify and guide the consumers based on other consumer's experiences on similar issues.

These resources not only empower individuals but also contribute to collective consumer advocacy efforts.¹⁶⁹

IV. ENHANCING INTERNATIONAL COOPERATION

¹⁶⁸ Johnson, P. (2019). *Consumer Education in the Digital Age*. *Journal of Consumer Studies*, 10(1), 43-52

¹⁶⁹ Goodman, H. (2021). *Consumer Advocacy and Protection Strategies*. *Consumer Rights Quarterly*, 5(2), 67-79

In today's interconnected world, unfair trade practices often extend beyond national borders. To address these challenges, International Cooperation is vital.

A. Harmonizing Standards

Divergent standards across countries create regulatory loopholes that companies can exploit. For example, a multinational corporation might adhere to stringent advertising rules in one jurisdiction while engaging in deceptive practices in another with weaker regulations. Harmonizing standards can prevent such exploitation and create a level playing field for businesses operating internationally. To address this:

- **Global Frameworks:** International organizations like the World Trade Organization (WTO) can lead efforts to establish universal trade standards. These standards may include:
 1. **Transparency in Labelling:** Clear and accurate product information, ensuring consumers can make informed choices.
 2. **Ethical Advertising:** Prohibiting false claims and misleading promotions across all member states.
 3. **Data Protection:** Implementing consistent guidelines for safeguarding consumer data in global transactions.

A notable example is the WTO's Agreement on Technical Barriers to Trade, which seeks to ensure that technical regulations, standards, and conformity assessments are non-discriminatory and do not create unnecessary obstacles to international trade.

- **Model Laws:** The United Nations Guidelines for Consumer Protection provide a robust template for countries to align their national laws. By adopting these model laws, nations can ensure a baseline of consumer protection that addresses deceptive practices, fraud, and exploitation globally.
- **Mutual Recognition Agreements:** Countries can enter into agreements to recognize and enforce each other's regulations. For instance, the European Union operates on a principle of mutual recognition, where products lawfully sold in one member state can be sold in another, provided they meet agreed-upon standards. Such agreements foster seamless regulatory environments and simplify compliance for businesses operating across borders .¹⁷⁰

B. Coordinating Enforcement

¹⁷⁰ Chen, R. (2020). *International Standards in Trade Practices: A Comparative Study*. *International Trade Review*, 28(4), 327-340

Global coordination among regulatory agencies is vital for tackling cross-border violations. Mechanisms for corporate executives involved in criminal practices can significantly enhance enforcement. Mechanisms for coordination include:

- **Information Sharing:** Platforms for sharing intelligence enable regulators to identify and respond to emerging threats more effectively. For example:
 1. **Market Trends Analysis:** Understanding global patterns in pricing or advertising that may indicate collusion.
 2. **Corporate Oversight:** Tracking entities with a history of violations across multiple jurisdictions.

The International Consumer Protection and Enforcement Network (ICPEN) is a key player in facilitating such exchanges, helping regulators collaborate on investigations and share best practices

- **Joint Task Forces:** Collaborative investigations enable regulators to pool resources and expertise. Organizations like the International Competition Network (ICN) lead joint task forces to address anti-competitive practices, particularly in industries with significant cross-border activity, such as technology and pharmaceuticals.
 1. **Capacity Building:** Many developing nations lack the resources to enforce complex regulations. Capacity-building initiatives can address these disparities by providing:
 2. **Training Programs:** Equipping regulatory personnel with skills in digital forensics, market analysis, and legal frameworks.
 3. **Resource Sharing:** Offering access to tools, technologies, and funding for enforcement actions.

Strengthening such networks can improve the collective capacity to address global challenges.¹⁷¹

V. FOSTERING COMPETITION

Healthy competition in the marketplace is a fundamental driver of innovation, efficiency, and consumer welfare. Competitive markets naturally curb unfair trade practices by encouraging businesses to focus on providing value to consumers rather than exploiting market dominance. This section explores two critical strategies for fostering competition: promoting market entry and limiting market concentration.

¹⁷¹ Park, Y. (2019). *Cross-Border Regulatory Cooperation*. Global Business Journal, 14(3), 289-300

A. Promoting Market Entry

Reducing barriers to entry for new businesses can stimulate competition and prevent monopolistic practices. Policies such as simplified business registration processes, financial support for startups, and access to affordable credit are effective in encouraging new entrants. In the tech sector, for instance, reducing the dominance of established platforms can allow innovative startups to compete. Certain strategies can be implemented to reduce these barriers. They are:

- **Access to Capital:** Low-interest loans or grants for startups.
- **Simplified Regulations:** Streamlined procedures for registering and operating businesses.
- **Infrastructure Development:** Investments in technology and logistics infrastructure to support new entrants.

Governments can also promote fair access to essential resources like distribution channels and digital infrastructure to ensure a level playing field.¹⁷²

B. Limiting Market Concentration

Excessive market concentration can stifle competition and enable companies to engage in exploitative practices. Regulatory authorities should monitor industries for signs of monopolistic behaviour, such as price-fixing or predatory pricing, and take corrective action when necessary. Tools such as antitrust laws and merger controls can prevent market domination. Measures to address market concentration:

1. **Vigilant Merger Review:** Scrutinizing mergers and acquisitions that might stifle competition.
2. **Breaking Up Monopolies:** For example, the breakup of AT&T in the 1980s fostered competition in the U.S. telecommunications sector.
3. **Encouraging Alternatives:** Supporting cooperatives and smaller businesses to balance market power

For example, blocking mergers that would create undue concentration ensures that consumers benefit from competitive pricing and improved product quality.¹⁷³

VI. ENCOURAGING SELF-REGULATION

¹⁷² Mills, E. (2021). *Encouraging Competition Through Regulatory Reform*. *Competition Journal*, 8(4), 54-71.

¹⁷³ Smith, J., & Reynolds, B. (2020). *Market Concentration and Antitrust Policies*. *Journal of Economic Perspectives*, 34(2), 73-89

Voluntary compliance by businesses can complement formal regulatory frameworks, fostering a culture of ethical practices within industries.

A. Industry Codes of Conduct

Developing and adopting industry-specific codes of conduct encourages businesses to self-regulate. These codes outline ethical standards for operations, marketing, and customer interactions, setting a benchmark for responsible behaviour. Advantages of establishing these codes include:

1. **Flexibility:** Industry-specific codes allow businesses to address unique challenges effectively. By tailoring standards to their operational context, industries can ensure relevance and practicality.
2. **Accountability:** Companies that publicly commit to ethical codes demonstrate a proactive approach to consumer trust and transparency. Adherence to these standards strengthens their reputation.
3. **Reduced Enforcement Burden:** Self-regulation minimizes the need for extensive external oversight, freeing up resources for regulatory agencies to focus on more complex violations

For example, the advertising industry in many countries has established self-regulatory organizations to address consumer complaints about misleading advertisements. By adhering to these codes, companies not only demonstrate commitment to fairness but also build consumer trust.¹⁷⁴

B. Peer Review Mechanisms

Peer review mechanisms allow businesses to hold each other accountable within an industry. Companies can assess their peers' compliance with ethical standards, promoting transparency and collective responsibility. Effective peer view system requires

1. **Transparent Criteria:** Establishing clear and objective benchmarks for evaluation ensures fairness and consistency in the review process. For instance, the banking industry uses standardized risk assessment tools to evaluate compliance with ethical and legal norms
2. **Incentives:** Offering rewards such as certifications, recognition programs, or awards motivates companies to prioritize ethical practices. These incentives highlight the value of ethical conduct in competitive markets.

¹⁷⁴ Brown, A. (2020). *Self-Regulation and Industry Standards in a Global Economy*. Business Ethics Quarterly, 12(1), 20-31

3. **Public Reporting:** Publishing the results of peer reviews allows consumers and stakeholders to identify responsible businesses. Public disclosure fosters accountability and enhances the credibility of the review process.

This approach has been successful in sectors like banking, where peer reviews help identify systemic risks and unethical practices. Such mechanisms can foster a culture of mutual accountability, benefiting both businesses and consumers.¹⁷⁵

VII. LEVERAGING TECHNOLOGY

Technology advancements offer powerful tools for detecting, preventing, and addressing unfair trade practices.

A. Data Analytics

Advanced data analytics can help regulators identify patterns indicative of unfair practices. For example, analysing pricing trends in real time can reveal instances of collusion or price-fixing. Similarly, analysing consumer complaints can help pinpoint repeat offenders and systemic issues within specific industries. Certain applications include

1. **Risk Profiling:** Using historical data and predictive models, regulators can identify high-risk sectors or companies that are more likely to engage in unfair practices. For instance, sectors with a history of price-fixing or deceptive advertising can be monitored more closely. Such profiling enhances the precision of inspections and enforcement action
2. **Market Analysis:** Real-time monitoring of pricing trends can reveal evidence of collusion or predatory pricing. For example, sharp and unexplained price hikes in specific markets may indicate price-fixing arrangements among competitors. Data analytics can flag such anomalies, prompting timely investigations
3. **Consumer Feedback:** Mining data from social media, online review platforms, and customer complaint databases can provide insights into systemic issues. For instance, frequent complaints about a specific company's products or services might indicate recurring violations of consumer protection laws.

Data-driven insights enable regulators to allocate resources more effectively and prioritize high-risk areas. Enhanced resource allocation is made possible through the insights gained from analytics, allowing regulators to concentrate their efforts on high-priority areas and

¹⁷⁵ Khan, M. (2018). *Peer Review Mechanisms in Industry Regulation*. *Journal of Business Ethics*, 13(2), 112-119

optimize the use of limited resources effectively. Furthermore, predictive analytics equips regulators with the ability to anticipate and tackle emerging issues, enabling them to remain proactive in the face of evolving market conditions.¹⁷⁶

B. Artificial Intelligence

AI-powered tools have transformed the way unfair trade practices are detected and addressed. With machine learning algorithms capable of analysing vast amounts of data, AI can uncover complex patterns and anomalies that may go unnoticed by traditional methods.

Applications of AI in Combating Unfair Practices

1. **Detecting Pricing Anomalies:** AI systems can monitor pricing data from e-commerce platforms and flag unusual patterns, such as coordinated price changes indicative of collusion. For example, advanced algorithms used by competition authorities in the EU have been employed to monitor digital marketplaces for anti-competitive behaviours (Kumar, 2020).
2. **Monitoring Advertising Compliance:** AI can scan digital advertisements to ensure compliance with disclosure requirements, such as clear labelling of sponsored content. It can also detect false claims and misleading promotional content. Tools like these have been successfully implemented in industries with significant online advertising, such as retail and finance (Nguyen, 2020).
3. **Identifying Counterfeit Products:** AI algorithms analyse product listings and customer reviews on e-commerce platforms to identify counterfeit goods. By cross-referencing data points such as pricing, reviews, and seller histories, AI can flag potentially fraudulent listings for further investigation (Goodman, 2021).
4. **Detecting Fake Testimonials:** Natural language processing (NLP) tools can identify patterns in online reviews that indicate fake or paid testimonials. This helps ensure that consumers receive accurate information about products and services.

Artificial Intelligence significantly enhances efficiency by processing and analysing vast amounts of data at speeds far surpassing human capabilities, which allows for more rapid interventions. Additionally, machine learning models continuously improve over time, leading to fewer errors and greater accuracy in regulatory actions. Furthermore, by automating routine tasks, AI alleviates the workload on human resources, enabling regulatory agencies to concentrate on more intricate investigations.¹⁷⁷

¹⁷⁶ Anderson, T. (2019). *Data Analytics for Regulatory Insight*. Journal of Business and Technology, 15(3), 45-60

¹⁷⁷ Nguyen, A. (2020). *AI in Trade Regulation*. Technology in Government, 7(3), 85-98

VIII. SUPPORTING CLASS ACTION LAWSUITS¹⁷⁸

Class action lawsuits are a powerful mechanism that provides consumers with a collective means to seek justice, especially when individual claims might be too small to pursue independently.

A. Facilitating Collective Action

Simplifying the process for filing class actions can empower consumers to hold companies accountable. For instance, online portals that streamline documentation and facilitate communication among affected individuals can make collective action more accessible. Reforms could include:

1. **Lower Costs:** Subsidizing filing fees for consumer groups.
2. **Streamlined Procedures:** Reducing bureaucratic hurdles and accelerating timelines.
3. **Access to Experts:** Providing expert witnesses and legal advisors to strengthen cases.

Legal reforms aimed at reducing procedural barriers, such as shorter timelines for case resolution and caps on legal costs, can further encourage participation in class actions. These measures ensure that justice is not only accessible but also efficient.

B. Enhancing Legal Aid

Providing financial and legal support to consumer groups engaged in class actions is crucial for levelling the playing field. Many consumers may lack the resources to challenge powerful corporations independently. Examples of support include:

2. **Pro Bono Services:** Encouraging law firms to take on consumer cases at no cost.
3. **Litigation Funds:** Establishing public or private funds to cover legal expenses for class actions.
4. **Public Interest Advocacy:** Supporting NGOs and advocacy groups involved in consumer protection.

Governments and non-profits can bridge this gap by offering subsidies for legal fees or pro bono services, ensuring that all affected parties can pursue redress.

IX. CONCLUSION

Unfair trade practices pose significant challenges to consumers, businesses, and economies alike. A comprehensive approach that combines legislative reform, consumer empowerment,

¹⁷⁸ Jones, L. (2022). *Legal Approaches to Consumer Collective Action*. Law and Society Review, 56(2), 198-213

international cooperation, competitive market policies, self-regulation, technology adoption, and legal support is essential to address these challenges effectively.

Governments and regulatory bodies must lead the charge by enacting robust laws, equipping enforcement agencies, and fostering a culture of accountability. Simultaneously, businesses should embrace self-regulation and transparency, recognizing that ethical practices build long-term trust and loyalty. Empowered consumers, equipped with knowledge and resources, can act as vigilant watchdogs, ensuring that unfair practices are exposed and penalized.

Through collaboration among stakeholders and the innovative use of technology, we can create a fair and transparent marketplace that benefits all participants. Such an environment not only deters unfair practices but also drives innovation, enhances consumer trust, and contributes to sustainable economic growth.

CONSUMER PROTECTION UNDER COMPETITION LAW

- Shreya.V¹⁷⁹

- Vaishnavi.M¹⁸⁰

ABSTRACT

Consumer protection is an essential component of the competition law that aims to protect the interests of the consumers. The systems of consumer protection and competition law are interconnected in order to enable equitable market practices and safeguard consumer interests, though both the consumer laws and the competition has different ways to deploy the consumer protection policies. In this sense, integration of both laws is necessary for establishing the fair market, ensuring fairness in price and innovation, and having goods and services of proper quality available. Competition law addresses various issues such as anti-competitive agreements, abuse of dominant position, anti- competitive mergers and acquisitions that ultimately affects the consumers by increasing pricing, reduced choices and decrease in the quality. These anti- competitive practices are addressed by competition commission of India and other consumer redressal forums and impose penalties for the same. It is also pertinent to note that the E- commerce and tech platforms are evolving markets in the digital domain and their anti- competitive practices are also addressed by competition law with the help of effective legal frameworks. Amendments were made in both legal frameworks towards the focus on digital markets in consumer protection and fair competition in E-commerce and technology driven areas. The overlap between Consumer Protection Act and Competition law also indicates the growing necessity in a multidimensional and dynamic market environment for consumer rights provisions. This paper explores about the interconnection between the consumer protection and competition law and the legislative frameworks and redressal mechanisms to address the anti-competitive practices to protect the consumer interests, which denotes adverse effects in the market place such as price fixing, predatory pricing, abuse of dominant position, and the need for transparent practices and innovation.

Keywords: Competition law, Consumer protection, unfair trade practices, digital market, redressal mechanisms.

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I. INTRODUCTION TO PRINCIPLES OF CONSUMER PROTECTION UNDER COMPETITION LAW

Consumer Law is governed by provisions that guarantee fair marketing practices in order to prevent anti-competitive behaviour that could negatively affect consumers. Its foundation lies on promoting consumer welfare, protecting their rights, and ensuring healthy competition in the markets. These lie under the following principles:

A. Protection from Anti-Competitive Practices

Competition law ensures that no player/ markets engages in activities that harm consumers, such as:

- a) **Cartel:** An agreement among competing parties to set a certain price or limit production that causes inflation in prices.
- b) **Abuse of Dominance:** The act of a dominant firm in the marketplace abusing its position.
- c) **Anti-competitive mergers:** Illegal mergers or acquisitions tend towards the reduction of competition and facilitate raising prices for consumers or reducing the quality of goods and services.

B. Protection and Promotion of Consumer Welfare

Competition law seeks to ensure that consumers are benefitted from competitive markets. It includes access to various products, innovation, reasonable prices, and quality goods/services.

C. Ensuring Market Access

Competition law favours market entry and growth of the small markets. It is expected that the competition foster innovation and choice for the benefit of consumers.

D. Prevention of Unfair Trade Practices

Practices such as misleading advertising, tie-in arrangements, and exclusive supply agreements are curbed in order to ensure that the consumer can make an informed choice.

E. Effective Regulation and Enforcement

Regulatory authorities like the Competition Commission of India for India, Federal Trade Commission for US and others enforce compliance. Consumer participation in the legal processes (e.g. complaints, advocacy) ensures accountability.

II. ANTI-COMPETITIVE PRACTICES

Anti-competitive practices refer to those actions and behaviors proclaimed by markets to unfairly and unduly distort competition in the marketplace. Such actions complicate fair competition to harm the consumers by reducing options, raising prices, or stifling innovation. Below are some key types of anti-competitive practices and their impact on consumers:

A. Cartels and Price Fixing

Agreements between competitors for fixing prices, limiting production, or dividing markets.

Impact to the consumers:

- a) **High Prices:** Consumer pays more than that would otherwise prevail in a competitive market.
- b) **Reduced Choices:** Artificial market segmentation restricts market choice and options.

European Commission v. Car Manufacturers,

In this case, the car manufacturers were fined for collusion to set prices, increasing costs for consumers.

B. Abuse of Dominant Market Position

A dominant firm exploits their dominant position to eliminate competition or impose unfair trading conditions like:

- a) **Unreasonably high pricing:** Setting exorbitantly high prices, especially when few or no alternatives are available to consumers.
- b) **Predatory pricing:** Consenting to lose money by selling below cost to eliminate competitors, later increasing prices to face competition.
- c) **Exclusive agreements:** Impose a requirement on suppliers or distributors to only supply or distribute its products in a particular way.

Impact to the consumer:

- a) Monopoly like pricing, which assures a constant increase in costs to the consumers.
- b) Curb further innovation and decreased quality in product.

C. Anti-competitive Mergers and Acquisitions

Illegal mergers having capacity to lessen competition, thereby creating monopolies or oligopolies are prohibited.

Impact to the consumer:

- a) Increased prices since there is reduced competition.

- b) Decline in innovation as competitors no longer have pressure to improve.

D. Resale Price Maintenance (RPM)

The minimum price that the manufacturer fixes at which retailers can sell their products¹⁸¹.

Impact to the consumer:

- a) Prevent discounts, prices remains artificially high.
- b) Reduced choices with regard to pricing options for consumers.

III. ABUSE OF DOMINANT POSITION

Abuse of a dominant position is when a company having market power takes advantage of that position to suppress competition, harm consumers, or adversely affect market integrity. This abuse is governed and prohibited under competition law at both national and international laws.

Key Features of Abuse of Dominant Position

(1) Dominant Position: A firm is said to hold a dominant position if it can act independently of competitors, customers, or suppliers with respect to competition in a relevant market."

(2) Abuse: The abuse results from the actions taken by the dominant firm to restrict competition or to exploit their power in an unfair manner.

Types of Abusive Practices

1. Predatory Pricing

Selling products/services at a price below cost to eliminate competitors from the market.

Impacts:

- a) It would decrease the competitors out of the market.
- b) Upon elimination of competition it guarantees monopoly pricing.

2. Excessive Pricing

Charging unfairly high prices after elimination of competitors in the marketplace.

Impacts:

- a) Consumers would have to pay more than the fair value of an item.
- b) May prevent the supply of goods/services that are essential.

3. Refusal to Deal

¹⁸¹ Amelia, MAP Pricing: Everything Brands Need to Know, METRICSCART (Dec 9, 2024, 11:41 PM), <https://metricscart.com/insights/map-pricing/>

Refusal to supply essential facilities or services to competitors for no objectively justifiable reason.

Impacts:

- a) Competition would not work well.
- b) Innovation ceases in the market.

4. Tie in agreements

Forcing consumers to buy additional products to buy the desired products.

Impacts:

- a) Shoots consumer choice in the marketplace.
- b) Forces needless expenditures.

5. Exclusive Agreements

Forcing customers or suppliers to deal exclusively with the offending firm.

Impacts:

- a) Prevents competitors from accessing the market.
- b) Consumers have lesser choices with increased prices.

6. Denial of Market Access

Markets with the dominant position prevent the other markets from entering or competing with them in the marketplace.

Impact:

- a) Monopolizing the market.
- b) Diminished innovation and competition.

IV. CARTELS

The cartels can be understood as some agreements between competing businesses to coordinate their activities in such a way as to restrict competition and entry of new markets.

This includes market practices like:

- a) **Price Fixing:** Businesses agreeing on certain prices, thus harming consumers by keeping prices too high.
- b) **Market Allocation:** Dividing markets by area or types of customers that could lead to lack of choices to the consumers.
- c) **Output Restriction:** Production is limited to sustain higher prices.
- d) **Bid Rigging:** Coordination in bids to manipulate competition.

Cartels have the capacity to weaken free market competition, raising prices, reducing quality and innovation, directly harming consumer welfare.

V. CONSUMER PROTECTION

The purpose of consumer protection laws is to promote consumer interest over any exploitation by ensuring fairness and transparency in the marketplace. Opposing cartelization is one of the cornerstones of consumer protection could accomplish the following:

- a) **Fair pricing:** with the prevention of collusion, competition based price levels are preserved.
- b) A better **quality** of products and services can be provided due to competition.
- c) **Access to choices** because whenever a cartel is broken, consumers have options in the market.

VI. CHALLENGES IN DETECTING CARTELS

- 1. **Secrecy:** Cartels once formed, work in secrecy that makes their detection difficult.
- 2. **Leniency Programs:** To facilitate the detection of cartels, the authority offers leniency programs encouraging whistleblowing by giving a reduced penalty for guilty parties who report the cartel.

Opposing cartels is paramount for a healthy market economy promoting fairness, innovation, and consumer trust.

VII. MERGER AND ACQUISITION

Merger and acquisition (M & A's) is a way to merge or acquire the businesses and their assets. If such (M & A's) causes monopoly in the marketplace, reduces competition and harms the consumer's interest that could amount to illegal merger and acquisition.

Merger Control means the taking precautionary actions like monitoring and assessment of mergers and acquisitions so that the transaction does not affect competition or consumer interest. This is one of the primary functions of competition law, aiding in the protection of market fairness and consumer interests.

Objectives of Merger Control

- a) **The regulation of Market Power:** Prevents creation and/or strengthening of dominant players in the market who may abuse their position.

- b) **Promotion of Competition:** Maintains healthy competition in the market so that innovation, better quality, and fair pricing are achieved.
- c) **Protection of Consumer Rights:** Ensures that the prices do not rise, quality does not diminish, and the options for goods available for the consumers are increased.

Consumer Effects from Mergers

Positive Effects

- a) **Economies of Scale:** These may lower costs for firms and therefore prices for consumers.
- b) **Innovation:** The creation of ideas with the help of a merger leads to products and services that are better than before, benefiting the consumer.
- c) **Product Mix:** Merging companies may offer a more diverse product line.

Negative Effects

- a) **Higher Prices:** Competition reduced allows the firm to increase prices.
- b) **Quality Decline:** The absence of competition fosters temptation to rest on one, allowing quality to decline.
- c) **Fewer Alternatives:** The merger reduces options for consumers by eliminating ticket competitors.
- d) **Entry Barrier:** The larger mouth with mergers may prevent the smaller firms from entering the market.

VIII. LEGAL FRAMEWORKS

A legislative framework for consumer protection under competition law is a system meant to ensure a fair market environment, prevent anti-competitive behavior, and to protect consumers against potential exploitation by markets. The provision for these laws varies with jurisdiction but usually includes factors such as:

1. Competition Act, 2002

Competition laws, otherwise referred to as antitrust laws in India, are fundamental to consumer protection. They focus on areas such as:

- a) Anti-competitive agreements,
- b) Abuse of dominance, and
- c) Regulation of combinations.

2. Sector-Specific Consumer Protection Regulations

Many countries enhance competition law with sector-specific regulations that deal directly with consumer-oriented issues. That could include:

- a) **Telecommunications:** Regulations that ensure transparent pricing and abuse of market power is limited.
- b) **Energy:** Regulations that protect customers from utility companies charging more than what's fair or engaging in improper practices.
- c) **Financial Services:** Safeguards against predatory lending, unfair fees, and hidden contracts.

3. Consumer Protection Laws

Although there exist separate competition laws and consumer protection laws, often they work parallel to carry out and support fair practices. And also includes the following laws:

- a) **Right to Information:** Requiring business enterprises to give detailed, factual, and unambiguous information of the goods and services offered.
- b) **Right to Redress:** Gives consumers a mechanism to seek direct talking compensation or dispute resolution from the seller in instances where the consumer has suffered unfair practices.
- c) **Product Safety Standards:** Consumer standards of safety and wholesomeness are involved in goods and services.

4. International Guidelines and Frameworks

Various international organizations have come up with various frameworks to globally harmonize the consumer protection standards, like

1. United Nations Guidelines for Consumer Protection (UNGCP)— gave recommendations for strengthening consumer protection from being exploited in the marketplace.
2. The WTO—encourages its member countries to assure fair competition and consumer protection in trade practice.

5. United States

1. Sherman Act, 1890,
2. Clayton Act, 1914, and
3. Federal Trade Commission Act, 1914

These acts form the base of U.S. antitrust laws and the consumer protection laws that aims to protect consumer rights and interest¹⁸².

6. European Union

Treaty on the Functioning of the European Union (TFEU): Articles 101 and 102 deals with the concept of anti-competitive agreements and abuse of dominance respectively.

IX. CONSUMER CHOICE AND MARKET ENTRY

Consumer Choice:

The law against competition protects and increases consumer choice by curbing varied anti-competitive or restrictive market practices. Key aspects include:

1. Preventing Anti-Competitive Practices:

Cartels: Agreements made by competitors such as price fixing, limiting productions, or dividing markets would reduce the alternative available to consumers.

Abuse of Dominance: A dominant company restricts consumer choice by using manipulation like tying, bundling, or predatory pricing.

2. Promoting Innovation:

Healthy competition pushes companies to come out with innovation in diversification of products for the consumer diversity.

3. Transparency and Information:

Consumer Awareness Empowered Competition More informed consumers make better choices. Competition law is designed to supplement consumer protection laws in ensuring that consumers receive proper information on the products in marketing.

4. Variety of Options:

The law of competition is intended to make possible the availability of a large number of products as well as services. Hence, it can facilitate the informed choice of the consumer.

5. Lower Prices:

More competition usually means lower prices for the benefit of consumers since it means that goods and services become very cheap.

6. Quality Improvement:

Companies tend to improve the quality of their products and services for competition to lure consumers more.

¹⁸² US Department of Justice (Dec 9, 2024, 11:54 PM), <https://www.justice.gov/doj/doj-strategic-plan/objective-41-reinvigorate-antitrust-enforcement-and-protect-consumers>

Market Entry:

Market entry restrictions enhance market accessibility for new competitors, fostering competition in innovation and price, and expanding consumer choice. Key issues include:

1. Barriers to Entry:

Structural barriers: High start-up costs or economies of scale can discourage potential entrants.

Regulatory Barriers: Competition law works to enabling the removal of barriers to entry from competing new entrants, making sure existing ones do not indulge in anti-competitive practices to prevent new competitors or entrants into the market.

Strategic Barriers: Existing players might engage in anti-competitive methods for entry blocking (e.g. exclusive selling or loyalty discounts).

2. Facilitating Entry and Expansion:

They intend to lift barriers that were not justified and to work for a fair environment where new entrants could compete well.

3. Consumer Benefits from Entry:

They usually introduce new ideas, lower prices, and sometimes new offerings, which help the consumer to enjoy better welfare.

4. Fair Competition:

Ensuring all businesses compete on a level field, which promotes innovation and efficiency.

5. Protecting Small Businesses:

Most small businesses are protected from prosecution under competition law to ensure they can compete against the larger, more established companies.

X. UNFAIR TRADE PRACTICES

Unfair Trade Practices (UTPs) in the domain of consumer protection, competition law, signify those non-ethical or deceptive business practices that adversely affect consumers, disturb fair competition, and cause distortion in the market dynamics. Such practices will be dealt within the purview of ensuring a level playing field for businesses while protecting the rights of consumers.

1. Deceptive Trade Practices:

False Advertising: Misrepresentation of quality, performance or price of a product to induce consumers to purchase.

Misleading Packaging: Designs that will mislead consumers about quantities, qualities or origins of the products.

Fake Discounts: Advertise that it comes with discount on a price which has been given an artificially inflated original price.

Non-disclosure: Hiding certain relevant information like hidden costs or safety hazards.

2. Anti-competitive practices:

Cartelization: Fixing a price, limiting supply, or dividing a market agreement among competitors.

Predatory Pricing: Sale of a good below cost in order to induce a rival to leave the market and subsequently raise prices.

Tying and Bundling: Forcing customers to buy a product or service they do not need.

3. Exploitation of Dominance:

Abuse of Market Power: Using a dominating position to impose unfair terms, limit competition, or abuse customers.

Exclusive Dealing: Partners must trade only with the dominant business, making competitors unable to enter the market themselves.

4. Restrictive Practices:

Refusal to Supply: Withholding access to essential infrastructure or products from competing entities thereby influencing the choice among consumers.

Resale Price Maintenance: Specifically preventing retailers from charging below the minimum price that is to be set for resale.

5. Exploitation of Consumers in Digital Markets:

Dark Patterns: An example may be hosting a pretended false website that persuades a consumer into incorrect subscriptions.

Algorithmic Discrimination: Price differentials between consumers and restrictions in the purchase of a product created on the basis of consumer data.

Fake Reviews: False testimony that misleads consumers regarding the quality of items.

6. Other UTPs Affecting Consumers' Rights:

Bait-and-Switch: Advertising a good at an extremely low price to attract buyers, but failing to make it available, is causing them to seek out more costly alternatives.

Counterfeit Goods: Selling a product that is not genuine as if it is a real thing to mislead customers and ruin legitimate businesses.

Unfair Contract Terms: Terms that are biased or discriminatory in a contract and thus restrict a consumer's options.

XI. DIGITAL MARKETS AND CONSUMER PROTECTION

It is the legal framework which provides consumer protection in the digital market. The consumer protection by competition law against the anti-competitive practices in online marketplaces, harmful to consumers, like price manipulation, deceptive advertising, unfair collection of data, and enforcement by supervising regulatory authorities that has the power to investigate and impose penalties on the companies because of their transgression against the rules; and the "Digital Markets, Competition and Consumers Act" in America provides direct enforcement powers to authorities in relation to consumer protection issues in the digital space without having to spend much time in court procedures.

1. Focus on Anti-competitive Practices:

With competition laws, practices like monopoly, price-fixing, collusion etc can all be taken into account, which are seen as detrimental to consumers through limited choices and increased prices in a market that is digital.

2. Data privacy concerns:

Authorities have shown increasing signs of vigilance over the activities carried out by organizations in collecting, processing, and sharing consumer data, as excess collection would create an unregulated competitive advantage for specific companies and endanger consumers' privacy.

3. Dark patterns:

Again, competition laws are used to deal with underhanded design methods that would otherwise deceive consumers into making unintended purchases or would demand giving up more personal data than they would.

4. Direct Powers of Enforcement:

Most countries are now passing legislations that give powers on competition agencies to directly enforce consumer rights in the electronic space, thus speeding up the processes in taking actions on offending practices.

5. Transparency:

Customers should have accurate information about prices, terms of service, and features of goods to avoid deceptive advertising, unclear terms, and hidden fees.

6. Algorithmic Accountability:

The government must ensure fair and non-discriminatory pricing, ranking, and customization algorithms, while monitoring these factors to prevent prejudice or anti-competitive conduct.

XII. CONSUMER REDRESS AND REMEDIES

Under Competition law, the consumer redress and the remedy of consumers is against the damage done to consumers as a result of anti-competitive practices or unfair trade activities. It aims to restore the consumer confidence in the market, ensure the fair practice of the market, and deter future violation for appropriate redress and remedy. This is really an essential element to be retained to uphold the market and protect the consumers in a competitive economy.

Redress Mechanisms:

Consumer redress doth refer to all possible consumer accesses to remedies for grievances triggered by violations of competition law. The major mechanisms include the following:

1. Individual Redress:

Direct Compensations: Refunds are meant to cover amounts lost as damage to para consumers or payment of sums in damages and other fees.

Product Replacement or Repair: Remedy measures for defective or substandard goods.

Dispute Settlement: Consumers can resolve the problem by negotiating, mediating, or arbitrating with the violator.

2. Collective Redress:

Class Action: A group of consumers joins to file a collective action against the firm for anti-competitive behaviour.

Representative Actions: The consumer organizations or regulatory authorities act on behalf of a group of consumers.

3. Public Enforcement Mechanisms:

Such regulatory authorities like competition commissions of India (CCI), can impose penalties on violators and manage consumer redress schemes.

1. Samir Agrawal vs. Competition Commission of India & Ors

Samir Agrawal filed a complaint against Ola and Uber, alleging that their pricing algorithms facilitated price fixing among drivers. The CCI dismissed the complaint, stating that there was no prima facie evidence of collusion.

2. Delhi Vyapar Mahasangh vs. Flipkart & Amazon¹⁸³

The Delhi Vyapar Mahasangh filed a complaint against Flipkart and Amazon, alleging that their exclusive arrangements with preferred sellers violated competition laws.

The CCI investigated allegations against Flipkart and Amazon for engaging in anti-competitive practices, such as deep discounting and preferential treatment of certain sellers.

Remedies:

Remedies are specific actions taken in response to and prevention of violations, it can be divided into:

1. Structural Remedies:

Divestiture:

The policy mandates businesses to sell constructive assets or divisions to decrease market concentration or dominance.

Operational Separation: To ensure fair competition among vertically integrated businesses (e.g., a marketplace function that separates a platform's retail operations).

2. Behavioural Remedies:

Cease-and-Desist Orders: Orders to stop anti-competitive acts such as pricing fixing or exclusive dealing.

Mandated Changes: Calling for changes in business practices, such as making contracts less one-sided or advancing open-access principles across digital-service platforms.

Transparency Requirements: The enterprise is required to provide access to information about pricing, algorithms, or other significant practices.

3. Monetary Remedies:

Fines and penalties: The businesses will have penalties applied to them for acts losing competition for stopping that kind of behaviour in the future.

Compensations to Consumers: The forthcoming act would provide for the creation of funds or mechanisms for the compensation of consumers in the event of any default.

4. Restorative Remedies:

Market Access: The policy will provide a facility or market that has previously been counted as monopoly to access, non-discriminatory.

¹⁸³ Case No. 40 of 2019 – CCI

Corrective Advertising: Inform the public that this business would carry the expenses of public disclosures to cure its misrepresentative claims.

XIII. CHALLENGES IN ENFORCING CONSUMER PROTECTION

There can be numerous obstacles from legal institutional to practical for establishing consumer protection within competition law. Here some of the significant barriers the followings are:

1. Balancing Competition and Consumer Protections Goals:

Complex Objectives: Competition law, which is very focused on efficiency and competition in the marketplace, has to be reconciled with the individual right based focus of consumer protection. Hence, it is balancing the activities that requires skill.

Conflict of Interests: Certain pro-competitive actions such as price war activities might harm consumers in the short run whereas, certain protective measures such as price caps prevent competition.

2. Institutional Challenges:

Jurisdictional Overlap: Quite often competition and consumer protection agencies will have two separate segments of jurisdiction between them.

Coordination Problems: On most of the occasion enforcement would require coordination with national authorities and international ones but this is fraught with challenges relating to different legal frameworks.

3. Evolving Market Dynamics:

Rapid Technological Change: It is now that enforcement utilities the new business models, especially in digital markets where the jury is still out as to how to assess dominance and consumer harm.

Globalization: Companies operate in jurisdictions, so enforcement may not apply in these cross-border consumer cases.

4. Resource Constraints:

Limited Expertise: Agencies may even lack expertise relevant to certain specialized areas- such as data protection, for example, behavioural economics, and digital platforms.

Insufficient Resources: Enforcement bodies often patrol lean budgets, leading to selective enforcement and delays in addressing complex cases.

5. Enforcement Mechanisms:

Burden of proof: These also require lots of evidence to demonstrate anti-competitive behaviour and its impact on consumers, which are often difficult to obtain.

Legal Processes: Extended investigations and legal proceedings often delay remedy for consumer harm.

6. Emerging Challenges in Digital Market:

Big Tech Monopoly: There is now a great possibility for these top-notch platforms to damage the consumers, in a less obvious and sinister fashion, through unfair terms, vague algorithms, and privacy violations.

Personalized Pricing: Organizations can use quality analytics to enable price differentiation among consumers, raising questions related to fairness and actual harm.

XIV. CONCLUSION

Competition laws usually play free markets into a market economy in order to be a guarantee for the protection of its citizens by the government. Competition laws may perform a function seen in transparency and guard against false practices while promoting competition. The future digitization would feature all that and more-cuts-edge-new regulatory frameworks of the future, international collaboration, and of course the appearance of new technologies, such as artificial intelligence and blockchain. Such campaigns would also empower consumers with rights and grievance redress mechanisms. While much scrutiny would be directed towards digital platforms on fairness, transparency, and privacy, competition law would also encompass sustainability and ethical concerns.

IMPACT OF DECEPTIVE ADVERTISING ON COMPETITORS AND CONSUMERS

- B.R Benci Jerald¹⁸⁴

ABSTRACT

A competitive market maximises consumer's welfare. One central element of a competitive market is advertising which plays an investable role in a free enterprise system. The purpose of advertisements is to promote a particular brand and demonstrate its superiority over the vast majority of competing goods but deceptive advertising not only misleads consumers, it also undermines their trust in the marketplace, eroding the overall integrity of firms. Deceptive marketing can induce naïve consumers to make purchases based on misleading promises, resulting in financial losses, and a loss of faith in the marketplace. This not only affects customers but also undermines fair competition within industries by allowing unethical enterprises to obtain an unfair advantage over honest competitors. Though misleading advertisements are not prima facie covered within the ambit of antitrust laws, a closer analysis of the dual impact that such misleading advertisements have, reveals that it effects not just consumers but also competitors. On one hand, a consumer can be influenced by a misleading advertisement and buy something which was fraudulently portrayed as a better product while on the other hand, a competitor may stand to lose his business and reputation to false claims made by opponents. In this paper the researcher attempts to analyse the issues related to misleading advertisements, the challenges faced by the consumers and the competitors, analyse the available regulatory frameworks and suggest reforms.

Keywords: Deceptive advertising, competitors, consumers, Antitrust laws.

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I. INTRODUCTION

We live in a commercialized world and advertisements form its backbone. Our senses and cognition perceive advertisements all the time. They are intended to create a need for consumers and to appeal their psyche in order to increase sales. In order to achieve this goal, advertisements may be well crafted so that most consumers can identify themselves with the product. Advertisements may not only sway the public towards a particular product, they may also reduce the market share of a competitor if an advertisement disparages a competitor's products, since such disparagement would lead to loss of public faith in such competitor's products. Hence, advertisements also have an integral linkage to competition. Deceptive advertising practises have also become a ubiquitous issue in today's corporate world, having a significant impact on both consumers and competitors. This research paper attempts to explore the varied nature of deceptive advertising and its far-reaching ramifications, shedding insight on its impact on these two important market parties- the consumers and the competitors.

II. WHEN AN ADVERTISEMENT BECOMES DECEPTIVE?

A. Advertisement:

"Advertising is legalized lying" – H.G. Wells

Advertising is mass communication i.e., messages related to products and services to persuade consumers to buy and in return increase the profits of the company. Section 2(1) of The Consumer Protection Act, 2019 provides a definition of the term "*Advertisement*" which means any audio or visual publicity, representation, endorsement or pronouncement made by means of light, sound, smoke, gas, print, electronic media, internet or website and includes any notice, circular, label, wrapper, invoice or such other documents.

Advertising is also incorporated into the ambit of freedom of speech and expression. Article 19 of the Indian Constitution lays down the fundamental right to freedom of speech. It basically means the right to express one's opinion through various mediums. It gives individuals the right to speak as well as listen and to attain information. The Supreme Court of India has recognized "commercial advertisement" as a protected speech under Art 19 (1)(a) of the Constitution of India.¹⁸⁵ Therefore Article 19 on the one hand, ensures that there is commercial freedom given to those who wish to market their product a certain way- by associating it with a tagline, jingle, assurance, guarantee or a celebrity. And on the other hand, the reasonable restriction¹⁸⁶ on this freedom is in the form of a

¹⁸⁵ Tata Press Ltd v. Mahanagar Telephone Ltd., AIR 1995 SC 2438.

¹⁸⁶ Article 19(2) of Indian Constitution

censorship which ensures that a consumer is not stripped off his precious little, and left at the sake of a corporate giant.

Advertising is a beneficial tool as long as the techniques used are fair. But the problem arises when deceptive and fraudulent advertising tactics are used by advertisers aimed at attracting consumers by luring through false or misleading messages about products, its qualities and utilities. False and misleading advertisements affect consumer's "right to be informed" and results in injuring consumer interest as well as the competing commercial brands.¹⁸⁷

B. Misleading or Deceptive Advertisement

Misleading Advertising has been defined by P. Ramanatha Aiyar, in his dictionary Advanced Law Lexicon as: "*Advertising that deceives or is likely to deceive those to whom it is addressed or whom it reaches and, because of its deceptive nature, is likely to affect consumers' behaviour or injures or is likely to injure a competitor*".¹⁸⁸ An advertisement comes under the ambit of 'Misleading' when it delivers factually erroneous or false information about a product.¹⁸⁹ It can be misleading if they contain false statements of fact, conceal or omit crucial details, or include or imply a promise to do something without intending to do so, it generates a false impression even if everything stated is correct. Despite its illegality in most countries, businesses and companies seize every opportunity to mislead customers and earn profits. As per *section 2(28) of the Consumer Protection Act, 2019*, 'misleading advertisement' is defined as in relation to any product or service, means an advertisement which

- falsely describes such product or service or
- gives a false guarantee to, the quantity or quality of such product or service; or
- conveys an express or implied representation which, if made would constitute an unfair trade practice; or deliberately conceals important information;

In ***Rajiv Sharma v. Maruti Udyog Limited***, the Delhi District Consumer Forum ordered Indian vehicle manufacturer Maruti Udyog Ltd (MUL) to pay the complainant Rs one lakh in compensation for "inducing" him to buy a car through false ads about its mileage. The MUL automobile advertised as having a mileage of 16.7 km/litre but really had a mileage of 10.2 km/litre.¹⁹⁰

¹⁸⁷ Maitrayi Jain, Meghna Khetrpal, *Redressal Mechanism for Competitors Against Misleading Advertisements*, International Journal of Educational Studies, <http://www.escijournals.net/IJES>

¹⁸⁸ Ibid

¹⁸⁹ Includes- Companies making false environmental claims (greenwashing) to capitalize on the growing demand for sustainable products.

¹⁹⁰ *Rajiv Sharma v. Maruti Udyog Limited*, Appeal No. A-358/97 .

III. IMPACT OF DECEPTIVE ADVERTISEMENT ON CONSUMERS AND COMPETITORS

A. Impact on Consumers

Deceptive advertising strategies range from making false promises and utilising misleading visuals to omitting important information. The fundamental goal of such practises is to persuade or influence customers into making purchases based on incorrect or exaggerated information. This, in turn, can have a variety of negative effects for consumers, such as financial losses, unhappiness, and breakdown of trust. consumers who fall victim to deceptive advertising may be initially enticed to the fraudulent company, only to be disappointed when their expectations are not satisfied. Furthermore, deceitful advertising adds to the erosion of customer confidence, resulting in widespread scepticism. In a climate of widespread deception, customers begin to question the veracity of all advertising claims, making it increasingly difficult for honest enterprises to win and maintain public trust.

*Francis Vadakkan v A-One Medicals & others*¹⁹¹ In this case, brought before a Kerala consumer court, the complainant noticed an advertisement promising that using the product (hair cream) for six weeks will result in luscious hair growth. Because the promise was not met despite using the cream for the specified period, the complainant filed a 'deficiency in service' claim against the product's manufacturers, the actor who promoted the product, and the medical store where it was purchased. The court ordered that all defendants pay the client compensation for making "false promises," and that the actor promote a product only after establishing its legitimacy and effectiveness.

B. Impact on Competitors

Misleading advertisements have a wide-ranging and significant impact on competitors in the commercial landscape. These deceptive practises can have a considerable impact on an industry's competitive dynamics, impacting how organisations operate and compete. First and foremost, rivals are significantly disadvantaged when other businesses use false ads. When businesses make false or exaggerated claims about their products or services, they frequently entice clients with promises that cannot be kept. As a result, these companies may obtain an unfair advantage over their honest competitors that practise ethical marketing and transparency. This might cause a loss of trust in the market and harm the reputation of all businesses in the industry. Competitors are also impacted by the erosion of consumer trust caused by false ads. In a climate where deceit is common, customers become careful and

¹⁹¹ Francis Vadakkan v. The proprietor, A-one medicals and Ors. CC No.345 of 2012

sceptical of any promotional claims. Even the most honest and respectable businesses in the industry are sceptical.

Deceptive advertising can also foster an environment of unethical competition, as competitors may feel driven to engage in similar deceptive practises in order to stay up with the dishonest corporations. The temptation to compete with businesses that utilise misleading advertising strategies can lead to a "race to the bottom," in which businesses resort to unethical practises, affecting not only their competitors but the industry as a whole. Furthermore, honest rivals may become embroiled in legal challenges or regulatory measures undertaken by authorities or consumer protection organisations in response to their competitors' dishonest advertising.

Another unintended consequence for competitors is increased consumer misunderstanding. Deceptive advertising frequently confuses consumers, leaving them unclear of whom to trust and what data to believe. Competitors may need to devote more time and money in consumer education and awareness activities to correct the misunderstanding and confusion caused by deceptive ads. To counteract the impact of deceptive advertising, rivals frequently emphasise the openness and accuracy of their marketing efforts.¹⁹²

Horlicks Limited vs Zydus Wellness Products Limited¹⁹³ Horlicks Limited ("Horlicks") petitioned the Delhi High Court for a permanent injunction against Zydus Wellness Products ("Zydus") from airing an advertising claiming a single glass of Complan (a Zydus Product) is equal to two glasses of Horlicks. The High Court ruled that the contested advertisement was deceptive and disparaging because, while a disclaimer was included, it was not clear, and the advertisement gave the impression that one cup of Complan was equal to two cups of Horlicks, without taking into account the serve size. Based on the foregoing, the High Court determined that the balance of convenience was in favour of Horlicks, who would suffer irreparable harm if the telecast of the contested commercial was not prevented, and so granted the remedy of an interim injunction.

IV. THE THREAT

Misleading advertisement poses a palpable threat to the wellbeing of the economy since they detriment, not just the consumers but also the competitors. Though misleading advertisements are not prima facie covered within the ambit of antitrust laws, a closer analysis of the dual impact that such misleading advertisements have, reveals that it effects

¹⁹² Dr.V.Saravanan, *Impact Of Unfair Advertising In India -Issues And Solutions*, 2018 IJCRT | Volume 6, Issue 2 April 2018 | ISSN: 2320-2882

¹⁹³ Horlicks Limited v. Zydus Wellness Products Limited, CS (Comm) 464 of 2019.

not just consumers but also competitors. On one hand, a consumer can be influenced by a misleading advertisement and buy something which was fraudulently portrayed as a better product while on the other hand, a competitor may stand to lose his business and repute to false claims made by opponents.

It is pertinent to mention here that the MRTP Act, 1969 while defining Unfair Trade Practices in Section 36 specifically included misleading advertisements. However, the Competition Act, 2002 as discussed above does not provide for redressal against misleading advertisements. Such omission in the Competition Act, 2002 can be gauged by the varying legislative intents behind both acts. The legislative intent of the MRTP Act illuminated that the provisions dealing with Unfair Trade Practices were primarily consumer-oriented whereas the Competition Act seeks to redress the grievance of competitors with regards to unfair trade practices. Due to the redundancy of MRTP Act, the need for a new statute was felt. During the same time, the Consumer Protection Act, 1986 was passed seeking to redress consumer grievances against manufacturers, producers, suppliers, and retailers. The Act incorporated provisions regarding fraud and deceptive practices hence developing a new law for unfair trade practices. In light of the same, the need to include provisions regarding unfair trade practices was not felt during the enactment of the Competition Act. The Competition Act broadly serves the interest of consumers and smaller competitors against their contemporaries. Though the act has dealt with their problems to a larger extent, it still has some grey areas including the issues arising due to misleading advertisements and their implications on the competitors. The Act is not exhaustive and operates hand in hand with other laws and the provisions shall have effect notwithstanding anything inconsistent therewith contained in any other law.¹⁹⁴

V. REGULATORY MEASURES TO CURB MISLEADING ADVERTISEMENTS

A. Legislations:

i) Consumer Protection Act, 2019

- Section 2(r) covers false advertisements under the definition of unfair trade practices. Provides redressal against misleading advertisements.

ii) The Food Safety and Standards Act, 2006

- Deceptive advertising falls under Section-53 of the Food Safety and Standards Act, 2006, making it punishable. FSSAI uses the Food Safety and Standards

¹⁹⁴ Shareeka H S , *Deceptive Advertising Practices And Their Impact On Consumers And Competitors: An Overview* 2024 IJCRT | Volume 12, Issue 1 January 2024 | ISSN: 2320-2882

(Advertisements & Claims) Regulations, 2018 which specifically deal with food and related products.

iii) The Drugs and Cosmetics Act, 1940

iv) The Drugs and Magic Remedies (Objectionable Advertisements) Act, 1955

- It regulates drug advertisements. Prohibits the use of test reports for advertising drugs. Penalties for violations include fines and imprisonment.

v) The Cable Television Networks (Regulation) Act, 1995

vi) The Cigarettes and other Tobacco Products (Prohibition of Advertisement and Regulation of Trade and Commerce, Production, Supply, and Distribution) Act, 2003 (Department of Health and Family Welfare).

vii) The Bureau of Indian Standards (Certification) Regulations, 1988 as under its Rule 7 (1) (l), (g), and (h) prohibits misleading advertisements about BIS certification.

viii) Misleading advertisements in print media are being monitored by the Press Council of India under Section 14 of the Press Council Act of India 1978.

B. Authorities:

i) The Central Consumer Protection Authority (CCPA) has issued certain guidelines for the prevention of misleading advertisements and their endorsement and also to protect consumers from unfair trade practices. The guidelines protect consumer rights with clear and mandatory conditions for valid and non-misleading advertisements and free claims advertisements. Guidelines have been formed on when to recognize and allow bait advertisement, disclaimers in advertisements, and disclosure of connection between endorser and trader. Besides these, the guidelines also prohibit surrogate advertising and prescribe restrictions on free claim advertisements and advertisements targeted toward children. The duties of manufacturers, service providers, advertisers, and advertising agencies are outlined in detail under the guidelines. A huge penalty is imposed for violating the guidelines. If found guilty, the CCPA can impose a penalty of INR 10 lakhs on manufacturers, advertisers, and endorsers of misleading advertisements. For subsequent mistakes, the CCPA may impose a penalty extending up to 50 lakh rupees. The Consumer Protection Act authorizes CCPA to prohibit the endorser of a misleading advertisement from making any endorsements for up to one

year, which can be further extended to 3 years if they continue with non-compliance.¹⁹⁵

- ii) Advertising Standard Council of India (ASCI)-Advertising Standards Council of India has established the ASCI Consumer Complaints Council to deal with false and misleading advertisements. The Advertising Standards Council of India accepts complaints against false and misleading statement advertisements from firstly the consumers or government secondly from one advertiser against another advertiser and finally from the ASCI board members, members of the Consumer Complaint Council, etc. The Code of ASCI tries to achieve fair advertising to protect the interest of the consumer and it uniformly applies to every advertisement irrespective of the medium of the country it originates.¹⁹⁶

VI. SUGGESTIONS TO HANDLE MISLEADING ADVERTISEMENTS

Following are some of the suggestions to overcome misleading advertisements: -

1. Every advertisement irrespective of the medium published should include every single detail in the advertisement with proper legal and documentary proofs of same.
2. To prevent consumers from being deceived by such advertisements, it is necessary to identify the spots where consumers need to be cautioned.
3. In addition to updating laws or legislation, the government should also set up a sovereign system to monitor law enforcement and ensure inflexible enforcement.
4. "Pre-clearance" involves evaluating ads before they are published or broadcast by the self-regulating body this will avoid false and misleading advertisements.
5. Strict punishment and if possible mandatory jail terms for advertising magic cures must be provided.
6. ASCI guidelines are in existence for a very long, but still, there is a lack of awareness among consumers as well as advertisers. ASCI and other Non-Governmental Organizations have to play the role of watchdog to curb misleading advertisements in the best possible manner.
7. It is an urgent requirement of the current time to strengthen the existing legal provisions and to introduce a new provision in the existing Acts to restrict and check commercial disparaging in comparative advertising.

¹⁹⁵ Nikita Modi & Dr. Ramarao P, *Misleading Advertisements*, [VOLUME 6 I ISSUE 1 I JAN. – MARCH 2019] e ISSN 2348 –1269, Print ISSN 2349-5138, <http://ijrar.com/> Cosmos Impact Factor 4.236.

¹⁹⁶ Madhavi Sripathi, *A Study on Impact of False Advertising on the consumer buying behaviour*. See discussions, stats, and author profiles for this publication at: <https://www.researchgate.net/publication>.

VII. CONCLUSION

Deceptive advertising practises have far-reaching implications, hurting not just customers but also market competitors. Deceptive advertising weakens trust, produces confusion, and poses a severe danger to the integrity of the corporate environment. While Advertisements can be highly beneficial to businesses, generating significant profits, it is also crucial that it remains ethical and are not in violation of the consumer rights. No right is ever absolute and the same principle applies to the right of publishing advertisements. The advertisements are also required to match some value standards. There are reasonable restrictions in order to protect the interest of consumers and competitors. The repercussions of deceptive advertising are compounded in the digital age, as information spreads quickly and advertising's influence is greater than ever. Consumers and rivals competitors must both be cautious and aware of the prevalence of deceptive practises in the marketplace. By doing so, they will be able to collaborate with regulatory authorities to respect the principles of transparency, truth, and fairness, promoting a corporate environment in which honesty prevails and confidence is restored, to the advantage of all stakeholders. Finally, we can lessen the impact of misleading advertising practises by working together to create a more equal, ethical, and consumer-centric marketplace.

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COMPETITION LAW AND ITS ROLE IN CURBING UNFAIR AND DECEIVING ADVERTISEMENT PRACTICES

- Pradyun S Kaushik¹⁹⁷

- Ajitesh Kumar¹⁹⁸

ABSTRACT

Advertising is an art which many try to perfect and in this pursuit of perfection, certain industries like the tobacco and the alcohol industry often cross the line of being ethical. They promote products which do not advertise such intoxicants to contravene advertising regulations in place, but the real aim would be the brand reach, which would in turn aid in selling of such intoxicants. Such practices deceive the consumers and violate the core values of transparency and accountability, as mandated by the Consumer Protection Act which demands truthful and honest representation of the brands and the products they sell. This paper analyses certain practices in place and how they end up deceiving consumers and their welfare, thereby warping competition and violating the Competition Act by granting an unfair advantage to these companies. Thus, the question that this research paper tries to examine deals with the types of advertisements that deceive consumers, their ethical and moral implications, the scope of competition laws in place and solutions for curbing such deceiving practices. It takes into account an in-depth analysis of legal cases and precedents using which it shown as to how various brands have been held accountable for their actions and the regulatory challenges in their enforcement. It strongly backs for more stringent oversight and robust regulatory mechanisms to safeguard the safety of consumers and ensuring a fair, level playing field. The ultimate aim is to achieve an outcome which promotes and fosters utmost creativity in advertising practices but never at the cost of consumers' welfare and rules of fair competition.

Keywords: Consumers, Consumer Protection, Competition Law, fair practices, deceiving advertisements.

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I. INTRODUCTION

Advertising holds great influence over consumer behavior and driving competition, but when some industries, alcohol and tobacco, exploit creative loopholes to bypass strict advertising regulations, it raises significant ethical and legal concerns. These industries always tries blur the lines between innovation and deception by using tactics like surrogate advertising, which involves promoting non-alcoholic or unrelated products under the guise of their primary brand. The ultimate goal is not compliance but brand reach, which is indirectly boosts sales of restricted products, thereby undermining the principles of transparency and accountability mandated by laws like the Consumer Protection Act.

Such practices mislead consumers distorting the competitive balance. They award undue preferential treatment to brands who avoid rules to the disadvantage of complaint, law-abiding competitors. This paper critically assesses how these strategies contravene the Competition Act, which seeks to ensure a fair, level playing field in the market. A legal analysis of cases, regulatory hurdles, and enforcement mechanisms has explored the broader implications for consumer trust and market integrity.

Ultimately, the paper calls for further oversight and a more adequate regulatory framework to check such vibes. The goal is to foster a competitive environment where innovation in advertising thrives, but never at the expense of consumer welfare or through unfair competition. Through better legal accountability, we provide market integrity that ensures the advertising serves its purpose without compromising ethical and legal standards.

II. THE ART OF DECEPTIVE ADVERTISING

In the dynamic marketplace, advertising has emerged as a significant tool in shaping consumer perceptions and influencing behavior¹⁹⁹. It perform an important role in building brand identity and driving competition. However, industries like alcohol and tobacco, bound by stricter regulations prohibiting direct promotion of their products, have devised creative yet deceptive advertising strategies to maintain visibility and consumer engagement²⁰⁰. However, often working through loopholes in the law, such practices are unethical and anti competitive because they deceive consumers and alter market flows²⁰¹.

¹⁹⁹ Abhinav Bhalla, Addressing the Issues: ASCI's Role and the Limits of its Authority, October 14, 2024, <https://www.scconline.com/blog/post/2024/10/14/addressing-the-issue-ascis-role-and-the-limits-of-its-authority/>, (Last visited- November 29, 2024)

²⁰⁰ *Tobacco & Alcohol Regulation Policies: A Global Perspective*, 58 Harv. L.J. 78, 81 (2021), (Last visited- November 29, 2024).

²⁰¹ Id Note. 2

A. Types of Deceptive Advertising Practices

1. Surrogate Advertising:

Surrogate advertising refers to the promotion of an otherwise permissible product (such as, soda, water, or merchandise) under the same brand name as a restricted product, such as alcohol or tobacco²⁰². This is a way to circumvent bans on advertisements without losing brand recognition²⁰³. For example: Bagpiper Soda, while ostensibly promoting a non-alcoholic beverage, the campaign keeps the primary brand, Bagpiper, associated with alcohol consumption in the minds of consumers. Kingfisher Packaged Water- Although Kingfisher is a beer brand, it markets water to ensure brand recall without directly advertising alcohol²⁰⁴.

This is loophole in the regulation of advertising because technically it is not promoting the restricted product but creates a subliminal connection that pushes for the sales of the intoxicants such as advertisements evoke ethical questions of transparency and consumer manipulation, with the ultimate intent of selling the product restricted for public health concerns,

2. Lifestyle Branding:

Lifestyle branding associates linking products with an aspirational lifestyles, such as luxury, sophistication, or adventure²⁰⁵. For alcohol and tobacco brands, this indirect approach targets consumer emotions, thereby encouraging an urge to be associated with the lifestyle depicted²⁰⁶. Such as, In Alcohol Advertising, a commercial may showcase an elegant dinner party or a group of stylish friends celebrating, subtly implying that the brand's alcohol is an integral part of such high-status gatherings. Tobacco Campaigns- Before stricter regulations, tobacco brands often associated smoking with masculinity, independence, or glamour (e.g., Marlboro's iconic cowboy imagery). Even without informing the restricted product, campaigns that embed the brand in consumers' aspirations, influence purchasing decisions. This type of emotional and psychological manipulation seeks consumer perceptions and diminishes informed decision-making. Sponsorships and Events, Sponsorship of major events allows alcohol and tobacco brands to bypass direct advertising

²⁰² World Health Organization (WHO), *Global Report on Surrogate Advertising: Trends and Challenges*, at 12 (2022).

²⁰³ Aniruddha Basu, *The Art of Disguise: Surrogate Advertising in India*, 17 Indian J. Mktg. 35, 39 (2020).

²⁰⁴ S. Ramanathan, *Kingfisher's Branding in India: A Case Study on Surrogate Advertising*, 19 Ind. Advt. Rev. 10, 13 (2022).

²⁰⁵ Richard Roe, *Lifestyle Branding in Modern Advertising*, 54 Mktg. Stud. Rev. 131, 135 (2020).

²⁰⁶ Id. note 7

restrictions while achieving significant visibility. This tactic integrates the brand into popular culture, fostering loyalty and recognition. Sports Sponsorships, Alcohol brands like *Heineken* and *Budweiser* sponsor global events such as the FIFA World Cup or Formula 1²⁰⁷. Logos and colors are majorly displayed during broadcasts, embedding the brand in the excitement of the event²⁰⁸. Music Festivals, tobacco or alcohol companies may sponsor concerts or festivals, ensuring that their branding is visible across banners, merchandise, and digital promotions²⁰⁹. Subtle Integration, these sponsorships do not directly advertise restricted products but position the brand as a significant part of social, cultural, or recreational events, ensuring recall without explicitly promoting the product.

B. Ethical and Moral Implications

Deceptive advertising practices, like as surrogate advertising, lifestyle branding, and event sponsorships that manipulate consumer perceptions for buying particular products and profound ethical and moral concerns²¹⁰. These practices have far-reaching consequences for consumer rights, public health, and trust in the marketplace.

1. Violation of Consumer Rights

- **Nature of Misrepresentation:** Consumers are often unaware of the hidden motives behind such advertisements. For example, a brand advertising "soda" under a well-known alcohol name may mislead consumers into associating the product with health or leisure, while the underlying intent is to keep the alcohol brand in public memory.
- **Example:** *Kingfisher Soda* is marketed as a refreshing drink but is intrinsically tied to the Kingfisher beer brand. This type of promotion makes sure that consumers associate the soda with the beer's established reputation, bypassing transparency about the intent of the advertisement.
- **Impact:** Such misrepresentation infringes on a consumer's right to make informed decisions, which is protected under the Consumer Protection Act, 2019 in India²¹¹.

2. Public Health Risks

- **Encouragement of Intoxicant Use:** Indirect promotion of alcohol or tobacco that normalizes their consumption, especially among impressionable demographics like youth.

²⁰⁷ D. Mehta, *Indian Sports Sponsorship and Brand Ethics*, 13 Ind. Sports Pol. J. 99, 103 (2021).

²⁰⁸ Id. Note 9

²⁰⁹ S. Patel, *The Influence of Tobacco Sponsorship on Indian Audiences*, 27 Ind. Health Pol. Q. 70, 74 (2022).

²¹⁰ *Surrogate Advertising and Indian Laws*, 16 Bombay L.J. 122, 126 (2020).

²¹¹ *Consumer Protection Act, 2019*, No. 35, Acts of Parliament, 2019 (India).

- **Example:** Lifestyle branding often portrays alcohol as synonymous with success and celebration. Advertisements showing celebrities enjoying drinks at glamorous parties create an aspirational link, that encourages consumers to mimic such behaviour.
- **Illustration:** Tobacco companies such as Marlboro sponsor Formula 1 racing teams, creating a very strong association between the excitement of racing and their brand. Even without direct cigarette advertisements, this technique indirectly glorifies tobacco use.
- **Effects:** Such increased consumption of such products undermines public health campaigns that aim to curb addiction and related health issues, such as liver disease or lung cancer.

3. Erosion of Trust

- **Consumer Distrust:** Deceptive practices shake consumer confidence in advertising as a whole, leading to scepticism even toward ethical brands.
- **Example:** When an alcohol company sponsors a sports event, there seems to be an incongruity. Usually, sports events are typically meant to promote health and fitness. However, it indirectly advertises a habit of intoxication in a way that is very ambiguous to audiences.
- **Brand Reputation Damage:** Companies involved in deceptive advertising often face backlash when consumers become aware of their manipulative tactics. For instance, certain cola companies have been criticized for indirectly marketing sugary drinks as “healthy” options, damaging their long-standing reputation.

III. LEGAL ANALYSIS

A. Consumer Protection Act, 2019

The Consumer Protection Act, 2019 emphasizes that advertisements must be truthful, non-misleading, and transparent. Section 2(1)(r) defines misleading advertisements as those that falsely describe a product, give a false guarantee, or mislead consumers about the product's nature, quality, or purpose. This provision protects consumers from deceptive practices and provides remedies, including compensation and penalties against offenders.

1. **Horlicks Ltd. v. Heinz India Pvt. Ltd. (2009)**²¹²-

In this landmark case, the Delhi High Court held that advertisements must not mislead consumers about the efficacy or nature of a product. The court emphasized that

²¹² Horlicks Ltd. v. Heinz India Pvt. Ltd., (2009) SCC 1054.

advertisers have a duty to ensure their claims are accurate and substantiated. Although this case dealt with nutritional claims, its principles extend to surrogate advertising. Advertisements promoting unrelated products under the guise of restricted goods, like alcohol or tobacco, are similarly misleading, as they indirectly influence consumer behavior while circumventing direct regulations.

2. **Colgate-Palmolive (India) Ltd. v. Hindustan Unilever Ltd.²¹³ (2013)**

The Bombay High Court ruled against Colgate for advertising claims that disparaged Hindustan Unilever's toothpaste. This case reaffirmed that comparative advertisements must be truthful and should not misrepresent competitors' products. Similar reasoning applies to surrogate advertising, where false impressions are created to promote a brand under the guise of unrelated goods.

3. **Marico Ltd. v. Adani Wilmar Ltd²¹⁴. (2013)**

The Delhi High Court highlighted that advertisements should not misrepresent facts to create undue influence over consumer decisions. In this case, Marico challenged Adani Wilmar's claims about its oil's cholesterol-reducing properties. The judgment reinforced the importance of honest representations in advertisements, further applicable to surrogate advertising practices.

4. **Hindustan Unilever Ltd. v. Gujarat Cooperative Milk Marketing Federation Ltd²¹⁵. (2017)**

The Delhi High Court reiterated the need for advertisements to avoid misleading consumers. The court noted that even subtle representations could create false perceptions, a principle that aligns with the deceptive practices used in lifestyle branding and surrogate advertising by tobacco and alcohol industries.

B. Competition Act, 2002

The **Competition Act, 2002**, serves as a critical framework to maintain fairness in India's market dynamics by prohibiting anti-competitive agreements and preventing the abuse of dominant positions by firms²¹⁶. Deceptive advertising practices, including surrogate advertising, often fall foul of these provisions by creating an uneven playing field that distorts fair competition and misleads consumers. Surrogate advertising is particularly prominent in industries like alcohol and tobacco, where companies market permissible products such as

²¹³ Colgate-Palmolive (India) Ltd. v. Hindustan Unilever Ltd., (1999) 7 SCC 1.

²¹⁴ Marico Ltd. v. Adani Wilmar Ltd., 2013 SCC OnLine Del 4622 (India).

²¹⁵ Hindustan Unilever Ltd. v. Gujarat Cooperative Milk Marketing Fed'n Ltd., 2017 SCC OnLine Del 8988 (India).

²¹⁶ *Competition Act, 2002*, No. 12, Acts of Parliament, 2002 (India).

soda, water, or music CDs under the same brand name as their restricted goods. These strategies exploit regulatory loopholes to maintain brand recall and visibility without directly promoting restricted products, giving larger firms with abundant resources an undue competitive advantage. Smaller competitors, often constrained by limited resources, are left at a disadvantage, unable to compete on equal footing.

MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd²¹⁷. (2011)- In this case, the Competition Commission of India (CCI) found the National Stock Exchange guilty of engaging in predatory pricing to stifle competition. This case underscores how dominant players can manipulate market dynamics to maintain their position, often at the expense of smaller or newer entrants. While this case does not explicitly address deceptive advertising, the principles it establishes—regarding the distortion of competition through unethical practices—apply equally to surrogate advertising, which manipulates consumer perception and market behavior in similar ways.

The economic implications of deceptive advertising are profound. By prioritizing brand visibility and emotional appeal over genuine product quality and value, such practices mislead consumers and distort market competition²¹⁸. Smaller businesses, unable to invest in elaborate advertising or exploit regulatory loopholes, often face significant challenges in gaining market traction. This undermines the spirit of competition, where innovation and merit should ideally determine success. Furthermore, the reduced competition diminishes the incentive for dominant players to innovate or improve their products, leading to stagnation and harming long-term economic growth. The ripple effects extend to consumers as well, who are denied access to diverse, innovative, and high-quality products, eroding trust in the market²¹⁹.

The Competition Act's provisions are well-suited to address these challenges, but their enforcement requires a more proactive and nuanced approach. The CCI must scrutinize advertising practices that indirectly violate competition laws and impose stringent penalties on companies engaging in deceptive marketing²²⁰. Strengthening the Act's enforcement mechanisms can deter unfair practices and ensure compliance. Additionally, raising awareness among consumers and smaller businesses about their rights under the Act is

²¹⁷ MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd., 2011 SCC OnLine CCI 22.

²¹⁸ Advertising Standards Council of India (ASCI), Guidelines for Advertising of Products that Require Health Warnings (2024).

²¹⁹ Advertising Practices and Market Dynamics: The Indian Perspective, COMPETITION LAW REPORTS (2022).

²²⁰ Preeti Shaw, Advertising Industry Vs Freedom Of Speech: Navigating The Slippery Slopes Of A Developing Jurisprudence, ISSN: 2582 – 7677.

essential to fostering transparency and accountability. A more robust regulatory framework could also mandate clearer definitions of permissible advertising practices, reducing ambiguity and preventing exploitation of legal loopholes.

Moreover, fostering collaboration between regulatory bodies, such as the Advertising Standards Council of India (ASCI) and the CCI, can enhance oversight and ensure that advertising practices adhere to both ethical standards and competition laws. Periodic audits and consumer feedback mechanisms can also provide insights into how advertising influences market dynamics, aiding in the development of more targeted regulations. By addressing the deceptive practices that erode trust and distort competition, the Competition Act can fulfill its objective of fostering a fair, innovative, and consumer-friendly market. This, in turn, will not only safeguard consumer interests but also encourage economic growth driven by genuine competition and innovation.

IV. REGULATORY CHALLENGES

Regulatory Challenges in curbing deceptive advertising practices highlight systemic weaknesses in enforcement mechanisms, the need for international benchmarking, and the critical role of consumer awareness. Addressing these challenges is crucial for ensuring ethical advertising, protecting consumer interests, and fostering fair competition.

1. Loopholes in Enforcement

1. Legal Ambiguities and Exploitation

Regulations often contain ambiguities that enable advertisers to engage in practices like **surrogate advertising**, which involves promoting restricted products (e.g., alcohol or tobacco) under the guise of permissible ones. For instance, a brand may market a soda or mineral water while implicitly promoting its liquor line. The intent behind such campaigns is difficult to prove, creating challenges for regulators.

2. Inconsistent Enforcement

Regulatory bodies in India, such as the **Advertising Standards Council of India (ASCI)** and the **Competition Commission of India (CCI)**, face jurisdictional overlaps. The lack of coordination hampers decisive actions against violators. Moreover, enforcement is often sporadic and reactive rather than proactive.

3. Inadequate Penalties

The financial penalties levied for deceptive advertising are often insufficient to deter large corporations. Companies treat these fines as operational expenses, undermining the punitive intent of the regulations.

4. Delayed Legal Processes

The adjudication of advertising violations is time-consuming, discouraging individuals and competitors from pursuing complaints. This delay erodes the effectiveness of the regulatory framework.

2. Global Practices and Comparisons

Benchmarking against international best practices provides valuable insights into tackling deceptive advertising.

United States

- The **Federal Trade Commission (FTC)** has stringent laws against deceptive advertising. It requires advertisements to be truthful, evidence-based, and not misleading. In the context of online marketing, the FTC enforces transparency in influencer collaborations by mandating clear disclosures for sponsored content.
- The **FDA** also oversees the promotion of regulated products like pharmaceuticals and tobacco, ensuring compliance with strict advertising norms. Violations result in significant fines and publicized enforcement actions, enhancing deterrence.

Japan

- Japan's **Act Against Unjustifiable Premiums and Misleading Representations** specifically prohibits exaggeration or false representation of product quality or performance. Companies found guilty face heavy penalties, and regulators can mandate public apologies to ensure accountability. The country also emphasizes industry self-regulation, with trade associations creating detailed guidelines to supplement government oversight.

Canada

- The **Competition Bureau of Canada** tackles deceptive advertising by ensuring strict adherence to the **Competition Act**. The law penalizes companies for false or misleading claims, whether implicit or explicit. This includes environmental claims, commonly known as "greenwashing."

- Canada also has a robust grievance mechanism, allowing consumers to report misleading advertisements easily. Reports are reviewed swiftly, ensuring timely resolutions and maintaining public trust.

India's current regulations can benefit from integrating elements of these frameworks, particularly in clarifying definitions, increasing penalties for violations, and ensuring that enforcement bodies have the authority to act swiftly and decisively.

3. Lack of Consumer Awareness

A significant obstacle in combating deceptive advertising is the limited awareness among consumers regarding their rights and the manipulative strategies employed by advertisers. Many consumers fail to recognize surrogate advertising and remain unaware of the ethical and legal violations associated with such practices. This lack of awareness not only weakens consumer advocacy but also allows companies to operate with minimal accountability. Surveys reveal that a substantial proportion of consumers cannot differentiate between genuine advertisements and those designed to bypass restrictions, leading to misinformed purchasing decisions and perpetuating unfair competition.

Addressing this challenge requires a multi-pronged approach:

- **Public Awareness Campaigns:** Educating consumers about deceptive advertising through targeted campaigns in schools, colleges, and public forums can empower them to make informed choices²²¹.
- **Integration into Curricula:** Including consumer rights and media literacy in educational curricula can instil critical awareness from an early age.
- **Accessible Grievance Mechanisms:** Establishing user-friendly platforms for reporting misleading advertisements can enhance accountability and encourage consumer participation in regulatory processes.

V. RECOMMENDATIONS AND SOLUTION

In order to handle issues presented by deceptive advertising, multifaceted solutions will strengthen the regulatory mechanisms, enhance consumer awareness, and establish ethical practices across all businesses²²². Strong regulations that specifically work according to the types of products, such as alcoholic and tobacco products, are much more required. Surrogate advertising, lifestyle brand positioning, and indirect marketing by way of all

²²¹ Santosh Kumar, Advancing Consumer Rights in India From Legislation to Digital Solutions, 26 Nov, 2024, <https://pib.gov.in/PressNoteDetails.aspx?NoteId=153460&ModuleId=3&reg=3&lang=1>

²²² *The Monopolies and Restrictive Trade Practices Act, 1969*, No. 54, Acts of Parliament, 1969 (India).

media- all electronic media- have been in need of specific detailed guidelines²²³. For example, a similar sector-specific policy, such as Singapore's complete ban on tobacco advertising or France's Évin Law, can be implemented in India. This will ensure greater transparency and compliance²²⁴. Additionally, independent oversight bodies to monitor sensitive industries will further enhance accountability.

Educating consumers about their rights is equally important. It can be spread through campaigns about surrogate marketing and subliminal messaging. Digital platforms and mobile-based tools can ensure that these efforts reach into rural and semi-urban areas so that consumers are empowered by the knowledge of making choices²²⁵. Interactive tools that facilitate lodging complaints and tracking the same can further enhance consumer participation²²⁶.

Severe sanctions to deter fraudulent practices should be imposed. The sanctions should be graduated, from minor to major offenses and those who have committed the same crime multiple times, even entailing criminal liability, corrective advertising, and rebuilding consumer trust²²⁷. This would ensure accountability while discouraging people from engaging in unethical behavior. There is a need for greater collaboration between stakeholders like policy makers, consumer groups, and industry leaders in setting up regulations that are appropriate and balanced²²⁸. International best practices and cross-border cooperation will help harmonize Indian policies relating to advertisements with international standards so that international companies operating in the country get fair competition.

Another important development is the step forward integration of technology within regulatory efforts. AI-powered real-time monitoring system can flag advertisements as deceptive; blockchain technology allows transparency and adherence to a given set of rules due to immutable advertisement records²²⁹. Legal backing in the favor of consumers, such as pro-bono services and redressal by courts dedicated exclusively to grievances would further bolster individuals and result in increased fairness in market practices.

²²³ Qambar Hussain, Role Of Advertising Standard Council Of India In Regulation Of Advertisements Of Consumer- Packaged Goods, ISSN: 2229-5348, September, 2023.

²²⁴ *Singapore Tobacco (Control of Advertisements and Sale) Act*, Cap. 309, Singapore Statutes Online.

²²⁵ Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Gazette of India, Pt. II, Sec. 3(i).

²²⁶ Indian Ministry of Consumer Affairs, *Online Consumer Complaints Portal*, available at <https://consumerhelpline.gov.in>.

²²⁷ Dr Madhavi Sripathi, A Study on Impact of False Advertising on the Consumer Buying Behaviour, JICR- ISSN: 0022-1945, October, 2020.

²²⁸ Public Health Foundation of India, Alcohol Marketing and Regulatory Policy Environment in India, November 2013.

²²⁹ Valerio Stallone, Enhancing Digital Advertising with Blockchain Technology, Sage Journal Vol. 59, Issue 1, September 20, 2023.

Encouraging responsible advertising practices is important for sustainable growth. Industry incentives for ethical compliance and the integration of advertising ethics into educational curricula will foster a culture of responsibility. Periodic policy reviews are necessary to keep pace with the changing trends in advertising, such as influencer marketing and virtual promotions, so that regulations remain relevant and effective²³⁰.

These measures can be taken by India to curb the harmful effects of deceptive advertising on consumer rights and the promotion of a competitive market environment in which ethical creativity thrives²³¹. Such solutions aim to find a balance between innovation and regulation, ensuring sustainable economic growth and public trust in advertising.

VI. CONCLUSION

Advertising should balance creativity with ethical responsibility. The alcohol and tobacco industries' deceptive practices highlight the need for stringent oversight to protect consumers and ensure fair competition. By fostering transparency and accountability, we can promote a healthier, more equitable marketplace.

This paper underscores the importance of regulatory reforms, consumer awareness, and ethical advertising practices to achieve this goal. Only through collaborative efforts can we safeguard consumer welfare without stifling innovation in the advertising industry.

²³⁰ Ahmed Mohammed Amjad, Understanding Influencer Marketing and Power of Influencers: Key Insights on Challenges, Matrics and Realities, Vol. 8, Number 1, April 10, 2024.

²³¹ Consumer Protection Act, No. 35 of 2019, India Code (2019).

THE IMPACT OF ONLINE TRAVEL AGGREGATOR (OTA)S ON THE COMPETITIVE LANDSCAPE OF GOA'S BEACH HOTELS

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ABSTRACT

Online Travel Aggregators have provided conducive mechanism for the growth of hotel industry all over the world by providing access to consumers to book hotels in a convenient way. These OTAs have flourished the landscape of Goan hotel industry where nearly 86 lakh tourists recording hotel occupancy rate of 69 percent. The regulatory agencies have raised concern over the anti-competitive practise of the OTAs over the years across the country. The price fixing, exclusive contracts, monopolistic practices and use of algorithms to increase the prices is affecting consumers. This research paper investigates the anti-competitive practises adopted by the OTAs in specific beach areas in Goa where tourist influx during peak season is very high. The study will focus on the price fixing , monopolistic practices , use of algorithms, unfair practises adopted by OTAs that harm the interest of consumers . The findings of this research will reveal the market dynamics and the role played by the OTAs in the area and provide an insight for the policy makers and industry stakeholders to make regulatory changes for bringing about market efficiency and fairness in the industry for the benefit of consumers.

Keywords: Anti-competitive trade practices, beach hotel industry, market, dynamics, consumers, OTAs

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I. INTRODUCTION

The tourism industry has undergone sea-change in the last two decades due to the digital platforms that connects service providers and consumers instantly. Online Travel Aggregators (OTAs) have pervaded the hotel room booking space with MakeMyTrip - Goibibo (Go-MMT), Booking.com, Expedia, Cleartrip, Yatra, Oyo are emerging as players in the market. The new entrants Bookflexi, Bluepillow, , Hotelcombined, and others are also vying in the market.²³⁴ The multinational booking platforms have established their market prowess in India. The market appears to be diverse and the OTAs have become the drivers of the tourism Industry. While Make My Trip is India's leading OTA garnering a share of 54 percent of the online business, the other platforms such as Booking and Airbnb is also gaining traction in the segment ²³⁵.

A survey conducted by Rakuten Insight, a market research company, in 2023 states that 2/3rd of the respondents with varying age groups were using online platform due to easy accessibility . Interestingly, 1/5th of the respondents above the age of 55 revealed that they were using the platform for booking hotels .²³⁶

OTAs offer a wide variety of service to the consumers including comparing the hotels on the basis of reviews given by the users, discounts, reward and loyalty programmes. In return, the OTAs generate revenue depending commission received from the hotel booking by consumers and advertisements. The hotels tie up with the OTAs as they get presence in online space with the hotel photographs, address, its price. Some OTAs also offer help in growth of hotel business by suggesting improvements in hotel standards²³⁷

A. Intervention by Competition Commission of India:

Even as the OTAs platforms enhance the business in various sector of economy , the stakeholders are concerned about the anti-competitive and unfair trade practised adopted by the platforms.

²³⁴ Aditya Solanki, *Inception of Online Travel Agencies (OTA): Present & Future*, LINKEDIN (Apr. 8, 2020), <https://www.linkedin.com/pulse/inception-online-travel-agencies-ota-present-future-aditya-solanki/> (accessed Dec. 10, 2024).

²³⁵ KIFT, *India's Massive Growth in Online Travel: Which Companies Will Lead?* (Mar. 27, 2024), <https://kift.com/2024/03/27/indias-massive-growth-in-online-travel-which-companies-will-lead/#:~:text=OTAs%20are%20poised%20to%20play,been%20steadily%20gaining%20market%20share> (accessed Dec. 10, 2024).

²³⁶ India: Reason for Using Online Travel Agencies by Gender 2021, STATISTA, <https://www.statista.com/statistics/1218809/india-reason-for-using-online-travel-agency-by-gender/> (accessed Dec. 10, 2024).

²³⁷ Competition Commission of India, *Market Studies*, <https://www.cci.gov.in/economics-research/market-studies/details/18/6> (accessed Dec. 10, 2024).

A gradual increase in complaints of anti-competitive practices before the Competition Commission of India is testimony of doubtful practises adopted by the OTAs. The imposition of dictates by online platforms on businesses has been under the scanner of CCI. The issues of preferential treatment given to few e-commerce websites, methods of data collection, deep discounting and predatory pricing have been highlighted. The exclusionary conduct displayed by the platforms is under question as preference is given to one or few entities excluding the visibility of the rivals. The monopolistic or exploitive conduct of some players has been a cause of concern as they fall in grey area where changes in competition policy is required to check the unfair methods. One-sided contracts, revision of agreement unilaterally due to lack of bargaining power of some entities has escaped the clutch of law. It has provided impetus to the unfair practises adopted by the dominant players in several segments of society and cannot be dealt with on a case by case basis.²³⁸

The Competition Commission of India (CCI) has passed several orders imposing penalty running into hundreds of crores against the enterprises involved in anti-competitive conduct and abuse of dominant position in the market. In the last three years, the CCI has dealt with complaints mostly in the real estate, financial services, print media, healthcare, automobile and IT services. The CCI has imposed penalty amounting to 809 crores during this period on the enterprises for violating the provisions of the law involving anti-competitive agreements and abuse of dominant position.²³⁹ In one of its significant cases exposing the dark side of competition in the hotel segment, The Competition Commission of India (CCI) fined and ordered MMT-Go (MakeMyTrip and Goibibo) to change its ways for abusing its dominating position. It had partnered with OYO (Oravel Stays Limited) to exclude competitors. In 2018, OYO entered into an anti-competitive deal with MMT-Go that resulted in the removal of OYO's competitors from MMT-booking Go's platforms.²⁴⁰

Imposition of these huge penalties on certain companies, has not served as a deterrent to the other companies. Apart from this, the companies, which indulge in anti-competitive conduct under the garb of use of algorithm in business. The technologically advanced tool like

²³⁸ International Economic Policy, Indian Council for Research on International Economic Relations (ICRIER), *Online Travel Aggregators and Hotel Pricing Dynamics* (2024), https://icrier.org/pdf/IPCIDE-Policy_Brief_5.pdf (accessed Dec. 10, 2024).

²³⁹ Competition Commission of India, *Annual Report 2020-21*, <https://www.cci.gov.in/public/images/annualreport/en/annual-report-2020-211652253149.pdf> (accessed Dec. 10, 2024).

²⁴⁰ CCI imposes monetary penalty on MakeMyTrip, OYO, and Goibibo for anti-competitive practices and abuse of dominant position, SCC ONLINE BLOG (Oct. 21, 2022), <https://www.scconline.com/blog/post/2022/10/21/cci-makemytrip-oyo-goibibo-anti-competitive-practice-abuse-of-dominant-position-monetary-penalty-imposed-competition-news-legal-updates/> (last visited Dec. 10, 2024).

pricing algorithms is changing the competitive landscape in many markets and sectors. While this is producing benefits and efficiencies, it is also raising concerns of possible anti-competitive behaviour.²⁴¹ Anti- competitive conduct of businesses coupled with use of data science to maximize profits has resulted in exploitation of the consumers²⁴². The use of algorithms by big players have pushed out the existing competitors and affected consumers' interest.²⁴³

B. Anti –competitive practises in Goa:

This anti –competitive conduct is also affecting the consumers in Goa in various sectors like real estate, pharmaceutical, starred hotels, restaurants taxi business. The state government has raised concern over high prices of hotel rooms, which is affecting tourism industry and will be pursuing the centre to check in the prices in aviation and hotel segment as it is affecting tourism industry.²⁴⁴ The average room rate has increased from Rs. 8,507 in the financial year 2022 to 10,267 in the financial year 2023.²⁴⁵ Hence, there is scope to analyze whether the OTAs are indulged in anti-competitive trade practise that is harming the interest of the consumers.

II. OBJECTIVES

1. To investigate the potential price fixing by OTAs in Luxury hotels in beach areas.
2. To suggest recommendations improving transparency in methods used for determining hotel prices across OTAs.

III. HYPOTHESIS

Online Travel Aggregators (OTAs) engage in anti-competitive trade practices, such as price fixing, within the luxury hotel sector in beach areas during peak tourist season

²⁴¹ Organisation for Economic Co-operation and Development (OECD), *Algorithms and Collusion: Competition Policy in the Digital Age*, <https://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf> (accessed Dec. 10, 2024).

²⁴² *Virtual Competition: CHALLENGES for Competition Policy in an Algorithm-Driven Market*, Queen Mary University of London, <http://www.icc.qmul.ac.uk/media/icc/gar/gar2018/Virtual-Competition---Challenges-for-Competition-Policy-in-an-Algorithm-Driven-Market.pdf> (accessed Dec. 10, 2024).

²⁴³ UK Government, *Algorithms: How They Can Reduce Competition and Harm Consumers*, <https://www.gov.uk/government/publications/algorithms-how-they-can-reduce-competition-and-harm-consumers/algorithms-how-they-can-reduce-competition-and-harm-consumers> (accessed Dec. 10, 2024).

²⁴⁴ *Must Keep Room, Flight Prices in Check: Khaunte*, The Times of India (2024), <https://timesofindia.indiatimes.com/city/goa/must-keep-room-flight-prices-in-check-khaunte/articleshow/115342726.cms> (accessed Dec. 10, 2024).

²⁴⁵ *India: Hotel Average Room Rate in Goa 2021*, STATISTA (2024), <https://www.statista.com/statistics/724261/hotel-average-rate-in-go-india> (accessed Dec. 10, 2024).

IV. METHODOLOGY

The present study is empirical in nature. The researcher has analysed hotel room price offered by leading OTAs Make Mytrip, Booking, Expedia, Cleartrip, Goibibo and Agoda. A sample of an average 30, 4 and 5 starred beach hotels, was taken for the purpose of study out of the 49 hotels, as listed on google travel website. The data was gathered from November 29, 2024 to December 8, 2024 for check in on specific dates such as December 1, December 13, December 21 (pre-peak tourist season) and from December 23 to December 31 (peak tourist season). After gathering the data the researcher examined the price variations among the OTAs by using statistical tools to have an insight into the competitive landscape among luxury hotels.

V. SCOPE AND LIMITATION OF THE STUDY

The research focuses on publicly available data regarding price variations offered by OTAs that may have impact on interest of consumers. The study is intended to examine the prices during pre-peak and during peak tourist season. The study is limited to only 4 and 5 starred hotels situated in the proximity of beach areas in Goa. It excludes other category of hotels.

VI. REVIEW OF LITERATURE

An OECD Report (2023)²⁴⁶ demonstrates various algorithmic theories of harm including collusion, predatory pricing, self-preference, rebates, increases prices, price-discrimination and unfair trade practises. It predicts that heavy reliance on algorithm will result in more harm to consumers.

A Research Paper by Prakhar Harit,²⁴⁷ states that where pricing decisions are taken with algorithms, enterprises can coordinate to avoid competition. He explored the potential challenges which the competition authorities may face due to use of algorithm for pricing. Use of algorithm provides scope for tacit collusion and it will be challenging for the investigation machinery to unearth it, the paper suggests.

²⁴⁶ Organisation for Economic Co-operation and Development (OECD), *Algorithmic Competition*, *OECD Roundtables on Competition Policy Papers*, No. 296, OECD Publishing, Paris (2023), <https://doi.org/10.1787/cb3b2075-en> (accessed Dec. 10, 2024).

²⁴⁷Prakhar Harit, *Autonomous Algorithmic Price Coordination*, SSRN (Nov. 18, 2021), <https://ssrn.com/abstract=3968162> or <http://dx.doi.org/10.2139/ssrn.3968162> (accessed Dec. 10, 2024)..

Another research paper by Zhang Xu & Mingsheng Zhang²⁴⁸ concludes that in markets where competitors do not have clear idea about the pricing strategy of each other, there will be tacit collusion harming consumer interest.

The paper cautions that algorithmic collusion can lead to price discrimination affecting fairness in the market.

In a study conducted on pricing algorithm and collusion Alexander Mackay & Samuel N. Weinstein²⁴⁹ concluded that even without collusion, dynamic pricing affects consumer interest. This is because the algorithms act in response to the price of the rivals. As the existing competition law cannot check algorithmic pricing, a robust regulation is required to protect consumers' interest.

Exploring the issue of artificial intelligence and price collusion F. Beneke & M.O. Mackenrodt²⁵⁰ concludes that there is no need for an explicit communication by the competitors when algorithms on themselves co-ordinate to maximize profit for all. In case of competitive markets, the algorithms can fix a focal price, that is followed by other players. This may be done to even cheat the consumers or to make correction in response to dynamics of the market. This focal price could be unnecessary high considering the competitiveness in market affecting interest of consumers.

A study conducted by Frédéric Marty & Thierry Warin²⁵¹ demonstrates ill effect of bandit algorithms, as it can find new pricing strategy quickly and at the same time exploits the market for maximizing profits. They conclude that the ability of this algorithm to operate with minimal historical data and rapid adjustment to the market changes can pose a challenge to the competition authorities that will have to interpret the decision-making process in complex environment.

VII. ANALYSIS

²⁴⁸ Zhang Xu & Mingsheng Zhang, *Algorithmic Collusion and Price Discrimination: The Over-Usage of Data*, arXiv:2403.06150v1 [econ.GN] (Mar. 10, 2024), <https://arxiv.org/pdf/2403.06150v1> (accessed Dec. 10, 2024).

²⁴⁹ Alexander MacKay & Samuel N. Weinstein, *Dynamic Pricing Algorithms, Consumer Harm, and Regulatory Response*, WASH. U. L. REV. (Nov. 25, 2022), <https://wustllawreview.org/2022/11/25/dynamic-pricing-algorithms-consumer-harm-and-regulatory-response/> (accessed Dec. 10, 2024)

²⁵⁰ F. Beneke & M.O. Mackenrodt, *Artificial Intelligence and Collusion*, 50 IIC 109, 109–134 (2019), <https://doi.org/10.1007/s40319-018-00773-x> (accessed Dec. 10, 2024).

²⁵¹ Frédéric Marty & Thierry Warin, *Deciphering Algorithmic Collusion: Insights from Bandit Algorithms and Implications for Antitrust Enforcement*, J. ECON. & TECH. (2024).

A. Descriptives

dec01

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
MMT	33	13143.06	7523.226	1309.626	10475.44	15810.68	4133	28827
Booking	29	13914.90	7141.255	1326.098	11198.51	16631.28	4734	27730
Expedia	5	13857.00	7103.471	3176.769	5036.88	22677.12	7056	22301
Cleartrip	2	5422.50	1498.359	1059.500	-8039.72	18884.72	4363	6482
Goibibo	4	9886.00	6191.269	3095.634	34.31	19737.69	4302	18262
Agoda	19	10552.68	5697.966	1307.203	7806.35	13299.02	4384	23146
Total	92	12580.74	6971.251	726.803	11137.03	14024.44	4133	28827

B. Oneway

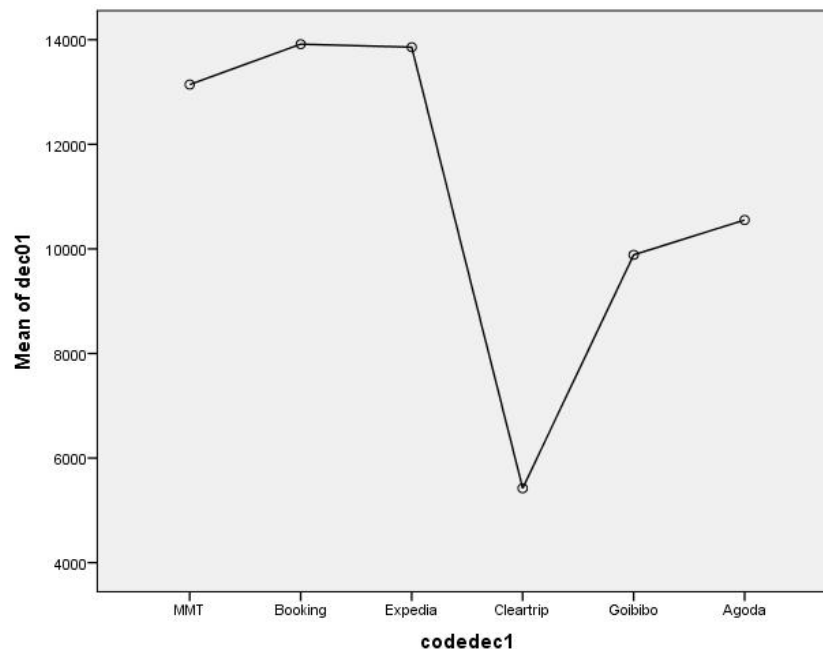
ANOVA

dec01

	Sum Squares	Df	Mean Square	F	Sig.
Between Groups	279872672.565	5	55974534.513	1.162	.335
Within Groups	4142576825.1	86	48169497.967		

	74				
Total	4422449497.7	91			
	39				

Means Plots



Nonparametric Tests

Hypothesis Test Summary

	Null Hypothesis	Test	Sig.	Decision
1	The distribution of dec01 is the same across categories of codedec1.	Independent-Samples Kruskal-Wallis Test	.140	Retain the null hypothesis.

Asymptotic significances are displayed. The significance level is .05.

The analysis aimed to compare the prices across different aggregators. An analysis of variance (ANOVA) was performed to test for significant differences in mean prices between the groups. However, the assumptions of ANOVA were not fully met, as assessed by standard diagnostic tests. To address these assumption violations, a non-parametric Kruskal-Wallis test was conducted as a robust alternative.

C. Results

1. ANOVA Results:

The ANOVA test did not reveal any statistically significant differences between group means:

- $F(5,86)=1.162, p=0.335(>0.05)$

2. Kruskal-Wallis Test Results:

Similarly, the Kruskal-Wallis test, which does not require assumptions of normality or homogeneity of variances, also showed no significant differences:

$p = 0.14(>0.05)$

3. The graph indicates that the mean prices vary slightly across aggregators, with Booking showing the highest mean price (13,915) and Cleartrip the lowest (5,422). Despite this variation, the ANOVA results ($p=0.335$) suggest these differences are not statistically significant. The overlapping confidence intervals (not visible in the plot but inferred from the ANOVA) further confirm the absence of significant differences. The trend line does not show a consistent increase or decrease, indicating no pricevariation pattern among aggregators.

Conclusion Both ANOVA and the Kruskal-Wallis test indicated that there are no statistically significant differences in prices across the aggregators. While the assumptions for ANOVA were not fully met, the consistency of results from the Kruskal-Wallis test supports the conclusion that the price variation between aggregators is not significant.

Descriptives

dec13

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		

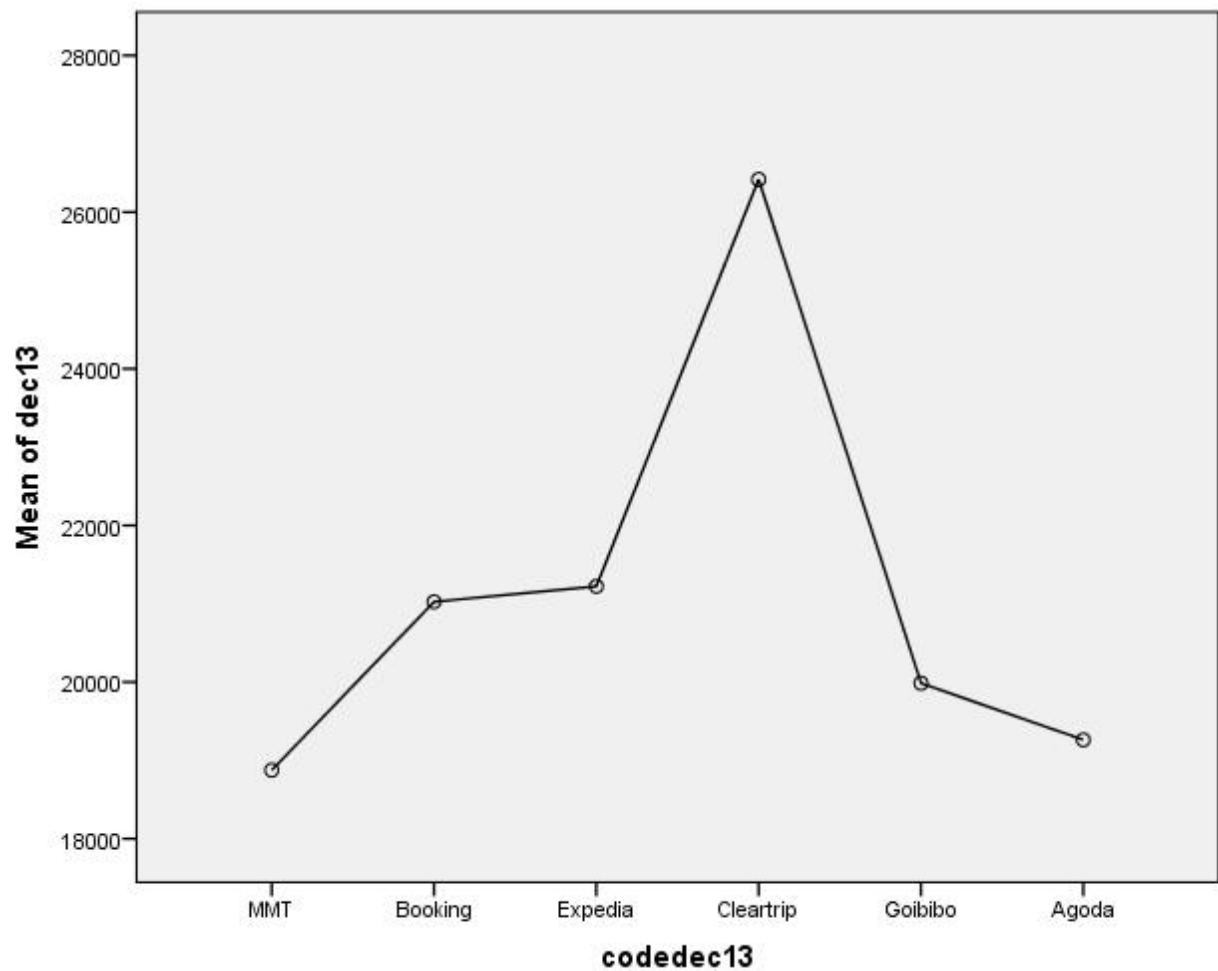
MMT	18	18874.44	10900.801	2569.343	13453.60	24295.29	6429	43070
Booking	15	21024.93	12345.470	3187.587	14188.24	27861.63	6473	44191
Expedia	13	21222.69	12927.821	3585.532	13410.49	29034.90	5373	44191
Cleartrip	7	26417.14	13906.622	5256.209	13555.66	39278.62	12747	44191
Goibibo	10	19986.10	10598.678	3351.596	12404.26	27567.94	6532	39772
Agoda	11	19261.91	13565.753	4090.228	10148.31	28375.51	5600	44191
Total	74	20644.20	11988.891	1393.680	17866.60	23421.80	5373	44191

ANOVA

dec13

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	321538537.146	5	64307707.429	.430	.826
Within Groups	10171007640.813	68	149573641.777		
Total	10492546177.959	73			

Means Plot



Hypothesis Test Summary

	Null Hypothesis	Test	Sig.	Decision
1	The distribution of dec13 is the same across categories of codedec13.	Independent-Samples Kruskal-Wallis Test	.695	Retain the null hypothesis.

Asymptotic significances are displayed. The significance level is .05.

The analysis aimed to compare the prices across different aggregators. An analysis of variance (ANOVA) was performed to test for significant differences in mean prices between the groups. However, the assumptions of ANOVA were not fully met, as assessed by

standard diagnostic tests. To address these assumption violations, a non-parametric Kruskal-Wallis test was conducted as a robust alternative.

Results

1. ANOVA Results:

The ANOVA test did not reveal any statistically significant differences between group means:

- $F(5,68) = .430, p = 0.826 (>0.05)$

2. Kruskal-Wallis Test Results:

Similarly, the Kruskal-Wallis test, which does not require assumptions of normality or homogeneity of variances, also showed no significant differences: $p = 0.695 (>0.05)$

3. The graph indicates that the mean prices vary slightly across aggregators, with Cleartrip showing the highest mean price (26417) and MMTP the lowest (18874.). Despite this variation, the ANOVA results ($p = 0.826$) suggest these differences are not statistically significant. The overlapping confidence intervals (not visible in the plot but inferred from the ANOVA) further confirm the absence of significant differences. The trend line does not show a consistent increase or decrease, indicating no price variation pattern among aggregators.

Conclusion Both ANOVA and the Kruskal-Wallis test indicated that there are no statistically significant differences in prices across the aggregators. While the assumptions for ANOVA were not fully met, the consistency of results from the Kruskal-Wallis test supports the conclusion that the price variation between aggregators is not significant

Descriptives

dec21

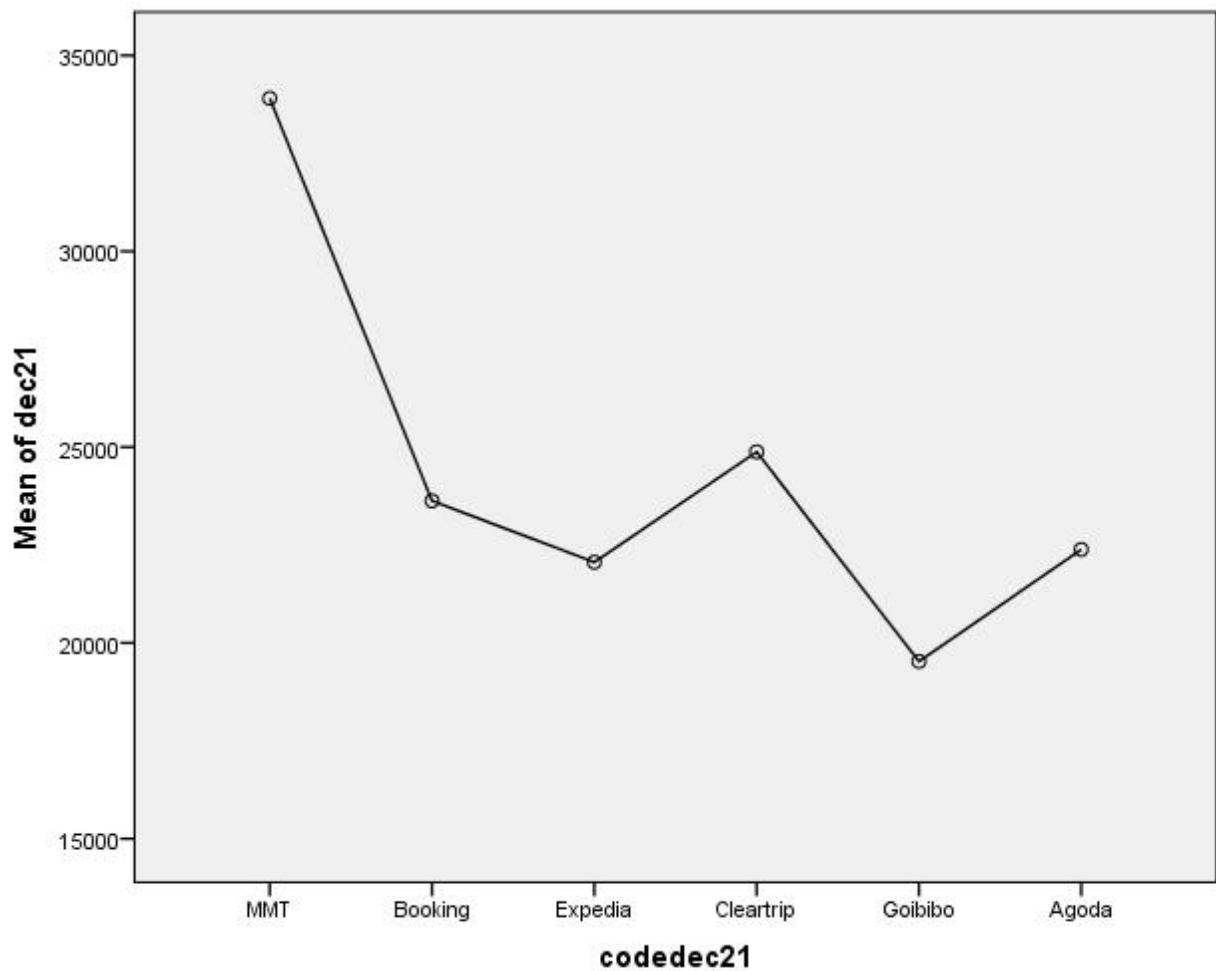
	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
MMT	23	33904.39	67426.359	14059.368	4747.05	63061.74	6420	73160

Booking	15	23627.60	13083.503	3378.146	16382.20	30873.00	10619	48970
Expedia	13	22060.77	14843.463	4116.836	13090.95	31030.58	6021	48970
Cleartrip	10	24877.20	14629.966	4626.401	14411.55	35342.85	8381	48970
Goibibo	18	19526.50	17464.655	4116.459	10841.53	28211.47	6463	73160
Agoda	12	22386.58	15164.080	4377.493	12751.79	32021.38	5629	48970
Total	91	25163.66	36099.165	3784.221	17645.64	32681.67	5629	73160

ANOVA

dec21

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	2583126898.037	5	516625379.607	.383	.859
Within Groups	114700345730.403	85	1349415832.122		
Total	117283472628.440	90			



Hypothesis Test Summary

	Null Hypothesis	Test	Sig.	Decision
1	The distribution of dec21 is the same across categories of codedec21.	Independent-Samples Kruskal-Wallis Test	.601	Retain the null hypothesis.

Asymptotic significances are displayed. The significance level is .05.

The analysis aimed to compare the prices across different aggregators. An analysis of variance (ANOVA) was performed to test for significant differences in mean prices between the groups. However, the assumptions of ANOVA were not fully met, as assessed by standard diagnostic tests. To address these assumption violations, a non-parametric Kruskal-Wallis test was conducted as a robust alternative.

Results

1. ANOVA Results:

The ANOVA test did not reveal any statistically significant differences between group means:

$$F(5,85) = 0.383, p = 0.859 (>0.05)$$

2. Kruskal-Wallis Test Results:

Similarly, the Kruskal-Wallis test, which does not require assumptions of normality or homogeneity of variances, also showed no significant differences:
 $p = 0.601 (>0.05)$

3. The graph indicates that the mean prices vary slightly across aggregators, with MMT showing the highest mean price (33904) and GoIBIBO the lowest (19526.). Despite this variation, the ANOVA results ($p = 0.859$) suggest these differences are not statistically significant. The overlapping confidence intervals (not visible in the plot but inferred from the ANOVA) further confirm the absence of significant differences. The trend line does not show a consistent increase or decrease, indicating no price variation pattern among aggregators.

Conclusion Both ANOVA and the Kruskal-Wallis test indicated that there are no statistically significant differences in prices across the aggregators. While the assumptions for ANOVA were not fully met, the consistency of results from the Kruskal-Wallis test supports the conclusion that the price variation between aggregators is not significant

ANOVA

dec2431

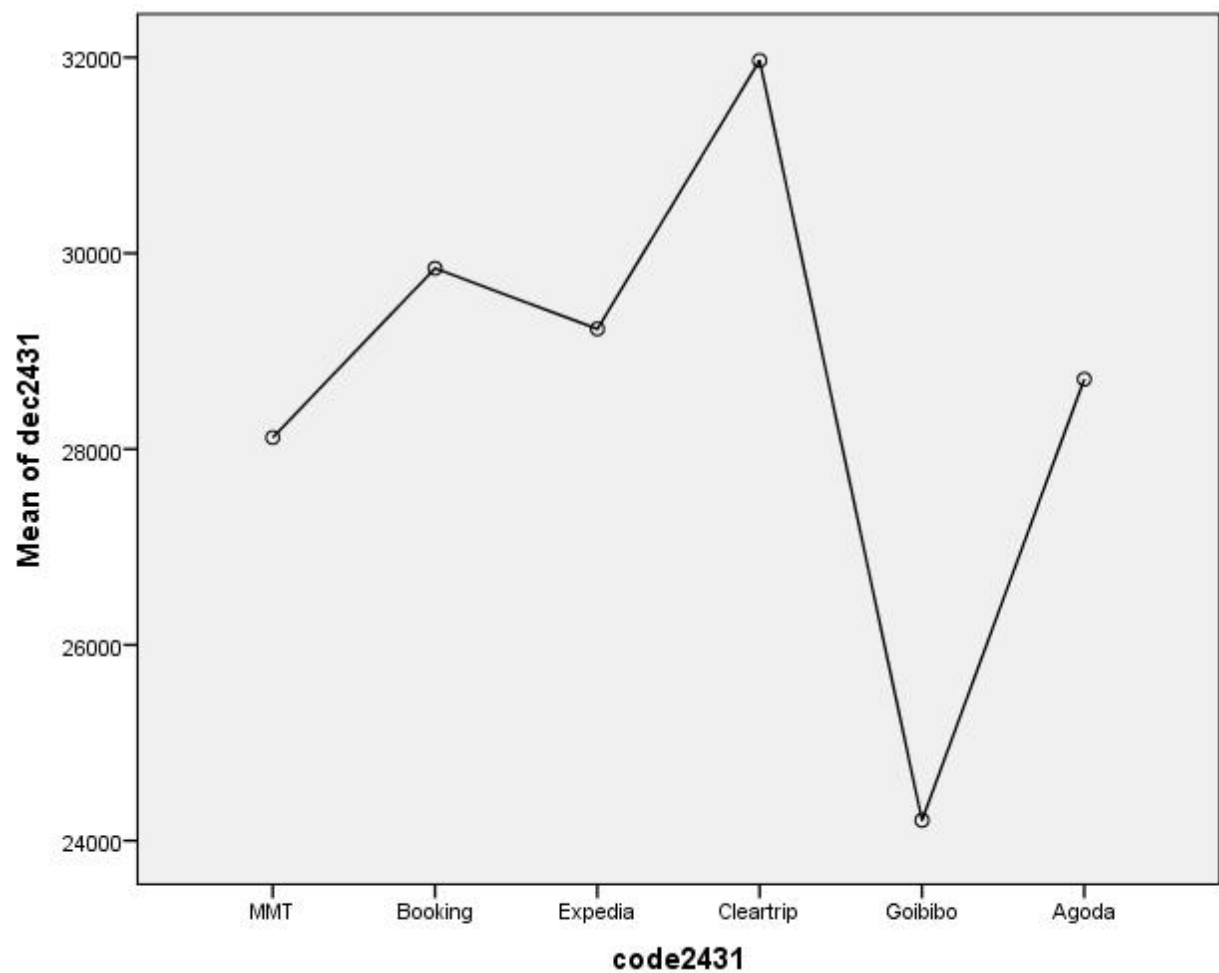
	Sum of Squares	df	Mean Square	F	Sig.

Descriptives

dec2431

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimum	Maximum
					Lower Bound	Upper Bound		
MMT	193	28116.93	19840.478	1428.149	25300.05	30933.80	6581	140171
Booking	156	29846.90	18967.058	1518.580	26847.11	32846.68	6581	119770
Expedia	93	29226.91	19629.652	2035.500	25184.24	33269.59	7102	119770
Cleartrip	55	31969.09	23394.380	3154.498	25644.70	38293.48	8321	119770
Goibibo	100	24208.35	15503.290	1550.329	21132.16	27284.54	6621	84370
Agoda	96	28714.00	21090.018	2152.491	24440.77	32987.23	7579	119770
Total	693	28479.75	19578.757	743.735	27019.50	29940.00	6581	140171

Between Groups	2868308658.857	5	573661731.771	1.502	.187
Within Groups	262394467695.951	687	381942456.617		
Total	265262776354.808	692			



Hypothesis Test Summary

	Null Hypothesis	Test	Sig.	Decision
1	The distribution of dec2431 is the same across categories of code2431.	Independent-Samples Kruskal-Wallis Test	.054	Retain the null hypothesis.

Asymptotic significances are displayed. The significance level is .05.

The analysis aimed to compare the prices across different aggregators. An analysis of variance (ANOVA) was performed to test for significant differences in mean prices between the groups. However, the assumptions of ANOVA were not fully met, as assessed by standard diagnostic tests. To address these assumption violations, a non-parametric Kruskal-Wallis test was conducted as a robust alternative.

Results

1. ANOVA Results:

The ANOVA test did not reveal any statistically significant differences between group means:

$$F(5,687) = 1.502, p = 0.187 (>0.05)$$

2. Kruskal-Wallis Test Results:

Similarly, the Kruskal-Wallis test, which does not require assumptions of normality or homogeneity of variances, also showed no significant differences:

$$p = 0.054 (>0.05)$$

3. The graph indicates that the mean prices vary slightly across aggregators, with Cleartrip showing the highest mean price (31969) and Goibibo the lowest (24208.). Despite this variation, the ANOVA results ($p = 0.187$) suggest these differences are not statistically significant. The overlapping confidence intervals (not visible in the plot but inferred from the ANOVA) further confirm the absence of significant differences. The trend line does not show a consistent increase or decrease, indicating no price variation pattern among aggregators.

Conclusion Both ANOVA and the Kruskal-Wallis test indicated that there are no statistically significant differences in prices across the aggregators. While the assumptions for ANOVA were not fully met, the consistency of results from the Kruskal-Wallis test supports the conclusion that the price variation between aggregators is not significant

4. Kruskal-Wallis Test Results:

Similarly, the Kruskal-Wallis test, which does not require assumptions of normality or homogeneity of variances, also showed no significant differences:

$$p = 0.054(>0.05)$$

- The graph indicates that the mean prices vary slightly across aggregators, with Cleartrip showing the highest mean price (31969) and Goibibo the lowest (24208.). Despite this variation, the ANOVA results ($p=0.187$) suggest these differences are not statistically significant. The overlapping confidence intervals (not visible in the plot but inferred from the ANOVA) further confirm the absence of significant differences. The trend line does not show a consistent increase or decrease, indicating no pricevariation pattern among aggregators.

Conclusion Both ANOVA and the Kruskal-Wallis test indicated that there are no statistically significant differences in prices across the aggregators. While the assumptions for ANOVA were not fully met, the consistency of results from the Kruskal-Wallis test supports the conclusion that the price variation between aggregators is not significant

ANOVA

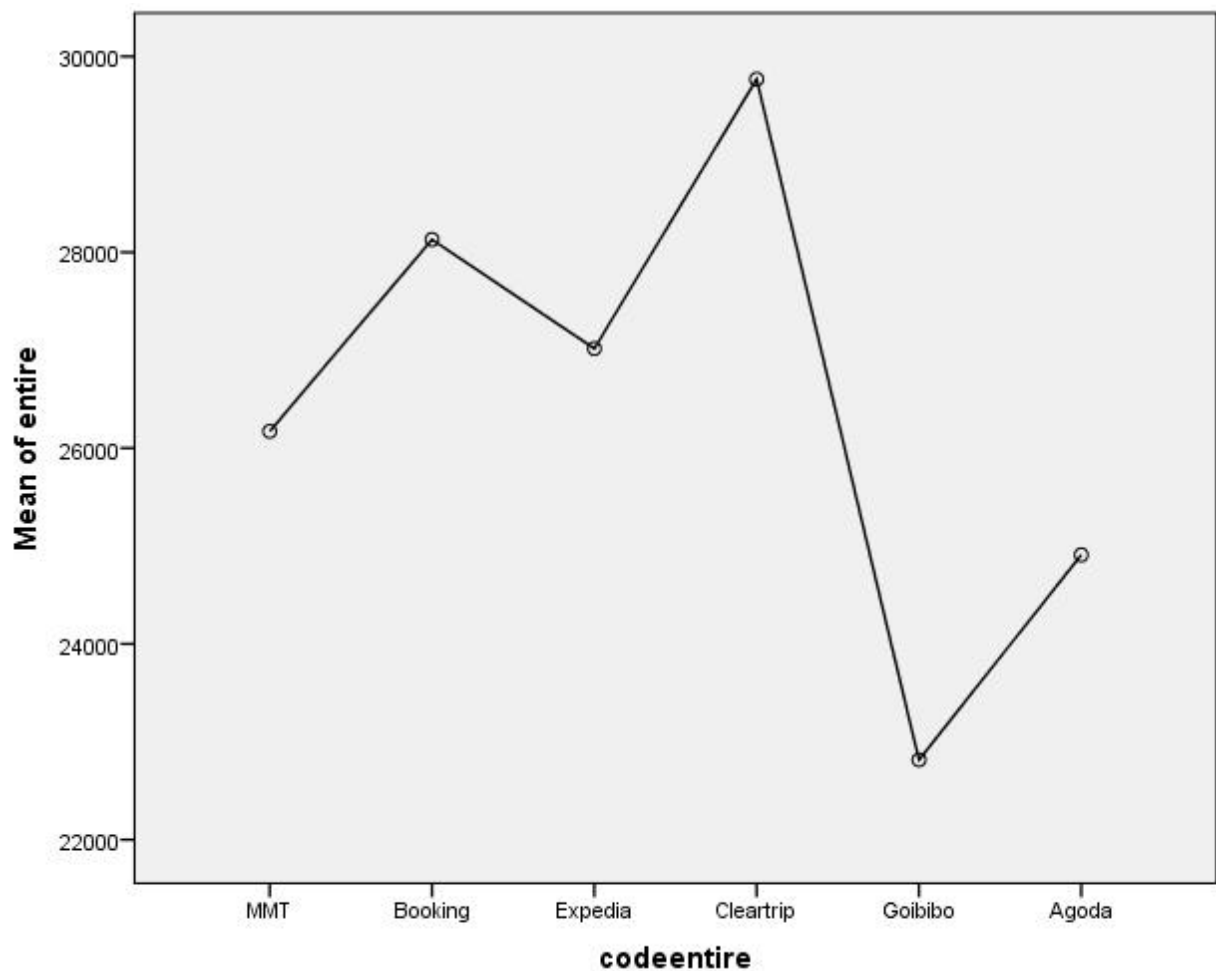
Descriptives

Entire

	N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean		Minimu m	Maximu m
					Lower Bound	Upper Bound		
MMT	266	26171.30	26637.540	1633.252	22955.50	29387.10	4133	119770
Booking	215	28130.40	28615.909	1951.589	24283.60	31977.20	4734	119770
Expedia	124	27016.72	18561.471	1666.869	23717.25	30316.18	5373	119770
Cleartrip	74	29768.07	21711.887	2523.956	24737.83	34798.30	4363	119770
Goibibo	132	22816.04	15443.454	1344.180	20156.93	25475.15	4302	84370
Agoda	138	24909.89	19658.041	1673.404	21600.85	28218.93	4384	119770
Total	949	26355.95	23595.369	765.938	24852.82	27859.08	4133	119770

Entire

	Sum of Squares	df	Mean Square	F	Sig.
Between Groups	3544381483.862	5	708876296.772	1.275	.272
Within Groups	524246480079.503	943	555934761.484		
Total	527790861563.366	948			



Hypothesis Test Summary

	Null Hypothesis	Test	Sig.	Decision
1	The distribution of entire is the same across categories of codeentire.	Independent-Samples Kruskal-Wallis Test	.023	Reject the null hypothesis.

Asymptotic significances are displayed. The significance level is .05.

The analysis aimed to compare the prices across different aggregators. An analysis of variance (ANOVA) was performed to test for significant differences in mean prices between the groups. However, the assumptions of ANOVA were not fully met, as assessed by standard diagnostic tests. To address these assumption violations, a non-parametric Kruskal-Wallis test was conducted as a robust alternative.

Results

1. ANOVA Results:

The ANOVA test did not reveal any statistically significant differences between group means:

- $F(5,943) = 1.275, p = 0.272 (>0.05)$

2. Kruskal-Wallis Test Results:

Similarly, the Kruskal-Wallis test, which does not require assumptions of normality or homogeneity of variances, also showed no significant differences: $p = 0.023 (>0.05)$

- The graph indicates that the mean prices vary slightly across aggregators, with Cleartrip showing the highest mean price (29768) and Goibibo the lowest (22816.). Despite this variation, the ANOVA results ($p = 0.272$) suggest these differences are not statistically significant. The overlapping confidence intervals (not visible in the plot but inferred from the ANOVA) further confirm the absence of significant differences. The trend line does not show a consistent increase or decrease, indicating no pricevariation pattern among aggregators.

Conclusion Both ANOVA and the Kruskal-Wallis test indicated that there are no statistically significant differences in prices across the aggregators. While the

assumptions for ANOVA were not fully met, the consistency of results from the Kruskal-Wallis test supports the conclusion that the price variation between aggregators is not significant

VIII. CONCLUSION AND SUGGESTIONS

Analysis of price offered on online platforms pertaining to luxury hotel in beach areas during the period under study shows that there is significant price variation among leading OTAs. There is no statistically significant price variation among OTAs before peak tourist season and during the peak tourist season. This raises concern about potential price fixing by the OTAs. As the literature suggests that there is no need for having tacit collusion for price fixing across the OTAs because the algorithms co-ordinate price fixing, further investigation needs to be done to find out whether this price fixing is machine driven or any agreement between the OTAs. Considering the pricing strategies adopted by the OTAs, it is suggested that regulations need to be in place to show the total number of rooms available and total number of rooms reserved including free cancellations on day to day basis, so that the consumers have transparency regarding the demand and supply. This could mitigate the harm caused to consumers.

(The authors acknowledge contribution of Assistant Professor in Mathematics, Mrunal Parsekar, Carmel College of Arts, Science and Commerce for Women, Nuvem, Goa, Email: mrunalparsekar@carmelcollegegoa.org, for statistical analysis of the data)

THEME 2

**ALL BARK NO BITE? ANTITRUST ACTIONS AND THEIR IMPACT ON
INNOVATION IN DIGITAL CONTENT ECOSYSTEMS**

-Dhruva Shukla²⁵²

ABSTRACT

The free market is increasingly influenced, shaped, and directed by Digital Content in today's day and age – a reality not lost on governments, who are continuously trying to reign in this impact with antitrust actions in the hopes of promoting a fair and competitive market. However, this focus on regulating the overarching monopoly of digital giants is not necessarily a boost to innovation, and may have negative spillover effects for smaller players in the digital content ecosystems. This paper analyses the impact of such antitrust actions vis-à-vis innovation in digital content ecosystems to address two gaps, namely, the deterring effect that such actions against giants may have on innovation by smaller players and secondly, whether such antitrust actions are even in alignment with the long-term goal of promoting competition or that they act only in stifling innovation for all. It then proposes potential solutions to the problem of imbalance between antitrust actions against digital giants and innovation, ultimately arguing that these antitrust policies must align with the realities of the digital age, ensuring they have both bark and bite in promoting competition without disrupting innovation for all competitors.

²⁵² Dhruva Shukla, Student, Faculty of Law, Delhi University

I. INTRODUCTION

The legal canon of literature examining the checks on anticompetitive behaviour in the market is replete with mentions of a conflict between antitrust action and patent law. This conflict takes centre stage when innovation is brought into the picture. Innovation is commonly understood as the fundamental factor guiding patent law, a law built to protect the rights of inventors by incentivising their ownership over their inventions. In other words, patent law encourages innovations by allowing the inventor a right to exclude others from using or exercising ownership over its innovations in an unbridled manner. In contrast to this right of exclusion granted by patent law, antitrust action functions on the assumption that exclusion of players in the market by any one player, whether it be from entering the said market or from functioning to its intended capacity amounts to anticompetitive and monopolistic behaviour that must be checked.²⁵³ Therefore, the paradox between patent law and antitrust action is glaringly obvious at first glance. This distinction also underlines that the crux of the conflict is the differing treatment of innovation for the respective end goals of the two laws. However, this puzzle is not as straightforward as it seems. Several scholars have suggested that perhaps antitrust action is a precursor to promoting more innovation in the market and thus does not stand in the way of patent law but is in alignment with it.²⁵⁴ This begs the question of whether antitrust action is truly antithetical to innovation and if so, is the reconciliation of antitrust action with innovation possible?

Another increasingly conspicuous aspect of the modern age that cannot be ignored when innovation is in question, is the ambit of digital content ecosystems. While it is established that market forces have always been driven by the waves of public perception and market demand, today we live in times where this public perception is almost entirely generated from behind screens. Such public perception is generated through digital content machines, wherein different digital platforms shape consumer behaviour through the digital content shared on such platforms – be it applications, retail websites, e-marketplaces or social media platforms. Therefore, digital content ecosystems have emerged as critical power hubs for the dissemination of market messages. These platforms are positioned as dominant players in today's economy because they have the power to influence consumer behaviour. Consequently, this has brought them under the scrutiny of antitrust regulators, for concerns of abuse of market power to suppress competition. These digital platforms perform a dual function in influencing the market. Firstly, they provide critical infrastructure that fosters

²⁵³ Michael A. Carrier, *Unraveling the Patent-Antitrust Paradox*, 150 *U. Pa. L. Rev.* 761 (2002).

²⁵⁴ *Id.*

content creation and innovation. Secondly, they yield the power to control access, pricing and visibility of products which can allow anti-competitive behaviour to fester. This complicates the approach that antitrust regulators must take towards these platforms because while the check on anti-competitive behaviour is crucial, it is also important to ensure that the opportunities for innovation are not discouraged and wiped out.

This paper, in Part I, examines the impact of antitrust action on innovation concerning digital content ecosystems. Part II proposes that the antitrust-innovation puzzle is not unilateral in its impacts and holds both positive and negative aspects to it. Herein, case studies are utilised to highlight the complex consequences of antitrust action for innovation. Finally, Part III proposes that by forsaking innovation, antitrust goals may also be compromised and examines whether balancing antitrust goals and innovation is possible.

II. CAUGHT IN THE CROSSFIRE: THE ANTITRUST – INNOVATION PUZZLE AND DIGITAL CONTENT ECOSYSTEMS

Consumer welfare is widely acknowledged as one of the greater goals of antitrust regulation. By limiting anticompetitive behaviour, market concentration and predatory pricing, antitrust action aims to regulate the market to optimise consumer welfare. Thus, the hallmarks of a competitive market which ensures consumer welfare provide the consumer with fair choices that are not dictated by the monopoly of any one player. This is where innovation comes in. Innovation is the cornerstone of free choice, for the greater the advancing range of options available to a consumer, the greater the competition in a market may be construed to exist. It is in this vein that one line of reasoning suggests that in the challenge of the patent–antitrust puzzle, innovation might behave as a common denominator in bridging this gap.²⁵⁵ One of the seminal approaches invalidating the existence of a patent-antitrust problem also argues that the right to exclude granted under patent protections is the legalised monopoly within the defined ambit of that particular patent grant and it is only when the entity exceeds its patent grant, that it faces trouble with antitrust regulation for it has now entered the ambit governed by antitrust law and beyond its patent grant.²⁵⁶ Further, it may also be observed that innovation thrives as a result of antitrust actions that limit anti-competitive behaviours by allowing more freedom to other players in the market.²⁵⁷

²⁵⁵ Carrier, *Supra* note 1, at 1.

²⁵⁶ Bartholomew Diggins, *The Patent-Antitrust Problem*, 53 *Mich. L. Rev.* 1093 (1955).

²⁵⁷ Sruthi Thatchenkery & Riitta Katila, *Innovation and Profitability Following Antitrust Intervention Against a Dominant Platform* (2021) (unpublished doctoral dissertation, University of Pennsylvania)

On the other hand, innovation as an equalizer between antitrust regulation and patent law can be strongly challenged. Antitrust action is often taken against market giants to curb them from misusing exclusivity and exclusionary tactics in their market dealings. This is done with the view to ensure that a manufactured monopoly of any one player does not negatively impact the market entry of other players and compel consumers to rely entirely on the monopolistic player. While curbing such monopolistic practices, antitrust regulation seeks to address the trend of exclusivity perpetrated by the monopolistic player. Thereby, the monopoly is challenged by divesting the market rights in as many players as possible and the exclusivity of rights to sell in a market by way of excessive product patenting or non-licensing of standard essential patents is shattered. The market is restored to status quo ante – wherein competition is maintained and consumer welfare is ensured through several options available to the consumer. However, this antitrust regulation that strips away the exclusivity of certain market rights from an anti-competitive market, works against the exclusivity of rights granted by the patent regime. The patent regime is based on the protection of innovation and such a destruction of certain exclusivity rights over innovations may ring a death knell for innovation in that sector.

The challenge posed to innovation by the exercise of antitrust regulations in the digital content ecosystem stems from several perspectives. The regulations aim to check exclusivity arrangements, predatory pricing, self-preferencing, and anti-competitive acquisitions – all standard self-promoting tactics used by digital content giants to eliminate competition in the market. For instance, the popular search engine giant Google was levied a fine of 2.42 billion euro in 2017 by the European Commission for violation of anti-trust regulations and engaging in anti-competitive practices. While Google appealed against this ruling in the Court of Justice of the European Union, its assertions fell hollow and the heavy fine was upheld. The anti-competitive behaviour exhibited by Google included an “abusive exploitation of dominant position”²⁵⁸ whereby Google showed signs of self-preferencing by placing paid ads on top. These antitrust actions are concerning when seen in the context of the innovation paradigm.

III. ANTITRUST ACTIONS AGAINST DIGITAL GIANTS AND WHAT THEY MEAN FOR INNOVATION

https://mackinstitute.wharton.upenn.edu/wp-content/uploads/2021/03/Thatchenkery-Sruthi-Katila-Riitta_Innovation-and-Profitability-Following-Antitrust-Intervention-Against-a-Dominant-Platform_v2.pdf.

²⁵⁸ Kate Holton, *EU Court Upholds Google's \$2.7 Bln EU Antitrust Fine*, *Reuters* (Sept. 10, 2024), <https://www.reuters.com/technology/eu-court-upholds-googles-27-bln-eu-antitrust-fine-2024-09-10/>.

This section evaluates the effects of antitrust actions against digital giants by analysing how antitrust regulation can foster or hinder innovation.

A. Positive Impact of Antitrust Actions on Innovation

Innovation is deeply connected to economic growth and progress²⁵⁹. It is with this in mind, that one must approach the relationship between antitrust action and digital content ecosystems to interpret the harmonising elements between the two. Antitrust actions aim to foster a healthy market environment where monopolistic and anti-competitive behaviour is curbed in favour of a progressing economy. Therefore, the greatest common denominator between antitrust actions and innovation is the quest for economic progress. Further, innovation is also the fundamental factor influencing different ranges and varieties of products in a market, allowing choices for the consumer and thereby, ensuring consumer welfare – another key principle of antitrust regulation. It has been argued that antitrust regulators view conduct hampering innovation in a bad light as they equate it with anti-competitive behaviour²⁶⁰. It is clear then that, in the right circumstances, antitrust actions can act as a catalyst to innovation by promoting competition and levelling the playing field.

i) Preventing Monopolistic Behaviours That Stifle Smaller Competitors

Monopolistic practices such as predatory pricing, exclusive agreements, or self-preferencing can limit market entry for smaller firms and startups. These smaller firms often serve as sources of disruptive innovations²⁶¹. Antitrust actions prevent dominant firms from abusing their market position, ensuring a competitive landscape that nurtures creativity and innovation.

Another significant anti-competitive behaviour that antitrust action seeks to challenge and restrict is anti-competitive acquisitions made by digital giant companies. It is often observed that big tech companies, flush with capital and having the resources and scale to acquire smaller companies which are competition, do so with the sole motive of eliminating competition from them in that sphere. Instead of scaling new technology and spearheading innovations to meet such competition head-on, the tech giants choose to pay out the competitive companies and acquire them. This has been described as “killer acquisitions”²⁶² aimed at limiting companies which pose a potential threat to the tech giant before they

²⁵⁹ Duyen My Thi Thi & Tinh Tran Phu Do, *The Interrelationships Between Economic Growth and Innovation: International Evidence*, 64 *Econ. Model.* 1 (2017).

²⁶⁰ Daniel F. Spulbar, *Antitrust and Innovation Competition*, 11 *J. Antitrust Enf't* 5, 6 (2022).

²⁶¹ Sudhanshu Kumar, *Antitrust Concerns Vis-à-Vis Disruptive Innovation: Takeaways for Competition Commission of India*, 14 *Ind. J. L. & Pol'y* 23 (2023).

²⁶² Colleen Cunningham, Florian Ederer & Song Ma, *Killer Acquisitions*, 129 *Q.J. Econ.* 649 (2021).

become a significant threat. For example, Facebook's acquisitions²⁶³ of Instagram and WhatsApp have faced retrospective scrutiny, with critics arguing that these deals eliminated competition in the social media and messaging markets. In digital content ecosystems, similar concerns arise when dominant players acquire smaller firms in niche markets like audiobooks, e-publishing, or music streaming.

For instance, in the case of search engine giant Google being penalized with heavy fines for its monopolistic behaviour with respect to shopping ads, the European Union exercised antitrust regulations to restore competition in the market, allowing smaller players the opportunity to participate fairly in the market and have the prerogative for innovation.²⁶⁴

ii) Encouraging Diverse Innovations by Levelling the Playing Field

Antitrust actions restrict market players that exhibit monopolistic or anti-competitive behaviour and by doing so, contain the anti-competitive barriers to market entry or predatory pricing. As a result, the market is levelled to a fairground with healthy competition. This allows all players in the field to partake in the market competition and come up with new and diverse innovations. The removal of a monopolistic barrier to market entry itself bolsters several players to try their hand at the market and compete with different innovations to boost their business. This is directly in line with the goals of the antitrust regime, which seeks to provide a competitive market where consumers have fair choice.

iii) Driving Consumer-Centric Innovations

Competitive markets incentivize firms to prioritize customer satisfaction, often through innovative offerings that address unmet needs or improve user experience. Antitrust actions against monopolistic behaviours ensure that firms cannot rely solely on their market dominance to retain their position, but need to innovate to stay relevant. For instance, the regulatory scrutiny on Apple's App Store policies has pressured the company to reduce fees and allow developers to explore alternative payment systems, leading to enhanced choices for consumers.²⁶⁵

B. Negative Impact of Antitrust Actions on Innovation

i) Deterrence to High Risk, High Cost Innovations

It can be observed that antitrust actions against large firms may deter them from engaging in significant investments in high-risk, capital intensive projects, which are possible at their

²⁶³ Sarah N. Lynch, *Meta Will Face Antitrust Trial Over Instagram, WhatsApp Acquisitions*, Reuters (Nov. 13, 2024), <https://www.reuters.com/legal/meta-will-face-antitrust-trial-over-instagram-whatsapp-acquisitions-2024-11-13/>.

²⁶⁴ Holton, *EU Court Upholds Google's \$2.7 Bln EU Antitrust Fine*, supra note 7.

²⁶⁵ *Epic Games, Inc. v. Apple Inc.*, No. 4:20-cv-05640-YGR (N.D. Cal. Sept. 10, 2021).

level only due to the immense market power enjoyed by them. Consistent and stringent antitrust measures against such forays into high-risk, high cost innovation projects could reduce their ability or willingness to take these risks, an endeavour impossible at a smaller scale and one that is crucial in scaling new technologies and innovations. The giant firms alone can provide the resources and scale necessary to execute such projects. For instance, the U.S. Federal Trade Commission's (FTC) lawsuits against Meta over acquisitions like Instagram and WhatsApp²⁶⁶ may prove contrary to innovation because such antitrust actions could deter future acquisitions and collaborative innovations necessary for scaling new technologies.

ii) Compliance Burdens and Deterrence to Collaborations

Excessive antitrust regulation on digital content companies may impose compliance burdens that divert resources from innovation to legal and operational challenges, particularly for smaller firms. Such overregulation can discourage collaborative innovation by complicating partnerships between startups and larger firms due to a fear of regulatory scrutiny.

iii) Negative Consequences for Digital Ecosystem Synergies

Some antitrust actions, such as forcing firms to unbundle services or split operations, may disrupt synergies that drive innovation within integrated ecosystems²⁶⁷.

C. Case Studies

Epic Games v. Apple: This was a landmark judgement that attacked the latter party's App Store policy whereby it deducted a 30% commission fee on in-app purchases and also featured restrictions against directing users to alternative payment methods other than that of its own company. Epic Games accused Apple of engaging in monopolistic practices by stifling innovation and competition and obstructing app developers from reaching consumers efficiently. The judgement in favour of Epic Games set a precedent for checking anti-competitive behaviour by digital giants that stifles innovation. Further, it emphasized the importance of consumer choice and consumer welfare with respect to such anti-competitive practices in the digital content ecosystems.²⁶⁸

EU v. Google:

The monopolization of search engine through its dominant position saw Google engaging in anti-competitive practices such as showing paid ads affiliated to itself on the top of a search

²⁶⁶ Lynch, *Meta Will Face Antitrust Trial Over Instagram, WhatsApp Acquisitions*, supra note 12.

²⁶⁷ Giulio Federico, Fiona Scott Morton & Carl Shapiro, *Antitrust and Innovation: Welcoming and Protecting Disruption*, 20 *Innov. Pol'y & Econ.* 125 (2020).

²⁶⁸ *Epic Games, Inc. v. Apple Inc.*, supra note 14.

list. The European Union undertook several antitrust lawsuits against Google, resulting in billion dollars' worth of fines, with the basic goal of challenging its anti-competitive practices as the single, dominating search engine giant. This regulatory push has had a lasting influence on competitors, giving them more visibility and an opportunity to innovate in areas like privacy (DuckDuckGo) and AI-powered search technologies (Bing). While Google remains a dominant force, the EU's enforcement actions have facilitated a more diverse digital ecosystem.²⁶⁹

IV. ANTITRUST GOALS AND INNOVATION: IS RECONCILIATION POSSIBLE?

Antitrust regulations function on the assumption that the entities subjected to their scrutiny are causing an anti-competitive environment in the market. Through their execution, these antitrust regulations aim to reign in the anti-competitive behaviour of the entities for the benefit of a free market which allows choice to the consumer. Therefore, the very goal of antitrust actions is to invoke a freely competitive market which does not blindside the consumer while limiting market access to sellers other than the monopolistic entity. In the context of digital content ecosystems, where innovation is the core of content creation and sharing, finding the balance between antitrust goals and innovation becomes very relevant. Overregulation can stifle innovation by “limiting potentially innovative paths and/or increasing innovations costs”²⁷⁰, while lax enforcement can entrench monopolies that inhibit market dynamism. This section explores the strategies and policy recommendations to strike a balance between these competing objectives.

A. Strategies and Policy Recommendation to Balance Antitrust Goals and Innovation

i) Differentiated Regulation

Tailoring antitrust regulations to the specific characteristics of digital markets can minimize the unintended negative consequences for innovation. For instance, applying different standards to hardware, software, and platform markets based on their competitive dynamics would ensure that blanket regulations do not do more harm than good by negatively impacting innovation and thereby reducing competition in the market as well as consumer welfare.

²⁶⁹ Thomas Höppner & Philipp Westerhoff, *EU General Court Confirms Landmark Google Android Decision with Strong Signal for Tougher Antitrust Enforcement in Digital Ecosystems*, LEXOLOGY (Sept. 14, 2022), <https://www.lexology.com/library/detail.aspx?g=7423107b-b748-4836-b1f0-0f1e73e2534f>.

²⁷⁰ Yafit Lev-Aretz & Katherine J. Strandburg, *Regulation and Innovation: Approaching Market Failure from Both Sides*, 9 *Harv. L. & Pol'y Rev.* 43, 2 (2015).

ii) Primacy to Consumer Welfare

Shifting the focus from punishing dominant firms to enhancing consumer welfare can create a more balanced regulatory approach, with the end goal of consumer welfare in mind. An innovative market would help foster competition and greater avenues of choices for the consumer.

iii) Incentivising and Encouraging Collaborative Innovation

Regulators can promote collaborations between large firms and startups to drive innovation without compromising competition.

iv) Leveraging Technology for Better Regulation

Regulators can use advanced technologies, such as AI and Data Analytics, to improve the effectiveness and precision of antitrust enforcement. Such tools can help regulators identify anti-competitive behaviour in the market more accurately and efficiently. Similarly, blockchain technology can enhance transparency in antitrust investigations, ensuring fair and unbiased enforcement.

v) Context-based and Case-by-Case Approach

Adopting a context-sensitive approach that analyses the need for antitrust regulations on a case-by-case basis and executes antitrust action based on the particular case and its impact on innovation could prove instrumental in harmonising antitrust actions against digital content entities with innovation. The application of a standard of blanket rules, without taking into account the nature of the company as a player in the digital content ecosystem might hamper innovation adversely and to unintended degrees.

vi) Encourage Open Standards

Antitrust regulations may mandate interoperability and open standards with respect to digital content ecosystems to foster competition without stifling innovation. The very essence of the antitrust regime is a market thriving with competition and consumer choice, and giving this boost to innovation through antitrust regulations may enhance the competitive nature of the digital content ecosystems.

V. CONCLUSION

It is clear from a close analysis of the tangled web of antitrust actions and innovation in digital content ecosystems that while the antitrust–patent paradox is not imagined; it is also not a blanket reality. In a sector such as the digital content ecosystem, the existence of massive digital giants has significant spillover effects for the smaller players. This is

especially true in the case of innovation. When the antitrust actions infringe on the exclusive freedoms of digital giants, they can influence the entire market of small players into an innovation standstill for the heavy costs that such innovation may entail if embroiled in an antitrust regulatory tussle. Similarly, in certain situations, antitrust actions may also drive innovation for they restrict the same digital giant companies from overstepping the metes and bounds of their rights and in doing so, they encourage smaller players to step into the voids and spaces left in the market by the expulsion of bigger players. In this examination, it is also evident that innovation is not divorced from the goals of antitrust regulations. Rather, the two share a definite relationship.²⁷¹ Innovation benefits a free and fair market in a direction of progress while also benefiting consumers with the gift of choice in a market – both significant goals of competition law. While the full import of the impact of antitrust actions on innovation in digital content ecosystems is yet to be seen as technology develops to take new forms in the AI age, balancing antitrust action with innovation in digital content ecosystems is possible. A context-sensitive approach prioritising innovation at the centrefold of the actions, while limiting monopolistic aggressions by big players is the key to a well-balanced and competitive digital content ecosystem.

²⁷¹ Carrier, *Supra* note 1, at 1.

HARMONIZING INNOVATION AND MARKET FAIRNESS: INSIGHTS INTO COMPETITION LAW AND INTELLECTUAL PROPERTY

- V.Shudarshana²⁷²

ABSTRACT

This paper explores the intersection of competition law and intellectual property (IP) rights, focusing on the delicate balance between fostering innovation and ensuring market fairness. As technological advancements and market dynamics evolve, the role of IP protection in promoting innovation is increasingly scrutinized within the framework of competition law. While intellectual property laws incentivize creators by granting exclusive rights to their innovations, they can also lead to monopolistic practices that stifle competition and hinder market entry for new players. This research investigates the tension between these two objectives, examining both theoretical perspectives and practical applications in contemporary legal systems. Through a detailed analysis of landmark case studies and global regulatory approaches, the paper highlights how different jurisdictions navigate the challenge of aligning IP protection with anti-competitive concerns. Key topics include patent misuse, excessive licensing practices, and the role of antitrust authorities in overseeing IP-related disputes. Furthermore, the study explores the evolving legal landscape surrounding digital markets, where the rapid pace of innovation often outpaces regulatory frameworks. Ultimately, this paper proposes a more nuanced approach to harmonizing competition law and IP rights, advocating for policies that incentivize innovation while safeguarding fair competition. It calls for adaptive regulatory mechanisms that can effectively address the complex, evolving nature of the intersection between IP and competition law in the modern economy.

Keywords: Innovation, market fairness, competition law, intellectual property, regulatory balance

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I. INTRODUCTION

A. Defining Innovation and Its Role in Economic and Social Development

Innovation is the process of creating new ideas, methods, products, or services that improve efficiency, solve problems, or meet needs in novel ways. It is a cornerstone of economic progress, driving productivity, competitiveness, and overall societal well-being. At its core, innovation fosters technological advancements, improves quality of life, and creates economic opportunities.

From an economic perspective, innovation enhances productivity by introducing tools, technologies, and processes that make production more efficient. For example, innovations in renewable energy have not only reduced costs but also addressed critical environmental challenges. Similarly, advancements in digital communication have revolutionized how businesses operate, enabling faster and more cost-effective global trade.

Socially, innovation addresses critical societal challenges such as healthcare access, education equity, and sustainable development. Breakthroughs in medical technologies, like vaccines and diagnostic tools, directly impact public health and longevity. In education, e-learning platforms have democratized knowledge, making education more accessible to underprivileged communities.²⁷³

However, fostering innovation requires a delicate balance between incentivizing creators and ensuring widespread societal benefits. This is where intellectual property and competition law play crucial roles.

B. Introduction to Intellectual Property (IP) and Competition Law

Intellectual property (IP) and competition law are distinct legal frameworks that intersect to shape innovation and market dynamics. Both aim to promote economic development but through different mechanisms.

IP law grants creator's exclusive rights to their inventions, works, or designs, encouraging them to invest time, effort, and resources into innovation. For instance, patents protect inventors by giving them exclusive rights to profit from their inventions for a limited period. Similarly, copyrights safeguard artistic and literary works, ensuring that creators reap the rewards of their efforts.

However, the exclusivity granted by IP rights can create monopolies, potentially restricting access to vital innovations or stifling competition. This is where competition law comes in. It

²⁷³ Organisation for Economic Co-operation and Development (OECD), *Innovation and Growth: Rationale for an Innovation Strategy* (2015), <https://www.oecd.org>.

ensures that markets remain fair, dynamic, and accessible. Competition law prohibits practices like monopolistic behavior, price-fixing, and abuse of market dominance, fostering a level playing field for all participants.

While IP incentivizes innovation by protecting creators, competition law prevents these protections from being misused to harm consumers or competitors. The intersection of these laws is vital in balancing the need for innovation with the broader goal of equitable market access.²⁷⁴

C. Importance of achieving a balance between Innovation Incentives and Market Innovation

Balancing innovation incentives with market fairness is essential for creating a thriving and equitable economy. When inventors and creators are rewarded for their efforts through protections like intellectual property (IP) rights, they are motivated to invest in new ideas and technologies. This leads to advancements that benefit society, such as life-saving medicines or cutting-edge digital tools.

However, if these protections go unchecked, they can lead to unfair practices like monopolies, where one company dominates the market, making products expensive and limiting choices for consumers. Competition law steps in to ensure markets remain fair and open, giving smaller businesses and new innovators a chance to succeed.

Striking the right balance means encouraging people to innovate while making sure their creations benefit society as a whole. This approach fosters healthy competition, keeps prices reasonable, and ensures that innovation drives progress for everyone, not just a select few.

Structure Overview

This paper explores the critical balance between fostering innovation through intellectual property (IP) rights and maintaining market fairness through competition law. It is structured into key sections for clarity and depth.

First, the paper defines innovation and its importance in driving economic and social development. Next, it introduces IP and competition law as distinct yet interconnected legal frameworks. The subsequent sections dive into the tensions between these frameworks, highlighting areas where IP exclusivity can conflict with market fairness.

²⁷⁴ World Intellectual Property Organization (WIPO), *Intellectual Property and Innovation in the Global Economy* (2020).

Case studies and examples are provided to illustrate these challenges, followed by an analysis of emerging issues in digital and biotechnology sectors. Finally, the paper proposes solutions and recommendations to harmonize innovation incentives with equitable market practices.

II. INTELLECTUAL PROPERTY: DRIVING INNOVATION THROUGH EXCLUSIVITY

A. Definition and Purpose of IP

Intellectual Property (IP) refers to legal rights granted to individuals or organizations for their creations of the mind, such as inventions, artistic works, designs, and symbols. These rights give creators exclusive control over how their work is used, allowing them to benefit economically from their efforts. In India, IP is governed by several laws, including the *Patents Act, 1970*, the *Copyright Act, 1957*, the *Trademarks Act, 1999*, and the *Designs Act, 2000*.

The primary purpose of IP rights is to encourage innovation and creativity. By granting exclusive rights, such as patents for inventions or copyrights for original works, the legal framework provides creators the opportunity to monetize their ideas without the risk of immediate imitation. For example, under the *Patents Act, 1970*, inventors are granted exclusive rights to their invention for 20 years, during which they can control its use, production, and distribution. This exclusivity incentivizes individuals and companies to invest time, resources, and money in research and development.

Similarly, the *Copyright Act, 1957* protects creators of literary, musical, or artistic works by granting them exclusive rights to reproduce or distribute their work, ensuring they receive fair recognition and financial benefits.

Through such protections, IP rights play a crucial role in fostering innovation while contributing to economic growth by ensuring that creators have the confidence to share and commercialize their work. This system ultimately benefits society by promoting technological and creative advancements.

B. Types of IP

In India, Intellectual Property (IP) is categorized into several types, each governed by specific laws:

1. **Patents:** Protect inventions and processes under the *Patents Act, 1970*.
2. **Copyrights:** Safeguard original literary, artistic, and musical works under the *Copyright Act, 1957*.

3. **Trademarks:** Protect distinctive signs, logos, and names under the *Trademarks Act, 1999*.
4. **Designs:** Secure aesthetic elements of products under the *Designs Act, 2000*.
5. **Geographical Indications (GIs):** Protect products tied to a specific location under the *Geographical Indications of Goods Act, 1999*.

C. Benefits of IP:

i) Stimulates Research and Development (R&D):

IP rights incentivize research and development by granting creators and innovators exclusive rights to benefit from their inventions. For instance, patents under the *Patents Act, 1970* protect inventors' rights for 20 years, allowing them to recover their investments and earn profits. This exclusivity encourages businesses and individuals to invest in new technologies, medicines, and processes, knowing their efforts will not be easily copied. For example, patent protections in the pharmaceutical industry have led to life-saving drugs and treatments.

ii) Enhances Knowledge-Sharing through Publication Requirements:

IP laws also promote the dissemination of knowledge. For instance, patent applications require inventors to disclose detailed information about their inventions under the *Patents Act, 1970*, § 10. This ensures that while the inventor enjoys exclusive rights, others in the field can learn and build upon these innovations after the patent expires. Similarly, copyrights encourage creators to publish their work, enriching public access to new ideas, art, and literature.

By stimulating innovation and fostering knowledge-sharing, IP rights create a cycle of development that benefits both creators and society as a whole.

D. Challenges with IP Rights

i) Risk of Monopolization if IP is Overly Restrictive:

IP rights, while designed to reward innovation, can sometimes create monopolies. When overly restrictive, these rights allow companies to dominate markets, limiting competition and inflating prices. For instance, pharmaceutical patents often grant exclusive rights to drug manufacturers, preventing generic alternatives for 20 years under the *Patents Act, 1970*. This can restrict access to affordable medicines and harm public welfare, especially in developing countries like India.

ii) Patent Trolling and Evergreening Strategies as Barriers to Competition:

Patent trolling occurs when entities, often called Non-Practicing Entities (NPEs), acquire patents not to innovate but to sue other companies for infringement. This practice stifles

competition and discourages new entrants. Evergreening, on the other hand, involves making minor modifications to existing patents to extend their lifespan, blocking generic competition. For example, under the *Patents Act, 1970*, courts have ruled against evergreening in cases like *Novartis AG v. Union of India*, where the Supreme Court denied a patent extension for a cancer drug. These strategies exploit IP laws, hindering fair competition and limiting the benefits of innovation to society.²⁷⁵

III. COMPETITION LAW: ENSURING MARKET FAIRNESS

A. Definition and Goals

Competition law refers to the legal framework designed to promote fair competition in markets by preventing anti-competitive practices. It ensures that businesses compete on merit rather than through unfair tactics, such as forming monopolies, price-fixing, or abusing a dominant market position. In India, competition law is governed by the *Competition Act, 2002*, which replaced the earlier *Monopolies and Restrictive Trade Practices (MRTP) Act*.²⁷⁶ The *Competition Commission of India (CCI)* is the primary authority tasked with enforcing this law.

The law's goals are threefold:

- **Preventing Anti-Competitive Agreements:** The Act prohibits agreements that harm competition, such as cartels engaging in price-fixing or market-sharing (*Competition Act, 2002, § 3*).
- **Prohibiting Abuse of Dominance:** The law prevents dominant players from misusing their position to restrict competition, such as unfair pricing or limiting production (*Competition Act, 2002, § 4*).
- **Regulating Mergers and Acquisitions:** Large mergers that could lead to monopolies are scrutinized to ensure they do not harm market dynamics (*Competition Act, 2002, §§ 5–6*).

Promoting Consumer Welfare, Innovation, and Equitable Access

Competition law plays a crucial role in ensuring that consumers benefit from lower prices, better quality products, and wider choices. For example, by curbing monopolistic practices,

²⁷⁵ *Novartis AG v. Union of India*, (2013) 6 SCC 1.

²⁷⁶ *Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, India Code (1969)*, repealed by *The Competition Act, 2002*.

competition law ensures that no single entity dominates the market to the detriment of consumers.

Innovation also thrives in competitive markets. Companies are incentivized to develop new products and services to stay ahead of rivals. The law's provisions against anti-competitive agreements (§ 3) and abuse of dominance (§ 4) prevent practices like predatory pricing or refusal to deal, ensuring equitable opportunities for all businesses.

The *Competition Commission of India (CCI)* enforces the Act, actively investigating and penalizing violations, such as the fine imposed on Google for abuse of its dominant position in the Indian digital market (*CCI v. Google LLC*, 2018).²⁷⁷

By maintaining fair competition, the law balances corporate growth with consumer welfare, innovation, and equitable market access.

B. Examples of Competition Law Across Jurisdiction

i) Sherman Antitrust Act (USA)

The Sherman Antitrust Act of 1890 is one of the earliest and most influential competition laws globally. It prohibits anti-competitive practices such as monopolies, cartels, and price-fixing. Section 1 bans agreements that restrain trade, while Section 2 targets entities attempting to monopolize markets. The law is enforced by the Federal Trade Commission (FTC) and the Department of Justice (DOJ), ensuring fair competition and protecting consumers from exploitative practices.²⁷⁸

ii) European Union Competition Law

The European Union's competition framework, primarily governed by Articles 101 and 102 of the *Treaty on the Functioning of the European Union (TFEU)*, aims to maintain fair competition within the single market. Article 101 prohibits agreements that distort competition (e.g., cartels), while Article 102 prevents abuse of dominant market positions. The European Commission oversees enforcement, ensuring markets remain fair and accessible to all EU member states.²⁷⁹

iii) Competition Laws in Emerging Economies:

- **India:** The *Competition Act, 2002* prohibits anti-competitive agreements (§ 3), abuse of dominant positions (§ 4), and regulates combinations (§ 5). The Competition Commission of India (CCI) enforces these provisions to promote fair competition.

²⁷⁷ Competition Commission of India v. Google LLC, Case No. 07 of 2018, Competition Commission of India (2018).

²⁷⁸ Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1890).

²⁷⁹ Consolidated Version of the Treaty on the Functioning of the European Union art. 101-102, May 9, 2008, 2008 O.J. (C 115) 47.

- **China:** The *Anti-Monopoly Law of China*, enacted in 2008, targets similar anti-competitive behaviors, such as price-fixing and abuse of dominance. It is enforced by the State Administration for Market Regulation (SAMR).²⁸⁰

C. Challenges in Implementation

i) Globalization Complicates Enforcement Across Borders:

In today's interconnected world, businesses often operate across multiple countries, making it challenging to enforce competition laws. When a company engages in anti-competitive practices, such as price-fixing or abuse of dominance, these actions can impact markets in several jurisdictions. However, competition laws differ from country to country, creating conflicts and inconsistencies in enforcement. For example, a merger approved in one country may be blocked in another due to differing regulations. Coordination among nations is limited, and cross-border enforcement often relies on bilateral agreements or cooperation between regulatory bodies, which is not always smooth or timely.

ii) Balancing Deterring Dominance and Encouraging Efficiency:

Competition laws aim to prevent companies from abusing their dominant market position, but this can be a double-edged sword. Large companies often achieve dominance through innovation, efficiency, or economies of scale. Over-regulating these firms might stifle their ability to innovate or grow further, harming economic progress. For instance, regulating a dominant tech company too harshly might limit its capacity to develop better products or services. Striking the right balance between deterring harmful monopolistic behavior and fostering competitive efficiency remains a complex challenge for policymakers.

This balance requires careful, case-by-case evaluations, as over-enforcement or under-enforcement can harm both markets and consumers.

IV. THE INTERSECTION OF IP AND COMPETITION LAW: NATURAL TENSIONS

A. Contrasting Objective

Intellectual Property (IP) and Competition Law often have conflicting goals, creating natural tensions. IP rights are designed to grant creators exclusivity over their inventions or works for a limited time. This exclusivity incentivizes innovation by allowing inventors to recover investments and earn profits. For instance, under the *Patents Act, 1970*, inventors can prevent others from using their patented products or processes for 20 years.

²⁸⁰ Anti-Monopoly Law of the People's Republic of China, 2008 (China).

On the other hand, competition law ensures fair market practices by restricting activities that hinder competition. The *Competition Act, 2002*, aims to prevent monopolies, cartels, and the abuse of dominant positions. While IP exclusivity rewards innovation, it can also lead to monopolistic behavior if misused.

For example, a pharmaceutical company holding a patent for a life-saving drug may charge excessively high prices, limiting access for consumers who cannot afford the medication. This creates a monopoly where only the patent holder benefits, while public welfare is compromised. In such cases, competition law intervenes to ensure affordability and market fairness, sometimes by compelling the IP owner to license the drug at reasonable terms, as allowed under the *Patents Act, 1970*, § 84 (compulsory licensing).²⁸¹

Balancing these contrasting objectives is essential to promote innovation without compromising consumer welfare or market fairness.

B. Key Points of Conflict

i) Anti-Competitive Licensing Practices

IP holders often engage in licensing practices that restrict market competition.

- **Exclusive Licenses:** When IP owners grant exclusive licenses, they may limit other businesses' access to critical technology or resources. For instance, if a patented technology is exclusively licensed to one manufacturer, other competitors are effectively barred from entering that market.
- **Tying Arrangements:** In tying, access to one product (e.g., a patented device) is conditional on purchasing another unrelated product or service. This can force competitors or consumers into unfair transactions, leading to monopolistic behavior. Such practices violate competition law principles under the *Competition Act, 2002*, § 3.

ii) Patent Misuse and Abuse

Patents, meant to reward innovation, can be exploited in ways that harm competition:

- **Patent Trolling:** Patent trolls are entities that acquire patents not to use or develop them but to sue businesses for infringement. These actions do not contribute to innovation but create financial and legal burdens for competitors, stifling market dynamics.
- **Evergreening:** Companies extend the life of patents by making trivial changes to existing products, blocking generic competitors. A notable example is the Indian

²⁸¹ *The Patents Act, 1970*, § 84.

Supreme Court's ruling in *Novartis AG v. Union of India* (2013), where the court denied a patent extension for a cancer drug, ensuring affordable generics for the public. This decision reflects India's stance against evergreening under the *Patents Act, 1970*, § 3(d).

iii) Refusal to License

Dominant firms may refuse to license essential IP, preventing competitors from accessing critical technologies or markets. For instance, a company holding a standard-essential patent (SEP) might deny licensing to rivals, effectively shutting them out of the industry. Competition law addresses such issues by enforcing compulsory licensing under specific circumstances, such as public interest or preventing abuse of dominance, as per the *Patents Act, 1970*, § 84.

C. Legal and Regulatory Frameworks for Balance:

Balancing Intellectual Property (IP) rights and competition law requires legal frameworks that prevent misuse while promoting fairness and public interest. Key mechanisms include:

i) Fair Use Doctrine

The fair use doctrine limits the exclusivity of copyrights, allowing certain uses of copyrighted material without permission. For instance, under India's *Copyright Act, 1957*, § 52, acts like private study, research, criticism, or review are considered fair use. This doctrine ensures that while creators are protected, their works can still be used for educational or transformative purposes, fostering creativity and public access.²⁸²

ii) Compulsory Licensing

Compulsory licensing allows governments to override IP rights in public interest. For example, under the *Patents Act, 1970*, § 84, India can authorize the production of patented medicines during health crises, ensuring affordability and access for the public.²⁸³

iii) FRAND Licensing

Fair, Reasonable, and Non-Discriminatory (FRAND) licensing applies to Standard-Essential Patents (SEPs), ensuring access to critical technologies like 5G. IP owners must license SEPs on equitable terms, preventing dominant firms from exploiting their position to block competitors. FRAND terms are enforced globally, including in India, under the *Competition Act, 2002*, § 4.²⁸⁴

²⁸² *Copyright Act, 1957*, § 52.

²⁸³ *The Patents Act, 1970*, § 84.

²⁸⁴ *The Competition Act, 2002*, § 4.

D. Case Studies: IP and Competition Law Conflicts

i) Microsoft Antitrust Case: Abuse of Dominance in Software Market

The Microsoft antitrust case is a landmark example of how a dominant firm's practices can harm competition. In the 1990s, the U.S. Department of Justice and state attorneys general sued Microsoft for abusing its monopoly in the operating systems market. Microsoft had bundled its Internet Explorer browser with its Windows operating system, limiting competitors' access to the market. The court found this practice violated the Sherman Antitrust Act, §§ 1 and 2, by restricting competition and innovation.²⁸⁵

This case highlighted the need to balance a company's IP rights with fair competition, ensuring that dominance does not stifle rivals or harm consumers.

ii) Pharmaceutical Industry: Balancing Patented Drugs with Affordable Generics

In the pharmaceutical sector, balancing innovation incentives with affordability is critical. In *Novartis AG v. Union of India*, the Indian Supreme Court denied a patent for a cancer drug under the *Patents Act, 1970*, § 3(d), ruling that minor modifications did not warrant an extension of exclusivity.²⁸⁶ This decision allowed the production of cheaper generic alternatives, ensuring public access to essential medicines. The case reflects India's commitment to preventing evergreening and promoting public health while respecting IP rights.²⁸⁷

V. EMERGING CHALLENGES IN THE DIGITAL AND BIOTECH ERAS

A. Impact of Technology on IP and Competition Law

i) Digital Platforms with Proprietary Algorithms and User Data

Digital platforms, such as search engines and social media networks, often operate using proprietary algorithms and vast amounts of user data. These technologies give companies significant competitive advantages but also raise concerns about monopolistic behavior. For example, firms may use algorithms to prioritize their own products or services, reducing market competition. The *Competition Act, 2002*, § 4, addresses abuse of dominance²⁸⁸, and cases like *CCI v. Google LLC* highlight the need for regulating such practices to ensure fair

²⁸⁵ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

²⁸⁶ *The Patents Act, 1970*, § 3(d).

²⁸⁷ *Novartis AG v. Union of India*, (2013) 6 SCC 1.

²⁸⁸ *The Competition Act, 2002*, § 4.

competition. The concentration of user data further complicates the landscape, as firms can exploit it for anti-competitive purposes, making equitable regulation crucial.²⁸⁹

ii) AI-Generated Works and Ambiguous IP Ownership

The rise of artificial intelligence (AI) introduces complexities in IP law. Works created by AI, such as music or art, raise the question: who owns the rights—the AI developer, user, or no one? Indian IP laws, including the *Copyright Act, 1957*, currently protect only works with identifiable human authorship, leaving AI-generated creations unprotected. This ambiguity necessitates updates to IP laws to address ownership and innovation incentives in the AI era.

B. Biotechnology and Pharmaceuticals

In biotechnology and pharmaceuticals, patent clusters—where overlapping patents cover various aspects of a single technology—can stifle innovation. For instance, genetic engineering and drug discovery often involve multiple patents on foundational methods, genes, or molecular pathways. Companies holding these patents may restrict access to essential research tools, creating a "patent thicket" that makes it expensive and legally complex for researchers to navigate.

In India, the *Patents Act, 1970*, § 3(b) limits patentability on certain biotechnological innovations deemed contrary to public interest, preventing monopolization of critical technologies. However, challenges remain as companies exploit clusters to dominate markets, discouraging smaller entities from entering the field.²⁹⁰

The case of *Roche v. Cipla* exemplifies efforts to balance patent enforcement with access to life-saving drugs. This balance is essential to ensure patents incentivize innovation without blocking progress in critical fields like genetic engineering and drug discovery.²⁹¹

C. Global Disparities

i) Developed Countries Dominating IP Filings

Intellectual Property (IP) systems often favor developed countries, where most patents are filed and granted. Advanced economies, with significant resources for research and development (R&D), dominate global IP filings, leaving developing nations behind. According to the World Intellectual Property Organization (WIPO), the United States, European Union, and China lead in patent applications, while developing countries face financial and technological barriers. This disparity creates inequality, as developing nations struggle to access critical innovations, especially in essential fields like healthcare.

²⁸⁹ Competition Commission of India v. Google LLC, Case No. 07 of 2018, Competition Commission of India.

²⁹⁰ *The Patents Act, 1970*, § 3(b).

²⁹¹ *F. Hoffmann-La Roche Ltd. v. Cipla Ltd.*, (2008) CS(OS) 89/2008 (Delhi High Court).

ii) COVID-19 Vaccine Patents and Compulsory Licensing

During the COVID-19 pandemic, vaccine patents became a contentious issue. Companies in developed countries held patents on life-saving vaccines, limiting production in poorer nations. India and South Africa led efforts at the World Trade Organization (WTO) to waive vaccine patents temporarily, allowing broader manufacturing.²⁹² Under India's *Patents Act, 1970*, § 84, compulsory licensing permits governments to override patents for public health emergencies, ensuring access to critical medicines.²⁹³

This disparity underscores the need for a more inclusive IP system that balances innovation incentives with global equity, ensuring lifesaving technologies are accessible to all.

VI. CONCLUSION

The intersection of Intellectual Property (IP) and Competition Law is a critical area that influences innovation, market fairness, and societal progress. While IP rights encourage creativity and technological advancements by granting exclusivity, unchecked exclusivity can lead to monopolistic practices that harm competition and consumer welfare. Similarly, competition laws aim to maintain open and fair markets but must be carefully balanced to avoid discouraging innovation.

This research highlighted key challenges, including anti-competitive practices, patent abuse, and cross-border inconsistencies. Case studies, such as the Microsoft antitrust case and disputes in the pharmaceutical sector, demonstrate the importance of finding a balance between protecting innovators and ensuring accessibility for consumers. Emerging challenges, particularly in digital platforms and biotechnology, further underscore the need for adaptable frameworks.

To address these issues, regulatory reforms, such as strengthening anti-patent abuse provisions and promoting open standards, are vital. Mechanisms like FRAND licensing, compulsory licensing, and the fair use doctrine can harmonize IP protections with market fairness. Global cooperation and consistent enforcement of laws across jurisdictions are also essential to prevent inequalities and foster innovation that benefits all.

Ultimately, a balanced approach ensures that IP rights drive progress while competition laws protect equitable market access, creating an ecosystem that rewards innovation without compromising public welfare.

²⁹² WTO, COVID-19 TRIPS Waiver Proposal, IP/C/W/669 (2021).

²⁹³ *The Patents Act, 1970*, § 84.

ANTITRUST REGULATION AND INTELLECTUAL PROPERTY: CATALYSTS FOR INNOVATION IN THE DIGITAL AGE

- Karthik Vijayanand²⁹⁴

ABSTRACT

Balancing Intellectual Property (IP) rights with antitrust regulation is absolutely necessary in the evolving digital economy. The former invokes innovation since there is a temporary situation of a monopoly, while the latter calls for competitive markets through prevention against monopolistic practices. How such conflicting objects can be better aligned by regulators for the promotion of innovation besides market competition will be discussed in this paper. The paper is dedicated to global approaches toward the integration of IP rights with competition law, focusing on key jurisdictions including the US, EU, and India. By reference to a few landmark rulings involving major technology giants like Google and Microsoft, this paper shall throw light upon how antitrust enforcement has, both in good and bad ways, shaped innovation. It also describes how the tech industry, in data and digital platforms, reacts to certain needs in the balance between competition and IP law. The paper also tries assessing how competition law plays a role in the development of innovation in sectors such as technology in terms of interoperability and preventing anti-competitive conducts. The paper attempts through the review of recent legal developments and regulatory trends a comprehensive analysis on how antitrust regulation might support innovation while discouraging anticompetitive acts that dampen incentives without undermining IP law. This study provides a nuanced view on how the challenges will continue into the future regarding balancing innovation with fairness in the market, specifically focusing on emerging technologies. This paper ends by recommending some policy reforms so that competition law and IP regulations can change as the needs of the 21st-century economy demands.

Keywords: Antitrust, Intellectual Property, Innovation, Technology, Economy.

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I. INTRODUCTION

In the evolving context of the global economy, IP rights and competition law stand as two important, though many times conflicting domains. The former encourages innovation when granting temporary monopolies to creators; it allows them to get monetary returns from the fruits of their inventions. Whereas, the latter speaks towards the cause of market equilibrium through the prevention of monopolistic behaviour and promoting the growth of enterprises of different sizes. This effect is especially strong within technology-impacted markets where fast changes align with the complexity of data monopolies, platform economics, and the imperative to interoperability.²⁹⁵

This integration has stirred considerable debate between legal scholars, policymakers, and professionals in the profession.²⁹⁶ Overprotection through intellectual property may lead to distortion of markets that can result in stifling of competition and innovation.²⁹⁷ Conversely, overaggressive enforcement of antitrust could undermine the incentives for research and development and would thus impede technological progress.²⁹⁸ Hence, this requires proper balancing towards the goal of promoting innovation but in a manner compatible with equitable market practices. This complicated nexus of intellectual property rights and antitrust laws involves special focus being placed within the tech-oriented and digital marketplace.

This paper explores how regional regulators are dealing with such tensions by reviewing global strategies by regions such as the United States, the European Union, and India.²⁹⁹ This paper will provide the relevance of the critical cases of Qualcomm, Google Android, and Microsoft in order to analyse how the impact of antitrust enforcement varies between regions.³⁰⁰ The paper further presents policy recommendations to promote an environment where innovation and competition can coexist. By investigating these issues, this article will

²⁹⁵ Joseph E. Stiglitz, *Intellectual Property Rights and Wrongs*, Project Syndicate (August 5, 2005), <https://www.project-syndicate.org/commentary/intellectual-property-rights-and-wrongs>.

²⁹⁶ Richard Gilbert & Carl Shapiro, *Antitrust Issues in the Licensing of Intellectual Property: The Nine No-No's Meet the Nineties* (Brookings Papers on Economic Activity, 1997), <https://www.brookings.edu/articles/antitrust-issues-in-the-licensing-of-intellectual-property-the-nine-no-nos-meet-the-nineties/>.

²⁹⁷ United Nations Conference on Trade and Development, *Competition Provisions in Regional Trade Agreements: How to assure development gains*, UNCTAD/DITC/CLP/2005/1, <https://unctad.org/publication/competition-provisions-regional-trade-agreements-how-assure-development-gains>.

²⁹⁸ Herbert Hovenkamp, *Antitrust and Innovation: Where We Are and Where We Should Be Going* (77 Antitrust L.J. 749, 2011) https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2834&context=faculty_scholarship.

²⁹⁹ European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer, H., Cr mer, J. *Competition policy for the digital era* (Publications Office, 2019), <https://data.europa.eu/doi/10.2763/407537>.

³⁰⁰ Mark A. Lemley, *IP in a World Without Scarcity* (90 New York University Law Review 460, 2015), <https://www.nyulawreview.org/wp-content/uploads/2018/08/NYULawReview-90-2-Lemley.pdf>.

contribute to the discussion on how to strike a balance between the market competition and intellectual property protection, to regulators, legislators, and other stakeholders in a quickly evolving economic environment.³⁰¹

II. HARMONISING IP RIGHTS WITH COMPETITIVE MARKET PRACTICES

This is the essential area of tension between incentives to innovation and fair market behaviour-competition law. Intellectual property laws give inventors temporary monopolies that promote innovation and secure returns on investments.³⁰² On the other hand, these monopolies could become a platform for anti-competitive behaviour, which needs intervention in the name of competition law.³⁰³ Differing jurisdictions like the United States, the European Union, and India apply various approaches towards reconciling these bodies of law.

A. The United States: Balancing Incentives and Market Fairness

The United States has seen some tremendous developments in the intellectual property-competition law relationship through a mix of legislative and judicial enactments. While the Sherman and Clayton Acts regulate competition, the Patent Act affords protection to intellectual property.³⁰⁴ A good example of how the judiciary approaches monopolistic abuse stemming from IP is the case of Microsoft.³⁰⁵ In this scenario, Microsoft used its commanding position in the market to combine its software products and still was being scrutinized by antitrust despite its patent rights.³⁰⁶

The US Supreme Court in *Illinois Tool Works Inc. v. Independent Ink, Inc.*, explained a patent on its own does not provide market power for antitrust purposes.³⁰⁷ This law has focused that intellectual property rights themselves are not sufficient to trigger antitrust examination and instead foster creativity without excessive interference by the regulatory authority.

The case of *Eastman Kodak Co. v. Image Technical Services, Inc.* illustrates an entirely different aspect of this balance. The Supreme Court ruled that Kodak's patent of replacement

³⁰¹ *Id.*

³⁰² World Intellectual Property Organization, *Intellectual Property and Competition Policy*, CDIP/4/4 Rev. (2009), https://dacatalogue.wipo.int/projectfiles/DA_7_23_32_01/CDIP_4_4_Rev/EN/cdip_4_4_rev_EN.pdf; *Supra* note 2.

³⁰³ *Supra* note 3; Michael A. Carrier, *Innovation for the 21st Century: Harnessing the Power of Intellectual Property and Antitrust Law* (Oxford Univ. Press, 2009), file:///E:/Downloads/ssrn-1368931.pdf.

³⁰⁴ *Patent Act*, 35 U.S.C. §§ 1–376 (2012); *Sherman Act*, 15 U.S.C. §§ 1–7; *Clayton Act*, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2012).

³⁰⁵ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

³⁰⁶ *Id.*

³⁰⁷ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28 (2006).

parts for its equipment constituted an abuse of its dominant power, although the patent itself was valid.³⁰⁸ In this case, the court emphasized a possibility of using intellectual property to stifle competition to lead to antitrust liability.

‘Patent misuse doctrine’ also prevents proprietors of IPs from venturing monopolies further than those provided in statutes.³⁰⁹ Recent cases like *FTC v. Qualcomm* illustrate the way in which licensing and royalty practices can also violate antitrust because they hinder competition in profoundly innovative industries.³¹⁰

B. The European Union: Prioritizing Consumer Welfare

The European Union takes an approach that is stricter towards the balancing of intellectual property rights and competition law. Articles 101 and 102 of the TFEU prohibit agreements affecting competition and abuse of dominant positions.³¹¹ A vivid example is the European Commission's investigation of Google's practices relating to Android.³¹² This led to the European Commission imposing fines on Google for its licensing conditions, which were found to have had a restrictive effect on manufacturers, thereby limiting competition and further choice to consumers.³¹³

The European Court held an abuse of dominance when a party refuses from licensing IP in *IMS Health GmbH v. NDC Health GmbH* where that refusal may prevent appearance of new products which the consumer desires to buy.³¹⁴ Again it indicates consumer benefits have precedence to pure IP rights.

Another is *AstraZeneca AB v. European Commission*, which held AstraZeneca liable for abusing its dominant position in misusing the patent system to delay generic competition in the drug market.³¹⁵ It thus demonstrates that the EU does not support IP-related practices that have a negative impact on market competition.

Furthermore, the "essential facilities doctrine" established by the European Union has proven to be effective in facilitating equitable market access, even in the context of intellectual property rights.³¹⁶ For instance, in the Magill case, the European Court of Justice instructed

³⁰⁸ *Eastman Kodak Co. v. Image Technical Servs. Inc.*, 504 U.S. 451 (1992).

³⁰⁹ *B. Braun Med., Inc. v. Abbott Labs.*, 124 F.3d 1419 (Fed. Cir. 1997).

³¹⁰ *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020); *Id.*

³¹¹ Consolidated Version of the Treaty on the Functioning of the European Union, arts. 101–102, Oct. 26, 2012, 2012 O.J. (C 326) 47.

³¹² *Google and Alphabet v. Commission*, Case T-604/18, decided on 18 July 2018.

³¹³ *Id.*

³¹⁴ *IMS Health GmbH v. NDC Health GmbH*, Case C-418/01, 2004 ECR I-5039.

³¹⁵ *AstraZeneca AB v. Commission*, Case T-321/05, 2010 ECR II-2805.

³¹⁶ *White & Carter (Councils) Ltd v. McGregor*, *EU Court of Justice Clarifies Scope of Essential Facilities Doctrine in Lithuanian Railways Case*, White & Carter (Dec. 4, 2020), <https://www.whitecase.com/insight-alert/eu-court-justice-clarifies-scope-essential-facilities-doctrine-lithuanian-railways>.

the broadcasters to license their copyrighted television listings, thereby illustrating that intellectual property rights could not be utilized as a barrier to deny essential resources to competitors.³¹⁷

C. India: A Developing Jurisdiction's Perspective

The Competition Act, 2002 is India's regulatory framework for the practice of competition law. This aims at achieving a proper balance between intellectual property rights and the practices that are likely to harm competition.³¹⁸ For most part, as illustrated in *Ericsson v. Intex*, the Indian courts and the Competition Commission of India have achieved a just balance between issues of Standard Essential Patents (SEP) and fair licensing terms.³¹⁹ According to the CCI, while patent rights do provide exclusivity, its exercise should not adversely affect competitive dynamics.³²⁰

In *Ericsson v. Micromax*, the Competition Commission of India (CCI) interrogated claims regarding excessive royalty demands over the SEPs.³²¹ This is when the CCI found that holders of SEPs indeed are entitled to license their patents under the conditions of FRAND (Fair, Reasonable and Non-Discriminatory terms).³²² In fact, the case was another success of balancing intellectual property rights by competition law within the Indian jurisdiction.

Investigation into the claims of market dominance by data policies from WhatsApp and Facebook goes deep, underlining a pattern of ever-growing interest in digital markets in India.³²³ These cases reflect how the relationship between IP, competition law, and innovation in India is changing.

This is challenging in achieving this balance, where the Ministry of Corporate Affairs proposes several reforms, and exemptions from intellectual property fall under the balance of competition law.³²⁴

These call for further harmonization in both intellectual property and competition law to promote more inclusive forms of innovation. Cross-border matters such as data monopolies

³¹⁷ Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v. Commission, Joined Cases C-241/91 P and C-242/91 P, 1995 ECR I-743.

³¹⁸ The Competition Act, No. 12 of 2003, INDIA CODE (2003).

³¹⁹ Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericsson (Publ), Case No. 76/2013, CCI.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ Harshita Chawla v. WhatsApp Inc. and Facebook Inc., Case No. 15 of 2020, CCI.

³²⁴ Ministry of Corporate Affairs, *Draft National Competition Policy for India* (July 28, 2011), https://www.mca.gov.in/Ministry/pdf/DraftNationalCompetitionPolicyForIndia-28th_July2011.pdf.

and SEP license disputes become very complicated and require global coordination towards maintaining equality and consistency.³²⁵

III. CASE STUDIES OF ANTITRUST ACTIONS AND THEIR IMPACT ON INNOVATION

Antitrust enforcement is an important ingredient for innovation development, especially in technology-intensive markets. This chapter expands the discussion on active regulation in major cases by jurisdiction.

A. Qualcomm: Licensing Practices and SEP

The American case, *FTC v. Qualcomm*, is the collision between antitrust law and intellectual property rights on Standard Essential Patents.³²⁶ The ‘no-license, no-chips’ policy of the firm compelled a cell-phone manufacturer to pay royalties for the complete product instead of the patented portion thereof, thus forcing these companies to accept higher-than-normal royalties to obtain the licensed patents and thereby reducing the amount of competition.³²⁷

Here, the Federal Trade Commission argued that Qualcomm was misusing its dominant position in standard-essential patents to extract exorbitant royalties and so stifle innovation for the benefit of its competitors.³²⁸ Even though the Ninth Circuit overturned the district court's ruling, a pronouncement as important as an approach to enforcement respecting innovation cannot be overstated.³²⁹

B. Google Android: Restrictive Licensing and Market Domination

In particular, the European Commission's probe of Google's Android operating system clearly depicted how antitrust actions can control monopolistic tendencies in the digital arena. In this case, Google was requiring the companies to install its search and Chrome browser in exchange for offering its Android application store. Thus, it dominated both the markets of search and advertisement.³³⁰

The European Commission fined Google €4.34 billion for anti-competitive practices, arguing that these restrictions reduced competition in search services and prevented innovation in mobile operating systems.³³¹ Such a verdict reflects the commitment of the European Union

³²⁵ World Intellectual Property Organization, *Settling IP Disputes Through Arbitration and Mediation: WIPO Services*, <https://www.wipo.int/sme/en/settle-ip-disputes.html>.

³²⁶ *FTC v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

³²⁷ *Id.* at 982.

³²⁸ *Supra* note 9.

³²⁹ *Id.*

³³⁰ *Google and Alphabet v. Commission*, Case T-604/18, decided on 18 July 2018.

³³¹ *Id.*

to choosing consumer preference and avoiding a monopolistic control in any emerging market.³³²

C. Microsoft: Tying and Abuse of Dominance

United States v. Microsoft: The case remains one of the most classic examples of applying antitrust laws to technology. Microsoft bundled its Internet Explorer web browser into its Windows operating system by relying on its market dominance to quell competition presented by Netscape Navigator.³³³

The U.S. Department of Justice argued that the actions of Microsoft prevented innovation in web browsing technologies by driving out competitors.³³⁴ Hence, the incorporation of a behavioural treatment that involved restrictions on bundling practices had also resulted in an intensified competitive environment.³³⁵

D. India's Ericsson SEP Disputes

Cases under India's competition law relating to SEPs have also been noteworthy in this regard. In *Ericsson v. Micromax*, the CCI was asked to examine Ericsson's royalty rates on SEPs that were said to be discriminatory against Indian companies.³³⁶ On the facts, the CCI noted that while the holders of SEPs were free to license their patents, they had to do so in compliance with their FRAND obligations under the license terms.³³⁷

This would provide a perfect precedent in the balance between IP rights and competition law across India, ensuring that SEP licensing fosters rather than inhibits innovation.³³⁸

E. Apple v. Samsung: Patent Litigation and Competitive Practices

The much-talked-about patent infringement issue related to the alleged rights between the technology giants Apple and Samsung has been a vital influencer on competitiveness, especially in relation to the claims of infringement upon patent rights.³³⁹ Apple asserted that its smartphone designs as well as utility patents undergird an important portion of Apple's competitive advantages.³⁴⁰ Courts in the United States favoured Apple and weighed out large

³³² *Id.*

³³³ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

³³⁴ *Id.*

³³⁵ Richard A. Posner, *Antitrust Law*, 2nd ed., Univ. of Chicago Press, 2001.

³³⁶ *Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson*, Case No. 50/2013, CCI.

³³⁷ *Id.*

³³⁸ Ministry of Corporate Affairs, *Report of the Competition Law Review Committee* (July, 2019), <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.

³³⁹ *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314 (Fed. Cir. 2012).

³⁴⁰ *Id.* at 1320.

damages, but the critics pointed to such heavy reliance on intellectual property protections in competitive markets as leading to incremental limitation of innovation.³⁴¹

This proved that the process of enforcing rights in such a fast-moving technology with high competition is bound to be complex.³⁴²

F. United Brands v. Commission: Abuse of Dominance and Innovation

In *United Brands v. Commission*, the European Court of Justice decided whether the particular policies of United Brands in relation to pricing and its refusal to supply bananas to certain wholesalers constituted an abuse of dominance.³⁴³ The court ruled United Brands had abused its dominant position by preventing actual or potential competition.³⁴⁴

Although not an IP-specific case, it was an important case precedent as to how dominant firms can strangle market innovation through exclusionary practices.³⁴⁵ Such a decision has since shaped many subsequent cases dealing both in IP and competition law in the EU.³⁴⁶

G. Pay-for-delay Agreements: The Pharmaceutical Sector between the EU and US

Pay-for-delay agreements are those agreements by which patent owners pay generic drug manufacturers to delay launching the more affordable generic versions. Pay-for-delay agreements have thus received significant scrutiny under the antitrust laws of Europe and the United States.³⁴⁷ For instance, Lundbeck was fined \$93.8 million by the European Union due to its anticompetitive conduct in delaying the generic antidepressant.³⁴⁸ Similar case in the United States is *FTC v. Actavis* wherein the Supreme Court resolved such an issue that found such agreement violated the antitrust laws due to the tendency that would support the maintenance of the monopoly power and the suppression of competition.³⁴⁹

These examples portray the fine line that must be drawn to ensure that intellectual property protections do not create artificial barriers of entry.³⁵⁰

IV. ROLE OF COMPETITION LAW IN STIMULATING INNOVATION IN TECHNOLOGY

Competition law in technologically driven markets plays a key role in fostering innovation through the eradication of anti-competitive practices, facilitation of entry into markets, and

³⁴¹ *Supra* note 9.

³⁴² *Id.*

³⁴³ *United Brands Co. v. Commission*, Case 27/76, 1978 ECR 207.

³⁴⁴ *Id.* at 240.

³⁴⁵ *Supra* note 22.

³⁴⁶ *Id.*

³⁴⁷ *Supra* note 3.

³⁴⁸ European Commission, *Lundbeck Case*, Case COMP/AT.39226 (2013).

³⁴⁹ *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013).

³⁵⁰ *Id.*

interoperability. The dynamics of the technology sector are very different and include network effects, data monopolies, and rapid innovation.³⁵¹ This section explains how competition law while enhancing innovation maintains fair dynamics within the market.

A. Prevent Abuse of Dominance in Digital Platforms

Digital platforms possess significant influence within the current technological ecosystems, by means of data as an asset. Corporations such as Google, Amazon, and Facebook have been subject to antitrust examination because of conduct that is anticompetitive and blocks innovation.³⁵² Such is the case with Google Search, in which the European Commission prosecuted Google Search for promoting services from the Google stable while neglecting others, leading to its relegation below those from a smaller company.³⁵³ Applying fines amounting to an amount of €2.42 billion, the commission ensured corrective action in their behaviour on countering exploitative practices into digital markets.³⁵⁴ The CCI has put the inquiry with respect to the privacy-related issues for WhatsApp, reflecting that where the competition laws have empowered control over platforms holding monopoly positions from reaping unjust advantages, further would block innovation and limit consumer preference.³⁵⁵ Examples of such interventions demonstrate ways in which competition law forms a safety net for this end: an open and competition-friendly environment for technological breakthroughs.³⁵⁶

B. Encouraging Interoperability and Standards

Interoperability is a must ingredient in technology markets because proprietary standards create an entry barrier. Competition law is directed at preventing dominant firms from using rights in intellectual property to prohibit interoperability or to create so-called "walled gardens".³⁵⁷ In the Microsoft Interoperability case, the European Commission compelled Microsoft to make information available to its competitors to allow interoperability with its operating systems.³⁵⁸ The decision did not merely promote competition but also innovation by enabling smaller companies to develop complementary products.³⁵⁹

³⁵¹ *Supra* note 4.

³⁵² European Commission, *Digital Markets Act: Ensuring Fair and Open Digital Markets*, https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en.

³⁵³ Google Search (Shopping) Case, Case AT.39740, European Commission (2017).

³⁵⁴ *Id.*

³⁵⁵ Harshita Chawla v. WhatsApp Inc. and Facebook Inc., Case No. 15 of 2020, CCI.

³⁵⁶ *Id.*

³⁵⁷ *Supra* note 22.

³⁵⁸ Microsoft Corp. v. Commission, Case T-201/04, 2007 ECR II-3601.

³⁵⁹ *Id.*

Standard Essential Patents is one of the largest areas in which fair licensing is ensured by the competition law. Through the FRAND principle, it encourages innovation as well as prevents SEP owners from abusing their power.³⁶⁰ Legal cases such as *Huawei v. ZTE* make FRAND conditions imperative to the maintenance of competitiveness and encouragement of innovation in the marketplace.³⁶¹

C. Data Monopolies and Artificial Intelligence

The new challenge under competition law, especially relating to AI, is data monopolies. Many tech giants possess high volumes of user data, which translates into a favourable position versus small businesses, which lack the same ground for rivalry. The case of Facebook-Germany exemplifies the anti-competitive effects of the dominance of data because of the fact that the regulators have compelled Facebook to change the practice of data collection.³⁶²

It creates additional risks as associated with the algorithmic collusion, such as those of companies doing unintentionally collusive conduct to synchronize price or limit entry into markets,³⁶³ and must evolve on that basis into producing frameworks promoting innovation while counteracting risks of anti-competitive harms.³⁶⁴

V. POLICY RECOMMENDATIONS ON BALANCING IP AND COMPETITION LAW

This balance between intellectual property rights and competition law will therefore foster innovation with the protection of fair market practices. The regulatory frameworks called for must be sensitive to emerging challenges in a rapidly advancing technological and digital market development. Recommendations to policymakers have been practically made, based on how the balance can be affected between incentives for innovation and protections against anti-competitive practices.

A. Strengthen licensing practice standards

³⁶⁰World Intellectual Property Organization, *Standard Essential Patents (SEPs)*, <https://www.wipo.int/en/web/patents/topics/sep>.

³⁶¹ Huawei Technologies Co. v. ZTE Corp., Case C-170/13, ECLI:EU:C:2015:477.

³⁶² German Federal Cartel Office, *Bundeskartellamt prohibits Facebook from combining user data from different sources*, https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

³⁶³ Ariel Ezrachi & Maurice Stucke, *Virtual Competition: The Promise and Perils of Algorithm-Driven Markets*, Osgoode Hall Law Journal 55.2 (2018).

³⁶⁴ UNCTAD, *The Future of AI: Why Innovation and Regulation Must Go Hand in Hand* (2023), <https://unctad.org/podcast/future-ai-why-innovation-and-regulation-must-go-hand-hand>.

At minimum, standards regarding licensing practice for SEPs issued by both government and competition authority, should be as specific as possible. Licensing should only be practiced according to FRAND and must not be unevenly weighted to deny or allow access to patented technologies equitably.³⁶⁵ For example, in cases of *Huawei v. ZTE*, this is the reason behind having clear licensing guidelines - it is in order not to abuse, but even to innovate more cooperatively.³⁶⁶

Such advancements may lead to regulatory pressure to create specialised courts specific to the resolution of SEPs-related disputes so as to expedite dispute settlement and reduce litigation costs.³⁶⁷

B. Promote Interoperability and Open Standards

Regulators will require interoperability between conflicting systems, especially in markets controlled by proprietary platforms.³⁶⁸ Therefore, open standards policies decrease obstacles to entry and induce new innovations in the markets.³⁶⁹ The case for Microsoft Interoperability has been paradigmatic; unless it is mandated, the latter will not be achievable.³⁷⁰

Tax incentives or grants to companies implementing the open standards can motivate the stakeholders to encourage open-source development, balancing between protection of IP and public interest.³⁷¹

C. Anti-data monopolies and algorithmic collusion

Big data and artificial intelligence require a more proactive posture from competition authorities in regulating new anti-competitive conducts, which have the potential to adversely affect the market's level of competition.³⁷² The authority must, therefore, provide mechanisms for algorithmic collusion detection and prevention.³⁷³

Additionally, compulsory provisions for data sharing would make all datasets available to smaller-scale businesses to promote innovation and help curb monopolistic practices.³⁷⁴ The

³⁶⁵ *Supra* note 66.

³⁶⁶ *Huawei Technologies Co. v. ZTE Corp.*, Case C-170/13, [2015] ECLI:EU:C:2015:477.

³⁶⁷ *Supra* note 31.

³⁶⁸ *Supra* note 4.

³⁶⁹ *Id.*

³⁷⁰ *Microsoft Corp. v. Commission*, Case T-201/04, 2007 ECR II-3601.

³⁷¹ UNCTAD, *Ensuring Open, Competitive and Fair Digital Markets* (Dec. 10, 2024), <https://unctad.org/news/ensuring-open-competitive-and-fair-digital-markets>.

³⁷² *Supra* note 69.

³⁷³ *Id.*

³⁷⁴ European Commission, *Strategy on Data*, <https://digital-strategy.ec.europa.eu/en/policies/strategy-data>.

EU General Data Protection Regulation is the gold standard set in balancing the difficulties created by data accessibility with the privacy worries.³⁷⁵

D. Establish Sector-Specific Regulatory Bodies

The regulatory framework will then have sector-specific bodies within it. This will mean that those sector-specific bodies will oversee sector-specific knowledge, catching specific expertise relating to matters of policy. This kind of approach applies best in sectors such as technology and pharmaceuticals, simply because such businesses are distinctive by nature, especially about matters of intellectual property and competition.³⁷⁶

E. Encourage Cross-Border Collaboration

Innovation is a cross-border phenomenon therefore international cooperation is required. Policymakers must be working on an international level to have international treaties and agreements for intellectual property and competition laws.³⁷⁷ For example, guidelines issued by WIPO on intellectual property and competition is an excellent step in terms of cross-border cooperation.³⁷⁸

F. Public interest safeguards

Competition authorities have to balance intellectual property rights against antitrust regulations by considering the public interest. For example, where the cases involve essential medicines, the regulatory authority can rely on provisions for compulsory licensing so that it can ensure that the medicines are affordable without sacrificing incentives for innovation.³⁷⁹ The case of Bedaquiline in India is an example of how competition law needs to be aligned with the imperatives of public health.³⁸⁰

VI. CONCLUSION

The complex nexus of intellectual property rights with competition law only underlines the difficulties arising from holding such a sensitive balance that should be met between pushing for innovation and ensuring balanced practices in markets. Thus, intellectual property rights-encouraged creativity and innovation may spur anti-competitive behaviour if practiced under

³⁷⁵ GDPR, Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data, 2016 O.J. (L 119) 1.

³⁷⁶ *Supra* note 44.

³⁷⁷ *Supra* note 8.

³⁷⁸ *Supra* note 5.

³⁷⁹ S. Abhipsha Dash, *The Bedaquiline Saga: Overlap Between Intellectual Property Rights and Competition Law*, CSIPR Blog, 24th February 2024, <https://csipr.nliu.ac.in/miscellaneous/the-bedaquiline-saga-the-overlap-between-intellectual-property-rights-and-competition-law/>.

³⁸⁰ *Id.*

the monopolistic or oligopolistic regimes. On the other hand, an overly strict application of competition law will undermine incentives for investment in R&D and stifle innovation in the key sectors. Pivotal cases such as Microsoft, Google Android, and Qualcomm demonstrate the complex role of competition law in managing intellectual property-related dominance. Moreover, these cases demonstrate the role of regulatory measures in furthering innovation, facilitating interoperability, and mitigating exclusionary behaviour. The pharmaceutical industry, as represented in the Bedaquiline case, demonstrates the broader social effects of this balance, as it shows how competition law and public health needs can meet. The focus of the policymakers and the regulatory authorities will be on imperative changes of legal structures responsive to market dynamics, which change with these emerging digital and AI innovations. Ultimately, a balance such as this will be struck by implementing certain recommendations for licensing standards, interoperability, combating data monopolies, and international cooperation. Thus, while the existence of balanced competition coincides with a culture of innovation, the regulatory body will be able to ensure that technological advancement has its benefits shared among consumers and innovators alike and, importantly, that such benefitting is fair. This paper contributes to the ongoing debate by providing insights and practical recommendations aimed at facilitating navigation through this intersection within a global economy.

**A STUDY ON THE ROLE OF COPYRIGHT LICENSING AND ITS IMPACT ON
MARKET COMPETITION WITH SPECIAL REFERENCE TO CHENNAI**

- Abiramavalli M. N³⁸¹

ABSTRACT

Copyright licensing plays a critical role in regulating the usage, distribution, and commercialization of creative works, offering protection to creators while shaping market competition. This study examines the role of copyright licensing and its impact on market competition, with a special focus on the city of Chennai, a burgeoning hub for creative industries including film, music, and software development. The analysis explores how licensing agreements affect market dynamics by either fostering competition or creating monopolistic control through exclusive rights. The primary objective of this research is to explore how different types of licensing agreements—exclusive, non-exclusive, compulsory, and open-source models—affect innovation, market entry, and consumer access in Chennai's creative economy. The methodology used here is empirical research with convenient sampling. The study concludes that balanced copyright licensing frameworks can stimulate innovation and competition, while overly restrictive practices may stifle creativity and create barriers to market entry. The study's findings indicate that exclusive licensing, commonly used in Chennai's media and entertainment sectors, often leads to limited access for smaller businesses and increases market control by larger entities. This research contributes to the ongoing discourse on copyright law, offering insights into how licensing practices can be optimized to enhance market competition, particularly in creative and digital industries in Chennai. It underscores the need for policies that promote equitable access while protecting the rights of creators in an increasingly competitive global market.

Keywords: Copyright Licensing, Market Competition, Intellectual Property, Economic Impact, Chennai.

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I. INTRODUCTION

Copyright licensing plays a significant role in today's knowledge-based economy, impacting how creative works, such as books, music, software, and films, are shared, consumed, and monetized. By granting exclusive rights to creators, copyright laws incentivize creativity and innovation, protecting the intellectual property (IP) of individuals and businesses. However, in a rapidly globalizing world, these protections can have far-reaching consequences for market competition, particularly in areas like software, media, and publishing, where licensing models shape market access and pricing strategies. In India, the government has introduced various initiatives and regulatory frameworks to balance the protection of intellectual property rights with the promotion of a competitive market. Copyright (Amendment) Act, 2012, Intellectual Property Rights (IPR) Policy, 2016, Incentives for Creative Industries and Copyright Education: Recognizing the economic potential of creative industries, the government offers various incentives and training programs. Several factors influence how copyright licensing operates and impacts market competition, especially in dynamic urban centers like Chennai. These factors shape how copyright holders, businesses, and consumers engage in the creative market and determine the accessibility and affordability of licensed content. Key factors include: Legal Framework and Regulatory Environment: The structure and enforcement of copyright laws play a significant role in licensing practices. Technological Advancements, Market Demand and Consumer Preferences, Role of Copyright Societies and Collecting Agencies, Globalization and Cross-Border Licensing, Intellectual Property Awareness and Education, Cost of Licensing and Royalty Structures, Government Policies and Support. Copyright licensing is evolving rapidly across the globe, influenced by digital transformation, changing consumer behaviors, and policy shifts. Emerging trends reveal how countries approach copyright protection, fair competition, and economic growth, with noticeable differences in licensing practices and regulatory frameworks. Here are some key trends and a comparative look at approaches in major regions: Digital Transformation and Streaming Services: Flexible Licensing and Freemium Models, Open Licensing and Open Access, Globalization and Cross-Border Licensing, Blockchain and Smart Contracts for Licensing. United States Strong copyright protections, advanced digital rights management (DRM) Widespread adoption of subscription models, use of DRM to limit piracy, and experiments with blockchain licensing. Heavy anti-piracy enforcement (e.g., DMCA) supports fair market competition.

II. OBJECTIVES

- i) To understand how copyright licensing works.
- ii) To explore the impact of copyright on businesses in Chennai.
- iii) To identify challenges in copyright licensing.

III. REVIEW OF LITERATURE

Towse, R. (2014) "Advanced Introduction to Cultural Economics" Towse examines how copyright licensing affects the economics of cultural markets, particularly in digital media. She argues that copyright serves as a means to incentivize creativity while noting that overly restrictive licensing can lead to monopolistic practices that hinder market competition. This work discusses the impact of international copyright treaties, specifically the WIPO Internet Treaties, on global copyright licensing practices. Ficsor explains how these treaties harmonize copyright laws across borders and affect competition by standardizing enforcement and licensing structures. **Lessig (2004)** provides a critical perspective on how copyright law, especially strict licensing models, restricts creative freedom and limits market entry for new creators. He advocates for balanced licensing that supports competition and argues for the role of open-source models in digital content. **Ginsburg, J. C. (2011)** – "The Role of National Copyright Policy in the Global Economy" Ginsburg explores how national copyright policies impact global market competition, focusing on how governments balance protecting IP and fostering competition. She discusses the potential monopolistic risks of overprotective licensing policies and their impact on cross-border digital content trade. **Hilty, R. M., & Nérissou, S. (Eds.). (2014)** – "Balancing Copyright – A Survey of National Approaches". This edited volume compares how different countries balance copyright protection and market competition. Hilty and Nérissou analyze licensing practices across various jurisdictions, discussing how restrictive or flexible copyright laws influence the competitiveness of digital content markets. **Kretschmer, M. (2012)** – "Copyright and Creative Industries in the Digital Era". Kretschmer examines the transformation of creative industries under digitalization and its effect on copyright licensing. He highlights how digital licensing models, such as streaming, have disrupted traditional market structures, impacting competition and market accessibility for independent creators. **Hugenholtz, P. B. (2018)** – "Copyright Reform for the Digital Age: A European Perspective". Hugenholtz discusses copyright reform in the European Union, particularly the 2019 Copyright Directive, which introduced revenue-sharing mechanisms for digital platforms. The author analyzes the

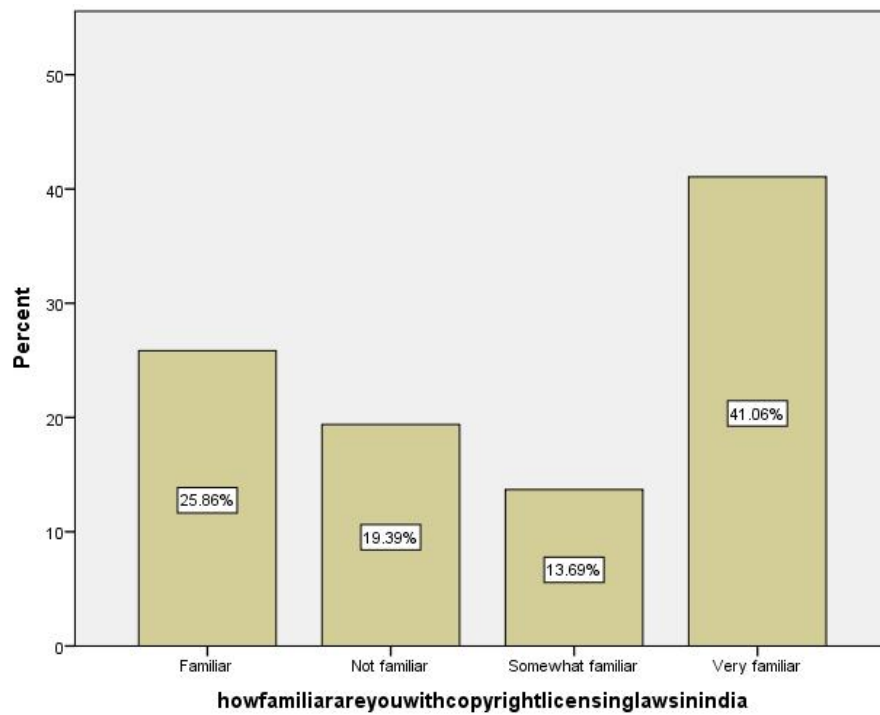
directive's effect on market competition, especially for smaller players in digital media. **Karnataka, C., & Sunder, M. (2021)** – "Copyright and Market Competition in Emerging Economies". Focusing on India, Karnataka and Sunder investigate how copyright licensing impacts competition in emerging markets. They examine the role of government initiatives in balancing copyright protections with affordable access, particularly through open licensing models for software and digital content. **Samuelson, P. (1999)** – "Intellectual Property and Market Power". **Samuelson** explores the relationship between intellectual property (IP) rights and market power, questioning whether copyright and licensing practices create monopolistic conditions that harm competition. She argues for policies that consider consumer rights and competition to create a balanced market. **Elkin-Koren, N., & Salzberger, E. (2004)** – "Law, Economics, and Cyberspace: The Effects of Cyberspace on Copyright". This book explores how cyberspace has altered copyright licensing and market competition, with a focus on digital goods. Elkin-Koren and Salzberger discuss how cyberspace requires new licensing models and balanced copyright laws to encourage a competitive, open digital market.

IV. METHODOLOGY

- i) **Research Method:** Empirical study
- ii) **Sampling Method:** Convenient Sampling
- iii) **Sample size:** 201
- iv) **Sample Frame:** In and Around Chennai

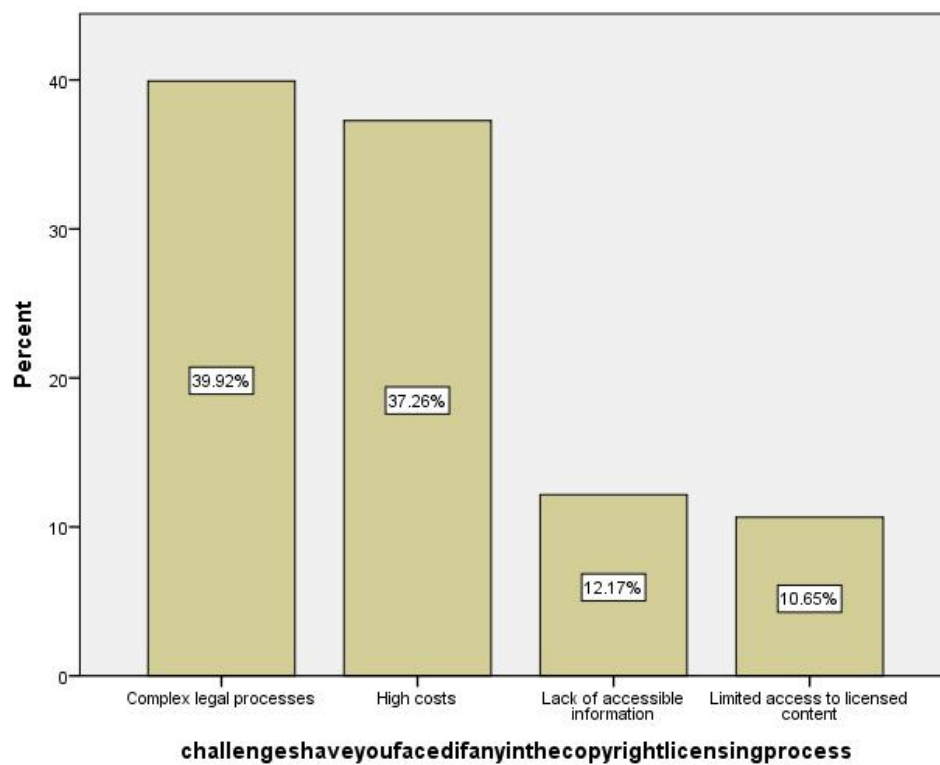
V. ANALYSIS

FIGURE 1



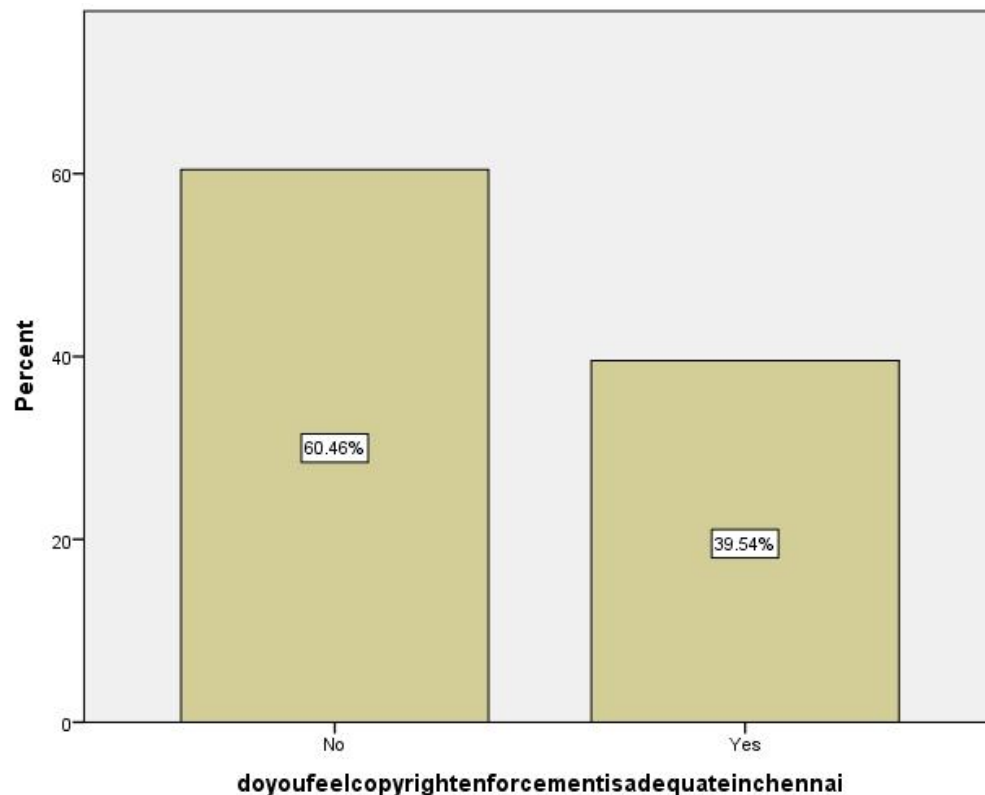
LEGEND: Fig 1 represents the opinion of the respondents on how familiar you are with copyright licensing laws in India.

FIGURE 2



LEGEND: Fig 2 represents the opinion of the respondents on challenges you have faced if any in the copyright licensing process.

FIGURE 3



LEGEND: Fig 3 represents the opinion of the respondents on do you feel copyright enforcement is adequate in Chennai.

VI. RESULTS:

- i) Fig 1 represents the opinion of the respondents on how familiar you are with copyright licensing laws in India. The major responses are from very familiar which is 41.06% and less responses are from somewhat familiar which is 13.69%.
- ii) Fig 2 represents the opinion of the respondents on challenges you have faced if any in the copyright licensing process. The major responses are from complex legal process which is 39.92% and less responses are from limited access to licensed content which is 10.65%.

- iii) Fig 3 represents the opinion of the respondents on do you feel copyright enforcement is adequate in Chennai. The major responses are from no which is 60.46% and less responses are from yes which is 39.54%.

VII. DISCUSSIONS

- i) (Fig 1) Here the major responses are from the very familiar this indicates that the respondents were well aware about copyright licensing laws in India, likely due to their professional or academic backgrounds.
- ii) (Fig 2) Here the major responses are from the complex legal process. This indicates that the respondents felt that the copyright licensing is a complex process and it needs the special expert and guidance for that.
- iii) (Fig 3) Here the major responses highlight a perception among respondents that existing measures to protect intellectual property rights are insufficient.

VIII. SUGGESTION

The suggestions to this study is to Focus on Specific Industries: Since copyright impacts different sectors uniquely (e.g., media, software, publishing), consider narrowing your study to a few key industries in Chennai where copyright licensing is particularly influential.

Conduct Case Studies: Include case studies of local businesses or startups in Chennai that have used copyright licensing to their advantage or have faced challenges due to copyright restrictions. This could offer practical insights.

IX. CONCLUSION

The study reveals that copyright licensing plays a significant role in shaping market competition in Chennai across various industries. Copyright licensing, while essential for protecting creators' rights, can both foster innovation and present barriers to market entry, depending on how it is structured and enforced. For established businesses, robust copyright protection can help secure market dominance by preventing unauthorized use of their works. However, smaller players and startups in Chennai often face challenges due to restrictive licensing fees, complex legal procedures, and limited access to copyrighted content, which can stifle competition and innovation.

**MONOPOLISING THE SPECTRUM: THE INTERSECTION OF COLOUR
TRADEMARKS AND COMPETITION LAW IN INDIA**

- R. Ashwin³⁸²

- Aditya B Dinesh³⁸³

ABSTRACT

The issue of trademark protection for colours in the fashion industry presents unique challenges that raise essential questions regarding competition and market dynamics in the intellectual property space. Traditionally, trademarks have been confined to logos, names, or symbols that differentiate goods and services in the commercial sphere. However, the increasing significance of colour in brand identity and consumer cognition has sparked a debate on whether the colour should be eligible for trademark registration in isolation. While trademark law allows brands to protect distinctive identifiers, including colours, which can enhance consumer recognition and brand loyalty, the exclusive rights granted to a single colour can lead to potentially anti-competitive practices. Monopolising specific colours, particularly those that become synonymous with a brand's identity, may limit choices for consumers and competing businesses, as stipulated by the colour depletion theory. This could stifle innovation, as smaller brands may need help to distinguish themselves in a marketplace wherein specific colours lay claimed by pre-existing legal entities.

Additionally, the inherently subjective nature of colour perception complicates the establishment of distinctiveness necessary for trademark protection. Unlike logos or textual trademarks, colours can evoke different associations and meanings, making it challenging to prove that colour uniquely identifies a single brand. The lack of clear standards for determining when the colour has acquired distinctiveness also curtails the idea of the colour trademark. This paper aims to shed light on recognising colours as a valid subject of trademark protection and its implications on competitive practices in the marketplace.

Keywords: Colour Mark, Fashion houses, Monopoly, Antitrust laws, Anti-Competitive Practices

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I. INTRODUCTION

In the competitive and ever-changing branding world, colours have emerged as powerful tools that transcend from mere aesthetic appeal to becoming integral to consumer identification and brand identity. Some of the best examples include the red sole associated with Christian Louboutin shoes and the purple-coloured packaging of Cadbury chocolates. In that regard, colour has been pushed into intellectual property law as a distinct brand characteristic, raising pertinent yet complex questions of its potential as trademark protection. Traditionally, trademarks have been limited to names, logos, and symbols distinguishing a product or service in the market. However, as brands increasingly harness the psychological and emotional resonance of colours to cultivate consumer loyalty, the question arises: should colours, in isolation, qualify for trademark registration?

This inquiry extends beyond academic implications; it has significant practical consequences for competition, innovation, and consumer choice in the marketplace. While the ability to claim colour as a trademark may help a company develop brand strength and prevent unfair uses by competitors, this capability also has the potential to create monopolistic opportunities that could disrupt market equilibria. The dual-edged characteristic of colour trademarks positions them at the confluence of intellectual property rights and competition law, thereby rendering the assessment of their legitimacy, practicality, and influence crucial.

Against this backdrop, this paper looks at the acceptance of colour as a valid trademark within India and its effects on competition and market dynamics. In this regard, it intends to look at legal frameworks that govern colour trademarks, problems in proving distinctiveness, and the economic and competitive implications of colour monopolisation. This research will critically examine this emergent field in intellectual property law, using case studies like the Christian Louboutin case and theoretical views like the theory of colour depletion.

This research will explore the intersection of trademark and competition law, emphasising the critical need for a balanced approach to protecting innovation and market fairness. By addressing key issues, the paper seeks to advance the discourse on non-traditional trademarks and their influence on the evolution of branding and competition in India, highlighting the significance of this study within the realm of intellectual property law.

II. TRADEMARK LAW AND COLOURS IN INDIA

Trademark law protects the identifiers that enable consumers to recognise the source of goods or services. Such traditionally includes words, logos, and symbols but have expanded to

encompass non-conventional marks such as sounds, shapes, and colours. The fundamental requirement for any trademark is that it should be unique in distinguishing one entity's goods or services from another's. This distinction may result from original or imaginative marks, such as newly created terms or distinctive logos referred to as Inherently Distinctive Marks, or it may develop over time due to enduring association with a brand, like Tiffany & Co.'s Robin's Egg Blue³⁸⁴, referring to the secondary meaning of distinctiveness.

Colours, by their nature, are not inherently distinctive. Rarely does a single colour act as an instantaneous origin identifier unless paired with additional design components. However, if a single colour is perceived by consumers as being strongly linked to a brand, it may gain uniqueness under trademark law. Understanding secondary meaning is essential for identifying colour trademarks.

A. Legal Framework Under the Trademarks Act, 1999

Under the Trademarks Act of 1999, any mark graphically representing and distinguishing goods or services is eligible for registration. The Act does not explicitly exclude colours from being registered as trademarks. However, Section 9³⁸⁵ requires that a mark not be devoid of distinctiveness and places the onus on the applicant to prove that the colour has acquired secondary meaning.

According to Section 10 of the Trade Marks Act³⁸⁶, 'combinations of colours' are covered by the act as long as they meet three requirements: they must be able to be recognised as a mark that can be graphically represented, and that can be used to differentiate one good or service from another—however, the issue of whether a specific colour can be registered as trademark becomes considerably more complicated. The problem had come up before Indian constitutional courts on multiple occasions but was answered differently.

B. Judicial Precedents

Judicial precedents in India have been instrumental in shaping the understanding and treatment of single-colour trademarks, especially given the lack of explicit statutory provisions under the Trademarks Act 1999. Courts have primarily relied on the broader principles of distinctiveness, functionality, and consumer perception while addressing claims for single-colour trademarks. The precedents demonstrate a nuanced approach that balances

³⁸⁴ Fashion Law Journal, The Story of the Iconic Tiffany's Blue Color, <https://fashionlawjournal.com/the-story-of-the-iconic-tiffanys-blue-color/> (last visited Dec. 11, 2024).

³⁸⁵ The Trademarks Act, No. 47 of 1999, § 9, India Code (1999)

³⁸⁶ *Id* § 10

the rights of trademark holders with the imperative of preserving market competition and consumer welfare.

In one of the earliest decisions, the Delhi High Court, in *Anchor Health and Beauty Care Pvt. Ltd. v. Colgate Palmolive Company*³⁸⁷, noted that a single hue might be registered as a trademark. However, it acknowledged exceptions where colours have practical applications or are commonly associated with a particular trade, like blue for ink or red for lipstick. In contrast, The Delhi High Court dismissed Cipla's assertion of exclusive rights over orange-hued, oval-shaped tablets in *Cipla Limited v. M. K. Pharmaceuticals*³⁸⁸. The Court ruled that the pharmaceutical sector cannot monopolise a single colour because customers do not purchase pharmaceuticals based on colour. The court emphasised medicinal names as distinguishing traits of greater weight than their colour or shape.

The iconic packaging for "Parachute" hair oil, which features a blue (Pantone 285C) bottle with text, was successfully protected by the judgement of the *Marico Limited v. Mukesh Kumar* case³⁸⁹. The court determined that the blue colour and other packaging elements created a distinctive identity, even though Marico did not assert exclusive rights over the colour itself. The defendant's use of the same shade of blue increased the likelihood of consumers confusing the two products.

III. COMPETITION LAW IN INDIA

"Competition law provides the framework for competitive activity. It protects the process of competition."³⁹⁰ The notion of competition in the market is highly regarded and deemed essential for protection.³⁹¹ It is suggested that competition, both in domestic and international markets, drives efficiency and productivity by ensuring that only the most capable firms, those best meeting market demands, thrive and endure.³⁹² Competition law aims to safeguard the market. Competition, fostering innovation and encouraging competitive pricing.³⁹³

³⁸⁷ *Anchor Health & Beauty Care Pvt. Ltd. v. Colgate Palmolive Co.*, (2003) 27 PTC 478 (Del.).

³⁸⁸ *Cipla Ltd. v. M.K. Pharm.*, 2004 (29) PTC 173 (Del.).

³⁸⁹ *Marico Ltd. v. Mukesh Kumar*, 2012 (49) PTC 100 (Del.).

³⁹⁰ Competition Bill (H.L.), H L Deb October 30, 1997, Volume 582 Column 1156

³⁹¹ Sandra Marco Colino, *INTRODUCTION To COMPETITION LAW* (Oxford University Press, 7 th ed. 2011).

³⁹² Klaus Schwab, *THE GLOBAL COMPETITIVENESS REPORT 2014-15* (World Economic Forum 2014).

³⁹³ Richard Whish, *COMPETITION LAW* (London, LexisNexis UK, 5 th edn. 2003) 734; Thomas Dreier, *Balancing Proprietary and Public domain Interests: Inside or Outside of Proprietary Rights?*, *EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY* (Rochelle, Cooper, Dreyfuss, et al eds. 2001) 312; Herbet Hovenkamp, et al, *IP AND ANTITRUST: AN ANALYSIS OF ANTITRUST PRINCIPLES APPLIED TO INTELLECTUAL PROPERTY LAW* (New York, Aspen Law & Business, 2002).

Ultimately, the objective of competition law is to enhance consumer welfare and protection.³⁹⁴

Competition law serves as a regulatory framework aimed at addressing market failures, particularly monopolies.³⁹⁵ On the other hand, Trademark law serves a critical economic purpose by reducing consumer search costs and enhancing market efficiency. Trademarks provide a precise and more reliable way for consumers to identify and differentiate products or services, fostering informed purchasing decisions. By protecting brand identity, trademark law incentivises businesses to maintain consistent quality and invest in building goodwill, ultimately promoting competition and innovation.

A. Indian Scenario Concerning Competition Act 2002

The Raghavan Committee mentioned the conflict of IPR with the Competition Law in its report. Clause 5.1.7 of the Raghavan Committee Report stated, "All forms of Intellectual Property have the potential to raise Competition Policy/Law problems"³⁹⁶. Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. Undoubtedly, intellectual property rights should be provided in the interest of human creativity, which needs to be encouraged and rewarded. This right enables the holder (creator) to prevent others from using their inventions, designs, or creations. But at the same time, there is a need to curb and deter anti-competition behaviour that may surface in the exercise of Intellectual Property Rights." Sections 3 and 4 of the Competition Act of 2002³⁹⁷ contain provisions for dealing with such issues.

i) Section 3 of the Competition Act

Section 3 of the Competition Act of 2002 requires the Competition Commission to investigate anti-competitive agreements; those determined to be anti-competitive are declared void.

Section 3 of the Indian Competition Act specifies that:- "*No enterprise or association of an enterprise is allowed to make any agreement about production, distribution, supply,*

³⁹⁴ Bork, R.H. (1978), *The Antitrust Paradox: A policy at War with Itself*, Basic Books; Posner, R.A. (2001), *Antitrust Law*, University of Chicago Press, 21 edition-

³⁹⁵ Niamh Dunne, *COMPETITION LAW AND ECONOMIC REGULATION - MAKING AND MANAGING MARKETS* 14 (Cambridge University Press, 2015).

³⁹⁶ Report of the High Level Committee on Competition Policy and Law, S.V.S. Raghavan Committee, ¶ 5.1.7 (2000).

³⁹⁷ Competition Act, No. 12 of 2002, India Code (2002), §§ 3, 4.

*acquisition, storage, controls of goods or provision of services, which will have a significant adverse impact on competition within India”.*³⁹⁸

ii) Exception to IPR under Section 3(5) of the Indian Competition Act 2002

The Indian Competition Act provides for ensuring workable competition (Workable competition, first articulated by J. M. Clark³⁹⁹ in 1940, admits that there are features of monopoly in practically all markets and that the responsibility of authorities is to ensure that there is enough competition among undertakings to safeguard consumers from market abuses.) in the country. The Indian Competition Act of 2002 does not violate intellectual property rights. However, the Act permits legal action if the CCI considers that IPRs have a considerable adverse effect on competition (AAEC)[4]. In this regard, Section 3(5) of the Competition Act offers a blanket exception for IPRs. It preserves the IPR holder's rights to avoid infringement and protects these rights as long as the limits imposed by the agreement are fair. It guarantees that competition policy does not interfere with the reasonable use of IPRs. This safeguard, however, is not absolute. The phrase reasonable usage suggests that Section 3(5) of the Act only authorises IP holders to impose reasonable conditions on licenses to secure IP protection without violating Competition law.

iii) Section 4 of the Competition Act

Section 4 of the Competition Act of 2002 expressly states that no firm shall abuse its dominant

position.⁴⁰⁰ The rule prohibits using a dominant position instead of its mere existence. It

Then, it defines what abuse of a dominant position means and specifies the harmful activities. This basis brings IPR and competition law into litigation. The case of Aamir Khan Productions Private vs. Union Of India⁴⁰¹ was a watershed moment in this area. It was determined that the Competition Commission (CCI) has the jurisdiction to handle intellectual property matters and that intellectual property regulations do not have an absolute overriding influence on competition law.

From the preceding discussion, one could argue that competition policy generally accepts any dominance arising from exercising intellectual property rights (IPRs), intervening only when such dominance amounts to abuse. Section 4 provides no exception for IPR-derived market power.

³⁹⁸ *Id.* § 3.

³⁹⁹ J M Clark, ‘Toward a Concept of Workable Competition’, *The American Economic Review* (1940) 30(2) 241-56

⁴⁰⁰ Competition Act, No. 12 of 2002, India Code (2002), § 4.

⁴⁰¹ *Id.* § 3(5)

However, this argument may not hold, as intellectual property rights (IPRs) do not necessarily confer a dominant market position. The legal monopoly granted by IPRs does not automatically translate into an economic monopoly, which is the focus of competition law. Furthermore, even if IPRs confer a dominant position, Section 4 does not prohibit mere possession of market power; there must be evidence of abuse of that dominance.

In *Singhania & Partners LLP v. Microsoft Corporation (I) Pvt Ltd & Others*⁴⁰², the Competition Commission reached a similar conclusion. Microsoft was accused of engaging in anti-competitive behaviour and abusing its dominant position in the Windows and Office 2007 sales. The Commission held that charging different prices for the same goods under various licensing agreements is reasonable and standard in the market. Moreover, there was no concrete evidence to suggest that Microsoft's dominance had driven any competitor out of the market. Consequently, despite holding 80% of the market share, Microsoft was found not to have violated competition laws.

B. 3.2 Refusal to grant license

A trademark owner's refusal to license a single-colour trademark can raise significant competition law concerns, particularly when such refusal impedes market competition or creates undue barriers for other players. For example, suppose the refusal is based on unreasonable or arbitrary terms. In that case, it may be deemed anti-competitive, as was demonstrated in the case of *Entertainment Network (India) Limited v. Super Cassette Industries Ltd.* Here, while the copyright holder had legitimate monopoly rights, their imposition of unsatisfactory terms led to the refusal being classified as anti-competitive.

Similarly, in the case of single-colour trademarks, the balance between protecting legitimate business strategies and preventing anti-competitive behaviour is critical. Practices such as exclusionary licensing agreements, tie-in arrangements, or excessive restrictions on using a specific colour could cross the line into anti-competitive territory. Although the monopoly granted by a single-colour trademark is legal and intended to protect the distinctiveness of a brand, it becomes problematic if its enforcement restricts market access or innovation beyond the intended scope of trademark law.

Thus, competition law acts as a safeguard, distinguishing legitimate use of single-colour trademarks from practices that unfairly limit competitors' ability to operate in the market. While exclusivity is a necessary feature of intellectual property rights, it must not be exercised in a manner that disrupts fair competition or stifles innovation.

⁴⁰² *Singhania & Partners LLP v. Microsoft Corp. (I) Pvt. Ltd.*, 2010 CompLR 312 (CCI)

IV. THE ADVERSE IMPACT OF SINGLE-COLOUR TRADEMARKS ON COMPETITION

Implementing single-colour trademarks can have far-reaching implications on market competition, particularly under the Competition Act 2002, designed to ensure fair competition and prevent anti-competitive practices. The following is a non-exhaustive list of the same.

A. The Risk of Creating Monopoly Power

Under Section 4 of the Competition Act, the abuse of dominant position is prohibited. This provision aims to ensure that no single enterprise can misuse its position in the market to the detriment of competitors or consumers. When a company gains exclusive rights to a colour, it may gain an artificial monopoly over that colour, extending far beyond the original intent of brand differentiation. This would likely grant the trademark holder an unfair competitive advantage, preventing other firms from using the same colour, even if it is separate from their brand identity.

For instance, in the fashion or consumer goods industries, where colour is often a key element of product differentiation, a single-colour trademark can restrict competitors from offering similar products in the same colour. This limitation on competition is particularly detrimental in markets with multiple players, where differentiation is key to attracting consumers.

The Raghavan Committee Report emphasises that while essential for encouraging innovation, intellectual property rights (IPRs) must not be allowed to distort competition in a market. By monopolising a colour, a brand could prevent others from accessing an essential element of product design, even though the colour may not be functionally necessary to the product. This effectively results in anti-competitive behaviour that the Competition Act seeks to avoid.

B. Anti-Competitive Agreements and Collusion

Section 3 of the Competition Act deals with anti-competitive production, distribution, and pricing agreements. While the focus of Section 3 is typically on formal agreements between enterprises, the effect of single-colour trademarks can mimic anti-competitive practices such as collusion, even in the absence of explicit agreements. When a single colour becomes linked to a particular brand, competitors may feel compelled to avoid using that colour or face the risk of legal action. This informal agreement to refrain from using the same colour restricts competition and reduces the variety of products available to consumers.

In industries where colour plays a pivotal role in product recognition, such as cosmetics or fashion, the exclusive use of colour by a single brand could prevent other companies from developing similar products attractively or recognisably. This results in a reduction in market diversity and price competition, which directly contradicts the objectives of Section 3 of the Competition Act, which seeks to promote healthy competition in the market and prevent monopolistic behaviour.

C. Barriers to Entry for Smaller Competitors

Implementing single-colour trademarks could create significant barriers to entry for smaller firms. Under the Competition Act, the goal is to foster a market environment where new entrants can compete on a level playing field. However, if more prominent, established brands can monopolise specific colours, smaller firms may be unable to afford the cost of differentiating their products, leading to market concentration and lack of innovation.

For example, in industries like cosmetics or beverages, where colour is used as a key marketing tool, smaller competitors who cannot afford to register a unique colour might have no choice but to adopt packaging designs that fail to capture consumer attention. This discourages innovation and prevents new firms from offering products that could compete with established players. The potential for reduced market entry and lack of competition in such scenarios is clearly at odds with the objectives of the Competition Act, which seeks to ensure that the market remains accessible to all players, particularly those who wish to challenge the status quo.

D. Decrease in Consumer Welfare

One of the core objectives of the Competition Act is to promote consumer welfare. A brand's monopolisation of a single colour can lead to higher consumer prices, as competitors cannot offer products with the same attractive and recognisable features. Additionally, a lack of colour variety could reduce the overall appeal of products, limiting consumer choice and forcing them to settle for options that do not align with their preferences.

When competition is reduced in this way, companies may feel less compelled to improve their products or lower prices. Without effective competition, firms have less incentive to innovate, diminishing the potential for new and better products. By restricting the use of colour and limiting consumer options, implementing single-colour trademarks could negatively affect consumer choice and market innovation, key tenets of the Competition Act.

E. The Risk of Colour Depletion and Market Homogenization

The colour depletion theory suggests that when one company monopolises a particular colour, it limits the options available for competitors who want to use that colour for product

differentiation. This could reduce product diversity across industries, which harms competition by restricting firms' ability to develop distinctive products. In markets where colour is a significant factor in branding, this could lead to market homogenisation, where products from different brands appear too similar, reducing consumer choice and diluting the impact of trademarks.

This issue is particularly relevant in sectors like fashion, where the aesthetic appeal of colour can be central to a product's success. If large companies monopolise specific colours, it becomes easier for new entrants or smaller players to distinguish themselves, undermining the dynamic market competition that the Competition Act is designed to foster.

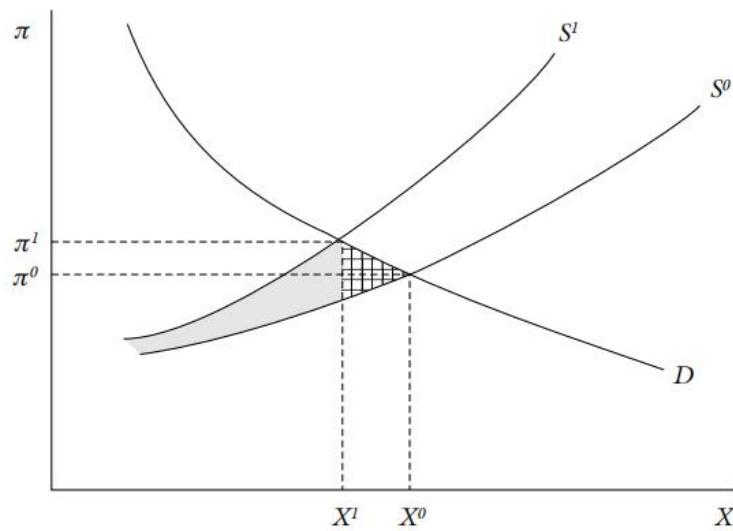
V. THE ECONOMICS OF SINGLE COLOUR MARKS

Competition law, fundamentally rooted in promoting market efficiency and consumer welfare, serves as vital welfare legislation. It aims to prevent practices that distort competition, ensuring that markets function effectively to deliver better choices, fair prices, and innovation to consumers. To fully grasp its provisions and their implications, it is imperative to consider the economic effects of market practices and regulatory measures. Analysing the financial consequences of granting exclusivity, such as single-colour trademarks, allows for a nuanced understanding of how such rights impact market dynamics, consumer welfare, and the broader objectives of competition law. Thus, the paper dwells on the economic effects of registration.

The concept of functionality, particularly relevant to design elements used as trademarks, is closely related to the notion of genericness. A functional feature is ineligible for trademark protection, and a feature that was once trademarked loses protection if it becomes functional. For instance, a tyre's circular shape cannot be trademarked due to its functional necessity. In contrast, a colour combination used in a product's trade dress can be considered an aesthetic feature. The most challenging issue with functionality arises in the context of "aesthetic" versus "utilitarian" functionality⁴⁰³. Here, "utilitarian" refers to its ordinary meaning—practical, straightforward, or unembellished. The tyre example mentioned earlier illustrates this type of functionality. The concept of "aesthetic" functionality acknowledges, quite appropriately from an economic perspective, that utility encompasses anything that increases a product's value to consumers.

⁴⁰³ William M. Landes & Richard A. Posner, Trademark Law: An Economic Perspective, 30 J.L. & ECON. 265 (October 1987).

The concept of functionality, encompassing both "utilitarian" and "aesthetic" dimensions, can be formalised into a graphical model. C , the production cost, is expanded to depend on the quantity of X produced and the product's physical features F , which are claimed as trademarks. Suppose denying another firm access to F increases its marginal production cost. If Firm A grants exclusive rights to F , the marginal costs for competitors (e.g., Firms B, C, D) will rise. This increase shifts the marginal cost curve for producing X to the left, resulting in deadweight loss⁴⁰⁴.

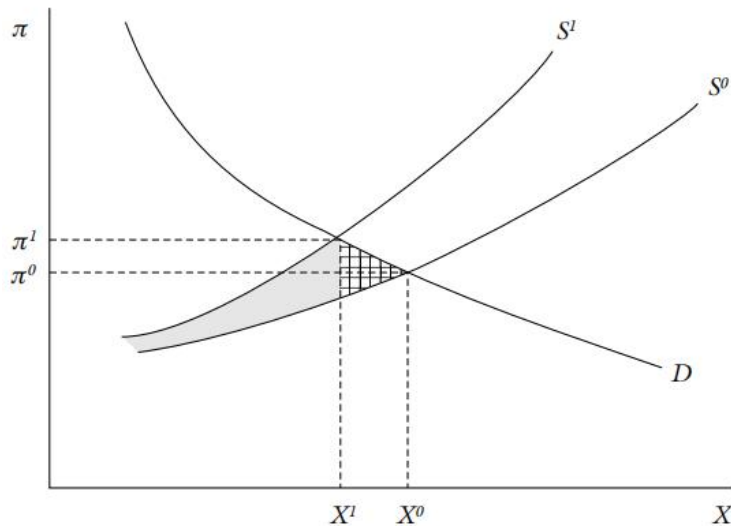


Source- William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective* (Univ. of Chi. Press 1987).

A firm producing an aesthetically functional feature does not impose a cost disadvantage on competitors. In this scenario, the firm's ability to enhance its mark's appeal depends on its investment in making it attractive. Consequently, granting the firm exclusive rights to prevent others from replicating its visually appealing trademark increases both the quantity of output (X) and its perceived quality and attractiveness ($Q(A)$). This shifts the supply curve to the right, boosting output and benefiting consumers.⁴⁰⁵ Unlike practical functionality, this does not restrict production by raising competitors' costs.

⁴⁰⁴ *Ibid.*

⁴⁰⁵ *Id.* at 20



Source- William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective* (Univ. of Chi. Press 1987).

However, issues arise if the aesthetic element becomes an intrinsic product feature (F) in the minds of consumers. In such cases, other firms must incur additional costs to replicate an equivalent product, similar to the impact of helpful functionality. This creates ambiguity in economic effects. While granting exclusivity encourages firms to invest in creating more attractive trademarks (A), it simultaneously restricts the availability of F to competitors, raising their production costs. The net effect on the supply curve becomes uncertain. Actual aesthetic functionality, where trademark protection is denied, exemplifies this tension. Although exclusivity may incentivise investments in appealing designs, such protection may not necessarily be trademark rights. Design patents, valid for up to 14 years, are often used to reward aesthetically pleasing, non-utilitarian design creators.

Colour serves dual roles as a functional and aesthetic product feature. Functionally, colour can enhance usability, such as red signalling danger or blue denoting calmness, aiding consumer decisions and safety. It may also improve product performance, like heat-reflective coatings. Aesthetically, colour adds appeal, helping products stand out and align with branding strategies. For example, Tiffany's Robin-egg blue is integral to its luxury identity. However, the overlap can complicate trademark claims; a colour critical to functionality (e.g., reflective yellow for safety gear) cannot be exclusively owned, while aesthetic-only colours may be protectable if they identify the brand uniquely.

VI. CONCLUSION

Implementing single-colour trademarks in India presents unique challenges at the crossroads of intellectual property rights, competition law, and consumer welfare. While single-colour trademarks have the potential to enhance brand identity and consumer recognition, their monopolistic nature poses significant risks to market competition and innovation.

The Indian legal framework, particularly the Trademarks Act 1999, does not explicitly address single-colour trademarks, leaving their regulation to judicial interpretation. While courts have made strides in balancing the rights of trademark holders with market fairness, the lack of clear statutory guidance has led to inconsistent outcomes. The interplay between trademark law and competition law further complicates the issue, as exclusivity over a single colour may create barriers to entry, reduce consumer choice, and hinder market dynamics.

Drawing from domestic precedents and international best practices, this paper highlights the importance of a nuanced approach that considers the specific characteristics of single-colour trademarks. Adopting explicit guidelines, coupled with regulatory collaboration and consumer education, can help mitigate the risks of monopolisation while promoting innovation and fairness.

In conclusion, India must develop a balanced framework that fosters brand innovation while ensuring that single-colour trademarks do not disrupt the competitive equilibrium of its dynamic market. By addressing legal ambiguities, strengthening oversight, and prioritising consumer welfare, policymakers can pave the way for a more equitable and efficient system that aligns with intellectual property and competition law principles.

BALANCING INNOVATION AND MARKET DYNAMICS: THE INTERSECTION OF PATENT LAW AND COMPETITION LAW

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ABSTRACT

The intersection of patent law and competition law represents a pivotal area of legal and economic analysis, where the need to incentivize innovation through patents must align with maintaining competitive market dynamics. This paper delves into the challenges and opportunities arising from this intersection, focusing on how patent systems can be inherently pro-competitive when effectively designed and implemented. Patents, by granting temporary exclusivity, stimulate competition by encouraging market entry through innovation and facilitating technology dissemination. This paper explores key mechanisms such as compulsory licensing, patent pooling, and fair, reasonable, and non-discriminatory (FRAND) licensing standards for standard-essential patents (SEPs) that promote competition. Additionally, the study examines the role of competition law in curbing abusive practices, including evergreening, patent thickets, and monopolistic behaviours like excessive licensing fees and refusal to license essential technologies. Through a comparative analysis of case law and regulatory frameworks in selected jurisdictions, the paper evaluates how competition authorities have addressed these challenges across jurisdictions, highlighting examples where patent policies have supported dynamic efficiencies, R&D incentives, and collaborative innovation models. It also investigates how patents create opportunities for licensing and partnerships, contributing to vibrant and competitive markets. By addressing the delicate balance between patent rights and competition principles, this paper underscores the role of patent regimes in fostering technological advancement, economic growth, and public welfare. It advocates for harmonised approaches that align innovation incentives with competitive practices, ensuring that patents remain catalysts for progress in an equitable and accessible marketplace.

Keywords: Patent Law, Competition Law, Standard-Essential Patents (SEPs), Compulsory Licensing, Patent Pooling.

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I. INTRODUCTION

Intellectual Property (IP) encompasses the intellectual creations of humans, including inventions, artistic works, designs, and commercial identifiers like logos and brand names. Legal frameworks such as patents, copyrights, and trademarks provide mechanisms to safeguard IP, granting creators exclusive rights to monetize their innovations through licensing, franchising, or sales.⁴⁰⁸ While these rights create a limited monopoly, they also incentivize creativity and innovation by ensuring financial returns on investments in ideas and intellectual pursuits.

A crucial area of legal and economic inquiry is the interaction between patent law and competition law, where the objectives of incentivizing innovation through patents must be reconciled with the need to maintain competitive market dynamics⁴⁰⁹. Patents, by granting inventors temporary exclusivity, provide a framework for fostering innovation and technology dissemination while encouraging market entry through new products and processes.⁴¹⁰ However, this exclusivity, if misused, can hinder competition and lead to monopolistic practices.

This paper begins by exploring the importance of competition in the market and the efficiency it seeks to achieve. It then examines how patents serve as a catalyst for innovation. The paper proceeds to address the balance between patent exclusivity and market competition. The paper then looks into the provisions of the TRIPS Agreement addressing anti-competitive practices, followed by an analysis of the strategies employed by the U.S. and the EU. It further examines the Indian perspective on the relationship between competition and intellectual property rights (IPR). Lastly, the paper explores specific issues such as compulsory licensing, patent pooling, standard essential patents (SEPs), and the phenomenon of patent evergreening.

⁴⁰⁸ What is Intellectual Property (IP)?, <https://www.wipo.int/about-ip/en/> (last visited Dec 10, 2024).

⁴⁰⁹ Paul A. Geroski, *Intellectual Property Rights and Competition Policy*, in PERSPECTIVES ON INNOVATION 455 (2007), <https://doi.org/10.1017/cbo9780511618390.025> (last visited Dec 11, 2024).

⁴¹⁰ Pratyush Prakarsh - et al., *The Role of Intellectual Property in Fostering Innovation and Economic Growth*, 6 INTERNATIONAL JOURNAL FOR MULTIDISCIPLINARY RESEARCH (2024).

II. THE ROLE OF COMPETITION IN MARKET DYNAMICS AND ECONOMIC EFFICIENCY

Competition is a cornerstone of economic theory, defined as the effort of individuals or firms to achieve the same objective simultaneously.⁴¹¹ Market structures, which range from pure monopoly to perfect competition, determine the level of competition within a market⁴¹². In a monopolistic market, a single firm dominates without any competition, allowing it to earn significant economic profits. Conversely, competitive markets drive firms to outdo each other by offering better products, services, or prices, resulting in the efficient allocation of resources to meet consumer needs effectively.

Competition serves as a mechanism for establishing market prices through the interaction of supply and demand, ensuring that resources are allocated optimally.⁴¹³ By fostering innovation and productivity, competition encourages firms to operate efficiently, thus enhancing consumer welfare. Competition policy plays a vital role in maintaining market competitiveness.⁴¹⁴ It also promotes fair competition in markets dominated by a few firms, ensuring that barriers to entry and market distortions are minimized.

From the competition law perspective, patents may appear restricting competition. The exclusivity granted by patents enables rights holders to prevent others from producing or selling the protected product, thereby limiting direct competition. Furthermore, competition among licensees authorized to produce or distribute the protected product may also be constrained.

III. THE SIGNIFICANCE OF PATENTS IN DRIVING INNOVATION

Patents, as a key component of IPRs, seek to balance the interests of inventors and the public. By safeguarding innovations while facilitating their wider societal application, patents act as effective instruments for fostering innovation and addressing unfulfilled needs. They

⁴¹¹ Competition and Market Structures (Industrial Organization), ECONLIB (2020), <https://www.econlib.org/library/Topics/Details/competitionmarketstructures.html> (last visited Dec 11, 2024).

⁴¹² Engin Oner, *Simultaneous Effects of Supply and Demand Elasticity with Market Types on Tax Incidence (Graphical Analysis of Perfect Competition, Monopoly and Oligopoly Markets)*, 5 INTERNATIONAL JOURNAL OF ECONOMICS AND FINANCE (2013).

⁴¹³ Organisation for Economic Co-operation and Development, *Competition and Innovation: A Theoretical Perspective* (OECD Publishing 2023), <https://www.oecd.org/daf/competition/competition-and-innovation-a-theoretical-perspective-2023.pdf> (last visited Dec. 10, 2024).

⁴¹⁴ “Why Is Competition Policy Important for Consumers?” *Competition Policy*, European Commission, https://competitionpolicy.ec.europa.eu/about/why-competition-policy-important-consumers_en (last visited Dec. 10, 2024).

By addressing anti-competitive practices such as price fixing, market allocation, and bid rigging.

safeguard information with public good characteristics, which are non-rivalrous and non-excludable, encouraging advancements that enhance the quality of life.⁴¹⁵

The process of innovation, however, is inherently complex, expensive, risky, and unpredictable. In this context, patents play a critical role by offering innovators enforceable rights that protect their investments and achievements.⁴¹⁶ These exclusive rights incentivize creativity, ensuring that inventors and investors reap the rewards of their efforts. *‘Innovation is defined as the implementation of new or significantly improved products, processes, marketing methods, or organizational strategies.’*⁴¹⁷ Patents, as a cornerstone of the intellectual property system, uphold this definition by preventing unauthorized use of inventors' ideas, thus fostering competition by substitution rather than imitation.

The patent system operates through two primary mechanisms. First, it prevents free-riding by protecting innovators from unauthorized appropriation of their ideas, ensuring that third parties cannot exploit the investments and risks borne by inventors. Second, it encourages competition by substitution, stimulating the development of alternative solutions rather than mere imitation. This dynamic drives the creation of new and efficient technologies.⁴¹⁸

In the absence of robust patent protection, market participants may prioritize copying over original creation.⁴¹⁹ Patents address this by granting exclusive rights to the inventor, enabling them to monetize their innovations through licensing or sales while checking unauthorized use or misuse⁴²⁰. By protecting economic rights and encouraging investment in new technologies, patents not only act as a tool for inventor protection but also provide investor security in a competitive market. This dual role underscores the importance of a well-functioning patent system in promoting technological progress, economic growth, and global competitiveness.

⁴¹⁵ David W. Barnes, *Congestible Intellectual Property and Impure Public Goods*, 9 NW. J. TECH. & INTELL. PROP. 533 (2011), available at <https://scholarlycommons.law.northwestern.edu> (last visited Dec. 10, 2024).

⁴¹⁶ U.S. Federal Trade Commission, *The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition* (Mar. 2011), available at <https://www.ftc.gov/sites/default/files/documents/reports/evolving-ip-marketplace-aligning-patent-notice-and-remedies-competition-report-federal-trade/110307patentreport.pdf> (last visited Dec. 10, 2024).

⁴¹⁷ OECD, Oslo Manual—Guidelines For Collecting And Interpreting Innovation Data (3rd Edn 2005) Para. 146.

⁴¹⁸ MARK LEMLEY, *Ex Ante Versus Ex Post Justifications for Intellectual Property*, (2016), <https://doi.org/10.31235/osf.io/nqbmp> (last visited Dec 11, 2024).

⁴¹⁹ Leading to a decline in the quality and efficiency of innovation.

⁴²⁰ GRAEME GOODAY & STEVEN WILF, *PATENT CULTURES: DIVERSITY AND HARMONIZATION IN HISTORICAL PERSPECTIVE* (2022).

IV. BALANCING PATENT EXCLUSIVITY AND COMPETITION

The relationship between patents and competition law has sparked significant debate among economists and legal scholars, with conflicting views on whether these two regimes complement or contradict each other. Traditionally, Patents have been treated as exceptions to competition rules, with competition law intervening only when behavior extends beyond the scope of granted rights. However, this approach often overlooks the economic rationale behind granting patents, reducing the discussion to a binary opposition rather than a nuanced interaction.

Two key perspectives shape the debate. One view posits that Patents and competition law are independent frameworks that should operate separately. Proponents argue that competition law enforcers should not interfere with the exclusivity of Patents, even if they lead to market dominance⁴²¹. Conversely, the second perspective emphasizes that Patents and competition law share the common goal.⁴²² According to this view, competition law should complement patents by addressing practices that hinder technological advancements and ensuring markets remain accessible and innovative.

Patents play a critical role in promoting dynamic competition by incentivizing investments in novel products and processes. They protect innovators' investments, ensure efficient dissemination of ideas (static efficiency), and encourage competition through innovation rather than imitation (dynamic efficiency). However, unchecked monopolies can stifle innovation and reduce market efficiency over time⁴²³. Therefore, a balance is necessary to maintain incentives for technological progress while preserving competitive pressures in the market.

Competition law primarily aims to enhance consumer welfare and resource allocation efficiency, often focusing on static competition⁴²⁴. However, long-term economic growth depends on fostering innovation and technological advancements, areas where dynamic efficiency is paramount. According to Merges, competition law should support innovation-driven competition without significantly undermining incentives for innovators.⁴²⁵

⁴²¹ Paul A. Geroski, *Intellectual Property Rights and Competition Policy*, in PERSPECTIVES ON INNOVATION 455 (2007), <https://doi.org/10.1017/cbo9780511618390.025> (last visited Dec 11, 2024).

⁴²² To foster innovation and enhancing dynamic efficiency.

⁴²³ COMPETITION, INNOVATION, AND ANTITRUST, (2007), <https://doi.org/10.1007/978-3-540-49601-4> (last visited Dec 11, 2024).

⁴²⁴ The Interface between Competition and Consumer Policies, 11 OECD JOURNAL: COMPETITION LAW AND POLICY 133 (2010).

⁴²⁵ Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUMBIA LAW REVIEW 839 (1990).

V. TRIPS AGREEMENT AND REGULATION OF ANTI-COMPETITIVE PRACTICES

The TRIPS Agreement provides for the control of practices that are against competition to ensure fair competition and promote technological innovation. Article 7 highlights the objectives, emphasizing the contribution of intellectual property rights to technological innovation and the transfer of technology for the benefit of both producers and users, as well as for the balance of social and economic welfare.⁴²⁶ Thus, the member nations can bring rules to ensure the same by making IPR laws pro-competitive. Article 8 provides the principles, allowing members to adopt measures safeguarding public health and promoting vital sectors while preventing the abuse of intellectual property rights and practices that unreasonably restrain trade or impede technology transfer.⁴²⁷ Article 40 specifically addresses the control of anti-competitive practices in contractual licenses.⁴²⁸ Thus, TRIPS has granted member countries the flexibility to make their IPR law procompetitive and to bring balance between the rights of the IP holder and the public.

A. US Position

The United States has long recognized the interplay between intellectual property (IP) and antitrust laws, with institutions⁴²⁹ playing a pivotal role in addressing this dynamic. The FTC's commitment to examining the IP-competition matrix is evident in its extensive reports, guidelines,⁴³⁰ and studies. These guidelines affirm that both IP and antitrust laws share the common objectives of fostering innovation and enhancing consumer welfare. However, studies by the FTC highlight challenges, such as anti-competitive agreements that have contributed to an estimated \$3.5 billion in higher drug costs annually.

A landmark legislative effort to address these issues came up in the year 1984.⁴³¹ This legislation aimed to tackle the issue of escalating drug prices by striking a compromise between generic and brand-name pharmaceutical companies. The Act sought to achieve two

⁴²⁶ TRIPS Agreement art 7. *Objectives*.

⁴²⁷ TRIPS Agreement art 8. *Principles*.

⁴²⁸ TRIPS Agreement Sec 8. Control of Anti-Competitive Practices in Contractual Licences. Art 40.

It acknowledges that certain licensing practices or conditions related to intellectual property rights may hinder competition and technology dissemination. Members are permitted to specify in their legislation licensing practices that constitute an abuse of intellectual property rights adversely affecting competition. Members may adopt appropriate measures to prevent or control such practices, including exclusive grant back conditions and coercive package licensing, in line with their laws and regulations.

⁴²⁹ Like the Federal Trade Commission (FTC).

⁴³⁰ U.S. Department of Justice and Federal Trade Commission, 'Antitrust Guidelines for the Licensing of Intellectual Property' (12 January 2017).

⁴³¹ The Drug Price Competition and Patent Restoration Act of 1984, commonly known as the Hatch-Waxman Act, passed after the decision of the Roche v. Bolar 733 F.2d 858 (Fed. Cir. 1984). In this case, the court ruled that producing and stockpiling generic versions of patented drugs for market approval during the patent's term constituted infringement. This decision delayed the entry of generic drugs into the market, requiring them to wait until the patent's expiry to begin the lengthy process of obtaining regulatory approval.

primary goals: first, by increasing the availability of more affordable generic versions of brand-name drugs, and second, by ensuring that brand-name manufacturers retained incentives to invest in research and development for new drugs.⁴³²

B. EU Position

The EC Treaty's Articles 81⁴³³ and 82 serve as safeguards for the market mechanism, aiming to protect the market from actions that undermine the competition. Article 81(1) primarily targets agreements and concerted practices among undertakings that have the object or effect of restricting competition. However, Article 81(3) provides an exemption mechanism, allowing agreements or practices that would breach Article 81(1) to be justified under certain conditions. This was introduced as an economic approach.⁴³⁴ If an agreement or practice restricts competition but contributes to improving the production and distribution of goods or promotes technical or economic progress, it may be exempted from the prohibition in Article 81(1).⁴³⁵ Article 82, on the other hand, focuses on preventing dominant companies from engaging in practices that harm consumers, restrict competition, or impede innovation.⁴³⁶ This provision aims to ensure a level playing field in the market and promote consumer welfare by curbing the abuse of dominant positions. While holding a dominant position is not inherently prohibited, the misuse of that position to restrict competition is prohibited. This can encompass practices such as price fixing, tying and bundling products, refusal to supply, and other behaviors detrimental to competition.

C. The Indian Perspective on Competition and Intellectual Property Rights

In India, the interface between competition law and intellectual property rights (IPR) is governed by the Competition Act.⁴³⁷ This provision ensures that the exercise of rights conferred under various IPR statutes is not unduly restricted by the Act.⁴³⁸ The provision explicitly protects the rights of individuals to prevent infringement or impose reasonable conditions necessary for safeguarding their intellectual property under laws such as the Patents Act,⁴³⁹ the Copyright Act⁴⁴⁰ and others.⁴⁴¹

⁴³² Drug Price Competition and Patent Term Restoration Act (1984), , in The SAGE Encyclopedia of Pharmacology and Society (2016), <https://doi.org/10.4135/9781483349985.n154> (last visited Dec 11, 2024).

⁴³³ EUR-Lex - 12002E081, EN, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12002E081> (last visited Dec 11, 2024).

⁴³⁴ Commission, 'Notice - Guidelines on the application of Article 81(3) of the Treaty' (2004) OJ C 101/97.

⁴³⁵ Commission Notice – Guidelines on the application of Article 81 to technology transfer agreements, OJ 2004 No. C 101.

⁴³⁶ EUR-Lex - 12002E082, EN, <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A12002E082> (last visited Dec 11, 2024).

⁴³⁷ Competition Act, 2002. Sec 3(5).

⁴³⁸ Competition Act, 2002.

⁴³⁹ Patent Act, 1970.

A plain reading of this section reveals that the Indian competition regime does not intend to interfere with the legitimate exercise of IPR. However, this does not imply that the Competition Commission of India (CCI) lacks jurisdiction over IPR-related cases. While the Act upholds the application of other laws, it also possesses overriding authority over existing legislations. This dual framework ensures a balanced approach, protecting intellectual property rights while addressing anti-competitive practices that may arise in their exercise.

This nuanced interaction between competition law and IPR highlights the importance of fostering innovation and fair market practices simultaneously. By maintaining this balance, the Indian legal framework strives to ensure dynamic market efficiency and consumer welfare.

VI. SPECIFIC SCENARIOS

A. Compulsory License

Compulsory licensing in patent law is crucial for ensuring that the advantages of patented inventions are accessible to the public, beyond the exclusive rights granted to the patent holder. While patents are designed to encourage innovation by granting exclusive rights to creators, these exclusive rights can sometimes lead to market monopolies, which may stifle competition, limit access to important technologies, and result in higher prices for consumers. Compulsory licensing serves as a mechanism to mitigate these potential negative effects while maintaining incentives for innovation.⁴⁴²

Compulsory licensing allows the government to grant a third party permission to use a patented invention without the patent holder's consent, usually under specific circumstances. The rationale for compulsory licensing is twofold. First, it serves the public interest by ensuring that essential products, particularly those related to public health, safety, or welfare, become more widely available at reasonable prices. This is especially important in sectors like pharmaceuticals, where monopolistic practices by patent holders can prevent access to life-saving medications. Second, compulsory licensing helps in preventing the abuse of market power.⁴⁴³ Competition law seeks to prevent businesses from abusing their dominant market position, which can happen when patent holders misuse their exclusive rights to limit

⁴⁴⁰ Copyright Act, 1957.

⁴⁴¹ Copyright Act, 1957.

⁴⁴² Kaushik, *Title: Compulsory Licensing and the Anti-Competitive Effects of Patents for Pharmaceutical Products: From a Developing Countries' Perspective*.

⁴⁴³ Hanns Ullrich, *Mandatory Licensing Under Patent Law and Competition Law: Different Concerns, Complementary Roles*, in MPI STUDIES ON INTELLECTUAL PROPERTY AND COMPETITION LAW 333 (2014), https://doi.org/10.1007/978-3-642-54704-1_17 (last visited Dec 11, 2024).

competition, increase prices, or engage in anti-competitive practices. In these cases, compulsory licensing serves as a solution, enabling competitors to enter the market and promoting competition, which helps reduce prices.

There are certain famous compulsory licensing related cases in India, which can provide more insights into this burning issue. In a series of high-profile compulsory licensing (CL) cases in India, several pharmaceutical companies sought to make life-saving drugs more affordable and accessible. India granted its first-ever compulsory license in 2012 to Natco Pharma for Bayer's patented drug *Nexavar* used to treat kidney cancer. Natco's request for a voluntary license was denied by Bayer, leading to the application for CL, which was granted by the Indian Patent Office (IPO).⁴⁴⁴ The Intellectual Property Appellate Board upheld the decision, emphasizing that patent holders must ensure their inventions are available to the public. Natco Pharma offered *Nexavar* at a significantly lower price, making it accessible to many more patients. This move was met with criticism from pharmaceutical companies concerned about the potential loss of patent rights. In another case, Emcure sought a CL for Roche's *Trastuzumab* (Herceptin), citing the drug's unaffordability and Roche's insufficient supply. Despite support from the DIPP,⁴⁴⁵ the Ministry of Health denied the request, stating that the public health crisis did not meet the necessary threshold for issuing a CL.⁴⁴⁶ In another case, BDR applied for a CL for *Dasatinib*, arguing that its high price made it inaccessible to most patients. However, the IPO rejected the application, stating that BDR had not made adequate efforts to negotiate a voluntary license within a reasonable timeframe.⁴⁴⁷ Similarly, Lee Pharma sought a CL for *Saxagliptin* used to treat Type II Diabetes, claiming that it was not available at an affordable price. The IPO rejected Lee Pharma's application, finding that the company had not provided sufficient evidence to support its claims and had failed to meet the legal requirements for obtaining a CL.⁴⁴⁸ These cases highlight the stringent requirements for obtaining a CL under Indian patent law and the delicate balance between protecting patent rights and ensuring public access to essential medicines.

Compulsory licensing and competition law intersect in various ways, such as preventing anti-competitive behavior and promoting competition. In the EU, compulsory licensing is allowed in cases of market dominance and anti-competitive behavior, while the US applies it more

⁴⁴⁴ *Bayer Corporation v. Union of India and Others (Bayer v. Natco) India, IPAB, 2013*

⁴⁴⁵ Department of Industrial Policy and Promotion, the Ministry of Health.

⁴⁴⁶ *Emcure Pharmaceuticals v. Roche*

⁴⁴⁷ *BDR Pharmaceuticals v. Bristol-Myers Squibb (BMS) C.L.A. No. 1 of 2013*

⁴⁴⁸ *Lee Pharma v. AstraZeneca C.L.A. No. 1 OF 2015*

restrictively. Both approaches emphasize the need to balance patent holders' rights with the goal of maintaining healthy competition.⁴⁴⁹ Public health is another area where compulsory licensing and competition law intersect. Frameworks like the TRIPS Agreement allow governments to override patent rights for the public good, such as during the HIV/AIDS crisis. However, this can also lead to patent holders refusing to license or charging excessively high prices for essential drugs, potentially abusing their market power.

Competition law promotes competition and access to essential goods and services, particularly in sectors like healthcare and technology. However, it must not discourage investment in R&D or create uncertainty for innovators. The challenge lies in striking the right balance between ensuring access to essential goods and creating a framework that incentivizes future innovation. A potential solution is the concept of reasonable royalties, where patent holders are fairly compensated for their patents.

B. Patent Pooling

Patent pooling involves the aggregation of patent rights from multiple holders into a structured licensing mechanism. Pools allow both members and non-members to access essential patents, with licensing fees distributed based on each member's contributions. These pools often function as joint ventures and facilitate sharing IP to overcome innovation barriers.⁴⁵⁰ While patent pools provide pro-competitive benefits, they can also distort market competition under certain conditions.⁴⁵¹

A key benefit of patent pools is efficiency. By consolidating complementary patents, they resolve mutual blocking issues, where firms with interdependent patents may hinder innovation or market entry.⁴⁵² Patent pools promote cross-licensing among members and extend licensing opportunities to third parties, fostering accessibility and innovation. When individual licensing is allowed, pools can prevent anti-competitive behavior, such as inflated royalties or refusal to license to competitors.⁴⁵³ Allowing individual licensing by pool members further ensures competitive pricing and prevents anti-competitive practices, such as

⁴⁴⁹ Carlos M. Correa, *Intellectual Property Rights and the Use of Compulsory Licenses: Options for Developing Countries*.

⁴⁵⁰ Ryan Lampe & Petra Moser, *Patent Pools: Licensing Strategies in the Absence of Regulation*, SSRN ELECTRONIC JOURNAL (2012).

⁴⁵¹ The Impact of Patent Pooling on Competition Law Policy, (2024), <https://www.khuranaandkhurana.com/2024/09/14/understanding-the-impact-of-patent-pooling-on-competition-law-policy/> (last visited Dec 11, 2024).

⁴⁵² Priyanka Rastogi, *Patent Pool*, INDIA (2014), <https://www.mondaq.com/india/patent/325602/patent-pool> (last visited Dec 11, 2024).

⁴⁵³ Ryan Lampe & Petra Moser, *Patent Pools: Licensing Strategies in the Absence of Regulation*, SSRN ELECTRONIC JOURNAL (2012).

vertically integrated members refusing licenses or inflating royalties to disadvantage competitors.

In India, patent pools are emerging, particularly in the context of affordable healthcare. While Indian law does not explicitly address patent pools, Section 102⁴⁵⁴ is seen as potentially facilitating government-administered patent pools. However, competition law in India, which prohibits anti-competitive agreements, may raise concerns if pool members engage in restrictive practices such as refusing to license third parties or price-fixing.⁴⁵⁵ Concerns include scenarios where pool members agree not to license to third parties, fix pricing, or allocate quotas. Such practices could contravene competition law by limiting market access and raising consumer costs.

In contrast, countries like the U.S. and EU have developed specific guidelines to regulate patent pools, ensuring they remain pro-competitive. The U.S.⁴⁵⁶ requires that patent pools only include technically essential, independently verified patents. Similarly, the EU, under Articles 101 and 102⁴⁵⁷, emphasizes that pools must involve complementary patents and prevent unfair terms or restrictions that harm non-members.

C. Standard Essential Patents (SEPs)

They are patents that are crucial for ensuring interoperability within industry standards, particularly in technology sectors like telecommunications, electronics, and information technology. These patents are essential because products or services conforming to a particular industry standard must use the patented technology.⁴⁵⁸ The relationship between SEPs, patent law, and competition law is complex, as it involves balancing the interests of patent holders with those of consumers, competitors, and the broader market.

From the perspective of patent law, SEPs are awarded exclusive rights to the patent holder, who is granted the ability to prevent others from using their technology. However, this exclusivity can raise concerns when the patented technology is foundational to a standard that is widely adopted. If the patent holder wields too much power, it can lead to anti-competitive practices such as patent hold-up, where the patent holder demands excessive royalties or imposes unfavorable licensing terms after the standard has been widely adopted, knowing

⁴⁵⁴ Patent Act, 1970.

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⁴⁵⁶ Department of Justice and Federal Trade Commission.

⁴⁵⁷ Treaty on the Functioning of the European Union. Art 101 and 102.

⁴⁵⁸ Standard Essential Patents, PATENTS, <https://www.wipo.int/en/web/patents/topics/sep> (last visited Dec 11, 2024).

that firms are locked into using the technology.⁴⁵⁹ This can stifle competition, discourage innovation, and harm consumers by raising prices or limiting product choices.

To mitigate these concerns, competition law has evolved to ensure that SEP holders license their patents on FRAND terms.⁴⁶⁰ FRAND commitments are typically made by SEP holders to assure that they will not use their patents to block competitors or charge excessive royalties. Competition authorities worldwide, such as in EU⁴⁶¹ and the U.S.,⁴⁶² closely monitor SEP licensing practices to ensure compliance with FRAND terms. A failure to adhere to FRAND commitments may be seen as an abuse of market power, leading to antitrust investigations and enforcement actions.

At the same time, patent law must also protect the incentives for innovation. Without robust patent protection, companies may be reluctant to invest in research and development to create new technologies that can become industry standards. This creates a tension between fostering innovation and ensuring competitive market dynamics. Courts and regulators have attempted to strike a balance between these interests by promoting transparency in SEP licensing and ensuring that the terms of agreements are reasonable and non-discriminatory, while still respecting the exclusive rights granted by patent law.⁴⁶³

In some jurisdictions, competition law has been used to address disputes over SEP licensing. For example, in the landmark case,⁴⁶⁴ the European Court of Justice ruled that SEP holders cannot impose unreasonable licensing terms on potential licensees and must negotiate in good faith. The ruling reinforced the idea that the use of SEPs should not be leveraged in ways that undermine competition or create unfair market conditions.

Ultimately, the challenge lies in striking a balance where the patent system continues to incentivize innovation while competition law ensures that the use of SEPs does not hinder market competition. A well-functioning regulatory framework should enable SEP holders to profit from their inventions without abusing their position to the detriment of consumers or competitors.

⁴⁵⁹ Standard Essential Patent Landscape in India – Part 1, IP HELPDESK, https://intellectual-property-helpdesk.ec.europa.eu/news-events/news/standard-essential-patent-landscape-india-part-1-2024-01-04_en (last visited Dec 11, 2024).

⁴⁶⁰ Fair, reasonable, and non-discriminatory terms.

⁴⁶¹ The European Commission.

⁴⁶² Federal Trade Commission (FTC).

⁴⁶³ Yuvaraj Arumugam, *Standard-Essential Patents in India: A Legal and Business Guide/ SEPs in India: A Guide for Compliance & Li...*, DE PENNING & DE PENNING, Sep. 26, 2024, <https://www.lexology.com/library/detail.aspx?g=86807f19-3e48-4c27-872f-52008ebeeafb> (last visited Dec 11, 2024).

⁴⁶⁴ *Huawei v. ZTE* Case C-170/13.

D. Evergreening of Patents

Evergreening is the practice of obtaining additional patent protection for a product beyond its original term by making incremental, often non-novel, changes to the product. This tactic is commonly employed in the pharmaceutical industry, where companies apply for patents on new formulations, combinations, or delivery methods of existing drugs, with the intention of extending market exclusivity and delaying generic competition.⁴⁶⁵ Patent law aims to encourage innovation by granting exclusive rights to inventors, but evergreening raises significant concerns in terms of competition, access to medicines, and market dynamics.

From a patent law perspective, evergreening can be seen as a legitimate exercise of patent rights, but the incremental innovations often fail to meet the threshold of "inventive step" or "novelty" required for patentability, meaning they may not represent true innovations.⁴⁶⁶ This has led to debates about whether patent offices should grant such patents or whether they are primarily used to extend monopolies and delay the entry of generics into the market.

Competition law plays a crucial role in addressing the anti-competitive effects of evergreening, as it can distort competition by preventing the timely entry of lower-cost generic drugs, which could otherwise benefit consumers and drive prices down. Some jurisdictions have introduced reforms aimed at strengthening the patent system's ability to filter out unjustified patent extensions, such as India's patent laws,⁴⁶⁷ which aim to strike a balance between encouraging innovation and preventing unjustified extensions of patent monopolies.

The challenge lies in balancing intellectual property protection with patent law's ability to promote competition. Evergreening can encourage innovation, but it should not prolong monopolistic control. Competition law and patent law must work together to maintain market dynamics and provide affordable alternatives, especially when innovation doesn't significantly improve existing products.

VII. CONCLUSION

The intersection of IP law and competition law plays a pivotal role in shaping market dynamics and fostering innovation. Patents, as a fundamental component of IP law, provide creators with exclusive rights to their inventions, incentivizing research and development.

⁴⁶⁵ Manupatra, *Articles – Manupatra*, <https://articles.manupatra.com/article-details/Ever-Greening-Of-Patents-Of-India> (last visited Dec 11, 2024).

⁴⁶⁶ <https://www.qmul.ac.uk/law/research/journals/the-queen-mary-law-journal/media/law/docs/research/2021QMLJ66.pdf>

⁴⁶⁷ Patent Act, 1970.

However, the misuse of patents can stifle competition and hinder market efficiency, undermining the very objectives they are meant to promote. This paper has explored various mechanisms such as patent pooling, standard essential patents (SEPs), and evergreening that illustrate the delicate balance between protecting intellectual property and maintaining fair competition.

Patent pooling, while offering benefits like resolving mutual blocking and enhancing innovation, must be carefully regulated to prevent anti-competitive practices, particularly in developing economies like India. The absence of specific regulations in India presents both opportunities and challenges, particularly when it comes to ensuring that patent pools do not restrict market access or inflate prices. In contrast, developed economies like the U.S. and the EU have established guidelines to ensure that patent pools function in a manner that promotes competition rather than distorts it.

SEPs, vital for ensuring industry interoperability, can also lead to anti-competitive behavior if SEP holders engage in patent hold-up, demanding excessive royalties once a standard is adopted. The implementation of FRAND terms and the monitoring of licensing practices by competition authorities are crucial to mitigating such risks. As demonstrated in landmark cases like *Huawei v. ZTE*, it is essential for SEP holders to negotiate in good faith and avoid exploiting their dominant positions in ways that harm market competition.

Evergreening, particularly in the pharmaceutical sector, represents a significant concern where incremental patent extensions delay generic drug entry, resulting in higher consumer prices and limited access to medicines. While evergreening may encourage incremental innovation, it should not be allowed to unduly extend monopolistic control. Legal frameworks, such as India's patent laws, aim to balance innovation with fair competition, ensuring that patents are granted for genuine innovations rather than strategic extensions that harm competition.

Ultimately, the challenge lies in striking a harmonious balance between IP protection and competition law. Effective regulation and enforcement are essential to prevent the abuse of patent rights while fostering a market environment that encourages genuine innovation, ensures consumer welfare, and promotes economic efficiency. By addressing the potential anti-competitive impacts of patent practices and refining legal frameworks, policymakers can create a system where intellectual property rights serve their intended purpose spurring innovation and benefiting consumers without undermining competitive market dynamics.

INTELLECTUAL PROPERTY AND COMPETITION LAW: BRIDGING THE GAP FOR SUSTAINABLE INNOVATION AND CONSUMER WELFARE

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ABSTRACT

The harmonization of intellectual property rights with competitive market practices involves navigating tensions between incentivizing innovation and preventing anti-competitive behaviour. “Blue Ocean Strategy is the simultaneous pursuit of differentiation and low cost to open up a new market space and create new demand”. In this current economic climate, the Blue Ocean Strategy encourages innovation by moving beyond the crowded social competitions. Intellectual property conflicts with competitive market practices, which have to be resolved properly for ensuring innovation and consumer welfare. Harmonizing these elements requires a nuanced approach. Through a comprehensive analysis of judicial rulings and regulatory frameworks across various jurisdictions, the research identifies best practices for aligning intellectual property rights with competitive market practices. While IPR ensures protection for inventors by providing monopoly, competition law prevents monopolistic practices, striking a balance between exclusivity and market accessibility. Blue Ocean Strategy complements this dynamic by enabling businesses to explore uncontested market spaces, steering away from competitive saturation. By focusing on value innovation, Blue Ocean Strategy drives growth through differentiation and cost efficiency, making it an essential tool for sustainable innovation. The authors perceive the solution for the aforesaid thesis by exploring various competitive market practice concepts around the globe. Patent Pool and Corporate licensing are some among the approaches which are given by the statute to enhance access to technology and innovation as well as it has become a prominent mechanism to reduce litigation risks and facilitate the commercialization of new technologies. The paper also tries to explore the potential policy recommendations aimed at creating a more synergetic relationship between IPR and competition law. This balance is vital for sustaining long-term growth and consumer welfare in evolving industries.

Keywords: Competitive market practices; Blue Ocean strategy; Innovation; Monopoly; Patent pooling.

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I. NAVIGATING THE NEXUS: INTELLECTUAL PROPERTY RIGHTS AND COMPETITION LAW: THE PROLOGUE

The overlap between Intellectual Property Rights and Competition law is a vital area of legal and economic discussion, where the goals of encouraging innovation and maintaining market fairness align and occasionally clash. Competition law aims to enhance fair competition in the market by preventing anti-competitive behaviors⁴⁷⁰ such as monopolies, cartels, and the misuse of dominant positions. In contrast, IPRs are intended to motivate creativity and investment by granting exclusive rights to inventors and creators, thus fostering the advancement of new technologies, artistic works, and brands. However, these exclusive rights can also lead to monopolistic behaviors that stifle competition, inflate prices, and limit consumer choices. This duality creates a complex regulatory environment where the protection of intellectual property must be balanced against the need to maintain competitive markets.

Recent legal developments have highlighted the challenges in navigating this nexus. As global markets continue to evolve with rapid technological advancements, the dialogue between IPR and Competition law becomes increasingly vital. Policymakers, legal practitioners, and businesses must work collaboratively to create a harmonious legal framework that promotes innovation while safeguarding competitive practices. This introduction sets the stage for a deeper exploration of the intricate relationship between IPR and Competition law, examining how their coexistence can promote both innovation and market efficiency for the welfare of consumers through a cohesive framework.

In the current fast-evolving business environment, discovering new markets and distinguishing oneself from competitors is increasingly crucial. This is where the Blue Ocean Strategy (BOS) comes in—a framework aimed at assisting companies in navigating away from crowded, competitive markets and fostering uncharted territories brimming with potential. Although this initially renders competition unnecessary, it is creating opportunities for increased competition in areas that are not yet contested.

II. OVERVIEW OF IPR AND COMPETITION LAW

The concept of law was intended to establish order in life and discipline human behavior. The fundamental purpose of humans living together in a society was driven by progress in science and inventions that simplified existence. Hence, in order to protect individuals' intelligence,

⁴⁷⁰ Preamble of competition Act, 2002

laws were required to provide protection, resulting in the development of intellectual property laws that emerged parallel to the progress in science that was fundamental to human development. According to WIPO, "Intellectual Property (IP) refers to creations of the mind, such as inventions; literary and artistic works; design; and symbols, names, and images used in commerce."⁴⁷¹ India's economy has undergone a major change in recent years, marked by the fast expansion of creative and technological industries and the growing significance of intellectual property rights.⁴⁷² The protection given by intellectual property rights has led to significant advancements in technology, starting from the simple cotton gin to the complicated system of computer networks.⁴⁷³ India has been hardworking in encouraging creativity and safeguarding intellectual property rights by using different laws. However, it's equally committed to fostering a competitive market place.⁴⁷⁴

Conversely, competition law encompasses regulations that oversee market mechanisms. It fosters competition within the market and prevents illegal monopolies. It protects trade and business practices by curbing the anti-competitive behaviors of different companies and supervises the policies and regulations of the market system to ensure that unfair marketing strategies are not employed and that producers can operate their businesses equitably for the welfare of the consumers. Competition law aims to protect the competition process rather than the competitors.⁴⁷⁵

Competition law centers on several important competitive market actions to ensure a just and effective marketplace. A main rule is the ban on anti-competitive agreements, which are arrangements among businesses that limit competition. Instances of such conduct include price-fixing, market allocation, bid rigging, abuse of dominant position etc. These arrangements commonly lead to higher prices, lower quality, and reduced innovation. Moreover, competition law tackles the misuse of market superiority by businesses with substantial market influence. These companies are forbidden from taking part in activities that harm competition, such as predatory pricing or imposing unfair trade conditions on suppliers or customers. These actions ensure that powerful companies do not take advantage of their position to the harm of competitors and consumers. Additionally, competition law

⁴⁷¹ WIPO, <http://www.wipo.int/about-ip/en/>.

⁴⁷² Yatinder Garg, "Balancing Act: Competition Law and Intellectual Property Rights in India", <https://www.saikrishnaassociates.com/balancing-act-competition-law-and-intellectual-property-rights-in-india/>

⁴⁷³ Tejaswi Sitaram Kandi and Divyansh Gautam, "Patent Trolls and Their Regulations in India" 5 International Journal of Law & Humanities 128(2018).

⁴⁷⁴ Supra 2.

⁴⁷⁵ A. Kezsbom & A. Goldman, "No Shortcut to Anti-trust Analysis: The Twisted Journey of the Essential Facilities Doctrine", [1996] Columbia Business L. Rev. 1, 2 (1996).

oversees mergers and purchases to avoid the creation of monopolies or oligopolies that could harm competition. By addressing these market behaviors, competition law seeks to build an atmosphere where businesses compete fairly, encouraging efficiency, innovation, and improved products, services, and prices for consumers. These rules ultimately support consumer well-being and a lively, competitive marketplace.

III. CHALLENGES IN HARMONIZING IPR AND COMPETITIVE MARKET PRACTICES

On the surface, it seems that the purposes and objectives of intellectual property law and competition law are at odds. IPRs grant the owner an exclusive monopoly, but competition law works to promote market expansion by preventing anti-competitive behavior in the marketplace. The recent clash between IPRs and competition law concerns the exercise of IPR rights that impact competition law in a society that is constantly changing due to technology.

Section 3(5) outlines that nothing in the act will limit the ability of any individual to stop violation of their IPRs or to set fair conditions needed to safeguard those rights. This indicates that IPR owners have the legal support to protect their rights from violation.⁴⁷⁶ But when these IP rules overprotect non-differentiating business features, it can result in monopolies and conflict between IPR and competition law. Because it may hinder imitation and lessen market competitiveness, this can discourage competition.⁴⁷⁷ Intellectual property rights have an exclusive monopolistic nature, which is enhanced by their marketability and transferability, as they can be sold separately. IPRs grant the holder a limited time and absolute monopoly; nevertheless, this monopoly is subject to competition from identical products, trademarks, and other sources.⁴⁷⁸ Excessive IPR might also present major impediments to new entrants. When established firms have large patent portfolios, new companies may find it economically untenable to enter the market due to licensing costs or the danger of violating existing patents. This inhibits competition and innovation by discouraging potential competitors from entering the market.⁴⁷⁹

⁴⁷⁶ The Competition Act, 2002, § 3(5)(i).

⁴⁷⁷ Bhavpreet Soni, Interplay of IPR and Competition Law, SONI'S VISION (Sep. 10, 2024) <https://www.sonisvision.in/blogs/>.

⁴⁷⁸ S. Abhipsha Dash "The bedaquiline saga: the overlap between intellectual property rights and competition law" [February 24, 2024] [The bedaquiline saga: the overlap between intellectual property rights and competition law – NLIU Cell for Studies in Intellectual Property Rights](#).

⁴⁷⁹ Carlos M. Correa, "Intellectual Property and Competition Law, Exploring Some Issues of Relevance to Developing Countries" Published by International Centre for Trade and Sustainable Development (Oct, 2007).

Overly restrictive intellectual property rights can considerably hinder innovation by creating obstacles that deter new competitors and restrict the exchange of knowledge. Although IPR is designed to motivate creativity by offering exclusive rights, excessively tight protections can foster monopolistic practices, where established companies focus on preserving their market power rather than seeking new advancements. This leads to diminished competition and, ultimately, a slowdown in innovation. Additionally, robust IPR can obstruct smaller businesses from entering the market, as they may not have the means to navigate complicated patent environments or may face legal challenges from more prominent firms. This phenomenon is especially noticeable in industries such as pharmaceuticals and technology, where the financial burden of adhering to IPR regulations can be substantial.⁴⁸⁰ Moreover, excessive intellectual property rights frequently result in higher prices and fewer options for consumers, as companies take advantage of their monopolistic power⁴⁸¹. For example, in the pharmaceutical sector, patents on crucial medications can postpone the launch of generic alternatives, maintaining elevated prices and restricting access to essential treatments. Therefore, although the goal of IPR is to encourage innovation, its excess can create detrimental effects that impede rather than facilitate technological advancement.⁴⁸² The term 'dominant position' has been defined to mean a position of strength, enjoyed by an enterprise in the relevant market in India, which enables it to operate independently of competitive forces prevailing in the relevant market that affect its competitors or consumers or the relevant market in its favor.⁴⁸³

The abuse of a dominant market position presents considerable obstacles in aligning intellectual property rights with competitive market behaviors. The exploitation of market power can result in anti-competitive actions such as predatory pricing, exclusive agreements, and refusal to provide critical inputs, which can hinder both competition and innovation.⁴⁸⁴ This conflict emerges when dominant companies utilize their IPR to impose unreasonable terms on rivals, limiting market access and obstructing the entry of new players. Regulatory measures, such as the Competition Act, seek to address these abuses by enforcing penalties and promoting fair practices. Nevertheless, the challenge of balancing strong IPR protection

⁴⁸⁰ Dosi, Giovanni; Stiglitz, Joseph (2013): The role of intellectual property rights in the development process, with some lessons from developed countries: An introduction, LEM Working paper series, No.2013/23, Scuola Superiore Sant' Anna, Laboratory of Economics and Management (LEM), Pisa.

⁴⁸¹ Prof. Jim Gibson, University of Richmond (July 29, 2009): Using IP To Suppress Innovation.

⁴⁸² Erik Komendant, AAM Vice President, Federal Affairs, "Pharmaceutical Patent Abuse: To Infinity and Beyond!"

⁴⁸³ Supra 7.

⁴⁸⁴ Radhika Goyal and Ashwini Panwar, "Exercise of Intellectual Property Rights And Abuse Of Dominance" (21 Aug, 2023) <https://www.mondaq.com>.

with competitive fairness continues to be a complicated issue for regulators around the world.⁴⁸⁵ In *Shri Neeraj Malhotra, Advocate vs. North Delhi Power Ltd. & Ors.*, The Competition Commission of India ruled that having a dominant position in a market is not illegal, but abusing that position is.⁴⁸⁶

Even though competition law and IPR law are conflicting with each other, they are very much concentrated on consumer welfare.⁴⁸⁷ “Both competition law and intellectual property policies stimulate innovation. Innovation leads to productivity and prosperity. Prosperity stimulates the creation of competition and intellectual property. This is a virtuous circle of the high order.”⁴⁸⁸

Intellectual Property Rights and Competition Law are crucial legal structures that seek to promote innovation while maintaining equitable market behavior. The convergence of Intellectual Property Rights and competition law, especially in relation to the abuse of dominant market positions, represents a complex field of legal practice. IPRs provide exclusive rights to inventors, encouraging innovation but possibly resulting in monopolistic conduct. This is particularly significant in sectors where market power can have a substantial effect on competition. In situations where leading firms refuse to license their IPRs, competition law may step in if such a refusal negatively impacts competition or consumers. For example, the European Union's competition regulations indicate that a dominant entity is required to provide access to vital resources unless the refusal is justifiable on objective grounds and does not obstruct market entry or innovation. This principle seeks to prevent dominant firms from using their IPRs to suppress competition. Section 4 of the Indian Competition Act provides a framework that seeks to balance the safeguarding of intellectual property with the prevention of anti-competitive behavior.⁴⁸⁹ This indicates that although IPR offers exclusivity, it does not protect IP owners from being evaluated under competition law if their conduct harms market competition. Section 4 tackles the issue of abusing dominant positions, which may involve the improper use of IPR. It enables the Competition Commission of India (CCI) to step in when intellectual property holders misuse their dominant position in ways that hinder market competition, making sure that the use of

⁴⁸⁵ Agrud partners, “Abuse of Dominant Position: Provisions and Case Studies”.

⁴⁸⁶ *Shri Neeraj Malhotra, Advocate vs. North Delhi Power Ltd. & Ors.*, Case No. 06/2009.

⁴⁸⁷ S. Chakraborty, Interplay between competition and IPR in its regulation of market, (November, 15,2015) <https://www.lawctopus.com/academike/interplay-competition-law-ipr-regulation-market/> 18.

⁴⁸⁸ Sheridan Scott, “Competition Law and Intellectual Property Law: Getting the Balance “Just Right””, Paper presented at University of Victoria Faculty of Law International Intellectual Property Law Symposium, July 15, 2006.

⁴⁸⁹ Competition Act 2002, § 4

intellectual property rights does not result in monopolistic practices.⁴⁹⁰ Collectively, these provisions encourage innovation while protecting market competitiveness, emphasizing the interconnectedness of intellectual property rights and competition law in India. In India, the Competition Commission regulates the relationship between competition and intellectual property rights, ensuring that IPR holders do not exploit their dominant market positions. According to Section 4 of the Competition Act, it forbids the abuse of dominant market positions, ensuring that IPR holders do not impose unjust limitations on their competitors. Ultimately, while IPRs aim to promote innovation, their relationship with competition law requires meticulous examination to avert anti-competitive effects. Regulators need to find a balance between safeguarding intellectual property and preserving a competitive market environment.⁴⁹¹ This situation highlights the significance of continuous dialogue between IP and antitrust experts to effectively navigate these intricate legal challenges. The conflict between these two domains is recognized in the TRIPS Agreement, which permits regulatory interventions to obstruct anti-competitive licensing practices.⁴⁹² The US courts have observed that the competition law and the intellectual property law are aimed at encouraging innovation in industry and competition.⁴⁹³ Recent judicial decisions have clarified that conflicts relating to IPR and competition should be resolved by the relevant authorities based on their jurisdictional responsibilities.

The Raghavan Committee noted that human ingenuity consistently contributes to the advancement of economic circumstances. Competition at the macro and microeconomic levels is rapidly increasing due to increasingly inventive ideas. Therefore, protecting inventions from exploitation has been made possible in large part by intellectual property law. Consequently, it was determined that competition and innovation are crucial instruments for the growth of the market economy and the enhancement of products and services for the benefit of customers.⁴⁹⁴

IV. BLUE OCEAN STRATEGY EXPLAINED

⁴⁹⁰ AKSHY VARSHANTH B, “INTERSECTION BETWEEN COMPETITION LAW AND IP LAWS IN INDIAN PERSPECTIVE” (Apr,2023) international journal for legal research and analysis, 2582-6433.

⁴⁹¹ Dr R Ian McEwin, “The Interoperation of Intellectual Property and Competition Law Rules and Principles”, (14-16 Sept, 2011), World Intellectual Property Organization Roundtable on Intellectual Property and Competition Law for Certain Asian and Pacific Member State.

⁴⁹² Intellectual Property Acquisition: An overview by Ms. Meghna Bhaskar.

⁴⁹³ Atari games vs Nintendo, 897F.2d at 1576

⁴⁹⁴ Report of the Competition law review Committee appointed by Ministry of Corporate Affairs Government of India, Chapter 6: Unilateral Conduct, p. 110 (July, 2019).

Marketing strategy is the scheme of an enterprise to locate potential consumers and make them the customers of the products or services. They serve as a framework for decision-making across various functional areas, ensuring alignment in efforts to drive growth and success. The endmost objective of marketing strategy is to achieve competitive superiority among contesting businesses.⁴⁹⁵ This was the traditional approach towards marketing practices until 2005, when Blue Ocean Strategy was introduced by W. Chan Kim and Renee Mauborgne. The strategy rejects the fundamental tenet of conventional strategy. The concept of red ocean is a market filled with intense competition, where numerous companies battle for a limited share of profits. In such crowded environments, new businesses must aggressively compete with established players to secure their slice of the market. Whereas The Blue Ocean strategy presents a novel approach for gaining market share by creating new, uncontested market spaces, rather than competing in overcrowded industries. Blue oceans refer to untapped market spaces where there is little or no competition. In these areas, businesses create new demand rather than competing for existing customers. This leads to significant opportunities for rapid and profitable growth.

According to Kim and Mauborgne (2015), the Blue Ocean Strategy comprises four key dimensions: elimination, reduction, raise, and creation. Initially, exclusion occurs when a company creates increased value by removing elements that other competitors typically emphasize. Downsizing causes the organization to review and decrease activities, like product design, that could have resulted in unnecessary cost hikes. The growth in size prompts the company to enhance specific aspects of its activities - like production, services, or marketing - more than its rivals to stand out and improve the quality of its products. Finally, by effectively incorporating these aspects, a company can stimulate innovation, discover fresh ways to provide value to customers, generate interest, and adjust its strategic direction.

V. INTEGRATION OF BLUE OCEAN STRATEGY FOR HARMONIZATION OF IPR WITH COMPETITIVE MARKET PRACTICES

Blue Ocean Strategy focuses on forming untapped market areas, which renders competition unnecessary. This methodology promotes creativity and value generation, enabling companies to access fresh demand instead of vying in overcrowded markets. Nonetheless,

⁴⁹⁵ David Kindness, "Marketing Strategy: What It Is, How It Works, and How to Create One", (26 July, 2024), <https://www.investopedia.com/terms/m/marketing-strategy.asp>.

once a blue ocean is created, the likelihood of competitors imitating it rises. This, in a way, inspires many entrepreneurs to flourish, providing a variety of products to consumers also.

Intellectual Property Rights are essential in safeguarding innovations in the blue ocean economy, promoting economic development, and stimulating the formation of new markets by protecting original ideas and products.⁴⁹⁶ IPR can enhance the potential for sustainable business models in evolving industries.⁴⁹⁷ Integrating Blue Ocean Strategy with intellectual property (IP) has the potential to significantly boost sustainable innovation by creating new market opportunities and enhancing collaboration. The integration can be achieved by:

Value Innovation: The blue ocean strategy is conceptually based on the value innovation principle, which refers to the pursuit of difference while being cost-effective. Companies may generate new market demand and differentiate themselves from competitors by prioritizing value innovation, sound strategic movements, and systematic decision-making tools and frameworks. Market demand is created in blue oceans rather than battled over by competitors, and there is plenty of possibility for lucrative and rapid growth.

Collaborative Frameworks: Promoting partnerships among companies can lead to the sharing of knowledge and resources, which are crucial for progressing green technologies. IP rights can be designed to enable collaborative research while ensuring that innovations are kept protected, thus encouraging joint ventures that concentrate on sustainability.

IPR can strengthen a company's value proposition by enhancing consumer trust and fostering brand loyalty. When consumers see that a product is safeguarded by IPR, it conveys quality and innovation, further setting it apart from rivals. This collaboration between Blue Ocean Strategy and IPR not only aids in seizing new market opportunities but also guarantees enduring sustainability against competitive pressures.

In reality, companies need to keep innovating in order to remain competitive in their uncharted markets. This means not just creating new products but also utilizing intellectual property rights to safeguard these innovations effectively. By merging strategic market development with robust protections for intellectual property, businesses can manage the challenges of entering new markets while reducing the risks linked to competition and imitation. Therefore, the combination of Blue Ocean Strategy and intellectual property rights represents a holistic approach to achieving enduring growth and profitability in the ever-changing business landscape today.

⁴⁹⁶ www.blueoceanstrategy.com

⁴⁹⁷ G20 New Delhi Leaders Declaration, New Delhi, India 9-10 September 2023

Competition law, often referred to as antitrust law, aims to encourage fair competition and avoid monopolistic behaviors in the market. Its goal is to safeguard consumers and create equitable conditions for companies by banning practices that harm competition. The blue ocean strategy is based on the idea that companies in the industry may change market boundaries and industry dynamics by changing their ideas and behaviors. However, this strategy does not advocate for monopolistic behavior, as such actions could be detrimental in the long run. Rather, it promotes the idea that market limits can be reshaped based on the initiatives of industry players. The objective is to generate new demand by delivering a distinctive value proposition and setting the company's products or services apart. Companies strategically price their offerings to attract a broad customer base without resorting to unfair competitive practices. In India, this methodology can adjust with competition laws by cultivating showcase passage for modern players and anticipating monopolistic honours. Companies use apparatuses just like the Four Activities System to distinguish openings that comply with legitimate benchmarks, guaranteeing economic development without encroaching on competitive directions.⁴⁹⁸ To understand this integration some case studies are provided:

VI. CASE STUDY 1

Tesla's open patents methodology, started in 2014, permits others to utilize its licenses beneath particular conditions, fundamentally to advance advancement within the electric vehicle (EV) industry. Whereas Tesla empowers open access, it holds the right to implement its licenses against those acting in awful confidence, guaranteeing assurance against misuse. This approach cultivates collaboration and quickens mechanical headway, whereas permitting Tesla to benefit from changes made by others. Eventually, Tesla's demonstration illustrates a one-of-a-kind adjustment between open-source standards and strategic mental property administration, strengthening its competitive position within the showcase.⁴⁹⁹

VII. CASE STUDY 2

Uber's Blue Ocean Strategy had a profound effect on the conventional taxi sector by establishing a new market niche that addressed persistent inefficiencies. By utilizing technology, Uber tackled common frustrations such as extended wait times, unclear pricing, and variable service standards. The mobile application enabled users to seamlessly request

⁴⁹⁸ <https://www.clearpointstrategy.com/blog/blue-ocean-strategy>.

⁴⁹⁹ Stephen J Kontos, Apr 27, 2021, startupnation.com.

rides, monitor drivers in real-time, and make cashless payments, improving customer convenience and satisfaction. This advancement not only drew in dissatisfied taxi customers but also transformed personal transportation, forcing traditional taxi services to adapt or risk losing their market presence. As a result, Uber created a competitive landscape that emphasized service quality over price competition, altering the industry's dynamics.

VIII. CASE STUDY 3

Rather than going head-to-head with conventional circuses, Cirque forged a new market niche by merging circus arts with theatrical elements, appealing to adult audiences in search of distinctive entertainment options. This tactical approach enabled them to set themselves apart notably, rendering competition irrelevant. By introducing innovation within performance art, Cirque utilized intellectual property rights to safeguard its creative works, securing exclusive rights to its shows and branding. This combination of intellectual property rights and Blue Ocean Strategy not only stimulated innovation but also adhered to competition regulations, fostering fair market practices while steering clear of direct competition in the heavily saturated entertainment sector.

IX. STATUTORY REMEDIES

Integrating patent pools with a blue ocean strategy can harmonize intellectual property rights and competition law by fostering collaboration and innovation. Patent pools reduce litigation risks and transaction costs, enabling companies to share complementary technologies without complex negotiations, thus creating uncontested market spaces. This approach can stimulate innovation while mitigating competition concerns, as pools that combine complementary patents may enhance overall welfare and encourage R&D investment.

Patent pools serve as a strategic tool to harmonize IPR with Competition Law by facilitating collaboration among patent holders. Patent pools can significantly impact market competition in blue ocean markets by fostering collaboration and reducing barriers to entry. They enable companies to share complementary patents, streamlining access to essential technologies and reducing licensing costs, which accelerates innovation and product development.

Corporate licensing can effectively harmonize intellectual property rights with competitive market practices by facilitating technology transfer and fostering innovation. Licensing agreements, such as cross-licensing, allow firms to share resources, reducing redundancy in R&D while promoting competition and preventing monopolistic behavior. In jurisdictions

like India, the Competition Act of 2002 provides a framework to regulate these agreements, ensuring that IPR holders do not engage in anti-competitive practices. This balance supports both the rights of innovators and the need for a competitive marketplace.

Compulsory licensing and parallel imports represent the two solutions employed to deter the misuse of a dominant position. This indicates that each element of the legislation aims to foster fair competition in the marketplace. Implementing compulsory licensing provisions to prevent abuse of IPR, allowing competitors access to essential innovations without undermining the incentive for creators. Parallel imports consist of products that are legally introduced into the market even in the absence of support from IP rights.⁵⁰⁰ Via TRIPS, members are obligated to adhere to the fundamental national standards of IP rights to achieve consistency within domestic laws in the economy.⁵⁰¹

X. SUGGESTIONS AND RECOMMENDATIONS

The first and foremost suggestion is the implementation of clear guidelines that balance IPR enforcement with competition law will ensure that monopolistic practices are curtailed while protecting legitimate rights. The establishment of global standards for IPR and competition law for the protection of rights and to reduce discrepancies across jurisdictions thereby facilitating smoother international trade and innovation. Embracing open innovation—collaborating with external partners—can enhance creative capabilities, with IPR serving as a framework to organize and protect these partnerships. This integrated approach fosters sustainable competitive advantages and continuous innovation. The formation of strategic alliances can further open new markets, promoting shared growth rather than rivalry. Establishing common principles for competition laws across nations helps to avoid inconsistent regulations and promote cooperation in enforcement. Likewise, by identifying customer challenges and optimizing processes to reduce costs without sacrificing quality, companies can broaden their consumer base and generate new demand. Developing strategies for competition advocacy will aid to raise awareness among stakeholders and ensure that competition principles are embedded in broader economic policies.

By ensuring that countries have adequately funded and staffed competition authorities, necessitates effective law enforcement. To boost innovation and enhance consumer well-being using Blue Ocean Strategy, companies should develop distinctive value propositions by

⁵⁰⁰G.Parveen, “Interplay between the IPR and Competition law” (October,11,2019). <https://blog.ipleaders.in/interplay-competition-law>.

⁵⁰¹ Patent act 1970, § 84.

grasping customer needs and tackling their challenges, which can generate new demand. Optimization processes to decrease expenses without compromising quality, thereby making products more affordable for consumers. Recognize and connect with potential customers who are currently not engaged in the market, thereby broadening the consumer base. Companies should perform comprehensive research to pinpoint emerging trends and market gaps that can be leveraged for fresh opportunities. These strategies together cultivate a competitive advantage while increasing consumer satisfaction. To prevent the overprotection of IPR by its owners and conserve consumer protection strict regulatory authorities should be created and maintained by the state.

XI. CONCLUSION

In conclusion, bridging the gap between intellectual property rights and competition law is vital for fostering sustainable innovation. The Blue Ocean Strategy, which emphasizes creating uncontested market spaces, can significantly enhance this synergy. By encouraging collaboration among competitors, firms can share knowledge and resources, leading to innovative solutions that address environmental challenges while maintaining competitive advantages.

Integrating Blue Ocean principles within IP and competition law frameworks can drive sustainable innovation, ultimately benefiting society and the environment without infringing on competitive practices. This approach not only balances the interests of innovators and consumers but also promotes a healthier economic environment conducive to growth and sustainability.

A harmonious integration of these two frameworks is vital for achieving a balanced approach to economic development and market effectiveness. The optimal equilibrium between competition policy and intellectual property maintains private motivation to invest and innovate, as long as no excessive obstacles are imposed on future competition and creativity.

**SYNCHRONISING INTELLECTUAL PROPERTY RIGHTS AND COMPETITIVE
PRACTICES: IMPLICATIONS OF THE PROTECTION OF PLANT VARIETIES
AND FARMERS' RIGHTS ACT 2001 FOR THE AGRICULTURAL MARKET**

- Krithi Srinivas⁵⁰²
- Mahathi Sivaraj⁵⁰³

ABSTRACT

Intellectual Property Rights (IPRs) and competitive market practices have long existed in a convoluted relationship; however, due to the prevalence of such obscurity, the qualitative nature of this relationship has widely been untravelled. While IPRs intend to promote economic growth and incubate innovation, they can also lead to market distortions and unfair competitive advantages and competition law seeks to prevent these outcomes by promoting fair competition and preventing monopolistic practices. Nations have implemented their own specific IPR legislations to strike a balance between innovation and a competitive market. Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR Act) has significantly impacted the market dynamics of the agricultural sector in India and under this act exclusive rights are granted to stakeholders identified by it, i.e, plant breeders, farmers, researchers and local communities, and acts as an incentive for innovation and investment in agricultural research. However, there exists a risk that these exclusive rights and protection could lead to anti-competitive market practices. The act further addresses the key concern of plant breeders abusing exclusive rights granted by imposing unfair terms on farmers. The PPVFR Act includes provisions to address these issues while ensuring farmers are given adequate rights and further restricts the sale of branded seeds in order to ensure adequate protection to the breeders. This paper aims to critically analyse the PPVFR Act using qualitative approaches grounded in existing scholarly work and how it balances the interests of key stakeholders while promoting healthy competition and examines whether sufficient mechanisms are established by the Act to mitigate risks that arise. It further offers an insight into the interplay of competition law and the PPVFR Act and the manner in which they work together to balance their individual competing objectives.

Keywords: PPVFR, IPR, Competition Law, Farmers, Breeders.

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I. INTRODUCTION

Intellectual Property (IP) refers to the products of human creativity and intelligence, such as inventions, literary and artistic works, and designs.⁵⁰⁴ The primary objective of granting IPRs is to incentivise innovation by providing creators with exclusive rights to their creations. This encourages investment in research and development, leading to the creation of new products, technologies, and artistic works. However, IPRs can also have unintended consequences. Excessively broad or prolonged intellectual property rights can lead to market distortions, as IP holders may leverage their exclusive rights to curtail competition, impose higher prices, or restrict the utilisation of their intellectual creations. Such practices can stifle innovation and adversely impact the other stakeholders. This involves striking a balance between providing sufficient incentives for innovation and preventing anti-competitive behaviour. Intellectual Property Rights (IPRs) and competition law are two legal frameworks that often intersect, each aiming to stimulate economic growth but with sometimes conflicting goals.⁵⁰⁵ By striking the right balance, it is possible to create a legal framework that fosters innovation without sacrificing competition, ultimately benefiting both creators and consumers.

India's intellectual property rights (IPR) landscape has undergone significant evolution since its accession to the World Trade Organisation (WTO) in 1995. While the Indian Patents Act of 1970 explicitly excludes plants, animals, and their derivatives from patent protection, the TRIPS agreement mandated the implementation of a *sui generis* system for plant variety protection. To comply with this international obligation, India enacted the Protection of Plant Varieties and Farmers' Rights (PPV&FR) Act, 2001. The PPV&FR Act aims to balance the interests of plant breeders and farmers by granting exclusive rights to plant breeders while also recognising the rights of farmers.⁵⁰⁶ By providing incentives to plant breeders, the Act encourages research and development, leading to the development of higher-yielding, disease-resistant, and climate-resilient varieties. It also facilitates technology transfer and collaboration between domestic and international breeders, accelerating the adoption of advanced breeding techniques.

The exclusive rights granted to breeders under the Plant Variety Protection and Farmers' Rights Act (PPV&FR Act) can lead to higher seed prices, thereby hindering smallholder farmers' access to quality seed. The dominance of large seed companies can result in anti-competitive behaviour, reducing market diversity and potentially eroding traditional

⁵⁰⁴ V K AHUJA, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS, 1 (LexisNexis 2017).

⁵⁰⁵ FRANK L. FINE, THE EC COMPETITION LAW ON TECHNOLOGY LICENSING, 14 (Sweet&Maxwell 2006).

⁵⁰⁶ Ramanna, Anitha, *India's Policy on IPRs and Agriculture: Relevance of FAO's New International Treaty*, ECON. & POL'Y WKLY. 4689 (Dec. 22-28, 2001).

agricultural knowledge. Furthermore, the Act's provisions may limit farmers' ability to save, exchange, and reuse seeds, thereby impeding the conservation and sustainable use of plant genetic resources. To mitigate these potential negative impacts of providing protection to plant variety, it is imperative to strike a balance between the interests of various stakeholders and protection of the market dynamics. While the PPV&FR Act incorporates certain preventive mechanisms, this paper employs a qualitative analysis to critically examine their sufficiency in preventing anti-competitive practices and market distortions.

II. SYNCHRONISATION OF COMPETITION LAW AND IPR

Competition law and Intellectual Property Rights (IPR) share a complex and nuanced relationship, deeply rooted in two contradictory economic theories.⁵⁰⁷ Competition law is grounded in the classical economic theory,⁵⁰⁸ which envisions an ideal market condition where numerous buyers and sellers operate freely, without undue influence or distortions. Its primary aim is to prevent market distortions, eliminate anti-competitive practices, and maintain a level playing field. By doing so, competition law aspires to achieve efficiency, lower prices, and enhanced consumer welfare. On the other hand, IPR is based on the economic theory of imperfect competition.⁵⁰⁹ This theory recognises that in the absence of incentives, markets may stagnate due to a lack of innovation. IPR laws, by granting exclusive rights to creators and innovators, deviate from the ideal market conditions envisioned by perfect competition. This exclusivity serves as an incentive, encouraging investment in research, creativity, and development.

By allowing innovators a temporary monopoly over their creations, IPR laws create a controlled deviation from perfect competition to foster long-term benefits, such as technological advancement and cultural enrichment. The tension arises because the very mechanism that incentivises innovation through exclusivity may also limit market competition. Striking a balance between these seemingly opposing frameworks is crucial to ensure that innovation thrives while preventing the abuse of exclusivity, which could lead to monopolistic practices and harm consumer interests. Despite the inherent tension between competition law and Intellectual Property Rights (IPR), they are not necessarily opposing

⁵⁰⁷ TUIRE ANNIINA VÄISÄNEN, ENFORCEMENT OF FRAND COMMITMENTS UNDER ARTICLE 102 TFEU 27 - 30 (Nomos Verlagsgesellschaft mbH) (2023).

⁵⁰⁸ Ibid

⁵⁰⁹ Ibid

frameworks. In fact, they can be viewed as complementary to each other.⁵¹⁰ Competition law operates on the classical economic theory of perfect competition, which envisions an idealised market where no single entity wields undue influence. However, achieving such a perfect market is improbable in reality. Instead, the role of competition law is to mitigate the risks of the market devolving into a monopolistic or closed system, ensuring that competition remains dynamic and fair.

IPR, by contrast, grants temporary exclusivity to creators and innovators as an exception to the principles of competition law. This exclusivity is designed to incentivise innovation by allowing intellectual property holders to reap the benefits of their creations. However, this exclusivity carries the potential to distort markets, creating conditions for anti-competitive practices. To address this, safeguards and preventive mechanisms are often incorporated into IPR legislation to limit the negative impact of exclusivity on other market participants. When these internal safeguards prove insufficient, competition law steps in to restore balance. It acts as a corrective framework, addressing anti-competitive behaviour arising from the misuse of IPR protections. By working together, IPR and competition law create a dynamic system that promotes innovation while preserving market integrity, ensuring both creators and consumers benefit.

III. A COMPREHENSIVE OVERVIEW OF THE PPVFR ACT, 2001

A. Types Of Varieties and Registration Process

The PPVFR Act 2001 outlines various categories of plant varieties eligible for registration and the criteria for their registration. New varieties are eligible if they have not been in the public domain in India for more than one year before the application or outside India for four years (six years for trees and vines). To qualify, they must meet distinctiveness, uniformity, and stability (DUS) standards, ensuring that the variety is different from existing ones and maintains consistent traits over generations. Essentially Derived Varieties (EDV) must be clearly distinguishable from an initial variety and exhibit some differences while retaining key characteristics. EDVs may require authorisation from the breeder of the initial variety and are subject to specific conditions. Extant varieties include those notified under the Seed Act, 1966, which have been released by variety release committees within the past 15 years, as well as varieties of common knowledge that have been used widely without formal registration. Farmers' varieties are those traditionally cultivated and maintained by farmers,

⁵¹⁰ Sustainable Development Policy Institute, *Corridors of Knowledge for Peace and Development – Interface between Competition Policy and Intellectual Property Rights*, 136 - 138 (2020).

which can include wild relatives. These varieties are protected under the Act, allowing farmers to save, use, sow, and exchange seeds, thus safeguarding traditional knowledge and agricultural biodiversity.

Certain varieties are not eligible for registration, these include denominations that are unclear, consist only of figures, are misleading, or cause public confusion.⁵¹¹ Denominations that may offend religious sentiments or violate the Emblems and Names (Prevention of Improper Use) Act, 1950, are also excluded. Additionally, varieties whose commercial use may harm public order, health, or the environment cannot be registered.⁵¹² The Central Government has the power to notify specific plant genera or species eligible for registration, with exceptions for extant and farmers' varieties.

The registration process involves submitting an application to the Registrar, which must include the denomination of the variety, detailed passport data of the parental lines, the geographical location of the genetic material, and any contributions from farmers, communities, or institutions. An affidavit confirming the absence of terminator technology and a declaration of lawful acquisition of genetic material should be submitted. A brief description of the variety highlighting its novelty, distinctiveness, uniformity, and stability (DUS) must accompany the application.

Seeds must be provided for testing to verify that they meet the DUS criteria.⁵¹³ The Registrar handles the tests and ensures seed viability and quality. If the application meets all requirements, it is accepted, potentially with conditions. If not, the Registrar can request changes or reject the application, giving the applicant an opportunity to respond. The Registrar must advertise the application, allowing for public objections within three months.⁵¹⁴ The grounds for objections can include the issues of ability to register or public interest concerns. If objections are raised, the applicant must respond within two months, or the application is deemed abandoned. For EDVs, the Act states that the application is reviewed by the Authority, which tests whether the EDV is derived from the initial variety.⁵¹⁵ If satisfied, the Authority directs the Registrar to register the EDV; if not, the application is refused. The breeder must obtain authorisation from the original breeder, who may impose conditions. Once approved, a certificate of registration is issued.

B. Stakeholder Rights and Obligations

⁵¹¹ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §15.

⁵¹² The Protection of Plant Varieties and Farmers' Rights Act, 2001, §29

⁵¹³ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §19.

⁵¹⁴ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §21.

⁵¹⁵ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §23.

The PPVFR Act establishes a comprehensive framework outlining the rights and obligations of various stakeholders in the plant breeding sector. Upon analysing the provisions of the Act, it becomes evident that four primary stakeholders are recognised and vested with specific rights and corresponding duties.

Plant breeders are provided with exclusive rights following registration of the variety which enables them to produce, sell, and license seeds or propagating materials of their protected varieties for a period of nine years for trees and vines and 6 years for other crops. Breeders must also prove that their varieties meet DUS criteria for registration.⁵¹⁶ The Act ensures reasonable compensation for breeders are given taking into account the costs incurred in breeding and development.⁵¹⁷ However, breeders must also respect farmers' rights and cannot restrict farmers from saving seeds for personal use.

Farmers benefit from rights granted under the Act, which allow them to save, use, sow, exchange, and sell seeds of protected varieties for their own use. While these rights support farmers' traditional seed practices, it also restricts them from selling seeds commercially without authorisation from the breeder or licensee. Farmers are also responsible for ensuring that they do not infringe on breeders' rights when engaging in commercial seed activities.⁵¹⁸

Researchers are permitted to access protected varieties for non-commercial research and experimentation.⁵¹⁹ This provision encourages scientific research that can lead to agricultural advancements, such as new crop varieties and improved farming techniques. Researchers must, however, respect the terms set for using protected varieties to avoid unauthorised commercial exploitation.

Local communities are recognised as valuable custodians of traditional plant genetic resources and knowledge. When local communities contribute to the development or conservation of plant varieties, they are entitled to share in the benefits.⁵²⁰ This provision ensures that communities receive fair compensation for their contributions, promoting a collaborative approach to biodiversity conservation.

C. Provisions Addressing Market Distortion and Anti-Competitive Practices

Preventive measures and mechanisms are strewn out throughout the PPVFR Act to prevent the abuse or exploitation of the market by persons who are granted exclusive right for protection of plant variety. The PPVFR Act prohibits the trademarking of a denomination that

⁵¹⁶ The Protection of Plant Varieties and Farmers 'Rights Act, 2001, §15.

⁵¹⁷ The Protection of Plant Varieties and Farmers 'Rights Act, 2001, §51.

⁵¹⁸ The Protection of Plant Varieties and Farmers 'Rights Act, 2001, §39.

⁵¹⁹ The Protection of Plant Varieties and Farmers 'Rights Act, 2001, §42.

⁵²⁰ The Protection of Plant Varieties and Farmers 'Rights Act, 2001, §43.

is not unique and distinct for the variety being registered.⁵²¹ This provision ensures there is no "double protection," preventing a single plant variety from enjoying overlapping protections under both Plant Variety Rights (PVRs) and trademarks. Such overlap would grant breeders excessive control, potentially leading to market distortions and barriers to competition.

The PPVFR Act is a pivotal in emphasising the principle of equitable benefit-sharing and it mandates that every application for registering a plant variety must include comprehensive "passport data."⁵²² Such documentation provides detailed information about the variety's origins, including the parental lines from which the variety has been derived and the specific geographical location within India where the genetic material was sourced. It also facilitates the registration of farmers' varieties by simplifying the process, ensuring that it is accessible to all, including illiterate farmers. This provision prevents the agricultural market from being dominated solely by large organisations or powerful individuals, promoting inclusivity and equity in agricultural development. Further that process of benefit-sharing begins transparently and fairly.

The PPVFR Act ensures that adequate advertisement and notice are given for calling objections regarding the ability to register, potential adverse effects, and public interest implications of a proposed registration.⁵²³ This ensures that the protection to be granted to the variety does not negatively impact the public and the market interest. Furthermore, the Registrar has the power to issue directions to protect the interests of breeders against any abusive actions by third parties between the filing of an application and the Authority's decision.⁵²⁴ This ensures that breeders are protected even before the Certificate of Registration (COR) is granted. The measure of protecting the breeders' rights by mandating the deposit of seeds or propagating materials, including parental line seeds, into the National Gene Bank,⁵²⁵ ensures that even in cases of destruction, disease, or natural disaster, the genetic material remains safe, providing both intellectual and physical protection and contributing to market stability.

The exclusion of certain varieties from registration, particularly those involving harmful technologies such as Genetic Use Restriction Technology (GURT) and terminator technology,⁵²⁶ prevent monopolistic practices and protect biodiversity and farmers' rights by

⁵²¹ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §17.

⁵²² The Protection of Plant Varieties and Farmers' Rights Act, 2001, §18.

⁵²³ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §21.

⁵²⁴ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §24.

⁵²⁵ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §27.

⁵²⁶ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §29.

ensuring that no single entity can control the production of a plant variety through harmful or restrictive methods. Additionally, researchers are provided with rights to use registered varieties for experimentation or research purposes, promoting innovation and new variety development.⁵²⁷ However, commercial use of such new varieties requires the breeder's permission, ensuring that breeders' rights are respected while encouraging scientific advancement and the development of new agricultural techniques and crop varieties. However, research usage must comply with the conditions set by the Act to prevent unauthorised commercial exploitation of protected varieties.

The PPVFR Act includes provisions that recognise and protect the contributions of local communities in maintaining biodiversity and conserving traditional plant varieties. The Act ensures that when these communities contribute their knowledge or genetic resources to the creation of new plant varieties, they are entitled to benefit-sharing. This ensures that their rights are respected, and their role in sustainable resource management is acknowledged.

The act provides for compulsory licensing (CL), which allows applications for license after three years if a breeder fails to meet public demand for a protected variety or if the variety is not available at reasonable prices, the Authority may issue a compulsory license to another party, ensuring continued access to the variety.⁵²⁸ This helps prevent monopolistic practices and ensures that the public has access to essential plant varieties when needed. Factors considered for assessing reasonable requirements include the pricing of the seed and the breeder's measures to meet public needs. While the three-year waiting period helps protect breeders' rights, it could potentially lead to gross misuse.

The act restricts unauthorised use of a registered variety's denomination.⁵²⁹ It is unlawful for any person other than the breeder, licensee, or registered agent to use the denomination for commercial purposes or on any packaging of seeds or propagating materials. This provision helps protect consumers from misleading or counterfeit products and preserves the integrity of the seed market. Further it imposes penalties on individuals who falsely apply a registered variety's denomination or use deceptive packaging that may mislead consumers⁵³⁰. Those found guilty of such acts can face imprisonment of up to two years, a fine of up to five lakh rupees, or both. This serves as a strong deterrent against fraudulent practices that could undermine market fairness.

⁵²⁷ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §30.

⁵²⁸ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §47.

⁵²⁹ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §68.

⁵³⁰ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §70.

The Act also provides a mechanism for the accused to challenge the validity of a registration if they believe it is not legitimate.⁵³¹ If a court deems the challenge credible, proceedings are adjourned for up to three months to allow the accused to file for rectification with the Registrar. This ensures that the registration system is not misused to maintain unfair market dominance.

These sections collectively establish a balanced regulatory environment that protects both breeders and farmers while fostering innovation and market stability. The PPVFR Act, through its comprehensive provisions, aims to create a fair, transparent, and equitable system that promotes sustainable agricultural development and discourages anti-competitive practices.

IV. IMPLICATIONS OF THE PPVFR ACT ON COMPETITION IN THE AGRICULTURE MARKET DYNAMICS

The PPVFR Act grants exclusive rights over plant varieties to the respective stakeholders. While this can incentivize innovation and investment, it may also create barriers to market entry, concentrating market power in the hands of rights holders and shifting market dynamics. Such exclusivity might result in monopolistic tendencies, which the competition law seeks to prevent particularly in essential and critical sectors. While the primary objective of competition law is to ensure economic balance and prevent monopolistic practices, the growing need to incentivize innovation and address the challenges of biopiracy in a free market underscores the necessity for complementary legislation like the PPVFR Act.⁵³² The PPVFR Act serves a crucial role in safeguarding biodiversity, preserving indigenous knowledge, and protecting against the growing threat of biopiracy, highlighting the need for a balanced regulatory framework. Such legislation not only safeguards biodiversity and indigenous knowledge but also harmonizes with competition law by fostering an equitable and sustainable market environment.

Open-Pollinated Varieties (OPVs), such as wheat, rice, and pulses, are generally non-registrable and predominantly exist in the public domain. Consequently, the incentive for innovation and investment in these varieties remains low.⁵³³ With the enactment of the PPVFR Act, private sector players are likely to focus their efforts on other registrable

⁵³¹ The Protection of Plant Varieties and Farmers' Rights Act, 2001, §76.

⁵³² Shiva, Vandana, *"Agricultural Biodiversity, Intellectual Property Rights and Farmers' Rights"*, 31 ECON. & POL'Y WKLY, 1621, 1630 (1996).

⁵³³ Suresh Pal, Robert Tripp & Niels P. Louwaars, *"Intellectual Property Rights in Plant Breeding and Biotechnology: Assessing Impact on the Indian Seed Industry,"* 42 ECON. & POL'Y WKLY 231, 235 (2007).

varieties under the Act, further reducing the propagation and commercialisation of OPVs. This shift may lead to a decline in the availability and diversity of these essential seed varieties.

PVP incentives private players to invest in agricultural research and development (R&D), particularly in biotechnology and hybrid seed development.⁵³⁴ This could lead to enhanced productivity and the introduction of advanced agricultural technologies. Enhanced technological development due to PVP can boost agricultural productivity, potentially increasing national income and export opportunities. However, the cost of technology adoption, especially by smallholders, may widen economic disparities within the agricultural sector. Increased reliance on hybrid and genetically engineered seeds may narrow the genetic base, posing risks to biodiversity.⁵³⁵ The integration of sustainable practices and eco-friendly technologies in R&D is essential to mitigate these concerns.

The PPVFR Act does present challenges, however measures are undertaken to help ensure a more balanced regulatory environment that aligns with competition law objectives. The positive impacts of the PPVFR Act, such as incentivising investment in agricultural R&D, fostering innovation, and enhancing productivity, outweigh the negatives. By promoting competition in innovation, even if somewhat restricted in the actual market, the Act has ultimately benefitted the agricultural sector. It has led to the development of advanced technologies and improved productivity, contributing to the overall growth of the industry.

V. SUGGESTIONS AND CONCLUSION

The PPVFR Act, as a *sui generis* system, should govern all matters related to plant varieties, genetic material, and associated technologies. This approach will prevent overlaps and inconsistencies with other intellectual property laws and reduce judicial interpretation ambiguities, as demonstrated in cases such as *Monsanto Technology LLC v. Nuziveedu Seeds Ltd.*⁵³⁶ Explicit provisions should be included in both the PPVFR Act and the Patent Act to clearly define the patentability of genetic traits infused into hybrid plant varieties. Such clarification is necessary to categorize these traits as technological innovations rather than biological processes, thereby reducing confusion and ensuring consistency in legal interpretation.

⁵³⁴ A. Ravishankar & Sunil Archak, "Intellectual Property Rights and Agricultural Technology: Interplay and Implications for India," 35 ECON. & POL'Y WKLY 2446, 2450 (2000).

⁵³⁵ *Ibid*

⁵³⁶ *Monsanto Technology LLC v. Nuziveedu Seeds Ltd.*, (2019) 3 SCC 381

The Central Government's power to exclude plant species or genera from registration on the grounds of public interest, as outlined in Section 29, should be moderated. To enhance transparency and accountability, a committee should be established to evaluate and decide on such exclusions, preventing potential misuse of governmental powers. Furthermore, the criteria for registering Essentially Derived Varieties should be refined to provide greater clarity in practical application. This should include detailed guidelines for distinguishing EDVs from the initial variety while ensuring that the essential characteristics of the original variety are preserved. Enhanced clarity in this area will help mitigate the risk of biopiracy and promote fair competition.

The three-year waiting period before an application for compulsory licensing can be made under Section 47 should be reduced to ensure that public needs are promptly met. If a reduction is not feasible, stricter guidelines should be introduced to allow compulsory licensing within the three-year period if there is clear evidence of gross misuse of the protected variety. This would prevent situations where delayed access to protected varieties adversely impacts agricultural productivity and accessibility.

This research paper has analyzed that there are sufficient preventive mechanisms incorporated within the Act to mitigate anti-competitive practices and market distortions. However, by incorporating these recommendations, the PPVFR Act can better balance the promotion of innovation with the protection of public and farmer interests, ensuring a more effective and transparent regulatory framework.

TRI-CONTINENTAL PERSPECTIVE ON THE JUXTAPOSITION OF COMPETITIVE LAWS AND INTELLECTUAL PROPERTY LAWS

- M.S.Dikshi⁵³⁷

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ABSTRACT

Competition laws and the Intellectual Property (IP) laws have presented an intricate display of interrelation in the legal field by drawing parallels between the principles that prove itself to be complementary yet paradoxical. IP laws predominantly revolve around the protection of new innovations thereby creating monopolistic dominance to a few enterprises. The role of Competition law is to foster competition in all markets of the economy and alleviate dominations for all participants in the field. This indicates the existence of a superficial conflict between these frameworks and this can be discerned in various industries that require new technological inventions. Business sectors in developing countries face a great deal of hardship pertaining to the incompatibility of these laws due to the lack of clear establishment as provided by other developed countries. In India, the telecommunication industry is one such paradigm that can be used to identify the contrasts of these regulations with one leading economy and another underdeveloped economy namely, the European Union (EU) and the Republic of Haiti (Haiti). This can be studied using Telefonaktiebolaget LM Ericsson v. Micromax⁵³⁹, wherein the allegations of market domination are expressed with respect to the rights of a Patent bearer as offered by the laws of India. Using this case, the paper primarily attempts to provide a comparative analysis of the interface of Competition laws and Intellectual Property laws in India, EU and Haiti. With assistance from this criterion, the paper aims to shed light on the complexities faced by India and provide suggestions, based on the experiences derived from these economies, to amend the existing statutes.

Keywords: Competition Law, FRAND, Intellectual Property Laws, Standard Essential Patent.

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⁵³⁹ Sahithya Muralidharan, *Ericsson v. Micromax – A Kick-Start to SEP-FRAND Antitrust Jurisprudence in India*, Kluwer Competition Law Blog (July 13, 2016), <https://competitionlawblog.kluwercompetitionlaw.com/2016/07/13/ericsson-v-micromax-a-kick-start-to-the-sep-frand-antitrust-jurisprudence-in-india/>.

I. INTRODUCTION

The interdisciplinary balance of Competition laws and Intellectual Property Rights (IPR) has proven to provide benefits to the economy due to the variance in the disposition of both these laws. Competition laws are known to promote fair and just competition between all organisations in a market by establishing anti-competitive behaviour to curb monopolisation. IPR, on the other hand, deals with furnishing the patent holders with exclusive advantages in such a way that it aids in promoting monopolisation. This creates polarity in the economy as IPR supports certain companies to gain unfair dominance over the others, while Competition laws work towards reducing the dominance of these companies. This illustrates the requirement of harmony between these two laws to avoid controlling the market scope which leads to the creation of a monopoly or a quasi-monopoly.

Due to the differences in the market development in different countries, jurisdictions of both these laws can be contrasted by analysing the statutes in the Republic of Haiti (Haiti), European Union (EU) and Republic of India (India). These regions express their prowess in Competition Laws and IPR in various ways, i.e., while few have explicitly constructed statutes as anti-trust regulations, the other region has no organisations for the requirement of these anti-trust regulations. This can be deduced with the help of the case of *Telefonaktiebolaget LM Ericsson v. Micromax*⁵⁴⁰. In this case, Ericsson had faced the harsh allegations of violating the Fair, Reasonable and Non-Discriminatory (FRAND) terms that are set in place for Standard Essential Patents (SEPs) from several other similar companies. By exploring the differences with the help of an underdeveloped country and a well-developed country, the flaws in India's legislations can be identified and stabilized. Therefore, this case can be an ideal criterion to examine the same as it superlatively explains the convergence between Competition Laws and IPR.

II. ROLE OF THE INTERSECTION IN THE TELECOMMUNICATION SECTOR

The interplay of Competition Law and IPR in India's telecommunications sector is intricate as well as a matter of legal concern. As both legal frameworks aim to foster innovation and consumer welfare, they can sometimes appear to be in conflict, particularly in fast growing industries like telecommunications where innovations and market dynamics are closely interwoven. The significance of the sectors in the Indian economy can help us understand how India can balance IPR with the need to prevent anti – competitive practices. Although

⁵⁴⁰ Ibid.

there is a congruency in promoting fair competition between the Competition Commission of India (CCI)⁵⁴¹ Act and the Telecom Regulatory Authority of India (TRAI)⁵⁴², the Apex Court explained that there is a large divergency in the mandates of the two acts, in a case where Reliance accused Bharti Airtel, Idea Cellular Limited, and Vodafone India Limited of anti-competitive practices. Moreover, the judgment tried to settle the jurisdictional dispute between CCI and TRAI to an extent and some of the overlapping provisions still indicate a lack of clear demarcation. A well-defined boundary between the two regulatory bodies is required to avoid the imposition of one law over the other.

On the contrary, when issues relating to both IPR and TRAI are involved, there is a complete lack of clear-cut guidelines through which such jurisdictional conflicts could be resolved efficiently. In this sector, patent rights play a pivotal role, as companies are consistently developing new technologies that shape the industry and create market advantages.⁵⁴³ However, this legal duality often leads to friction in these industries. The best example can be found in the case of SEP protecting technologies necessary to meet telecommunication standards, for example, 3G, 4G or 5G protocols. While SEPs are essential in maintaining synergy and standardization among devices, a host of complex legal issues related to competition comes into light.⁵⁴⁴ In effect, if a company had to hold SEPs, it would have control over most similar industry-standard technology, unless licensed by the patent holder on FRAND terms. Therefore, FRAND obligations seek to bring into proper balance the rights of an IP holder with the need to ensure essential technology is available to competitors⁵⁴⁵.

In India, disputes over the issue of SEPs have invited quite heavy litigation, particularly between international telecom giants like Telefonaktiebolaget LM Ericsson (Ericsson), Reliance Jio Infocomm, Limited, Bharti Airtel etc. These companies quite frequently come under attack over their licensing practices as SEP holders. Exorbitant royalty rates or restrictive terms may invite allegations of abuse of dominance under Antitrust Laws, since such practices could potentially render the market inaccessible to smaller players and defer innovations. Similarly, CCI has also been quite vigilant as far as these issues are concerned

⁵⁴¹ *To promote and sustain an enabling competition culture through engagement and enforcement that would inspire businesses to be fair, competitive and innovative; enhance consumer welfare; and support economic growth.*, (Mar. 30, 2022), <https://www.cci.gov.in/>.

⁵⁴² https://trai.gov.in/sites/default/files/The_TRAI_Act_1997.pdf.

Ayush Verma, *Drawing the line between competition law and telecom sector - iPleaders*, IPleaders (Nov. 26, 2020), <https://blog.ipleaders.in/drawing-line-between-competition-law-telecom-sector/>.

⁵⁴⁴ <https://nujlawreview.org/wp-content/uploads/2021/03/13-4-Bothra-Kumar.pdf>.

⁵⁴⁵ Geeta Gouri, *Competition Law and Standard Essential Patent (SEP) in India: A Few Critical Issues to Ponder*, SpringerLink (July 24, 2018), https://link.springer.com/chapter/10.1007/978-981-13-1232-8_12.

and has also extensively investigated the SEP holders on their compliance with FRAND terms and any anti-competitive practices involved.

The importance of this junction is only growing per the deployment of advanced technologies like 5G, IoT, and AI, all of which are based upon patented technologies forming the backbone of future telecommunications. With the increasing reliance on SEPs within the market, clarity is needed on how the IP rights and Competition laws combine. If patent holders use their market power to prevent effective competitors from entering or competing in the marketplace, the threat to technological development and consumer choice would be real.

III. DEARTH OF THE LAWS IN HAITI IN COMPARISON TO INDIA

The comparative telecommunications landscapes of India and Haiti are shaped by their distinct socio-economic condition, regulatory framework, and market dynamics. The Indian telecom sector has seen stupendous growth in the last few years within the fiercely competitive markets characterized by intense price competition and fast technological innovation, thereby being the second largest subscriber community in the world. The entry of disruptive players like Reliance Jio in 2016 catalysed a dramatic transformation that forced established operators like Bharti Airtel and Vodafone Idea to revolutionize⁵⁴⁶ their offerings and pricing strategies.⁵⁴⁷ This intensive competition has also triggered unparalleled innovation in digital payment systems, as illustrated by the Unified Payments Interface which serves as a model for developing nations committed to advancing financial inclusion.

As drastically different, the small island nation of Haiti, one of the most economically distressed nations in the Western Hemisphere, has a far different picture when it comes to the field of telecommunications. The sector is dominated by two main operators,⁵⁴⁸ Digicel and Natcom, operating in an environment characterized by limited investment in infrastructure and lack of regulatory oversight. While this duopoly has helped provide basic mobile connectivity to about 65% of the population, the absence of effective competition means

⁵⁴⁶ (Jan. 22, 2021), <https://www.cci.gov.in/images/whatsnew/en/market-study-on-the-telecom-sector-in-india1652177923.pdf>.

⁵⁴⁷ Vidushi Saxena, *Jio and the Transformation of the Indian Telecom Industry*, Bisinfotech (Sept. 19, 2024), <https://www.bisinfotech.com/jio-and-the-transformation-of-the-indian-telecom-industry/>.

⁵⁴⁸ World Bank Group, *Modern, Open and Innovative: the Challenges of new Technologies in Haiti*, (Oct. 14, 2016), <https://www.worldbank.org/en/news/feature/2016/09/27/moderniser-ouvrir-innover-enjeux-des-nouvelles-technologies-haiti>.

service costs are relatively high and technological innovation is limited.⁵⁴⁹ Natural disasters have caused multiple damages to critical telecommunication infrastructures and took away resources that could have been used for network expansion and modernization efforts, despite of initiatives taken by the United Nations International Telecommunications Union,⁵⁵⁰ which is trying to expedite the rebuilding of Haiti's infrastructure.⁵⁵¹

The diverging phrase of these markets really points to the importance of regulatory frameworks and market structure in stimulating innovation and access. TRAI has taken fair steps toward benefiting competition through measures like mobile number portability, sharing infrastructure, and allocation of spectrum through a transparent method. In contrast, the telecommunications sector in Haiti is under the regulatory umbrella of CONATEL (National Telecommunications Council)⁵⁵², which has failed amidst political turmoil and lack of resources. As a result of this, there has been an incomplete introduction of advanced technologies; for example, 4G services have only become available in 2016, several years after their introduction to comparably sized markets. These act as a barrier to growth and digital transformation, and it is crucial that these regulations are updated in order to foster innovation, connectivity, and economy.

IV. STRATEGIC CONVERGENCE OF THE LAWS IN THE EUROPEAN UNION AND INDIA

Over the past decennium, telecommunication has remained as an economic upswing between countries like India and the European Union (EU) as they share a perennial relationship in the sphere of Information and Communication Technology (ICT).⁵⁵³ The collaboration between the European Telecommunications Standards Institute (ETSI)⁵⁵⁴ and the Telecommunications Standards Development Society of India (TSDSI) ⁵⁵⁵ plays a dynamic role in trying to exemplify strategic synergy between India and the EU in innovation, fair

⁵⁴⁹3.5 Haiti Telecommunications | Digital Logistics Capacity Assessments, <https://lca.logcluster.org/35-haiti-telecommunications> (last visited Dec 11, 2024).

⁵⁵⁰ *UN leading efforts to ramp up rebuilding of Haiti's telecom system*, UN News (July 2, 2010), <https://news.un.org/en/story/2010/07/343842>.

⁵⁵¹ Guest Author, *Opinion: Haiti's telecom laws must be modernized*, The Haitian Times (May 10, 2021), <https://haitiantimes.com/2021/05/10/haitis-telecommunication-laws-must-be-modernized/>.

⁵⁵² *Researching Haitian Law*, Globalex <https://www.nyulawglobal.org/globalex/haiti1.html>.

⁵⁵³ *Bilateral Cooperation*, Ministry of Electronics and Information Technology (Jan. 5, 2024), <https://www.meity.gov.in/content/country-wise-status>.

⁵⁵⁴ *Etsi*, Welcome to the World of Standards! (Nov. 18, 2024), <https://www.etsi.org/>.

⁵⁵⁵ *Telecommunications Standards Development Society, India*, India's Telecom SDO <https://tsdsi.in/>.

competition, and robust IP systems, while enabling global standard setting and expanding European ICT footprints in India's thriving telecom market.⁵⁵⁶

The EU's telecom policy builds upon the three pillars: liberalization, harmonization, and finally competition enforcement. Starting in 1988, the EU dismantled monopolies across telecom sectors and reached a pinnacle in the full liberalization of voice telephony ⁵⁵⁷and infrastructure by setting up value - added systems. To foster a coalesced market, it introduced the Open Network Provision (ONP) framework,⁵⁵⁸ mandating incumbents to provide cost-oriented interconnections, levelling the playing field for new entrants. Finally, EU's competition rules⁵⁵⁹ guard against anti-competitive practices, ensuring fair market dynamics and preventing monopolistic dominance.⁵⁶⁰ Though the framework was adopted in 2002⁵⁶¹, it has proven to be versatile in accommodating significant changes in the industry's objectives. Later in 2009 when the Body of European Regulators for Electronic Communications (BEREC)⁵⁶² was adopted, it facilitated the implementation of the European Commission (EC) and the National Regulatory Authorities (NRAs). As National Regulatory Authorities (NRAs) must operate independently from telecom providers to ensure unbiased appeal mechanisms for distressed parties and act transparently while consulting stakeholders on major decisions impacting the market.⁵⁶³

Historically economic studies in the area of competition and innovation by Reinganum in 1989⁵⁶⁴, have examined that an increase in the amount of companies in an industry often leads to an immediate diffusion of innovations and sectors like telecommunications were considered as a natural monopoly due to the high costs in infrastructure. However, there has been a shift in technological advancements which have revised the market structures by increasing competence for greater competition and ultimately accelerating the spread of new technologies. This phenomenon is evident in the evolution of the telecommunications

⁵⁵⁶ *EU-India cooperation on ICT standardisation*, Horizon 2020 <https://www.h2020.md/en/eu-india-cooperation-ict-standardisation>.

⁵⁵⁷ *Wto*, Services: Telecommunications services https://www.wto.org/english/tratop_e/serv_e/telecom_e/telecom_e.htm.

⁵⁵⁸ (Oct. 10, 2012), <http://aei.pitt.edu/37553/1/A3414.pdf>.

⁵⁵⁹ *ScienceDirect*, <https://www.sciencedirect.com/science/article/abs/pii/S030859619390078H>.

⁵⁶⁰ *Microsoft Word* - s01_356.en, https://ec.europa.eu/commission/presscorner/api/files/document/print/en/speech_01_356/SPEECH_01_356_EN.pdf.

⁵⁶¹ *Regulatory framework for electronic communications*, EUR-Lex <https://eur-lex.europa.eu/EN/legal-content/summary/regulatory-framework-for-electronic-communications.html>.

⁵⁶² *Mission*, BEREC <https://www.berec.europa.eu/en/mission>.

⁵⁶³ *Mission & Strategy*, BEREC <https://www.berec.europa.eu/en/mission-strategy>.

⁵⁶⁴ *Pii: S1573-448X(89)01017-4*, [https://www.edegan.com/pdfs/Reinganum%20\(1989\)%20-%20Chapter%2014%20The%20Timing%20Of%20Innovation%20Research%20Development%20And%20Diffusion.pdf](https://www.edegan.com/pdfs/Reinganum%20(1989)%20-%20Chapter%2014%20The%20Timing%20Of%20Innovation%20Research%20Development%20And%20Diffusion.pdf).

industry from monopolistic structures to competitive markets. EU is one of the world's most influential regions, with a highly ambitious telecommunications industry that serves customers across the continent. In 2022, EU had the largest proportion of unique mobile subscribers in the world- nearly 91 per cent of the population of Europe. Besides this, EU had the largest share of broadband connections per 100 inhabitants.⁵⁶⁵

Until 1998, no competition at all was attainable in most of the European countries in this industry, as markets were traditionally monopolies⁵⁶⁶. The European Commission's strategy for the telecommunications sector aims at increasing employment, competition, investment, and innovation within the EU as a whole. In light of this, there was a need to assess the current level of competition in the EU nations' telecommunication sectors twenty years since liberalization and discuss ways through which the situation can be improved. As acceleration and improving returns in the European telecom sector has been largely a function of deregulation of digital infrastructure. The following Guidelines on Technology Transfer accompany Regulation 772/2004 in 2018 which adapted to the harmony approach to IPR and competition law, and argue that economic efficiencies can be improved, if such an approach is adopted⁵⁶⁷. Consensus sees growth falling by 2022, reflected in the share prices of the sector due to deregulation.⁵⁶⁸ In a nutshell, while India's telecom is regulated under one umbrella for its single market, EU operates through a multi-layered system involving EU institutions, national regulators, and independent operators. This structure reflects the unique political organization of the EU but can lead to fragmentation and inefficiencies compared to the more centralized system in India.

V. COMPARITIVE EXAMINATION OF THE JURISPRUDENCE OF THE CASE

The case of *Telefonaktiebolaget LM Ericsson v. Micromax* has been of crucial value in India as it emphasized the prominence of Competition laws in the field of innovations, especially in the telecommunication industry. In this case, Ericsson, a well-known telecommunications organisation, expressed monopolistic behaviour by filing a complaint against Micromax for

⁵⁶⁵ *Topic: Telecoms in Europe*, Statista <https://www.statista.com/topics/3981/telecommunications-industry-in-europe/>.

⁵⁶⁶ *President Juncker's Political Guidelines*, European Commission https://commission.europa.eu/publications/president-junckers-political-guidelines_en.

⁵⁶⁷ *Regulation*, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0772>.

⁵⁶⁸ *European telecom companies poised for growth amid deregulation*, Goldman Sachs (Oct. 3, 2024), <https://www.goldmansachs.com/insights/articles/european-telecom-companies-poised-for-growth-amid-deregulation>.

using its SEP technology in Global System for Mobile communication (GSM).⁵⁶⁹ Being the first FRAND litigation in India, the case highlighted the lack of comprehensible legislations regarding SEP and FRAND, thereby having the potential to cause a significant increase in the sovereign power exercised by major companies. However, to apprehend the importance of the FRAND legislations with respect to Competition laws, the ideal procedure would be to analyse the differences in countries that do not possess this legislation and the countries that do.

A. Haiti

Haiti is a nation which felt the need for legitimate regulations in neither Patent laws nor Competition laws due to the lack of elemental development in industries. This was predominantly as a consequence of the consistent tragedies striking the land. With primary focus on protecting the people, the government paid no heed to the progression of the economy which led to stagnation in the one sector that is essential for communication facilities even with the aid of grants worth millions.⁵⁷⁰ This scarceness in the concern given to new creations and market dynamics operates as the perfect illustration for why a case similar to that of *Ericsson v. Micromax*⁵⁷¹ has no likelihood of occurring in Haiti. This is traceable back to the point that companies like this would not exist in Haiti; firstly because of the absence of regulatory bodies for the telecommunication industry and secondly, the requirement of Competition laws would arise only when there is an existence of 2 or more companies in the same industry, which Haiti is in a deficit of.

Additionally, the case was fundamentally fixated on granting an injunction order to the company that infringed the SEP protecting SIM cards that were invented for the purpose of using it in cell phones.⁵⁷² If such a case had originated in Haiti, the patented country would not have had the opportunity to be filing for an injunction owing to the fact that Haiti does not have any established laws for allowing such orders. Furthermore, multiple sources claim the transfer of most cases to the United States of America jurisdiction if cases that require contributions from these unprecedented legislations arise in Haiti. However, by cause of a shortage in substantial information, the concept of the transfer of territorial jurisdiction is found to be notably ambiguous. Therefore, even though India in itself is unaccustomed to

⁵⁶⁹Supra.

⁵⁷⁰ Stephen Marshall, *Haiti Telecoms Market Report*, Budde Comm <https://www.budde.com.au/Research/Haiti-Telecoms-Mobile-and-Broadband-Statistics-and-Analyses>.

⁵⁷¹Supra.

⁵⁷² Ayush Menon, *Ericsson v. Micromax – A Case of Abuse of Dominance and Unambiguous Laws of India*, Libertatem (Oct. 28, 2021), <https://libertatem.in/blog/ericsson-v-micromax-a-case-of-abuse-of-dominance-and-unambiguous-laws-of-india/>.

lawsuits pertaining to the intersection between Competition laws and Patent laws, Haiti would find it more challenging to interpret the same.

B. EU

In virtue of leading telecommunication companies like Swisscom with inventions like the Communication cables with illumination⁵⁷³ and Deutsche Telekom with inventions like the SLAM tags⁵⁷⁴, the European Union has spearheaded the industry alongside the United States of America for years. EU's ability to take the lead in this particular sector can be ascertained to the fact that the regulations set in place for effective competitiveness and the Patent laws have been extremely efficacious. For the prevention of domination of certain companies, the Treaty on the Functioning of the European Union (TFEU) has provided Article 101 that specifies the various deals that promote market dominance and hinder competition. Moreover, the jurisdiction fabricated by the Brussels Regime for the purpose of Patent disputes has been paramount for ensuring that the options viable for the infringement of European Patents are known to the patented companies.⁵⁷⁵ Even with well constituted Competition laws and Patent laws, cases like *Ericsson v. Micromax*⁵⁷⁶ would arise in EU with very similar judgments to that of India's due to the similarities in the jurisdiction of cases dealing with the intersection of Patents and Competition between companies in the market.

The particulars of the case which shows the similarities and the differences are as follows:

- a. In lieu of the injunction issued against Micromax that nearly caused the shutdown of their entire company; Ericsson provided a settlement that required the royalty payment for the entire product and not just the product that was patented, consequently affecting the prices of the product. This agreement contradicted Section 3 of the Competition Act, 2002.⁵⁷⁷ Correspondingly, Article 101 of the TFEU is a provision in EU that this agreement would have been in violation of.⁵⁷⁸ Both these clauses relay that any contract drawn between the parties that could affect the selling price of the common creation is an evidence of portraying market dominance. As demanding for payment of the valuation of the entire device is a direct contrast to the

⁵⁷³ *Patents by Inventor SWISSCOM AG*, Justia Patents <https://patents.justia.com/inventor/swisscom-ag>.

⁵⁷⁴ *Patents Assigned to Deutsche Telekom AG*, Justia Patents <https://patents.justia.com/assignee/deutsche-telekom-ag>.

⁵⁷⁵ EUROPEAN PATENT ACADEMY, THE JURISDICTION OF EUROPEAN COURTS IN PATENT DISPUTES 3-7 (2018).

⁵⁷⁶ *Ibid.*

⁵⁷⁷ The Competition Act, 2002, § 3(3)(a).

⁵⁷⁸ Jonida Lamaj, Interpretation of Articles 101 & 102 of TFEU, 4 EUROPEAN ACADEMIC RESEARCH, 6944, 6950-6952 (2016).

provided legislations, this proves that Ericsson was prima facie at fault due to the dominance displayed via the contract.

- b. The ex-parte injunction that was granted to Micromax at the request of Ericsson was immediately attested by the Delhi High Court without any valid reason to back their decision.⁵⁷⁹ An ex-parte injunction is customarily issued only when the actions of the party has the potential to cause irreversible damages to the other party if allowed to continue in the same manner and thus, such a situation appears only during times of emergency. This is followed both in India as well as in the EU. In the EU, Article 1019e(1) of the Dutch Code for Civil Procedure (DCCP)⁵⁸⁰ defines the same conditions under which an ex-parte injunction can be provided in cases concerning Intellectual Property Rights (IPR). Ergo, the injunction issued by the Delhi High Court should have been condemned. However, the occurrence of this circumstance in EU is improbable in view of the fact that the DCCP has specified the law for the execution of it in disputes that emerge in relation to IPR.⁵⁸¹ Since India lacks the specifics for the implementation of injunction, such a case only seems natural to originate.

VI. CONCLUSION

Innovations in the market have become a regular phenomenon in most industries, thereby instilling the requirement of IPR, especially patents, to ensure the protection of the technology. However, these new inventions also highlight the significance of enforcing Competition laws so as to reduce the influential power that is exercised by few firms in an industry. Patenting an invention is known to provide an upper hand to that particular firm and this dominance has the potential to mitigate the importance of consumer welfare and the entry of other firms in the sector, whereupon Competition laws take effect.⁵⁸² In India, the existence of legislations in both Patent law and Competition law sometimes brings about inconsistencies in the implication, hence striving to strike a balance between the laws must

⁵⁷⁹ Prashant Reddy, *Interim justice: Troubling trend*, Business Standard (Mar. 30, 2013), https://www.business-standard.com/article/opinion/interim-justice-troubling-trend-113033000223_1.html.

⁵⁸⁰ Marteen Rijks, *Ex parte injunctions in the Netherlands*, Taylor Wessing (May 18, 2020), <https://www.taylorwessing.com/en/insights-and-events/insights/2020/05/ex-parte-injunctions-in-the-netherlands>.

⁵⁸¹ Ibid

⁵⁸² Raju KD, *Interface Between Competition Law and Intellectual Property Rights: A Comparative Study of the US, EU and India*, 2 Intellectual Properties Rights 17 (2014).

become a priority to avoid causing negative impacts on the competitiveness.⁵⁸³ The entire competition code is interlinked in a way to secure a significant chunk of market share and they provide prices that are pushed down in the competitive market therefore helping in improving the quality of the products. This allows more people to afford it, resulting in increasing market demand in turn high production which boosts the economy. Analysing both the laws with the help of the case of *Ericsson v. Micromax* and the regulations of a developed and an under-developed country, it can be understood that even though India has had substantial progress in establishing the code, it still has to develop in terms of the judicial process. The statutes, in comparison to EU, do not exclusively vary from one and other except for the way that these laws are being implemented. Furthermore, the interface of these two laws remains a mystery for the jurisdiction of the Indian courts. With various other questions of the Indian patent law in relation to the competition in a market emerging, the following suggestions are provided:

- Patent pooling is a concept in IPR that has adverse effects on the competition in the market as it hinders the entry of new firms and prohibits them from competing in the market.⁵⁸⁴ This is due to the fact that firms who have established the patent pool dominate the field and this causes significant increase in the price of the product as a result of the reduced competition. This escalation of prices is in direct violation of the Section 3 of the Competition Act, 2002⁵⁸⁵, thereby becoming the responsibility of the Competition Law to handle the aftermath.⁵⁸⁶ To counter this effect caused by patent pools, European Commission approved the implementation of the MPEG Licensing Administrator (MPEG LA) which has been proven to increase competition and the efficiency of obtaining the technology with minimal transaction cost.⁵⁸⁷ This can be put into effect in India to avoid anti-competitive practices being disseminated in the Indian economy.
- The ex-parte injunction that was granted by the Delhi High Court resulted in Micromax being afflicted with patent holdup, especially considering that the

⁵⁸³<https://www.lakshmisri.com/Media/Uploads/Documents/Interface%20between%20Competition%20Law%20and%20Intellectual%20Property%20Laws%20-%20INDIAN%20PERSPECTIVE.pdf>

⁵⁸⁴ Raju KD, *Interface Between Competition Law and Intellectual Property Rights: A Comparative Study of the US, EU and India*, 2 Intellectual Properties Rights 18 (2014).

⁵⁸⁵ Supra.

⁵⁸⁶ Intepat Team, *Competitive Ramifications and Re-Tooling Patent Pools in India*, Intepat (Sept. 24, 2020), <https://www.intepat.com/blog/competitive-ramifications-and-re-tooling-patent-pools-in-india/>.

⁵⁸⁷ Garrard R Beeney & Renata B Hesse, *Why Patent Pools Are the Right Answer for a New Era*, Access Advance (July 14, 2021), <https://accessadvance.com/2021/07/14/why-patent-pools-are-the-right-answer-for-a-new-era/>.

technology used had an SEP.⁵⁸⁸ This situation has very little probability of emerging in any other court without hearing the other party. Moreover, it was only after the CCI got involved that the detriments were identified and investigated. This is proof that the judicial system of India has to be improved in such a way that orders are passed only after scrutinizing the entire picture. The EU also has specific provisions for issuing ex-parte injunctions for patent disputes and enforcing similar provisions in India would reduce the liabilities of the courts. Additionally, the priority of the firms must always rest on consumer welfare along with their economic growth. Therefore, granting a stay order would have been more appropriate than an injunction.⁵⁸⁹

- The Competition law framework in India has to be developed to ensure that the firms in a particular sector do not exercise dominance over the other existing firms or prevent the entry of any new firms in the sector. The responsibility of addressing this abuse of dominance lies solely on the CCI. Albeit, with the involvement of invention in sectors like telecommunication, technology, pharmaceuticals, etc. the question of precedence of laws arises. As the Patents Act is considered to be a special act, it would be prevalent in comparison to the Competition Act in case of any discrepancies that could cause irreparable damage to the involved parties.⁵⁹⁰ Thereupon, it is essential that the CCI and the existing frameworks collaborate with the organizations regulating the Patent laws to prevent market dominance in these industries.

⁵⁸⁸ Prashant Reddy, *Interim justice: Troubling trend*, Business Standard (Mar. 30, 2013), https://www.business-standard.com/article/opinion/interim-justice-troubling-trend-113033000223_1.html.

⁵⁸⁹ Ibid

⁵⁹⁰ Kapil Mudgil, *IPR and Competition Law: The Power Couple Demystified*, 9 JOURNAL OF LEGAL STUDIES AND RESEARCH 451 (2023).

THEME 3

**THE BALANCE OF INNOVATION AND COMPETITION: A STUDY ON THE
EFFICACY AND LIMITATIONS OF EU MERGER CONTROL REGULATIONS IN
ADDRESSING ‘KILLER ACQUISITIONS’**

-Rituraj Mal Deka⁵⁹¹

ABSTRACT

The merger and acquisition regulation continues to evolve and become more complex in the face of changing market dynamics, especially with the development of strategic “Killer Acquisitions” for technology and biotechnology sectors. This paper explores the effectiveness and boundaries of the European Union’s merger control framework that mainly utilizes the turnover-based thresholds in evaluating whether antitrust review would be warranted.

*The landmark case of **Illumina/Grail** has been used as our point of departure and examine the attempt of the European Commission to enlarge its authority under Article 22 of the EU Merger Regulation to include a review of deals not eligible for standard notification requirements. The subsequent judgment by the European Court of Justice restricting that overreaching interpretation manifests this tension between certainty of business law and the imperative to prevent anti-competitive practices that may smother innovation.*

This paper examines the policy, legal, and economic significance of the European Court of Justice (ECJ) decision, which examines whether the existing statute law adequately addresses risks connected with such acquisitions that slip outside traditional oversight mechanisms. The paper concludes with a comparative discussion that considers global practices.

The particular interest are experiences, for example, in the United States and Australia-places that are conducting innovation experiments with alternative regulatory thresholds and strategies. Finally, the proposal to a number of possible legislative reforms that could be enacted to strengthen the merger control regime of the EU in response to such challenges so as to contribute to the ongoing debate over the most appropriate way to balance stimulating innovation with the need for fair competitive market conditions.

Keywords: Merger Regulation, European Union, Killer Acquisition, Regulatory Reform, European Court of Justice

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I. INTRODUCTION

The European Union (EU) has developed a very strong framework for the regulation of mergers and acquisitions (M&A) to ensure fair competition in its internal market. The core of this regulatory system is the EU Merger Regulation (EUMR), which is primarily governed by Council Regulation (EC) No. 139/2004.⁵⁹² This regulation has empowered the European Commission (EC) to evaluate and approve the M&A transactions that may have a significant effect on market dynamics within the EU. The main goal is to prevent levels that would be harmful to effective competition, thereby making the market operations fair and innovation robust.⁵⁹³

The EUMR (the regulatory body) sets out certain obligation of M&A notifications and approvals when exceeding specific the turnover thresholds. The latter is calculated on the global and EU-level revenues of the concerned parties. It would refer the transactions that fall below the thresholds but may still has an impact competition to the EC, which allows the Member States to request the review of such cases under Article 22.⁵⁹⁴ The referral system is meant to fill the oversight gaps, especially on high-impact transactions involving startups or firms with low turnovers but a strong influence on the market.

The European Court, apart from the jurisdictional thresholds, uses a simplified procedure for cases that are unlikely to raise competition concerns. This reduces the administrative burden of the companies and fasten up the review, focusing the court's resources on more complex cases.⁵⁹⁵ Recent evaluations have highlighted the effectiveness of these simplified measures but also identified opportunities for further streamlining and flexibility to adapt to evolving market conditions.

The national competition authorities in Member States complement the EU's regulatory framework to form a multilevel system of enforcement.⁵⁹⁶ This has ensured a comprehensive oversight, which accommodates both large-scale, cross-border deals and smaller, localized transactions, and has recently updated reforms and policies to face new challenges, such as

⁵⁹² Council Regulation (EC) No 139/2004 of 20 January 2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation), 2004 O.J. (L 24) 1, <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32004R0139>.

⁵⁹³ *Ibid.*

⁵⁹⁴ European Commission, Public Consultation on EU Merger Control (2021), https://competition-policy.ec.europa.eu/public-consultations/2021-merger-control_en.

⁵⁹⁵ European Commission, Memo/13/1098: EU Merger Control – Frequently Asked Questions (Dec. 5, 2013), https://ec.europa.eu/commission/presscorner/detail/en/memo_13_1098.

⁵⁹⁶ European Commission, National Competition Authorities in the European Competition Network, https://competition-policy.ec.europa.eu/antitrust-and-cartels/european-competition-network/national-competition-authorities_en.

“killer acquisitions,” where dominant players acquire smaller competitors to stifle their potential innovation.⁵⁹⁷

The EU’s merger control regime is aimed at balancing the need for economic efficiency and market integration with the imperative to foster higher competition and protect consumer interests.⁵⁹⁸ The EU remains committed to refining its regulatory approach, as markets continue to evolve to meet new challenges effectively.

II. THE RISE OF “KILLER ACQUISITIONS”

Killer acquisitions refer to the strategic purchase of emerging firms by the market leaders in order to suppress nascent competition.⁵⁹⁹ Such concerns are a significant issue in the technology sector, for instance in biotechnology sectors, due to acquisitions involving promising start-ups or smaller firms with innovative capabilities that are pushing huge monsters of the existing companies.⁶⁰⁰ The acquiring firms eliminate or reduce the competitive offerings of the acquired companies, effectively eliminating potential future rivals and consolidating their market dominance.

This is particularly concerning in the biotechnology industry, where drug development is resource-intensive. The major pharmaceutical companies buy out smaller firms to eliminate competing drugs or therapies that could challenge their current offerings.⁶⁰¹ This may lead to fewer choices for patients and stifle the development of new treatments. For example, anecdotal evidence points to how these acquisitions have delayed or suppress the introduction of new therapies, affecting public health outcomes.⁶⁰²

Killer acquisitions occur in the digital markets in which dominant firms, such as major platform companies, buy innovative start-ups. These transactions are strategically motivated to absorb disruptive technologies or services that may potentially erode the market share of

⁵⁹⁷ *Ibid.*

⁵⁹⁸ Barry Rodger, Competition Law Compliance Programmes: Key Success Factors, 37 UTRECHT J. INT’L & EUR. L. 51, 51–67 (2021).

⁵⁹⁹ Colleen Cunningham, Florian Ederer & Song Ma, Killer Acquisitions, 129 J. POL. ECON. 649, 649–702 (2021).

⁶⁰⁰ *Ibid.*

⁶⁰¹ Congressional Budget Office, The Budget and Economic Outlook: 2020 to 2030, at 55 (Jan. 2020), <https://www.cbo.gov/publication/57126>.

⁶⁰² Ágnes Lublóy, Factors Affecting the Uptake of New Medicines: A Systematic Literature Review, 45 EUR. J. HEALTH ECON. 1, 1–12 (2014).

the acquirers.⁶⁰³ The acquisitions in artificial intelligence and niche software applications, which could have fostered greater competition if allowed to flourish independently.⁶⁰⁴

Such acquisitions require regulation, but the conventional methods of notification thresholds that focus on turnover or market shares often fail to account for such deals involving nascent firms with low revenues but strategic importance.⁶⁰⁵ The authorities in these jurisdictions, such as those in the EU and in the US, were considering alternative measures such as value-based thresholds.⁶⁰⁶ These policies seek to identify acquisitions in which the acquisition price represents the competitive threat that the target firm presents, even though its current revenues are insignificant.

III. EUROPEAN UNION MERGER CONTROL FRAMEWORK

A. Turnover-Based Thresholds and Antitrust Review

The European Union (EU) uses turnover-based thresholds to determine whether such mergers and acquisitions fall under its jurisdiction for competition review.⁶⁰⁷ These thresholds are codified in the European Merger Regulation (EUMR) and aim to identify transactions with a “Community dimension,” ensuring they are assessed for potential anti-competitive effects.⁶⁰⁸ This approach seeks to balance the administrative burden and the economic significance of reviewed transactions.

The European Commission (EC) has issued guidelines that allow Member States to refer transactions that fall below national thresholds but raise competition concerns.⁶⁰⁹ While this expansion was aimed at combating under-the-radar “killer acquisitions,” it has created the legal uncertainty for businesses contemplating mergers as companies must now contemplate risks in jurisdictions where such notification was not traditionally required.⁶¹⁰ These changes highlight the difficulty of preserving a regime that catches bad mergers without squashing legitimate business activity or innovation.

⁶⁰³ McKinsey Global Institute, *Disruptive Technologies: Advances that Will Transform Life, Business, and the Global Economy*, at 4 (May 2013).

⁶⁰⁴ OECD, *Start-ups, Killer Acquisitions and Merger Control*, at 15 (May 2020).

⁶⁰⁵ *Ibid.*

⁶⁰⁶ European Commission, *Commission Staff Working Document: Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control*, SWD(2021) 66 final, at 7 (Mar. 26, 2021).

⁶⁰⁷ European Commission, *Mergers: Overview*, https://competition-policy.ec.europa.eu/mergers/overview_en.

⁶⁰⁸ *Ibid.*

⁶⁰⁹ White & Case, *EU Top Court Delivers Blow to European Commission’s Approach to Article 22 Below-Threshold Merger Control*, <https://www.whitecase.com/insight-alert/eu-top-court-delivers-blow-european-commissions-approach-article-22-below-threshold>.

⁶¹⁰ Richard Whish QC (Hon), *Killer Acquisitions and Competition Law: Is There a Gap and How Should It Be Filled?*, 34 NLSIR 1, 1-25 (2022).

B. Challenges in the Evaluation of Modern M&A Dynamics

The dynamics of modern Mergers and Acquisitions in such industries that presents a challenge in the application of traditional antitrust principles. The higher transaction values in these industries often do not correlate with such turnover, thereby creating blind spots under the current EU framework.⁶¹¹ The complexity of such vertical integrations and conglomerate mergers is becoming higher and poses analytical challenges. These transactions relate to overlaps in highly differentiated products or pipeline innovations that traditional competition metrics may not be able to capture.

The EC has responded to change through procedural reforms such as making notification procedures easier and more collaborative with NCAs and overseas regulators.⁶¹² There is legal uncertainty in below-threshold transactions, which discourages investment and innovation in key sectors .⁶¹³ There are efforts to streamline merger control procedures and incorporate new tools, such as transaction value thresholds, are being debated as the potential paths to better align regulatory practices with evolving market realities.

IV. CASE STUDY: THE ILLUMINA/GRAIL MERGER

A. Background of the Case

Illumina is a global leader in next-generation sequencing (NGS) technologies, sought to acquire Grail, a biotechnology firm specializing in early cancer detection tests using NGS.⁶¹⁴ Grail's cutting-edge work promised significant advancements in healthcare by enabling early and efficient cancer diagnostics, potentially saving lives and reducing treatment costs.⁶¹⁵ However, concerns arose regarding the potential anti-competitive effects of this transaction.

The EC intervened based on Article 22 of the EUMR even though the merger did not reach the traditional turnover thresholds for review. The EC cited the risk of “killer acquisition” behavior because Illumina's control over NGS technology could restrict access for competitors, which would stifle innovation and market competition in the emerging field of cancer diagnostics. This marked one of the first major applications of Article 22, which

⁶¹¹ Lina M. Khan, Amazon's Antitrust Paradox, 126 YALE L.J. 710, 710-805 (2017).

⁶¹² ICLG, Merger Control Laws and Regulations: European Union, 2025, <https://iclg.com/practice-areas/merger-control-laws-and-regulations/european-union>.

⁶¹³ *Ibid.*

⁶¹⁴ Illumina, Illumina and Grail Announce Acquisition Agreement, <https://www.illumina.com/company/news-center/press-releases/press-release-details.html?newsid=53c5d93c-454e-4685-aebb-caca6655391c> (2021).

⁶¹⁵ *Ibid.*

greatly increased the EC's jurisdiction for the review of mergers between new entrants, including competitors with low revenues but huge market potential.⁶¹⁶

The EC based its prohibition decision on findings that Illumina could foreclose Grail's rivals by raising the costs or lowering the quality of NGS technology, which is a critical input for their diagnostics. This would weaken competition, limit innovation, and choices in cancer diagnostics markets.⁶¹⁷ Adding to the complexity, Illumina implemented aspects of the merger before obtaining regulatory approval, and the EC levied substantial fines for “gun-jumping.”

B. European Commission's Expansion of Authority under Article 22

The European Commission (EC) has developed its view of Article 22 of the EUMR to respond to emerging challenges in merger control, with the increase in so-called “killer acquisitions” in the digital, technology, and biotechnology industries. This refers to a larger firm acquiring a smaller, innovative firm that can potentially disrupt markets and hence eliminate future competition.⁶¹⁸ The Illumina/Grail case became a watershed moment in the EC's expansion of its authority under Article 22.

Traditionally, merger control within the EU based its framework on turnover-based thresholds to identify whether mergers were subject to reporting to the EC for review purposes. The threshold, therefore provided businesses with clear understanding of when their deals are subject to scrutiny.⁶¹⁹ However, with increasing concerns of anti-competitive acquisitions that do not trigger these thresholds, especially in growth sectors, the EC adopted a softer approach to the use of Article 22. The policy looked at mergers that cross borders or have the ability to harm competition by eradicating innovative competitors that do not meet the thresholds for notification.⁶²⁰

In 2021, the EC actively started urging national competition authorities (NCAs) to refer mergers to the EC for review under Article 22 even if the mergers were not above the

⁶¹⁶ Global Competition Review, European Union: EUMR Article 22 and DMA Cast a Wide Net for Merger Control, in 2025 The European, Middle East and African Antitrust Review, <https://globalcompetitionreview.com/review/the-european-middle-east-and-african-antitrust-review/2025/article/european-union-eumr-article-22-and-dma-cast-wide-net-merger-control>.

⁶¹⁷ European Commission, Mergers: Commission Prohibits Acquisition of GRAIL by Illumina, IP/22/5364, at 2 (Sept. 6, 2022), https://ec.europa.eu/commission/presscorner/detail/it/ip_22_5364.

⁶¹⁸ Supra Note 5 at 3.

⁶¹⁹ Concurrences, Turnover Threshold Merger, <https://www.concurrences.com/en/dictionary/turnover-threshold-merger>.

⁶²⁰ Ibid.

traditional turnover thresholds.⁶²¹ This was particularly aimed at addressing “killer acquisitions,” especially in the technology and biotechnology industries, where small companies can have significant future competitive potential. Despite the merger not meeting the turnover thresholds, the EC took action based on the potential competitive harm the deal could cause in the future. The EC reviewed and ultimately blocked the merger in 2022, citing concerns that it would stifle competition and innovation in the biotechnology sector.

However, this enlarged application of Article 22 was challenged in court. The General Court of the EU upheld the interpretation of the EC regarding Article 22, but in 2024, the European Court of Justice (ECJ) declared against the EC with an order to set aside the judgment passed earlier. The ECJ held that the EC lacked the legal powers to encourage referrals from NCAs when the mergers were not in the national jurisdictions.⁶²² It emphasized that the turnover thresholds were critical for ensuring legal certainty and predictability to businesses, and any move to change this system had to be significant enough through legislative reform.

A severe blow to the success of the EC’s pursuit of merger review authority enlargement, this judgment underlines the importance of a consistent and predictable regulatory environment—a balance between market regulation on the one hand and an environment that encourages innovation, on the other.⁶²³ While, following the judgment, all possibilities of using Article 22 for below-threshold mergers were effectively nullified for the EC. Consequently, the EC may look into alternative options, such as advocating for legislative changes that would permit lower thresholds for merger examination. However, this will be subject to the will of member states and therefore unlikely to be implemented overnight. The ruling points out the tension between protecting competitive markets and achieving clarity in merger control enforcement.

V. POLICY AND LEGAL IMPLICATIONS OF THE ECJ DECISION

The Illumina/Grail decision of the European Court of Justice (ECJ) has very deep policy and legal implications, particularly within the EU competition law. It undoes the European Commission’s (EC) expansion of authority under Article 22 of the EU Merger Regulation.

⁶²¹ Sidley, Landmark Judgment on European Commission Merger Control Powers – Legal Certainty Restored?, <https://www.sidley.com/en/insights/newsupdates/2024/09/landmark-judgment-on-european-commission-merger-control-powers-legal-certainty-restored>, Sept. 6, 2024.

⁶²² Stibbe, The Gift That Keeps on Giving: Article 22 is Here to Stay, <https://www.stibbe.com/publications-and-insights/the-gift-that-keeps-on-giving-article-22-is-here-to-stay>.

⁶²³ Crowell & Moring, The EU Court of Justice’s Judgment in Illumina/Grail: Has the Killer of Killer Acquisitions Been Disarmed?, <https://www.crowell.com/en/insights/client-alerts/the-eu-court-of-justices-judgment-in-illuminagrail-has-the-killer-of-killer-acquisitions-been-disarmed>.

(EUMR), thus reinforcing the significance of having clear and predictable thresholds in merger control.⁶²⁴ This decision highlights the tension between business certainty, which is based on stable and predictable regulatory frameworks, and the need to prevent anti-competitive practices, particularly in high-innovation sectors like biotechnology and technology. The ruling essentially curtailed the EC's ability to review below-threshold mergers based on concerns about future competitive harm, a move the EC had implemented to address the growing risks posed by so-called "killer acquisitions."⁶²⁵

This judgment is a significant step in balancing the enforcement of antitrust laws with the need for legal certainty for businesses operating in the EU. The ECJ highlighted the challenges that arise when competition authorities intervene in mergers that do not meet the criteria set forth by existing regulations.⁶²⁶ This decision will have an impact on the broader EU competition policy, in forcing a review of how competition law can be applied to address the new market trends and dynamics in rapidly changing competitive industries, like digital markets or high-tech biotechnology sectors.

This ruling is a part of the larger struggle between promoting innovation and maintaining competitiveness. On the one hand, the Commission's new reliance on Article 22 sought to safeguard nascent competition by intervening in deals that may seem innocuous in the short term but would actually eliminate potential future competitors. The ECJ ruling, however, held that such preventive measures could easily lead to overreach, as they threatened legal certainty businesses rely on when making strategic decisions. The judgment suggests that prevention of anti-competitive mergers need not be at the cost of undermining the predictability of a regulatory environment considered fundamental to encouraging investment and innovation.⁶²⁷

But this ruling also speaks to some of the challenges of dealing with mergers in very innovative industries, where, of course, the dangers posed by acquisitions may not necessarily be evident in the near term. For example, a start-up in biotech may have little current revenue, but a great deal of future value, and people have legitimate concerns that merger may strangle innovation in just those sorts of industries.\\\\\\\\\\\\\\\\ This gap was initially addressed by the EC's approach under Article 22, but the ECJ's decision reflects a conservative approach, preferring

⁶²⁴ Supra Note 33 at 8.

⁶²⁵ Dentons, Illumina/Grail: ECJ Strikes Down EC Policy of Accepting Referrals of Non-Notifiable Deals, <https://www.dentons.com/en/insights/articles/2024/september/13/illumina-grail-ecj-strikes-down-ec-policy-of-accepting-referrals-of-non-notifiable-deals>.

⁶²⁶ Ibid.

⁶²⁷ Ibid.

to leave such interventions to the legislature rather than competition authorities. This might have a direct effect on the ability of EU competition authorities to keep track of how the market is evolving and the risks it faces with acquisitions that, though they do not have the thresholds required by the standards, do have significant long-term negative implications for competition and innovation.⁶²⁸

Ultimately, the ECJ ruling points to a need for legislative reforms to address the limitations of the current thresholds in capturing anti-competitive mergers that are subtle yet impactful on future competition. As competition policy evolves, particularly in the context of innovation-driven industries, balancing effective enforcement with regulatory certainty remains a challenge.⁶²⁹

VI. COMPARATIVE ANALYSIS OF GLOBAL PRACTICES

United States: Innovation-Driven Regulatory Thresholds

The United States M&A landscape under competition law stands unique, with a constantly evolving trend of innovation-driven regulatory thresholds. The dynamics of these markets, which are shifting as the markets become high-tech and digital, calls for new approaches to mergers and acquisitions. Unlike the European Union, the U.S. framework under the Clayton Act⁶³⁰ and the Federal Trade Commission Act⁶³¹ assesses mergers based on whether they “substantially lessen competition” or “tend to create a monopoly,” giving flexibility in assessing deals that may not meet traditional thresholds but still pose competitive concerns. This approach has facilitated a nuanced understanding of market power and innovation impact.

The U.S. antitrust framework is highly based on assessing competitive effects rather than revenue-based thresholds. The FTC and the DOJ have increased scrutiny of potential anti-competitive behavior, especially in innovation-driven sectors.⁶³² For instance, the FTC’s case against Meta’s proposed acquisition of Within Unlimited, a virtual reality company, marked a significant departure from traditional evaluations. The FTC argued that the dominance of

⁶²⁸ European Court of Auditors, Special Report 24/2020: The Commission’s EU Competition Law Enforcement, <https://op.europa.eu/webpub/eca/special-reports/eu-competition-24-2020/en/>.

⁶²⁹ Frédéric Louis, Cormac O’Daly, Anne Vallery, Sophie De Schepper, Hartmut Schneider, Leon B Two Negatives Don’t Make a Positive: European Court Rules That European Commission Cannot Review Mergers That Are Not Reportable at the EC Level or in a Member State, WilmerHale (Sept. 5, 2024), <https://www.wilmerhale.com/insights/client-alerts/20240905-european-court-rules-that-european-commission-cannot-review-mergers-that-are-not-reportable-at-the-ec-level-or-in-a-member-state>.

⁶³⁰ Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 29 U.S.C. §§ 12–27).

⁶³¹ Federal Trade Commission Act, 15 U.S.C. § 41 et seq. (1914).

⁶³² Daniel F. Spulber, Antitrust and Innovation Competition, 11 J. ANTITRUST ENFORCEMENT 5, 5–50 (2023), <https://doi.org/10.1093/jaenfo/jnac013>.

Meta in the VR space could lead to reduced innovation and higher barriers for smaller players. The court rejected the FTC's injunction, but the case reflects the U.S. system's emphasis on dynamic competition concerns beyond immediate price effects.⁶³³

A critical feature of the U.S. approach is its reliance on economic analyses, including the use of simulation models and innovation impact assessments. This methodology helps regulators predict the long-term effects of mergers on innovation ecosystems. The FTC's intervention in the Nvidia/Arm acquisition demonstrated the U.S.'s commitment to protecting innovation. Nvidia, a leader in graphics processing units (GPUs), proposed acquiring Arm, a semiconductor company whose technology underpins numerous competitors' products. The FTC blocked the merger, citing concerns about harm to innovation in the semiconductor industry, reflecting an increasing focus on dynamic competition rather than static market shares.⁶³⁴

The United States also has different ways of dealing with vertical mergers where companies in a different stage of production combine their businesses. This is evidenced by the challenge posed by the DOJ against AT&T's acquisition of Time Warner. Although the deal went through, the case revealed the vigilance of the DOJ in preventing vertical integration that would undermine competition especially where new markets such as streaming content are involved.⁶³⁵

Australia: Alternative Approaches to Merger Control

Australia's merger control regime, as overseen by the Australian Competition and Consumer Commission (ACCC), is marked by its peculiar voluntary notification system and a focus on the substantial lessening of competition (SLC) test under Section 50 of the Competition and Consumer Act 2010.⁶³⁶ In contrast to jurisdictions that have mandatory notification thresholds, Australia places the burden on parties to self-assess whether a proposed merger might breach competition laws. This is a flexibility that, however, has also come under fire as likely to let some damaging transactions occur free of adequate checks.

Recent cases have shown the ACCC's aggressive approach towards mergers, even in the voluntary regime. In the Pacific National/Aurizon case, the ACCC opposed the acquisition,

⁶³³ *Ibid.*

⁶³⁴ Nvidia/Arm, In the Matter of Nvidia Corp., Softbank Grp. Corp., & Arm, Ltd., FTC Matter/File No. 2110015, Docket No. 9404 (Feb. 14, 2022), <https://www.ftc.gov/legal-library/browse/cases-proceedings/2110015-nvidiaarm-matter>.

⁶³⁵ Timothy Taylor, The AT&T Merger with Time Warner: Another Follow-up, *CONVERSABLE ECONOMIST* (May 3, 2023), <https://conversableeconomist.com/2023/05/03/the-att-merger-with-time-warner-another-follow-up/>.

⁶³⁶ Competition and Consumer Act 2010, § 50 (Austl.).

arguing it would lessen competition in the rail freight sector. However, the Federal Court allowed the merger, citing efficiency gains.⁶³⁷ This showed the difficulties that lie in the way of the ACCC in courts regarding substantial lessening of competition. Similarly, in 2021, the ACCC expressed concerns over the Google acquisition of Fitbit due to risks to innovation and competition in health data markets. Even though the merger was not blocked, it highlighted the ACCC's alignment with the global trends of addressing competition issues in data-driven and digital markets.⁶³⁸

In 2024, comprehensive reforms to the merger control framework were proposed to address such challenges. These include mandatory notification requirements for significant mergers, codifying competition and innovation impact factors, and enhanced scrutiny of acquisitions in digital markets.⁶³⁹ This shift is also particularly crucial in meeting concerns over “killer acquisitions” and other deals that could end up killing innovation by taking away emerging competitors.

For instance, the public benefit focus that Australia uses in merger assessment makes it stand out from the rest. In the Tabcorp/Tatts merger case, the Australian Competition Tribunal agreed to the merger despite the opposition of ACCC because of efficiency gains and improvement in competition with foreign competitors. The public benefit test is more holistic than mere competition-based review but has its complexity and unpredictability in the merger review process.⁶⁴⁰

The ACCC's proposed reforms reflect a broader global movement toward strengthening merger controls in light of evolving market dynamics. Australia's regime, though distinct in its flexibility, is converging with international practices to address gaps and enhance its ability to tackle modern competition challenges. This evolution positions Australia as an adaptive jurisdiction capable of balancing innovation, market dynamism, and competitive integrity.

⁶³⁷ Full Federal Court Dismisses ACCC Appeal Against Pacific National Rail Merger Ruling, ALLENS (May 2020), <https://www.allens.com.au/insights-news/insights/2020/05/full-federal-court-dismisses-accs-appeal-against-pacific-national-rail-merger-ruling/#:~:text=>.

⁶³⁸ ACCC Rejects Google Behavioural Undertakings for Fitbit Acquisition, AUSTRALIAN COMPETITION & CONSUMER COMM'N (Jan. 25, 2021), <https://www.accc.gov.au/media-release/accc-rejects-google-behavioural-undertakings-for-fitbit-acquisition>.

⁶³⁹ Australia's Mandatory Merger Control Legislation Introduced to Parliament, WHITE & CASE (Aug. 24, 2022), <https://www.whitecase.com/insight-alert/australias-mandatory-merger-control-legislation-introduced-parliament>.

⁶⁴⁰ Australian Competition Tribunal Decision on Tabcorp-Tatts Merger, AUSTRALIAN COMPETITION & CONSUMER COMM'N (July 7, 2017), <https://www.accc.gov.au/media-release/australian-competition-tribunal-decision-on-tabcorp-tatts-merger-0>.

VII. CHALLENGES IN ADDRESSING ACQUISITIONS BEYOND TRADITIONAL OVERSIGHT

The complexity of M&A landscapes is increasing, posing challenging issues for regulatory frameworks that continue relying on traditional oversight mechanisms. Strategic acquisitions of smaller yet relevant entities, often called “killer acquisitions,” show fundamental gaps in statutory thresholds, as these acquisitions most frequently go unnoticed because they may not meet financial or market-share thresholds set by the regulatory authorities.⁶⁴¹ The case of Illumina/Grail in the European Union (EU) illustrates this issue, where the European Commission (EC) used Article 22 to retroactively review a merger that bypassed traditional notification requirements.⁶⁴² Despite its justification, the subsequent European Court of Justice (ECJ) ruling emphasized the need for clearer statutory boundaries to prevent overreach while addressing anti-competitive risks effectively.

One central risk of weak statutory mechanisms is that they do not reach acquisitions in digital and biotechnology sectors where innovation and data often dominate market power. Many companies in these industries have low current revenues but massive future potential. The acquisitions of WhatsApp and Instagram by Meta (Facebook), which at the time avoided strict scrutiny but today worry many about consolidation.⁶⁴³ Such gaps allow dominant players to effectively eliminate new entrants, crush innovation, and favor monopolistic practices.

Regulatory dependence on hard economic indicators like the turnover thresholds fails to factor into the dynamic nature of contemporary markets. Statutory regimes do not allow for flexibility that factors into qualitative considerations, including innovative potential, the role of data, and future dynamics of the market.⁶⁴⁴ It results in under-enforcement, as seen in the biotechnology sector where there are a number of strategic acquisitions that have taken place with minimal antitrust review. International experiences are replete with lessons on how these challenges can be addressed.

Germany has set a turnover value threshold for the merger’s notice, where acquisitions, irrespective of their revenue amounts, are caught in capturing high-value target acquisitions.

⁶⁴¹ Supra Note 9 at 4.

⁶⁴² Supra Note 35 at 9.

⁶⁴³ Meta Will Face Antitrust Trial Over Instagram, WhatsApp Acquisitions, THE HINDU (Nov. 14, 2024), <https://www.thehindu.com/sci-tech/technology/meta-will-face-antitrust-trial-over-instagram-whatsapp-acquisitions/article68866444.ece>.

⁶⁴⁴ D. Settembre-Blundo, R. González-Sánchez, S. Medina-Salgado, et al., Flexibility and Resilience in Corporate Decision Making: A New Sustainability-Based Risk Management System in Uncertain Times, 22 GLOBAL J. FLEXIBLE SYS. MANAG. 107, 107–32 (2021), <https://doi.org/10.1007/s40171-021-00277-7>.

It is also effective at strategic acquisitions where intangibles such as intellectual property and data are involved.⁶⁴⁵ By having a threshold, all mergers with a greater implication on competition will not miss being reported based on traditional thresholds on turnover.

Another very instructive example is the UK, where the CMA applies a “share of supply” test, which is more concerned with market impact in particular markets. This is a rather flexible approach that allows the CMA to cover acquisitions not even approaching global turnover thresholds but having an important impact locally.⁶⁴⁶ International best practices call for the need for flexible, innovation-oriented regulatory regimes. In handling modern challenges of M&As, regulators should outgrow strict thresholds and work on devising mechanisms responsive to strategic implications of an acquisition. This requires including predictive economic tools, interagency cooperation, and striking a delicate balance between nurturing innovation and conserving competitive markets.

VIII. PROPOSALS FOR LEGISLATIVE REFORMS IN THE EU

The European Union (EU) faces significant challenges in ensuring that its merger control regime adapts to the complexities of modern markets. Traditional turnover-based thresholds often fail to capture anti-competitive acquisitions in sectors like digital technology and biotechnology, where companies with limited current revenues may wield significant innovation potential or strategic importance.⁶⁴⁷

The idea is to catch acquisitions of smaller but strategically critical firms, especially those driven by intellectual property and data. With its focus on transaction value over turnover, the EU should address more mergers with competitive implications and innovation effects more accurately.⁶⁴⁸ In addition, besides these thresholds, prediction tools which assess the long-run implications of mergers come under an increased importance. Such tools shall aid regulators in not merely understanding the immediate market ramifications but also the risks from nascent competition and the ecosystems of innovation.⁶⁴⁹

⁶⁴⁵ Germany Proposes Transaction Value Threshold to Require Notification of High-Value Deals Even with No de Minimis Sales in Germany, KLUWER COMPETITION LAW BLOG (July 22, 2016), <https://competitionlawblog.kluwercompetitionlaw.com/2016/07/22/germany-proposes-transaction-value-threshold-to-require-notification-of-high-value-deals-even-with-node-minimis-sales-in-germany/>.

⁶⁴⁶ Chambers Merger Control 2021: Global Practice Guide - UK, CLEARY GOTTlieb STEEN & HAMILTON LLP (2021).

⁶⁴⁷ Elias Deutscher & Stavros Makris, Sustainability Concerns in EU Merger Control: From Output-Maximising to Polycentric Innovation Competition, 11 J. ANTITRUST ENFORCEMENT 350, 350–99 (2023), <https://doi.org/10.1093/jaenfo/jnac019>.

⁶⁴⁸ Anca D. Chirita, Data-Driven Mergers under EU Competition Law, (Durham Univ. 2021).

⁶⁴⁹ *Ibid.*

The Illumina/Grail case highlighted the need for clearer statutory guidance on the use of Article 22 of the EU Merger Regulation. While this provision has enabled the European Commission (EC) to review mergers outside traditional thresholds, its broad application has led to legal uncertainty, as evident in the subsequent European Court of Justice ruling.⁶⁵⁰ Legislative reforms are therefore required to balance the efficiency of intervention with predictability for businesses. Clear rules on notification requirements and reviewing processes can therefore help in doing this, such that there is robust oversight that is also transparent in its regulatory efforts.⁶⁵¹

Sector-specific approaches are another important part of these reforms. In digital markets, reforms should address issues such as data concentration and interoperability to prevent dominant firms from strangling competition. The EU can ensure more effective oversight and foster an environment conducive to both competition and innovation.

The lessons from international experiences highlight the importance of aligning EU policies with global best practices. The EU can further consolidate its lead in antitrust regulation in a manner that ensures policies would be effective in managing modern M&A dynamics. It is important to balance imperatives of innovation and fair competition so that the EU will navigate the changing tides of global markets successfully.

IX. CONCLUSION

The analysis of the merger control regime in the EU highlights critical holes in its capacity to engage with modern market dynamics, primarily on “killer acquisitions” and very high-value, low revenue transactions

in industries like digital technologies and biotechnology. The dependency on turnover thresholds has ultimately been inadequate. Landmark cases like Illumina/Grail exposed critical limitations about the capacity to catch potentially anticompetitive mergers. Similarly, the expanded use of Article 22 by the EC has brought to light tensions between regulatory flexibility and legal certainty, which calls for reforms with predictability but robust oversight. Comparative insights from the United States and Australia emphasize the necessity of adopting value-based thresholds, sector-specific approaches, and predictive tools to safeguard the innovation ecosystems and prevent concentration in the market. In future policy

⁶⁵⁰ Supra Note 35 at 9.

⁶⁵¹ Gerwin Van Gerven, Annamaria Mangiaracina, Will Leslie & Lodewick Prompers, *Crucial Developments to European Data and Privacy in Merger Control*, in *Digital Markets Guide* 3rd ed. (Global Competition Review, 2021), <https://globalcompetitionreview.com/guide/digital-markets-guide/third-edition/article/crucial-developments-european-data-and-privacy-in-merger-control>.

directions, introducing transaction value thresholds is one area to strengthen the EU merger control framework by addressing gaps created by turnover-based models. More clarity on statutory interpretation, especially about Article 22, should reduce uncertainty and enhance compliance. More focused regulatory approaches toward emerging sectors such as data-centric technologies and biotech may help address sector-specific problems while fostering fair competition. The cooperation and harmonization with the rest of the world, like the focus of the U.S. on nascent competition or reforms in Australia regarding mandatory notification, can serve the EU as useful frameworks. The objective will be to strike a balance between innovation and fair market competition. By implementing forward-looking policies and making use of advanced analytical tools, the EU can effectively adapt to evolving market dynamics and remain at the forefront in global antitrust enforcement. Such measures will ensure that the merger control regime of the EU not only responds effectively to the challenges of the times but also contributes to sustainable and competitive markets.

**DYNAMIC MARKETS AND ADAPTIVE POLICIES: REASSESSING ECONOMIC
TOOLS IN MERGER AND ACQUISITION OVERSIGHT WITHIN COMPETITION
LAW**

- Suhasini Gopal⁶⁵²

ABSTRACT

The rapid evolution of global markets, especially in the digital and technology sectors, has posed significant challenges for competition authorities worldwide. Mergers and acquisitions (M&A) have become a key focal point for regulatory scrutiny, prompting a reassessment of traditional economic tools and market definition frameworks. This paper, titled "Dynamic Markets and Adaptive Policies: Reassessing Economic Tools in Merger and Acquisition Oversight within Competition Law," examines emerging trends and challenges in M&A regulation from both national and international perspectives. Using a hybrid methodology that combines comparative legal analysis and case study evaluation, this research provides a comprehensive analysis of global merger control practices. The paper compares the regulatory approaches of jurisdictions such as the European Union, United States, and key developing economies, identifying both commonalities and divergences in how they address dynamic markets. A central focus is on the role of economic models—such as SSNIP tests, HHI indices, and counterfactual analysis—alongside the evolving importance of market definition in digital and cross-border transactions. Through detailed analysis of landmark merger cases, including Facebook/WhatsApp and Amazon/MGM, the paper illustrates how competition authorities apply economic tools to assess competitive risks. Preliminary findings underscore the need for adaptive regulatory policies that can respond to the complexities of modern markets, particularly those influenced by technological innovation and globalization. The paper concludes with forward-looking recommendations to refine economic tools, enhance their relevance in dynamic markets, and promote international convergence in merger regulation, aiming to balance innovation promotion with competition protection.

Keywords: Competition Law, Merger Regulation, Economic Tools, Digital Economy

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I. INTRODUCTION

A. Context and Relevance

In the 21st century, markets have become increasingly dynamic, with rapid technological advancements and globalization reshaping the competitive landscape. The digital economy has emerged as a dominant force, driving innovation but also introducing new complexities to market structures. At the forefront of these changes are mergers and acquisitions (M&A), particularly in the technology and digital sectors. Transactions involving major players, such as the acquisition of WhatsApp by Facebook or MGM by Amazon, underscore the significant role of M&A in shaping competitive dynamics.

These mergers, often involving vast data ecosystems and intricate networks of complementary services, challenge the traditional boundaries of market definitions. The rapid pace of innovation, coupled with the global reach of digital enterprises, means that traditional tools for assessing market competition are increasingly inadequate. Market dynamics now operate at the intersection of digital platforms, artificial intelligence, and cross-border activities, requiring regulatory frameworks to adapt swiftly to these transformations.⁶⁵³

The role of competition law in this evolving scenario is pivotal. It ensures not only that markets remain fair and competitive but also that consumer welfare is protected. The unchecked growth of monopolistic practices could stifle innovation, reduce consumer choices, and lead to price manipulation, particularly in data-driven industries. As such, the oversight of M&A has become a critical domain for competition authorities worldwide, emphasizing the need for robust and adaptive regulatory practices.⁶⁵⁴

B. Problem Statement

Traditional economic tools like the SSNIP test and Herfindahl-Hirschman Index (HHI) are ineffective in capturing the complexities of digital and technology-driven markets, where network effects, interdependence, and consumer value extend beyond price. Globalization and the dominance of tech giants like Google, Amazon, and Facebook create cross-border regulatory challenges, while AI-driven algorithms complicate pricing strategies and market behavior. Moreover, uneven regulatory approaches across jurisdictions, such as the EU's strict merger control policies versus more flexible enforcement in the US and developing economies, hinder international consensus on antitrust and M&A regulation in dynamic markets.

⁶⁵³ Spencer Weber Waller, *Antitrust and Social Networking*, 90 N.C. L. Rev. 1771 (2012).

⁶⁵⁴ Carl Shapiro, *Antitrust in a Time of Populism*, 61 Int'l J. Indus. Org. 714 (2018).

C. Objective

This paper seeks to address these challenges by reassessing traditional economic tools and proposing adaptive methodologies for overseeing mergers and acquisitions in dynamic markets. Specifically, the research aims to:

- i) Evaluate Existing Frameworks: Analyze the effectiveness of traditional tools such as SSNIP tests, HHI indices, and counterfactual analysis in digital and technology-driven markets.
- ii) Incorporate Dynamic Market Features: Identify critical aspects of digital economies, such as network effects, platform interdependencies, and cross-border operations, that require tailored analytical approaches.
- iii) Develop Adaptive Strategies: Propose innovative policies and tools that are better suited to the complexities of modern markets.
- iv) Foster Global Convergence: Recommend strategies for harmonizing international practices to achieve consistent and effective regulation of M&A in dynamic markets.

II. LITERATURE REVIEW

A. Evolution of Competition Law and Merger Oversight

i) Historical Context of Competition Law in M&A Regulation

The origins of competition law can be traced to the late 19th and early 20th centuries, with landmark statutes such as the Sherman Antitrust Act (1890) in the United States and the Clayton Act (1914) marking foundational developments. These laws aimed to curb monopolistic practices and promote fair competition, setting the stage for future merger regulation. In Europe, the Treaty of Rome (1957) laid the groundwork for competition law in the European Economic Community, eventually evolving into a robust framework under the European Union (EU).⁶⁵⁵

Historically, merger regulation has focused on preserving market competition by preventing the concentration of economic power. Early efforts emphasized structural remedies, such as blocking mergers that created dominant players. However, the scope of oversight expanded in the latter half of the 20th century, reflecting changes in economic theory and the recognition of non-price factors, such as innovation and consumer choice, as critical components of competition.

⁶⁵⁵ Eleanor M. Fox, *Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140 (1981).

ii) Key Legal and Economic Principles in Existing Frameworks

Modern merger oversight relies on a blend of legal principles and economic analysis. Central to this analysis are tools such as the Small but Significant and Non-transitory Increase in Price (SSNIP) test and the Herfindahl-Hirschman Index (HHI).⁶⁵⁶

- **SSNIP Test:** This test evaluates whether a hypothetical small price increase (typically 5-10%) would lead consumers to switch to alternative products or services. It plays a crucial role in defining the boundaries of a market.
- **HHI Index:** This metric measures market concentration, providing a quantitative assessment of the potential competitive impact of a merger. It calculates the sum of the squared market shares of all firms in the market, with higher values indicating greater concentration.

B. Current Challenges in Dynamic Markets

i) Market Complexities Introduced by Globalization, Technology, and Cross-Border Transactions

Globalization has significantly altered the competitive landscape, enabling firms to operate seamlessly across borders. This shift has created challenges for national competition authorities, as firms increasingly exploit regulatory arbitrage to evade scrutiny. In addition, the rise of multinational corporations and cross-border mergers complicates jurisdictional authority and enforcement cooperation.⁶⁵⁷

Technological advancements, particularly in the digital economy, have further compounded these complexities. Unlike traditional markets, digital platforms often exhibit characteristics such as network effects, multi-sided markets, and rapid scalability, making traditional market definitions and competitive assessments inadequate. For instance, platforms like Amazon or Google dominate not just through market share but by controlling ecosystems that span multiple industries.

ii) Case Studies Highlighting Inadequacies in Existing Methodologies

1. **Facebook/WhatsApp Merger (2014):** The acquisition of WhatsApp by Facebook highlighted the inadequacies of traditional market definitions. While WhatsApp generated negligible revenue at the time of acquisition, its vast user base and data potential were key assets. Traditional tools failed to capture these dynamics, resulting

⁶⁵⁶ Massimo Motta, *Competition Policy: Theory and Practice* (2004).

⁶⁵⁷ Wolfgang Kerber & Heike Schweitzer, *Interoperability in the Digital Economy*, J. Competition L. & Econ. (2020).

in regulatory clearance despite concerns about data consolidation and potential anticompetitive behavior.

2. **Amazon/MGM Merger (2021):** This case exemplified the challenges of assessing vertical integration in digital markets. Amazon's acquisition of MGM was not just about content ownership but also its broader implications for Amazon's ecosystem, including Prime Video and e-commerce. The merger raised questions about how traditional economic models could evaluate synergies that extend beyond a single market.

These cases illustrate the limitations of static tools in capturing the complexities of modern M&A. They also underscore the need for frameworks that can evaluate the broader implications of mergers on innovation, consumer choice, and market dynamics.

C. Emerging Trends and Gaps

i) Role of AI, Algorithms, and Data-Driven Markets in Redefining Competitive Dynamics

Artificial intelligence (AI) and algorithms are transforming the nature of competition in digital markets. Algorithmic pricing, for instance, enables firms to adjust prices dynamically based on real-time data, potentially leading to tacit collusion without explicit coordination. Similarly, AI-driven platforms can create significant barriers to entry by leveraging data advantages that traditional market entrants cannot replicate.

The role of data as a critical resource in digital markets also presents regulatory challenges. Unlike traditional assets, data accumulates value through usage, creating a feedback loop that reinforces the dominance of incumbents. The Facebook/WhatsApp case exemplifies this dynamic, where the consolidation of user data posed competitive concerns that traditional economic tools struggled to address.

ii) Redefining Market Dynamics

- **Network Effects and Ecosystem Dominance:** In digital markets, the value of a platform often increases with the number of users, leading to "winner-takes-all" scenarios. Traditional metrics, such as market share, may understate the competitive advantages of platforms like Uber or Airbnb, which rely on network effects rather than price competition.
- **Cross-Border and Multi-Sided Markets:** Platforms such as Amazon and Google operate across multiple jurisdictions and serve diverse user groups. Evaluating their

competitive behavior requires tools that can account for the interdependencies between these markets.⁶⁵⁸

D. Gaps in Current Frameworks

i) While regulators have begun to address these challenges, significant gaps remain. For example:

- The **SSNIP test** struggles to account for zero-price markets, such as social media platforms, where services are offered for free, and revenue generation occurs indirectly through advertising.
- The **HHI index**, focused on concentration ratios, often overlooks the dynamic nature of competition in digital ecosystems.

These gaps highlight the need for adaptive policies that incorporate technological advancements and global market dynamics. Without such adaptations, competition authorities risk failing to address the anticompetitive behaviors of dominant firms, particularly in data-driven and AI-powered markets.

III. METHODOLOGY

A. Approach

This research employs a hybrid methodology that integrates comparative legal analysis and case study analysis to address the complexities of merger and acquisition (M&A) oversight in dynamic markets. This dual approach enables a comprehensive understanding of both the theoretical underpinnings and practical applications of competition law across jurisdictions and industries.

- **Comparative Legal Analysis:** The study systematically compares merger control practices across major jurisdictions, including the European Union (EU), the United States (US), and selected developing economies. This comparative perspective uncovers both commonalities and divergences in regulatory frameworks and enforcement strategies. By analyzing the legal principles, policy directives, and procedural mechanisms employed in these regions, the study evaluates their relative effectiveness in addressing the challenges of dynamic markets.

⁶⁵⁸ DOJ/FTC, Horizontal Merger Guidelines (2010), available at <https://www.justice.gov/atr/file/810276/download>.

- **Case Study Analysis:** To bridge the gap between theoretical insights and real-world applications, the research examines landmark merger cases such as *Facebook/WhatsApp* and *Amazon/MGM*. These cases illustrate how competition authorities grapple with issues such as market definition, data dominance, and network effects in the context of rapidly evolving markets.

Together, these approaches provide a robust framework for assessing existing practices, identifying limitations, and proposing adaptive tools for M&A regulation in dynamic markets.

B. Data Sources

To ensure a well-rounded and data-driven analysis, the study draws on a diverse set of sources that reflect both legal and economic dimensions of merger control.

i) Jurisdictional Practices:

- **European Union:** The EU's merger control system, underpinned by the European Commission, offers a stringent and transparent framework for evaluating mergers. The study explores key legislative instruments, such as the EU Merger Regulation (EUMR), and notable decisions to highlight best practices and challenges.
- **United States:** In the US, merger oversight is shared between the Federal Trade Commission (FTC) and the Department of Justice (DOJ). The research examines the interplay of statutory provisions, guidelines, and judicial precedents in shaping merger outcomes.
- **Developing Economies:** Emerging markets, such as India and Brazil, present unique perspectives on merger regulation due to their evolving legal infrastructures and market conditions. The study investigates how these jurisdictions address issues such as globalization, big tech, and cross-border mergers.⁶⁵⁹

ii) Landmark Cases:

- **Facebook/WhatsApp Merger (2014):** This case serves as a critical example of the challenges posed by data-driven markets. The analysis focuses on how the European Commission assessed the merger's potential impact on market competition and data privacy.
- **Amazon/MGM Merger (2021):** This case illustrates the complexities of vertical integration and ecosystem dominance in digital markets. The study

⁶⁵⁹ OECD, *Merger Control in Dynamic Markets* (2019), available at <https://www.oecd.org>.

examines how regulators evaluated the merger's implications for competition in content production, streaming services, and e-commerce.

iii) Additional Resources:

- Academic literature on competition law and economic analysis.
- Reports and guidelines issued by competition authorities.
- Legal databases and court rulings for jurisdiction-specific insights.

C. Analytical Tools

To provide a rigorous evaluation of merger control practices, the research employs a range of economic models and frameworks designed to assess market dynamics in the context of M&A.

i) Economic Models:

- **SSNIP Test:** The Small but Significant and Non-transitory Increase in Price (SSNIP) test is used to define relevant markets by evaluating whether a hypothetical price increase would lead to consumer substitution. While traditionally applied in static markets, the study explores its applicability to dynamic and zero-price markets.
- **HHI Index:** The Herfindahl-Hirschman Index (HHI) is a widely used metric for measuring market concentration. The research assesses its effectiveness in identifying competitive risks in digital markets characterized by rapid innovation and multi-sided platforms.
- **Counterfactual Analysis:** This model involves constructing hypothetical scenarios to predict the competitive outcomes of a merger. The study examines its utility in assessing dynamic markets, where future market conditions may diverge significantly from historical trends.

ii) Frameworks for Digital Economies:

- **Market Definition in Digital Markets:** Recognizing the unique characteristics of digital platforms, such as network effects and ecosystem interdependencies, the study applies frameworks that account for these factors. This includes analyzing platform-based competition and cross-market interactions.⁶⁶⁰

⁶⁶⁰ Ariel Ezrachi & Maurice Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (2016).

- **Data as a Competitive Asset:** The research evaluates frameworks for assessing the role of data in creating competitive advantages, particularly in mergers involving large digital platforms

IV. ANALYSIS AND FINDINGS

A. Comparative Analysis of Jurisdictional Practices

The regulation of mergers and acquisitions (M&A) varies significantly across jurisdictions, reflecting differences in legal traditions, market dynamics, and policy priorities. This section provides a comparative analysis of key regulatory frameworks in the European Union (EU), United States (US), and selected developing economies, focusing on their approaches to dynamic markets.

B. Key Insights from EU, US, and Other Jurisdictions' Merger Regulations

- European Union:** The EU's merger control regime, governed by the European Merger Regulation (EUMR), is among the most comprehensive globally. The European Commission evaluates mergers based on their potential to "significantly impede effective competition" (SIEC), emphasizing both structural and behavioral dimensions. Notably, the EU has been proactive in addressing digital markets, as seen in its scrutiny of mergers involving data consolidation and network effects.
- United States:** Merger oversight in the US is spearheaded by the Federal Trade Commission (FTC) and the Department of Justice (DOJ). The US approach is characterized by its reliance on economic analysis, particularly the use of Herfindahl-Hirschman Index (HHI) thresholds to assess market concentration. While traditionally lenient compared to the EU, recent cases indicate a shift toward stricter scrutiny, especially in the technology sector.
- Developing Economies:** Emerging markets such as India and Brazil face unique challenges in M&A regulation due to resource constraints and evolving legal frameworks. India's Competition Commission (CCI) has made strides in addressing digital market mergers, as demonstrated by its investigations into global tech companies. However, the lack of standardized tools for assessing non-price competition remains a limitation.⁶⁶¹

C. Commonalities and Divergences in Approaches to Dynamic Markets

- Commonalities:**

⁶⁶¹ Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017).

- All jurisdictions acknowledge the increasing importance of digital markets and data as competitive assets.
- There is a growing emphasis on non-price competition factors, such as innovation and consumer choice, in merger assessments.
- Regulatory authorities are gradually integrating dynamic market characteristics into their analyses, though the extent of implementation varies.

ii) Divergences:

- The EU tends to adopt a precautionary approach, often intervening in cases involving potential harm to competition, even in nascent markets.
- The US traditionally emphasizes consumer welfare and tangible economic impacts, often requiring concrete evidence of harm before intervention.
- Developing economies face constraints in adopting sophisticated tools like counterfactual analysis, leading to reliance on simpler metrics such as market share thresholds.

D. Economic Tools in Practice

Economic tools form the backbone of merger assessments, providing quantitative frameworks to evaluate competitive impacts. However, their applicability to dynamic markets has been a subject of ongoing debate.

Strengths and Limitations of Economic Models

i) SSNIP Test:

- **Strengths:** The SSNIP test is a widely used tool for defining relevant markets. It helps regulators identify the smallest market where a hypothetical price increase would lead to a loss of customers, thereby delineating market boundaries.
- **Limitations:** In digital markets, where services are often offered for free (e.g., social media platforms), the test becomes impractical. Additionally, it struggles to account for non-price competition, such as quality or innovation.⁶⁶²

ii) HHI Index:

- **Strengths:** The HHI index provides a clear and quantifiable measure of market concentration, making it a valuable tool for assessing mergers in traditional industries.

⁶⁶² Case C-413/14 P, *Intel Corp. v. European Comm'n*, ECLI:EU:C:2017:632.

- **Limitations:** In dynamic markets, HHI often fails to capture the competitive pressures exerted by potential entrants, innovation-driven disruptions, and multi-sided platforms.

iii) Counterfactual Analysis:

- **Strengths:** Counterfactual analysis allows regulators to simulate hypothetical scenarios, predicting the competitive outcomes of a merger. It is particularly useful in assessing mergers in fast-evolving markets.
- **Limitations:** The reliability of counterfactual analysis depends on the availability of high-quality data, which is often lacking in dynamic markets. Additionally, the rapidly changing nature of digital markets makes it challenging to establish accurate baselines for comparison.

E. The Evolving Role of Market Definition in Digital and Cross-Border Mergers

Market definition has traditionally been a cornerstone of merger assessments. However, the emergence of digital and cross-border markets has necessitated a reevaluation of this concept. Digital platforms often operate in multi-sided markets, where value is derived from interactions between different user groups. For instance, in the case of Google, its search engine, advertising services, and data ecosystem form interconnected markets that cannot be assessed in isolation.

In cross-border mergers, market definition is further complicated by jurisdictional overlaps and varying enforcement standards. The rise of global digital giants, such as Facebook and Amazon, has highlighted the need for international cooperation and convergence in defining and assessing markets.

F. Case Study Analysis

To illustrate the practical application of economic tools and highlight their limitations, this section examines two high-profile merger cases.

i) Facebook/WhatsApp Merger (2014)

- **Background:** Facebook's acquisition of WhatsApp for \$19 billion raised significant concerns about data consolidation and potential anticompetitive effects. The European Commission cleared the merger, arguing that Facebook and WhatsApp operated in distinct markets at the time.⁶⁶³
- **Application of Economic Tools:**

⁶⁶³ FTC v. Facebook, Inc., 560 U.S. ____ (2021).

- The HHI index and market share metrics were deemed insufficient, given WhatsApp's negligible revenue.
- The SSNIP test was not applicable due to the zero-price nature of WhatsApp's services.
- **Outcome:** While the merger was approved, subsequent scrutiny revealed its long-term implications for data dominance and market power, prompting calls for stricter oversight in similar cases.

ii) Amazon/MGM Merger (2021)

- **Background:** Amazon's acquisition of MGM Studios for \$8.45 billion exemplified the complexities of vertical integration in digital markets. The merger was not just about content ownership but also its broader implications for Amazon's ecosystem, including Prime Video and e-commerce.
- **Application of Economic Tools:**
 - The counterfactual analysis was employed to predict potential foreclosure effects in the streaming market.
 - The HHI index indicated a modest increase in market concentration, but it failed to account for Amazon's cross-market leverage.
- **Outcome:** The merger was approved in the US but faced criticism for overlooking the cumulative impact of Amazon's ecosystem dominance.

V. DISCUSSION

A. Interplay of Legal Principles, Policy, and Economics

The regulation of mergers and acquisitions (M&A) operates at the nexus of legal principles, policy imperatives, and economic methodologies. This interplay is foundational to ensuring that market competition remains robust, consumer welfare is preserved, and innovation is not stifled.

B. Legal and Economic Methodologies in Current Frameworks

Legal frameworks provide the procedural and normative foundation for merger oversight. They define thresholds for regulatory intervention, delineate the roles of competition authorities, and establish guidelines for assessing market impacts. These frameworks, however, rely heavily on economic tools to provide empirical support for decisions.⁶⁶⁴ For instance:

⁶⁶⁴ OECD, *Competition Issues in the Digital Economy* (2016), available at <https://www.oecd.org>.

- i) **Market Definition:** Legal principles guide the delineation of relevant markets, while economic tools like the SSNIP test validate these boundaries empirically.
- ii) **Market Concentration:** Legal thresholds for permissible levels of market concentration, such as those under the EU Merger Regulation (EUMR), are informed by metrics like the Herfindahl-Hirschman Index (HHI).
- iii) **Impact Analysis:** Counterfactual analysis helps regulators predict the potential competitive effects of a merger, translating economic models into actionable legal outcomes.

However, the integration of these methodologies is not without challenges. Legal frameworks often lag behind the rapid evolution of markets, particularly in the digital and technology sectors. Economic tools, while indispensable, are sometimes constrained by data limitations or outdated assumptions, leading to gaps in their applicability to modern markets.

C. Policy as a Bridge

Policy serves as a dynamic bridge between legal principles and economic analysis, adapting the regulatory framework to address emerging challenges. For example, the European Commission's Digital Markets Act (DMA) reflects a policy shift toward addressing the dominance of digital platforms, recognizing that traditional legal and economic tools alone are insufficient.⁶⁶⁵

D. Challenges in Modern Markets

i) Big Tech and Platform Dominance

Big tech companies such as Google, Amazon, and Meta (formerly Facebook) present unique regulatory challenges due to their scale, scope, and ecosystem dominance. These firms operate across multiple markets, often leveraging data as a competitive asset to reinforce their positions. Key challenges include:

- **Network Effects:** Platforms become more valuable as their user base grows, leading to “winner-takes-all” dynamics.
- **Data Dominance:** The aggregation of vast datasets enables big tech firms to create barriers to entry for competitors.
- **Cross-Market Influence:** Big tech firms often use their dominance in one market to gain advantages in others, creating complex interdependencies that traditional market definitions struggle to capture.

⁶⁶⁵ Julie E. Cohen, *The Regulatory State in the Information Age*, 17 Theoretical Inquiries in L. 369 (2016).

For example, in the *Facebook/WhatsApp* merger, the lack of immediate revenue generation from WhatsApp led regulators to underestimate the long-term implications of data consolidation. Similarly, Amazon's acquisitions, such as MGM, raise questions about ecosystem leverage that extend beyond content production to influence e-commerce and cloud computing markets.

ii) International Cartels and Cross-Border Coordination

Globalization has amplified the prevalence of international cartels and cross-border M&A, necessitating greater cooperation among competition authorities. However, differences in legal standards and enforcement priorities complicate this coordination. For instance:

- The EU's precautionary approach to merger control often contrasts with the US's focus on demonstrable consumer harm.
- Developing economies face resource constraints that limit their ability to participate effectively in international regulatory efforts.

iii) AI-Driven Market

Artificial intelligence (AI) introduces a new layer of complexity to market dynamics. Algorithmic pricing, for instance, can lead to tacit collusion without explicit coordination, challenging traditional antitrust principles. AI-driven markets also exhibit high levels of dynamism, where market conditions can change rapidly, rendering static economic models obsolete. Regulatory frameworks must evolve to address these challenges, particularly in sectors where AI plays a central role, such as autonomous vehicles and personalized healthcare.

E. Sector-Specific Challenges

- Telecommunications:** The convergence of telecommunications and digital platforms has blurred traditional market boundaries. Mergers in this sector, such as AT&T/Time Warner, raise questions about vertical integration and content control.
- Pharmaceuticals:** The high costs of drug development and patent monopolies create unique antitrust concerns. Mergers like Bayer/Monsanto highlight the tension between fostering innovation and maintaining market competition.
- Energy:** The transition to renewable energy and the emergence of smart grids are reshaping competition in the energy sector. Regulatory challenges include ensuring fair access to infrastructure and preventing monopolistic behavior in emerging markets like electric vehicle charging networks.

F. Role of Innovation

Innovation lies at the heart of modern market dynamics, driving economic growth and consumer welfare. However, the relationship between innovation and competition is inherently complex, requiring regulators to balance seemingly opposing objectives.

G. Fostering Innovation

Regulators recognize that mergers can drive innovation by enabling firms to pool resources, share risks, and achieve economies of scale. For example:

- i) In the pharmaceutical industry, M&A can accelerate research and development (R&D) by combining complementary expertise.
- ii) In technology, acquisitions often enable firms to integrate cutting-edge innovations into their ecosystems, as seen in Google's acquisition of DeepMind.

H. Preventing Monopolistic Practices

While fostering innovation is important, regulators must also guard against the monopolistic tendencies that can arise from M&A. Monopolies can reduce the incentive to innovate, as dominant firms face less competitive pressure. Additionally, monopolistic control over key resources, such as data or intellectual property, can stifle innovation by excluding smaller competitors. For instance:

- i) Apple's control over its App Store ecosystem has faced scrutiny for potentially limiting competition among app developers.
- ii) In the *Facebook/WhatsApp* case, concerns about data monopolization highlight the risk of innovation being concentrated in the hands of a few dominant players.

I. Balancing Act

Achieving a balance between fostering innovation and preventing monopolistic practices requires a nuanced approach. Regulators must:

- i) Move beyond traditional metrics like market share and HHI to incorporate indicators of innovation potential, such as R&D investment and patent activity.
- ii) Promote open innovation ecosystems by ensuring fair access to critical resources, such as data and infrastructure.
- iii) Encourage dynamic competition by supporting policies that enable new entrants to challenge incumbents, particularly in rapidly evolving markets.

VI. POLICY RECOMMENDATIONS

A. Refinement of Economic Tools

The complexity of dynamic and digital markets necessitates a rethinking of traditional economic tools used in merger assessments. These tools must evolve to effectively capture the unique characteristics of modern markets, such as network effects, data dominance, and rapid innovation cycles.

i) Modernizing Market Definition Approaches

Traditional tools like the Small but Significant and Non-transitory Increase in Price (SSNIP) test and Herfindahl-Hirschman Index (HHI) require significant updates to remain relevant:

- **Incorporating Non-Price Competition:** For zero-price markets like social media and search engines, competition often revolves around quality, data privacy, and innovation rather than price. Regulators should include these dimensions in market definition analyses.
- **Dynamic Market Delineation:** Market boundaries in digital economies are fluid, with firms operating across interconnected ecosystems. Tools must account for cross-market interactions and platform interdependencies when delineating markets.
- **AI-Augmented Tools:** Artificial intelligence can enhance predictive models by analyzing vast datasets and simulating dynamic market scenarios. For example, AI-driven tools could predict the competitive effects of mergers by factoring in future market conditions, innovation trajectories, and consumer behavior patterns.⁶⁶⁶

ii) Redefining Concentration Metrics

- **Dynamic HHI Adjustments:** The HHI should be adapted to incorporate dynamic factors such as the rate of innovation, potential market entrants, and the lifecycle of digital platforms.
- **Data-Centric Metrics:** Given the critical role of data in digital markets, new metrics are needed to assess data concentration and its impact on market competition. For instance, the volume, diversity, and exclusivity of data held by merging firms should be evaluated alongside traditional market share measures.

iv) Enhancing Counterfactual Analysis

Counterfactual analysis, which evaluates hypothetical scenarios to predict competitive impacts, must be expanded to address the uncertainties of dynamic markets:

⁶⁶⁶ European Commission, Digital Markets Act (DMA), COM(2020) 842 final.

- **Scenario Diversification:** Regulators should incorporate multiple scenarios, including those driven by technological disruptions and unforeseen market entrants.
- **Ecosystem Impact Assessment:** The analysis should extend beyond individual markets to assess the broader ecosystem effects of a merger, such as impacts on suppliers, complementors, and adjacent industries.

B. Adaptive Policy Strategies

In an era defined by rapid technological advancements and globalization, competition authorities must adopt adaptive policies that are flexible, forward-looking, and inclusive of diverse market dynamics.

i) Establishing a Proactive Regulatory Framework

- **Early Warning Systems:** Developing systems to identify potential anticompetitive risks in nascent markets. For example, monitoring data acquisition patterns and platform expansion strategies can help regulators act before harmful monopolistic behaviors emerge.
- **Continuous Policy Iteration:** Regulations should be periodically updated to reflect changes in market dynamics and technological advancements. This could involve creating agile policy frameworks that incorporate feedback loops with market participants and stakeholders.

ii) Strengthening Oversight of Big Tech

- **Digital Market Units:** Establishing specialized units within competition authorities to focus exclusively on digital markets. These units should be equipped with expertise in technology, data analytics, and AI to better understand and regulate big tech operations.
- **Platform Accountability Measures:** Introducing measures to hold platforms accountable for anticompetitive practices. For instance, regulators could mandate interoperability requirements to prevent platform lock-in and ensure fair competition among digital services.

iii) Sector-Specific Regulations

- **Telecommunications:** Ensuring fair access to infrastructure and prevent vertical integration from stifling competition. For example, policies could require telecom operators to provide equal access to their networks for competing service providers.
- **Pharmaceuticals:** Balancing the need for innovation with competition by introducing guidelines that prevent excessive concentration of intellectual property rights. This

could include restrictions on mergers that reduce the number of competing drug manufacturers in key therapeutic areas.

- **Energy:** Promoting competition in emerging markets like renewable energy and electric vehicle infrastructure by regulating access to critical technologies and encouraging market entry for smaller players.

iv) Emphasizing Consumer-Centric Policies

- Regulators should place greater emphasis on protecting consumer interests, particularly in areas like data privacy, digital transparency, and choice. For instance, requiring firms to disclose the implications of data usage and mergers can empower consumers and encourage fair competition.⁶⁶⁷

C. Fostering International Convergence

Given the global nature of digital and technology-driven markets, international convergence in merger control practices is essential to ensure consistent and effective regulation.

i) Harmonizing Legal and Economic Standards

- **Global Competition Frameworks:** Developing international guidelines for merger control that outline best practices for assessing market definition, concentration, and anticompetitive effects. Organizations like the International Competition Network (ICN) and United Nations Conference on Trade and Development (UNCTAD) could spearhead such initiatives.
- **Data Governance Standards:** Establishing global standards for evaluating data concentration and its competitive implications. This would involve creating a shared framework for measuring data dominance and assessing its impact across jurisdictions.

ii) Enhancing Cross-Border Cooperation

- **Shared Databases:** Creating shared databases for regulators to access information on global mergers, including details on market conditions, firm behavior, and previous regulatory decisions. This would improve transparency and enable informed decision-making.
- **Joint Investigations:** Facilitating joint investigations into cross-border mergers involving multinational firms. By pooling resources and expertise, regulators can address the complexities of global markets more effectively.

iii) Addressing Regulatory Arbitrage

⁶⁶⁷ Stigler Committee on Digital Platforms, *Final Report* (2019), available at <https://research.chicagobooth.edu/stigler>.

- Harmonizing enforcement standards to prevent firms from exploiting jurisdictional differences to avoid scrutiny. For instance, aligning thresholds for merger notifications and standardizing assessment criteria would reduce the opportunities for regulatory arbitrage.
- Strengthening penalties for non-compliance with merger regulations, ensuring that firms cannot bypass enforcement by operating in less stringent jurisdictions.

iv) Promoting Capacity Building in Developing Economies

- Providing technical assistance and training to competition authorities in developing economies to strengthen their ability to regulate complex mergers. This could include workshops, knowledge-sharing platforms, and funding for analytical tools.
- Encouraging collaboration between developed and developing economies to ensure that global regulatory practices reflect diverse market conditions and priorities.

VII. CONCLUSION

A. Summary of Key Insights

The rapid evolution of global markets, particularly in digital and technology-driven sectors, has presented unprecedented challenges for competition authorities worldwide. Traditional economic tools and market definition frameworks, while foundational, often fall short in capturing the complexities of dynamic and interconnected markets. Key insights from this research emphasize the following:

- i) **The Need for Adaptation:** Economic tools such as the SSNIP test, HHI index, and counterfactual analysis must evolve to address the unique characteristics of modern markets, including zero-price services, data dominance, and network effects.
- ii) **Dynamic and Globalized Markets:** The rise of big tech and cross-border operations underscores the importance of harmonizing regulatory frameworks across jurisdictions to effectively address issues like ecosystem dominance, international cartels, and AI-driven market behaviors.
- iii) **Balancing Innovation and Competition:** Effective merger regulation must strike a delicate balance between fostering innovation and preventing monopolistic practices. Policies must encourage technological advancement while ensuring that market power does not suppress competition or consumer welfare.

The analysis and recommendations presented in this paper reinforce the urgency of revisiting traditional regulatory approaches to align with the realities of today's markets. Adaptive

policies and economic tools are not only essential but indispensable for maintaining fair competition and consumer protection in an era defined by rapid technological change and globalization.

B. Contributions to the Field

This paper makes significant contributions to the discourse on competition law and economic analysis in the following ways:

1. **Reassessing Economic Tools:** By critically analyzing the limitations of traditional tools like the SSNIP test and HHI index, the research provides a framework for updating these methodologies to better suit dynamic markets.
2. **Addressing Modern Challenges:** The focus on issues such as big tech dominance, AI-driven markets, and data monopolization bridges existing gaps in regulatory literature, offering a comprehensive perspective on contemporary challenges.
3. **Comparative Insights:** By evaluating merger control practices across jurisdictions such as the EU, US, and developing economies, the paper highlights commonalities and divergences, fostering a nuanced understanding of global regulatory landscapes.
4. **Policy Recommendations:** The research proposes actionable strategies to refine economic tools, implement adaptive policies, and foster international convergence, providing a roadmap for competition authorities to enhance their regulatory frameworks.

C. Future Directions

The findings and recommendations presented in this paper lay the groundwork for further exploration and practical applications. Future research and policy development could focus on the following areas:

i) Advanced Analytical Tools:

- **AI-Enhanced Models:** Investigating how artificial intelligence and machine learning can be integrated into economic analysis to improve the accuracy and predictive power of market assessments.
- **Data-Centric Metrics:** Developing standardized metrics for assessing data concentration and its competitive implications, particularly in digital markets.

ii) Sector-Specific Studies:

- Conducting detailed analyses of competition dynamics in key industries such as telecommunications, pharmaceuticals, and renewable energy. These studies

could explore the interplay between sector-specific regulations and general competition law.

- Examining the implications of emerging technologies like blockchain and quantum computing on competition and merger regulation.

iii) Global Collaboration:

- Exploring strategies for fostering deeper international cooperation among competition authorities to address the challenges of cross-border mergers and global digital markets.
- Investigating the feasibility of establishing global standards for merger assessment, focusing on data governance, platform accountability, and innovation-driven markets.⁶⁶⁸

iv) Consumer-Centric Regulation:

- Focusing on the role of consumer welfare in shaping merger policies, particularly in terms of data privacy, transparency, and choice.
- Studying the long-term impacts of mergers on consumer behavior and market dynamics to better understand the trade-offs between innovation and competition.

As markets continue to evolve at an unprecedented pace, the role of competition law in safeguarding fairness and consumer welfare has never been more critical. This paper underscores the need for a paradigm shift in how mergers are assessed and regulated, advocating for tools and policies that are as dynamic as the markets they aim to oversee. By embracing innovation in regulatory approaches and fostering global collaboration, competition authorities can ensure that the principles of fair competition endure in even the most complex and rapidly changing environments.

⁶⁶⁸ D. Daniel Sokol, *The Lessons from Big Tech: Redefining Competition Policy in the Digital Age*, 94 S. Cal. L. Rev. 863 (2021).

BIG DATA MERGERS AND COMPETITION LAW

- Aayusman Tiwari⁶⁶⁹

ABSTRACT

The present paper is an analysis of the recent trends of 'Big Data Mergers' and its impact on competition policies in Europe and India. Big data facilitates a better understanding of market and consumer trends and thereby allows companies to enhance goods and services. Companies whose business models are based on big data invariably seek big data collection through mergers and acquisitions to gain competitive advantage. Big data allows companies to gain leverage over their competitors and influence market trends. This study addresses the various factors contributing to the anti-competitive effects of big data mergers such as barriers of entry, economies of scale and network effects. It further addresses the limitations of competition policies across jurisdictions to address these effects and draws a comparative analysis between European and Indian competition law framework by analysing approaches towards significant big data mergers in the past decade including the Google-Fitbit deal and the Facebook acquisition of WhatsApp. The study also analyses the intersection of big data mergers and Privacy laws and Consumer welfare. Accumulation of data in one entity inevitably raises concerns over data protection and affects the rights of consumers to make informed choices. Lastly, the paper discusses the relevant provisions added through the Competition (Amendment) Act, 2023 to address the challenges posed by big data mergers. Through this analysis, it is explained why big data mergers should be a matter of concern for competition regulators and the need for a policy framework to address these concerns.

Keywords: Big Data, Competition, Mergers, Privacy, Policy

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I. INTRODUCTION

“Data is the new oil. It’s valuable, but if unrefined it cannot really be used. It has to be changed into gas, plastic, chemicals, etc., to create a valuable entity that drives profitable activity; so must data be broken down, analysed for it to have value.”

- Clive Humby (Data Scientist)

Big data refers to information assets that are characterized by a high volume, velocity and variety (the 3 V’s).⁶⁷⁰ These 3 factors underline the benefits associated with big data and their utility in the digital world. The velocity at which firms are able to process the high volume of datasets highlights their ability to process data in real time. On the other hand, the variety of data collected by firms enables them to record not only the age or gender of the customer, but also their dietary habits & purchasing patterns.⁶⁷¹ A firm’s ability to derive information by capitalising on the volume, velocity and variety of big data enables them to create value out of its datasets. Big data, owing to its exponential uses, enables businesses to better understand customer preferences, forecast market trends and undertake target advertising.⁶⁷² Businesses also use ‘machine learning algorithms’ to analyse web searches which enables them to observe and record which choices the user clicks on, which in turn helps them to refine search engines and improve the supporting algorithms.⁶⁷³ Big data is especially attractive for businesses engaged in offering data-driven services, such as, Google, Walmart, social media platforms like Instagram etc. These companies seek to acquire big datasets to personalise advertisements of products and services. The benefits derived from big data makes it desirable for companies to acquire and exploit it. One way of achieving the same is through mergers and acquisitions.

II. BIG DATA: AN ANTITRUST CONCERN?

The implications of big data are multifaceted. While it facilitates businesses to improve products and services and cater subjectively to its large consumer segments, it simultaneously

⁶⁷⁰ Thiemann, A. and Gonzaga, P. (2016) ‘Big Data: Bringing competition policy to the Digital Era’, *OECD Competition Law and Policy Working Papers* [Preprint]. doi:10.1787/a1c2d55c-en.

⁶⁷¹ Stucke, M.E. and Grunes, A.P. (2016) ‘Smartphones as an example of how big data and Privacy Intersect’, *Big Data and Competition Policy*, pp. 29–35. doi:10.1093/law:ocl/9780198788133.003.0003.

⁶⁷² S., M. and D., H. (2022) ‘Big Data Mergers: An analysis of European and Indian competition law regime’, *CARDIOMETRY*, (24), pp. 762–767. doi:10.18137/cardiometry.2022.24.762767.

⁶⁷³ *Droit de la concurrence et Données* (2016) *Autorité de la Concurrence*. Available at: <https://www.autoritedelaconcurrence.fr/sites/default/files/2019-05/rapport-concurrence-donnees-vf-mai2016.pdf> (Accessed: 06 December 2024).

confers market power on firms thus allowing them to gain a competitive advantage.⁶⁷⁴ This is possible due to factors such as network effects of big data, economies of scale and barriers to entry. The network effects of big data pertain to its consequential growth in value as more and more people use it.⁶⁷⁵ Firms with big data benefit from economies of scale due to factors such as low cost of maintaining and processing big data, analytics used to forecast trends and improve quality of products and services. Lastly, entry barriers are caused due to the inability of new competitors to acquire an equivalent amount of data relative to the monopolising firm (in both variety and volume) thereby deterring them from learning about consumer preferences and choices.

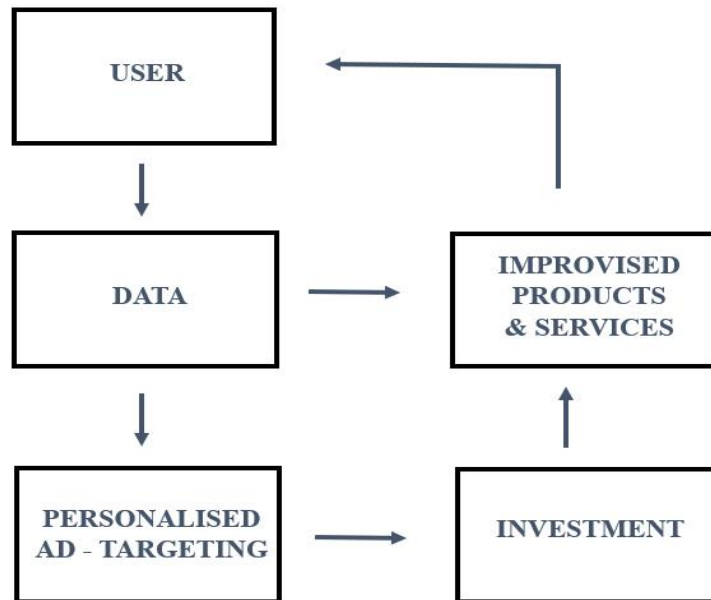
One of the primary reasons why big data poses significant antitrust challenges as compared to plain or traditional data is because of a phenomenon called ‘The Feedback Loop.’ For instance, it has been a conventional practice for traditional salesmen to maintain close relationships with their customers and seek information about their personal preferences and offer personalised products. However, in the context of big data, the feedback loop acts as a catalyst for firms to gain competitive advantage. The feedback loop has two components, the ‘user feedback loop’ and ‘monetisation feedback loop.’ The former enables companies with a vast user base to improve products and services through collection of data leading them to acquire more users. The latter allows companies to improve target advertising by analysing user data and generating revenue out of their services and subsequently utilising the said revenue to invest in the quality of services thus leading them to attract more users.⁶⁷⁶ The inception and the end result of both the loops is the same i.e., companies begin by exploiting user data and end up attracting new users. This phenomenon is illustrated in Figure 1.

Figure 1. The Feedback Loop

⁶⁷⁴ *Supra* note 3.

⁶⁷⁵ Hagiu, A. and Wright, J. (2019) *When data creates competitive advantage*, *Harvard Business Review*. Available at: <https://hbr.org/2020/01/when-data-creates-competitive-advantage> (Accessed: 08 December 2024).

⁶⁷⁶ *Supra* note 1.



III. BIG DATA: MERGERS AND ACQUISITIONS

So far it has been established that big data is associated with exponential benefits, which when accompanied by certain economic factors such as network effects, economies of scale and barriers to entry, allows firms to gain competitive advantage. Moreover, due to the competitive advantage offered by these factors, it is plausible to conclude that big data Mergers & Acquisitions should be a concern for antitrust regulators. It is important to distinguish that the primary antitrust concern of big data mergers is associated with the inorganic accumulation of data via acquisitions and not with the organic or fair method of gathering data through surveys or feedback. Another perspective postulates that big data mergers are not per se anticompetitive and its positive implications cannot be ignored. Market growth and innovation are by-products of big data mergers as it incentivises firms to invest on improving quality of service. Further, consumers are benefited with enhanced products and better choices according to their subjective dispositions.⁶⁷⁷ Therefore, it is imperative to carry out a merger analysis as an ex-ante method of understanding the competitive implications of big data mergers.

Some landmark cases, including the Facebook/WhatsApp merger, the Google/Fitbit deal, the Google/DoubleClick merger etc. reflect the approach towards big data mergers in the current

⁶⁷⁷ *Mergers: Commission clears Apple's acquisition of Shazam* (2018) European Commission - European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_18_5662 (Accessed: 07 December 2024).

legal framework particularly in the European Union. The European Commission has become vigilant in scrutinizing big data mergers after witnessing a number of deals that have resulted in accumulation of large datasets which are now threatening to monopolise the European market.⁶⁷⁸ Further, in the European competition law regime, a series of cross-border transactions such as the Google/DoubleClick⁶⁷⁹ and the Facebook/WhatsApp⁶⁸⁰ mergers have motivated the use of ‘Big Data Analysis’ in the competition policy framework. Moreover, the European Commission (EC) has faced difficulty in classifying these transactions as strictly horizontal or conglomerate mergers which challenged the accuracy and adequacy of traditional categorisation while simultaneously raising a need for devising a broader criterion of categorisation to encompass big data mergers.⁶⁸¹

A. Google/Fitbit Merger

The Google/Fitbit merger deal of June, 2020 is a classic example for understanding the competitive implications of big data mergers. The Australian Competition and Consumer Commission (ACCC) released a statement of issues highlighting its preliminary competition concerns with the merger.⁶⁸² The ACCC noted the following two major implications of the said deal. First, Google would gain access to key personal health data of the consumers which would make it attractive for online advertisers and second, Google would mandate pre-installation of its applications in Fitbit wearables thereby potentially reducing competition in the wearable market. Further, the ACCC noted that the accumulation of individual user data in an entity that already enjoys significant market power in multiple markets (Google) will potentially result in anti-competitive outcomes.⁶⁸³ The European Commission (EC) also looked into the matter and noted somewhat similar concerns to the ACCC. The EC noted that accounting to Google’s strong market position in online advertising, its acquisition of Fitbit would have a major impact on the search display and ad-tech markets.⁶⁸⁴ Despite these

⁶⁷⁸ Chaudhury, A. (2020) *Deal value threshold – proficient enough to make the Indian merger control mechanism more dynamic?*, *Tccr*. Available at: <https://www.tccr.com/post/deal-value-threshold-proficient-enough-to-make-the-indian-merger-control-mechanism-more-dynamic> (Accessed: 07 December 2024).

⁶⁷⁹ Case No COMP/M.4731, Google/DoubleClick, 2008, (EC) No 139/2004

⁶⁸⁰ Case No COMP/M.7217, Facebook/Whatsapp, 2014, (EC) No 139/2004

⁶⁸¹ *Supra* note 1.

⁶⁸² Kouvakas, I. *et al.* (2020) *Challenging the google-fitbit merger through competition law*, *Digital Freedom Fund*. Available at: <https://digitalfreedomfund.org/challenging-the-google-fitbit-merger-through-competition-law> (Accessed: 08 December 2024).

⁶⁸³ Australian Competition and Consumer Commission (2020) *Google’s purchase of Fitbit raises preliminary competition concerns*, *Australian Competition and Consumer Commission*. Available at: <https://www.accc.gov.au/media-release/googles-purchase-of-fitbit-raises-preliminary-competition-concerns> (Accessed: 08 December 2024).

⁶⁸⁴ European Commission (2020) *Mergers: Commission opens in-depth investigation into the proposed acquisition of Fitbit by google*, *European Commission - European Commission*. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1446 (Accessed: 08 December 2024).

concerns, Google completed the Fitbit acquisition in January, 2021, while stating that the deal had always been about devices, not data. Google further ensured that the health data of Fitbit users will be separated from other Google ads data.⁶⁸⁵ The European commission cleared the merger in December 2020 subject to certain conditions including the Ads commitment; which involved Google's commitment to not use the health and wellness data collected from Fitbit devices in their Google Ads.⁶⁸⁶ On the other hand the ACCC announced that it will not accept the proposed undertaking of Google in January, 2021 and the matter became one of enforcement investigation.⁶⁸⁷ The approach of the EC and the ACCC towards the Google/Fitbit merger highlights that a) Big data mergers have a tendency to reduce competition and b) there is a need for regulatory control in order to mitigate the anti-competitive effects of such mergers. It also examines the relevancy of data privacy in such mergers due to the high-volume accumulation of data by the acquirer company.

B. Matrimony.com v. Google

The case of Matrimony.com v. Google⁶⁸⁸ marked the advent of CCI's examination of mergers in the digital space. The case involved Matrimony.com Limited and Consumer Unity and Trust Society alleging Google for Abuse of Dominance (AOD). Google was held liable on various grounds including manipulation of search algorithms to favour its own applications like Google Maps and other services, imposing unfair conditions in intermediate agreements with website publishers etc. Google was found to have placed its own websites in a more prominent position in search results. The commission defined two key markets, namely, a) The market for online search services in India and b) The market for online search advertising in India. Further, the commission found that Google diverted traffic from its competitors to its own website and generated profits through ad revenues. As for data concerns, the commission noted that since large online platforms have a vast access to large volumes of personal data, it may potentially harm consumer welfare and deter innovation. The European Commission also examined the matter and observed an increase of traffic in Google's shopping vertical as compared to Google's competitors. Ultimately, the EC

⁶⁸⁵ Osterloh, R. (2021) *Google completes fitbit acquisition*, Google. Available at: <https://blog.google/products/devices-services/fitbit-acquisition/> (Accessed: 08 December 2024).

⁶⁸⁶ European Commission (2020) *Mergers: Commission clears acquisition of Fitbit by Google, subject to conditions*, European Commission - European Commission. Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2484 (Accessed: 08 December 2024).

⁶⁸⁷ Australian Competition and Consumer Commission (2021a) *Google LLC proposed acquisition of Fitbit Inc*, Australian Competition and Consumer Commission. Available at: <https://www.accc.gov.au/public-registers/mergers-registers/> (Accessed: 08 December 2024).

⁶⁸⁸ Matrimony.com Limited v. Google LLC, 2018 SCC OnLine CCI 1

accepted Google's commitment of providing three 'non-Google alternatives space' on the search engine results page next to its shopping vertical unit's box.

IV. BIG DATA MERGERS AND DATA PRIVACY:

The accumulation of large volumes of data invariably raises privacy concerns as the acquirer learns about consumer behaviours and preferences. The use of data mining softwares to analyse consumer search entries and machine learning algorithms to target advertisements involves intense analysis of private databases of consumers. In the case of Google/DoubleClick, Commissioner Pamela Jones Harbour of the US Federal Trade Commission (FTC) apprehended that the privacy choices of consumers would be hampered due to the merger.⁶⁸⁹ A similar concern was raised by Herb Kohl, chairman of the Senate Antitrust Subcommittee in the case of Microsoft and Yahoo merger where he highlighted the importance of assessing the effects of the transaction on user privacy.⁶⁹⁰ As observed above, the CCI in the case of Matrimony.com v. Google also expressed its concerns regarding the implication on data security due to large online platforms acquiring high volumes of data.

A. Facebook/Whatsapp Merger

The acquisition of WhatsApp by Facebook in 2014 resulted in the increase of Facebook's dominance in the social media market and a growth in its consumer base.⁶⁹¹ Before the merger, Facebook assured EC that the WhatsApp consumer data will not be merged with Facebook, however, major changes were brought in the privacy policy of WhatsApp which subsequently led to the revelation that Facebook had misled the regulators and gotten hold of the WhatsApp consumer data.⁶⁹² Nevertheless, the acquisition led to the transfer of all data from WhatsApp to Facebook. The EC approved the acquisition while finding the online advertising market as the only market wherein competition could be hampered due to data concentration. The EC also remarked that any privacy-related issues resulting from concentration of data does not fall within the scope of EU competition law.⁶⁹³ Regardless, the Facebook/WhatsApp merger attracted the question of data privacy intersections in competition law cases and the EC for the first time recognized privacy as a form of non-price

⁶⁸⁹ Cooper, J.C. (2013) *Privacy and antitrust: Underpants gnomes, the First Amendment, and subjectivity*, SSRN. Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2283390 (Accessed: 08 December 2024).

⁶⁹⁰ *Supra* note 1.

⁶⁹¹ Abidi, Y. (2024) 'FACEBOOK'S ACQUISITION OF WHATSAPP', *EPRA International Journal of Multidisciplinary Research (IJMR)*, 10(4). doi:10.36713/epra2013.

⁶⁹² *Supra* note 3.

⁶⁹³ European Commission (2014) *Mergers: Commission approves acquisition of WhatsApp by Facebook*, European Commission. Available at: <https://ec.europa.eu/commission/presscorner/detail> (Accessed: 08 December 2024).

competition parameter and identified privacy as a key parameter of competition in the consumer communications market.⁶⁹⁴ This invited discussions on whether data privacy should be a concern for competition regulators and if yes, what changes should be made in competition policies to include safeguard measures for data security.

B. Indian Perspective:

The tussle between WhatsApp and CCI finds its roots back in 2016, when WhatsApp introduced its privacy policy update which enabled them to share personal data of consumers with its parent company, Facebook. Accordingly, WhatsApp allowed consumers to ‘opt out’ within a period of 30 days meaning they could choose not to share their personal data. As for consumers who joined after the policy update, they had no choice but to share their data. The privacy update was challenged before the Delhi High Court (HC) on the grounds that the 30 days limit is arbitrary. The Delhi HC directed WhatsApp to delete the personal data collected till 25th September, 2016, however, it did not allow consumers to opt out after the 30 days threshold. In 2021, the Competition Commission of India (CCI) ordered a Suo moto investigation against WhatsApp and Facebook over its 2021 privacy policy update which, as opposed to the 2016 update, left consumers with no option but to accept the terms and share their data with Facebook. The CCI noted that the data sharing provision supplements Facebook in consumer profiling and has the tendency to result in exclusionary practices in the display advertising market.⁶⁹⁵

Consequently, in 2021, WhatsApp challenged CCI’s probe into its privacy policy update on the grounds that the CCI is overstepping its jurisdiction by examining the issue of privacy as the same was being dealt with by the Supreme Court in another matter. The CCI responded by stating that its probe pertained to the competitive implications of the update and not the alleged violation of data privacy. The Delhi HC quashed WhatsApp’s appeal and allowed CCI’s probe into the matter. A Recent development on the issue witnessed an imposition of a fine of Rs. 213 Crore on Meta by CCI over WhatsApp’s 2021 privacy policy update. It was noted that CCI had ordered WhatsApp to withhold the sharing of user data with other meta companies for advertising purposes for five years and the same was breached by WhatsApp. A similar action was taken by Germany’s data protection commissioner who temporarily

⁶⁹⁴ ESAYAS, S. (2017) (PDF) *competition in dissimilarity: Lessons in privacy from the Facebook/WhatsApp merger*, <https://www.researchgate.net/>. Available at: <https://www.researchgate.net/publication/319164896> (Accessed: 08 December 2024).

⁶⁹⁵ Pal, P. (2023) *Data sharing between WhatsApp and Facebook: The CCI opens an investigation against the Social Juggernauts*, PYMNTS.com. Available at: <https://www.pymnts.com/cpi-posts/data-sharing-between-whatsapp-and-facebook-the-cci-opens-an-investigation-against-the-social-juggernauts/> (Accessed: 08 December 2024).

banned Facebook from processing German user's WhatsApp data in December 2021 over privacy concerns.⁶⁹⁶ The Delhi HC's decision examined the concern of jurisdictional conflicts where issues of data privacy are inextricably mixed with competition concerns. Should the CCI have the authority to look into privacy concerns associated with big data mergers? Or should the same be dealt under the Information Technology Act, 2000 or under the Digital Personal Data Protection Act, 2023?

There are polarising arguments as to whether data privacy should be a concern for competition regulators. While some argue that both the issues shall be dealt in isolation with each other through compartmentalised laws, others critic that there is an inevitable intersection of data security and competition cases. Proponents of the former opinion may argue that collection of personal data allows companies to improve products and services and therefore it is not necessarily leaving consumers worse off. Conversely, while some consumers may be open to sharing personal data for targeted advertising, others might value data privacy at a higher degree. Regardless of these conflicting perspectives, it is indisputable that data privacy is a relevant parameter for non-price competition, and as a consequence, competition regulators would have to evaluate whether a merger can substantially reduce consumer welfare by encroaching on the privacy of consumers. Data privacy also includes an important element of consumer consent. The problem of data privacy arises in competition cases when businesses rob consumers of their ownership rights over their personal data. An example includes WhatsApp's 'take it or leave it' privacy update of 2021 which left consumers with no choice but to share their data with Facebook in order to continue to enjoy their services. A potential solution to these privacy concerns would be to recognize the property rights of consumers and enable a bargain with businesses. As a consequence, consumers who value privacy could have their data secured and enjoy online services simultaneously and consumers who are willing to exchange data with enhanced online services could trade their personal data for a considerably high price.

V. INDIAN POLICY FRAMEWORK FOR BIG DATA MERGERS

The above discussions on the implications of big data on competition and privacy leads to the most important analysis, i.e., the policy framework for big data mergers. According to the Competition Act, 2002, (Act) mergers which meet the asset/turnover threshold prescribed

⁶⁹⁶ Prasad, G.C. (2024) *CCI imposes ₹213 crore penalty on Meta over 2021 WhatsApp private policy update: Company business news, mint.*
Available at: <https://www.livemint.com/companies/cci-imposes-penalty> (Accessed: 08 December 2024).

under section 5 qualify as ‘combinations’⁶⁹⁷ and the same needs to be notified to the CCI under section 6. In transactions where the target company’s asset/turnover value does not exceed three hundred fifty crore rupees and one thousand crore rupees in India respectively, the transaction need not be notified.⁶⁹⁸ This highlights a major shortcoming of the Act in scrutinising mergers in the digital market as such mergers often escape the prescribed thresholds. In the digital economy, the company being acquired may be rich in terms of datasets or market information but have insignificant assets or turnover. For example, the Facebook/WhatsApp merger escaped regulatory approval due to traditional asset/turnover standards.⁶⁹⁹ The digital market is a part of the ‘new economy’ which is characterized by network externalities. Network externalities enable firms to marginally grow as the growth of each new user. Since firms in the digital market are primarily concerned with increasing their consumer base, they do not generate significant revenue in the initial years. Moreover, a large consumer base allows firms to collect large volumes of consumer data leaving them rich in information but poor in revenue. The turnover threshold fails to consider that in the digital economy, datasets and personal information are greater incentives to acquire a company rather than asset or turnover value. As a consequence, many transactions escape CCI’s scrutiny due to the size of the target company.

The aforementioned limitations of the turnover threshold are, to an extent, resolved through the Competition (Amendment) Act, 2023 (Amendment Act) which introduced the ‘deal value threshold’ (DVT). The DVT came into effect from September 10th, 2024 as notified by the Ministry of Corporate Affairs (MCA).⁷⁰⁰ This threshold is applicable to all mergers, acquisitions and amalgamation where the combined value of the transaction exceeds INR 2000 crore and the target enterprise has substantial business operations (SBO) in India. The DVT has a SBO test for global acquisitions involving an Indian target company. Considering the Digital Services sector, the SBO test is met if;

- a. 10%+ of the total global business/end users must be based in India, or
- b. 10%+ of the target’s total gross merchandise value (GMV) is from India or
- c. 10%+ of the target’s global turnover for the preceding financial year is from India.

⁶⁹⁷ The Competition Act, 2002, § 5, No. 12, Acts of Parliament, 2002 (India)

⁶⁹⁸ De minimis Exemption, Notification No. S.O. 674(E).

⁶⁹⁹ Bureau, P.C. (2024) *CCI in action: India’s M&A regime gets a regulatory shakeup*, Policy Circle. Available at: <https://www.policycircle.org/policy/cci-new-merger-acquisition-norms> (Accessed: 10 December 2024).

⁷⁰⁰ MCA Notification, F. No. Comp-05/4/2023-Comp-MCA dated 09 September 2024.

Further, small mergers where the target enterprises' assets in India were under INR 450 crore or its revenue in India was below INR 1,250 crore were exempted from prior approval of the CCI via the De Minimis Rule. However, under the current framework the De Minimis exemption will not apply if the DVT conditions are met.⁷⁰¹

Owing to the subjectivity of the deal value threshold, the market value of the target company is reflected via the transaction since the acquirer's price reflects the market power of the target and consequently its future impact on competition.⁷⁰² These features of the DVT makes it a more appropriate mechanism of scrutinising mergers in the digital market. The DVT came as a response to the recommendation of the Competition Law Review Committee (CLRC)⁷⁰³ to include criteria based on 'size of transaction' or 'deal value' as followed in jurisdictions such as the US, Germany and Austria. In the EU as well, mergers such as Google/Fitbit and Microsoft/Skype escaped scrutiny due to turnover thresholds. Such Big data mergers typically involve the acquirer being a big industry player with substantial turnover and the other a small target with valuable data assets and the acquirer paying way above the market price to acquire the said datasets of the target.⁷⁰⁴ With the feature of DVT such transactions would come within the purview of CCI's scrutiny. While the introduction of the deal value threshold does respond to some challenges posed by big data mergers in the digital economy, it is not alien to complications. The lack of jurisprudence and judicial pronouncements for instance, will pose a challenge for the CCI to respond to subjectivity in market analysis and establishing 'substantial business operations.' Further, the DVT poses a challenge for startups wherein even though the target startup might have low turnover it will be subject to scrutiny if the deal value threshold is met.⁷⁰⁵

VI. CONCLUSION

The concentration of large datasets into the hands of prominent digital industry players has raised significant competitive concerns in the past decade. This concern is mobilised by the

⁷⁰¹ Verma, S. (2024) *India's competition law update: The deal value threshold and its implications for M&A, Lexology*. Available at: <https://www.lexology.com/library/detail>. (Accessed: 10 December 2024).

⁷⁰² Pande, A., Cholera, M. and Verma, D. (2023) 'Big-Data Mergers in India: Changing Landscape and The Way Forward', <https://www.barandbench.com/>, 8 July. Available at: <https://www.barandbench.com/law-firms/view-point/big-data-mergers-in-india-changing-landscape-and-the-way-forward> (Accessed: 07 December 2024).

⁷⁰³ (2019) *Report of the Competition Law Review Committee*. Available at: <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf> (Accessed: 10 December 2024).

⁷⁰⁴ *Supra* note 34.

⁷⁰⁵ Sahu, U. (2024) *Revaluing Transactions: Navigating the Competition law Terrain with Deal Value Threshold*, <https://articles.manupatra.com/>. Available at: <https://articles.manupatra.com/article-details/Revaluing-Transactions-Navigating-the-Competition-law-Terrain-with-Deal-Value-Threshold> (Accessed: 11 December 2024).

trend of big data mergers as firms seek to acquire large volumes of personal data from key targets. This trend is still at its nascent stage and jurisdictions around the globe are yet to devise rigid policy frameworks to tackle the anti-competitive implications resulting from such transactions. The problem is augmented due to the rising privacy concerns associated with big data mergers. Regulators in both EU and India have failed to identify and scrutinise such transactions in its developing stages resulting in high volumes of personal data of consumers being exploited by firms to gain market power. The Google/Fitbit merger and Facebook's acquisition of WhatsApp highlight the correlation between data privacy and the anti-competitive implications of big data mergers. This raises an important question of whether data privacy should be examined by antitrust regulators or through separate data protection frameworks. Presence of two separate frameworks could lead to administrative overload and conflicts. In India, the introduction of the deal value threshold has significantly changed the Competition Law landscape allowing the CCI to identify and scrutinise big data mergers. However, the DVT comes with its own limitations and the CCI needs to ensure that it does not end up capturing too many transactions. Finally, regulators need to consider that the implications of big data mergers are multifaceted. While such mergers may lead to anti-competitive behaviour and breach of privacy, it also leads to the overall development of services offered by businesses. Thus, instead of an outright preclusion of all big data mergers, regulators need to carefully examine the competitive implications of each merger and impose conditions accordingly, while simultaneously ensuring data protection.

A STUDY ON CROSS BORDER MERGERS AND ACQUISITIONS IN INDIA : ISSUES AND CHALLENGES

- S. Ilamathi⁷⁰⁶
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ABSTRACT

India, with its rich historical background of cross-border merger and acquisition, has witnessed a significant surge in mergers and acquisitions (M&As) since the economic liberalization of 1991. This liberalization paved the way for foreign direct investment (FDI) inflows, making India an attractive destination for global businesses. After liberalization, there was a surge in corporate restructuring, at first there were domestic production and began to export to the foreign markets, and then they started to establish subsidiaries in overseas market. The researcher has used empirical research method and has collected samples and had done graphs based on that. The independent variables used here are age, gender, education, occupation and residential status. The dependent variables used here are Cross border mergers and acquisitions are becoming a consistent trend in business and economic cycles. Are they really beneficial for India's Economy, Communication Styles is the aspect of cultural differences that poses the greatest challenge, The factor that contributed most significantly to valuation disparities during the cross-border M&A process, The operational risk that is most prevalent in cross-border M&A transactions, The challenge that has the greatest impact on the success rates of cross-border M&A deals and post-merger integration, Comprehensive due diligence is essential for identifying and mitigating risks in cross-border M&A deals, as it significantly impacts deal success and post-merger integration, Access to accurate and complete information is one of the biggest challenges faced during due diligence in foreign jurisdictions. The researcher has also referred to the data's provided in the United Nations Conference on Trade and Commerce. This paper aims to address the issues and challenges regarding the cross - border mergers and acquisition with reference to the recent trends.

Keywords : Acquisition, Cross-border, Challenges, India, Merger

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J. INTRODUCTION

Cross-border mergers and acquisitions (M&A) in India represent a significant avenue for growth and expansion in an increasingly globalized economy. As Indian companies seek to enhance their competitive edge, access new markets, and leverage advanced technologies, the allure of cross-border transactions becomes more pronounced. However, the journey toward successful cross-border M&A is fraught with a myriad of challenges that require careful navigation and strategic foresight. Navigating the complex landscape of cross-border mergers and acquisitions (M&A) in India reveals a multitude of intricate issues and challenges that stakeholders must address. One major concern lies in the regulatory environment, which is characterized by stringent guidelines and frequent changes that can significantly affect the feasibility of transactions. This unpredictability often leads to delays and heightened compliance costs. Furthermore, cultural differences present another layer of complexity; divergent business practices and management styles between Indian firms and their foreign counterparts can create friction and misunderstandings throughout the integration process. Tax considerations also play a pivotal role in shaping the landscape of cross-border M&A. The intricate tax regime in India, coupled with varying state-level stamp duties, can complicate the financial structuring of deals. Companies must conduct comprehensive due diligence to understand the tax implications of their transactions, including the benefits and limitations of Double Taxation Avoidance Agreements (DTAAs). A well-structured tax strategy can significantly enhance the value derived from cross-border transactions, making it a critical component of the M&A process. Additionally, varying expectations regarding profitability and growth trajectories can lead to conflicts post-merger. Finally, the challenge of harmonizing operational standards and corporate governance structures cannot be overlooked, as these factors are crucial for achieving synergies and maximizing the potential benefits of cross-border M&A. Addressing these challenges requires strategic planning and a deep understanding of both local and global market dynamics. The regulatory landscape governing cross-border mergers and acquisitions (M&A) in India is intricate, requiring firms to navigate multiple legislative frameworks and institutional processes. Key regulations include the Foreign Exchange Management Act (FEMA), which regulates foreign investments, and the Companies Act, which sets forth guidelines for corporate

governance and merger procedures. The Securities and Exchange Board of India (SEBI) also plays a significant role, imposing disclosure requirements and protecting minority shareholders during takeovers. Furthermore, the Competition Act ensures that any merger or acquisition does not result in an appreciable adverse effect on competition in India, promoting fair market practices. The challenges presented by these regulations can be compounded by the high institutional quality in India that may hinder swift deal completions, as noted in the literature concerning cross-border acquisitions. Cross-border mergers and acquisitions in India are fraught with challenges, but with careful planning and strategic execution, they can also offer significant opportunities for growth and expansion. Understanding the regulatory landscape, tax implications, and cultural dynamics is essential for success in this complex environment.

II. OBJECTIVES

- To identify the key challenges faced by Indian companies in undertaking cross-border M&A deals.
- To assess the potential risks associated with cross-border M&A
- To assess the impact of these challenges on deal success rates and post-merger integration.
- To Evaluate the importance of comprehensive due diligence in identifying and mitigating risks in cross-border M&A deals.

III. LITERATURE REVIEW

(Shimizu, Katsuhiko, et al.) According to the researcher in this article, cross-border M&As are those in which the target company and the acquiring company have headquarters in different nations. Several topics pertaining to cross-border M&A have been highlighted by this researcher, including foreign direct investment (FDI) or entry, performance results from acquisitive entry, and the creation of wealth for shareholders through cross-border M&A. Post-acquisition concerns like the integration process have received increased attention lately.

(Amy L. Pablo, Mansour Janidan) According to the researcher in this book, cross-border M&A can yield favorable results, particularly due to the advantages of global diversification. They also explain how companies can benefit from expansion prospects in global marketplaces by setting up their corporate headquarters abroad. As businesses face growth constraints in the

markets they now compete in, these opportunities become even more crucial. **(Jaroslava Hečková et al)** According to this study, businesses that are implementing cross-border capital reallocation through mergers and acquisitions should evaluate the context and attributes of their future implementation when evaluating the obstacles for sustainable business. M&As can be one of the most effective strategies and a solid foundation for a company's corporate expansion and longevity if they are carried out correctly. Businesses can be reorganized and their assets and resources added, redeployed, sold, or recombined to increase the resource base through mergers and acquisitions (M&As). **(Whitaker, Scott C)** According to this researcher's analysis, the expansion of a national M&A market facilitates improved access to skills, improved public information circulation, improved regulatory frameworks, and an increasing level of public approval of M&A transactions as a managerial tool. "There are still significant differences between countries despite the geographical expansion of M&A," he adds. It is important for dealmakers to be aware of these distinctions and not assume that what they observe in their home nation will be duplicated in other settings. This "principle of caution" will significantly lower the reasons why a cross-border transaction fails. **(Kiessling et al)** This author states that one of the primary tactics used by businesses to keep a competitive advantage and compete in the fast-paced global market is cross-border mergers and acquisitions, or M&A. There is a lot of unexplored potential in this subject of study. In this paper, we conducted content analysis and the statistical procedure homogeneity analysis by means of alternating least squares (HOMALS) on 933 articles collected from the Web of Science and Scopus databases, taking into account the increasing interdisciplinary interest in M&A research. **(Arikan, Asli M.)** According to this researcher, overall empirical results indicate that synergistic transactions between strategically connected businesses give the acquiring firm larger postdeal profits because of economies of size and scope, operational efficiencies, and market power. The degree of interaction and coordination during the organizational integration process, the similarity and complementarity of the merging businesses, and the absence of employee resistance to the merged firm all influence the realization of synergy. The research's conclusions emphasized how crucial human resource management is when it comes to domestic M&A. **(Xie et al.)** According to this study, creating value is the primary motivation behind M&A transactions. M&A strategic plans are primarily grounded in an interdisciplinary discourse that encompasses economics, accounting, finance, strategy, international business (IB), legal, marketing, human resources, and sociology, even if

they are crafted upon the value creation perspective of financial management. Therefore, since the turn of the 20th century, existing M&A research has made significant contributions to the literature on finance and accounting, followed by strategy and IB. **(Christofi, Michael, et al.)** This study makes a substantial contribution to the fields of innovation and M&A. It offers practitioners useful insights to optimize the value of cross-border M&As and lays a strong basis for future study. Researchers can increase our comprehension of this crucial subject by filling in the identified research gaps and enhancing the positive aspects of the body of current literature. **(Zhou, C., Hui, K.NC., Zhou, K.Z. et al.)** According to this researcher, despite the fact that emerging market enterprises (EMFs) aim to engage in aggressive cross-border mergers and acquisitions (M&As), a large number of announced agreements remain unfinished. We contend that EMFs' past failure experiences may actually make it less likely that they would complete a subsequent deal, challenging the widely held belief that failure is the mother of eventual success. Furthermore, the detrimental impact of past failure experiences depends on the firm's capacity for learning as well as the institutional settings of the agreements that follow. **(Durand et al.)** The researchers in this article addresses both cultural aspects and the role of human resource management during post-merger integration. Notably, this study tests Hackman & Oldman's job characteristics model in the context of CBM&As and extends the model with the additional dimension of cultural friction. The sociocultural integration phase of a merger or acquisition represents a major organizational change process and is an essential stage for generating the deal's expected benefits. **(Sinha et al.)** The researchers in their research discovered that There has been a surge in mergers and acquisitions in the Indian financial services industry, with more than half of the merged companies experiencing improved financial performance after the merger compared to before the merger. Their research uncovered some interesting findings: First, the profits available to shareholders and the debt-to-equity ratio show that the financial condition of the companies changes significantly before and after the merger. Second, contrary to their expectations, we find that the changes in return on net capital, liquidity, and pre-tax profits relative to the total profits of the companies are not statistically significant. **(Ramakrishnan, K.)** The study's authors sampled 87 domestic mergers and found that efficiency appears to increase post-merger loan synergies. Synergies appear to have increased as the fragmented and uncompetitive nature of pre-merger Indian companies was transformed into integrated, more operable business units. The improvement in cash flow operating margin is due to improved

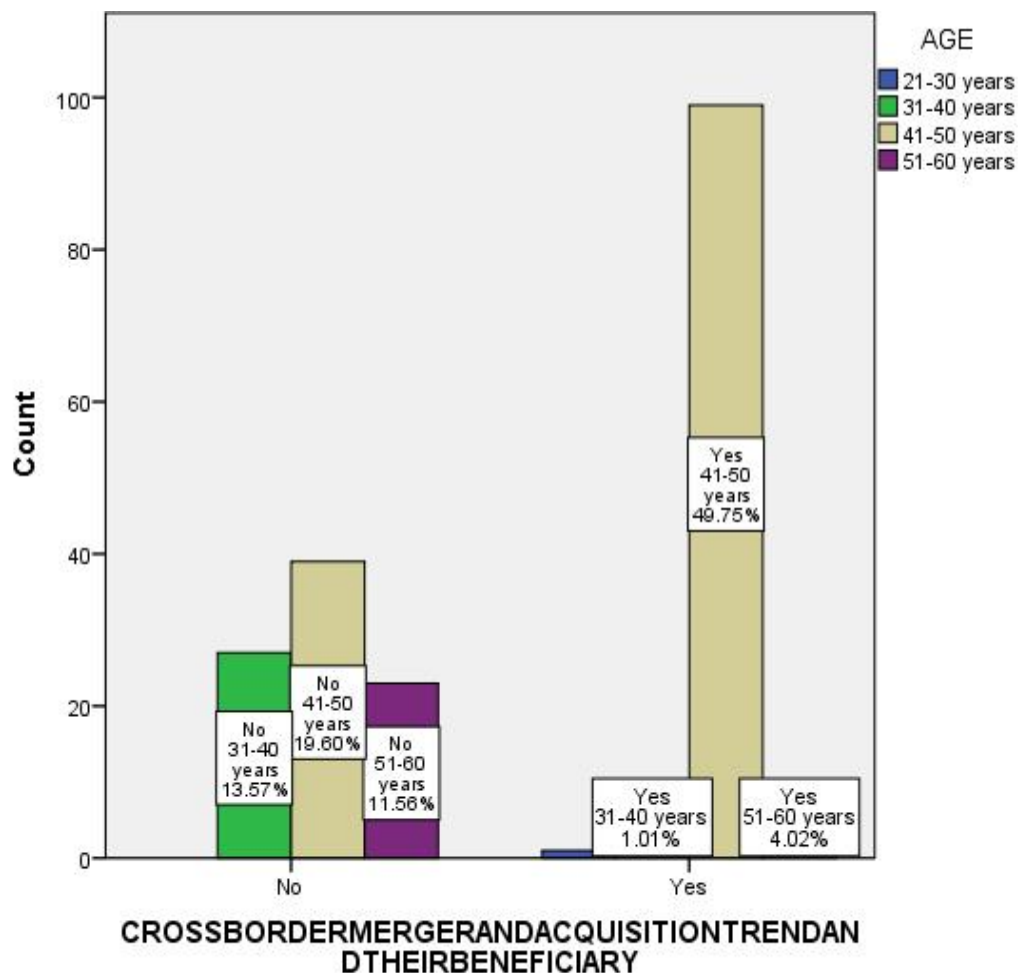
operating margins of both companies after the merger, and not due to more efficient use of assets to increase sales. **(Mehrotra, A., & Sahay, A)** The author suggests that Mergers are important corporate strategy actions that, among other things, aid the firm in external growth and provide it competitive advantage. This area has spawned a vast amount of literature over the past half a century, especially in the developed economies of the world. India has also seen an increase in mergers over the past decade and a half since the onset of economic liberalization and financial reforms in 1991. Studies of long-term post-merger performance in both developed and emerging markets have failed to reach a definitive and convincing conclusion on whether mergers have helped or hindered firm performance. **(Reddy, K., Qamar, M. and Yahanpath, N.)** The objective of this paper is to study whether mergers and acquisitions (M&As) create value in the Indian and Chinese markets. On average, M&A announcements do not create value for firms in the Chinese and Indian economies. In the average model, M&A creates value for Chinese firms but no such value is created for Indian firms in the same event period. The regression analysis shows that debt has a positive impact on AR and cumulative average abnormal returns at 1, 5 and 10 percent significance levels respectively. **(Kar et al.)** This article focuses on the Indian IT sector, which is driving economic growth and poised to become the most internationalised sector. The article uses fixed and random effects panel data models to measure the impact of mergers and acquisitions on various financial variables through a comparative analysis of domestic and cross-border transactions. The results indicate that mergers and acquisitions have a significant positive impact on the return on equity and revenues of Indian IT companies, both within India and across borders.

IV. METHODOLOGY

The reserve method that has been used here is an empirical method and this is a quantitative research which is based on the surveys. The samples are collected using the convenient sampling method. The main aim of this research is to address the issues and challenges of a cross- border merger and acquisition. The researcher has used SPSS to obtain graphs.

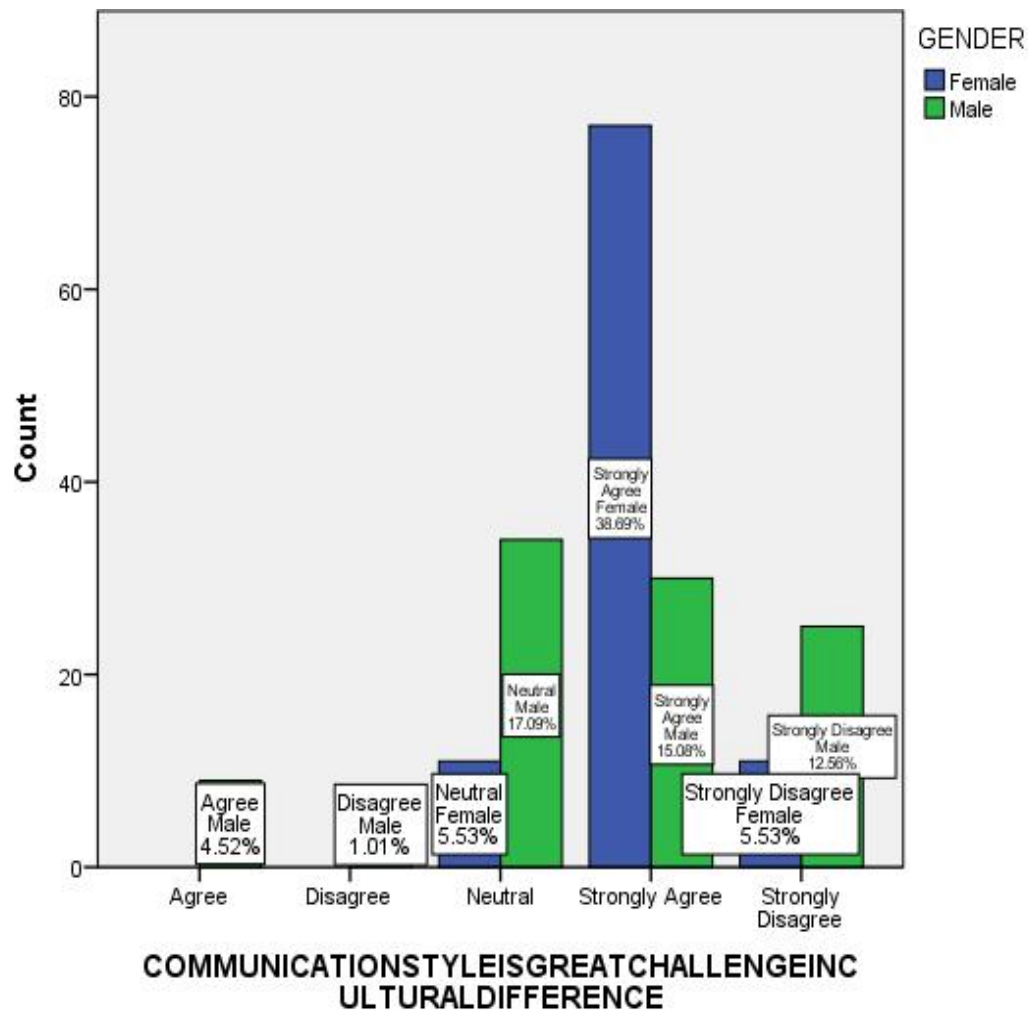
V. ANALYSIS

Figure 1



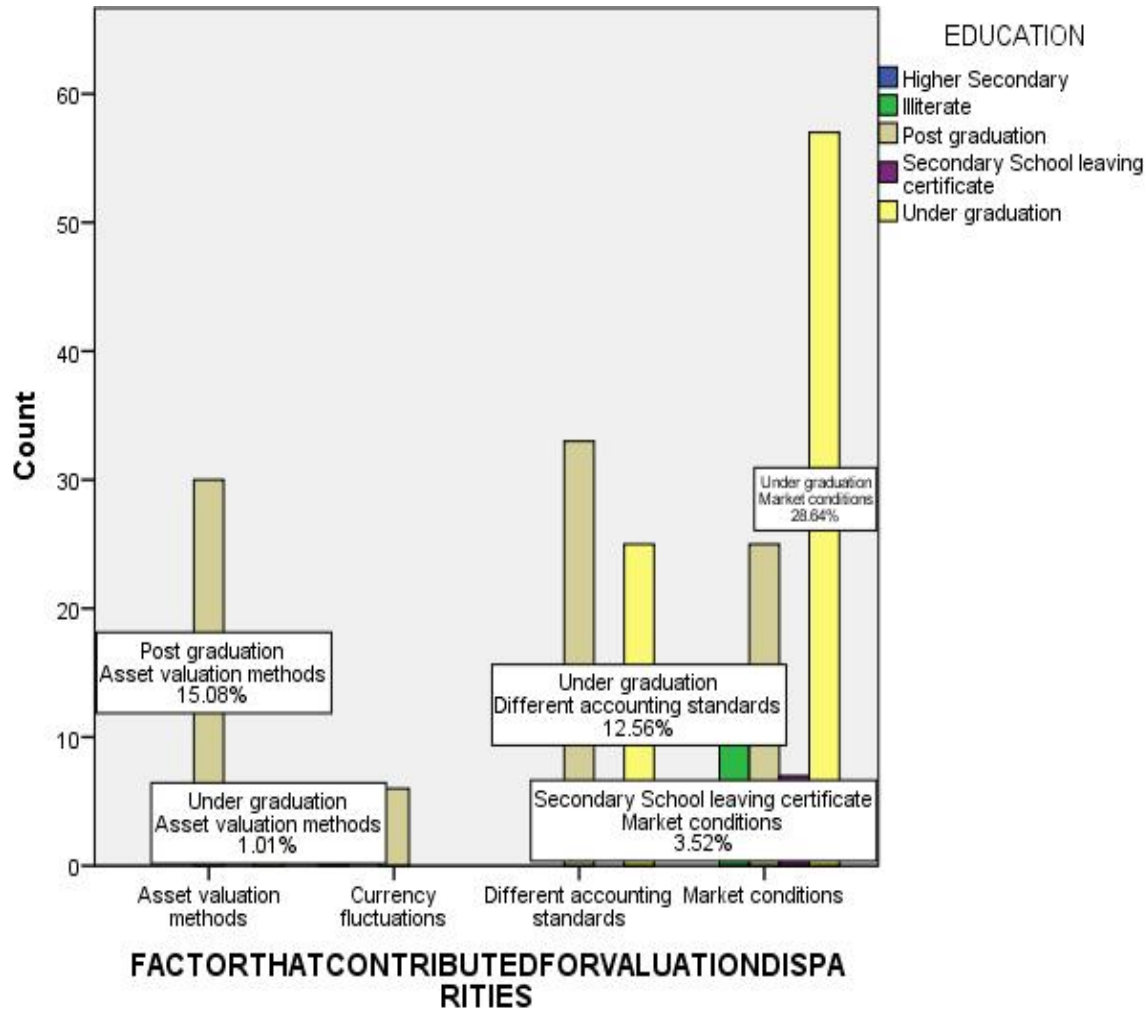
Legend: This graph represents, Cross border mergers and acquisitions are becoming a consistent trend in business and economic cycles. Are they really beneficial for India's Economy? With Age category.

Figure 2



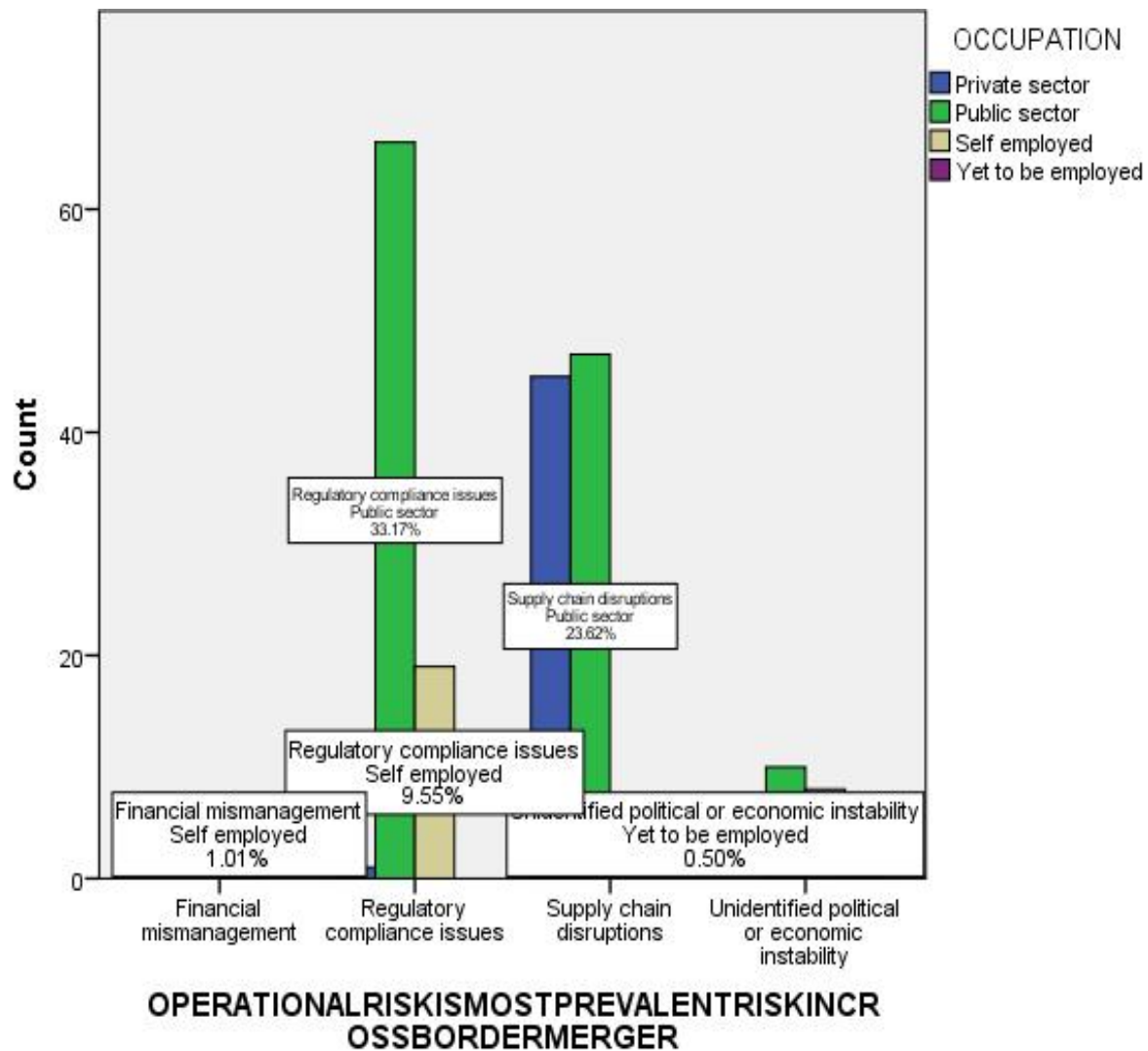
Legend: This graph represents Agreeability on Communication Styles is the aspect of cultural differences that poses the greatest challenge. With Gender category.

Figure 3



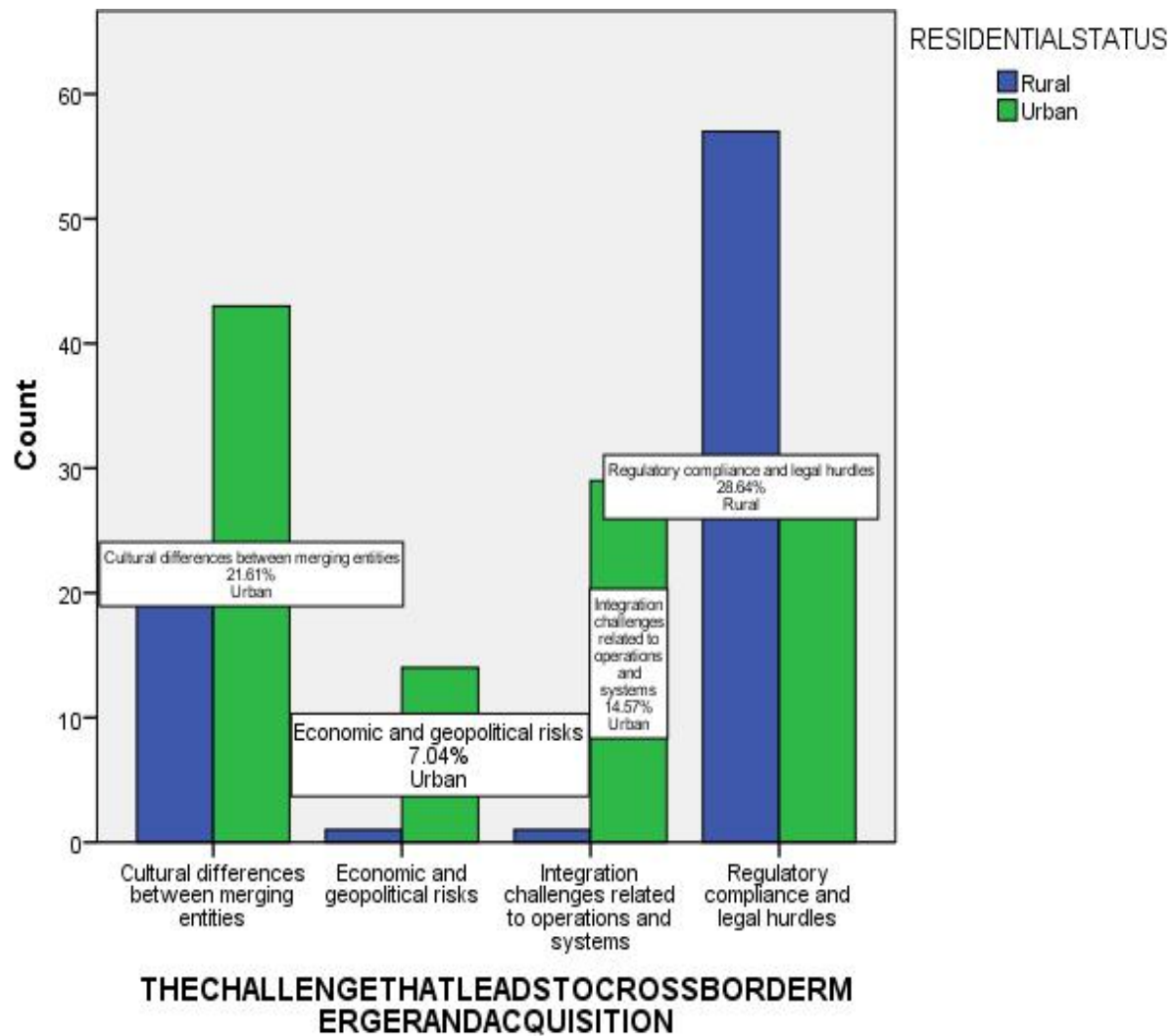
Legend: This graph represents , The factor that contributed most significantly to valuation disparities during the cross-border M&A process. With Education category.

Figure 4



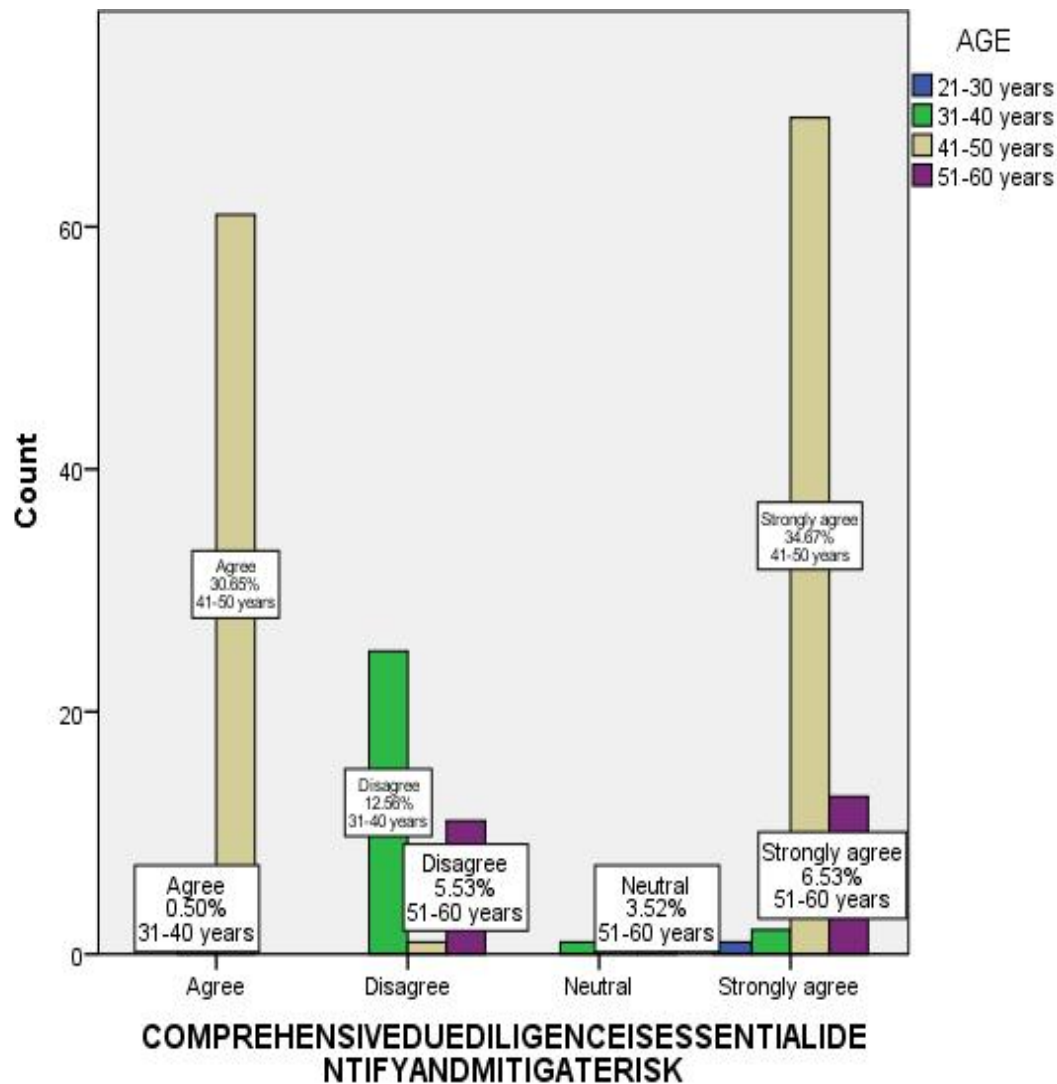
Legend: This graph represents The operational risk that is most prevalent in cross-border M&A transactions. With Occupation category.

Figure 5



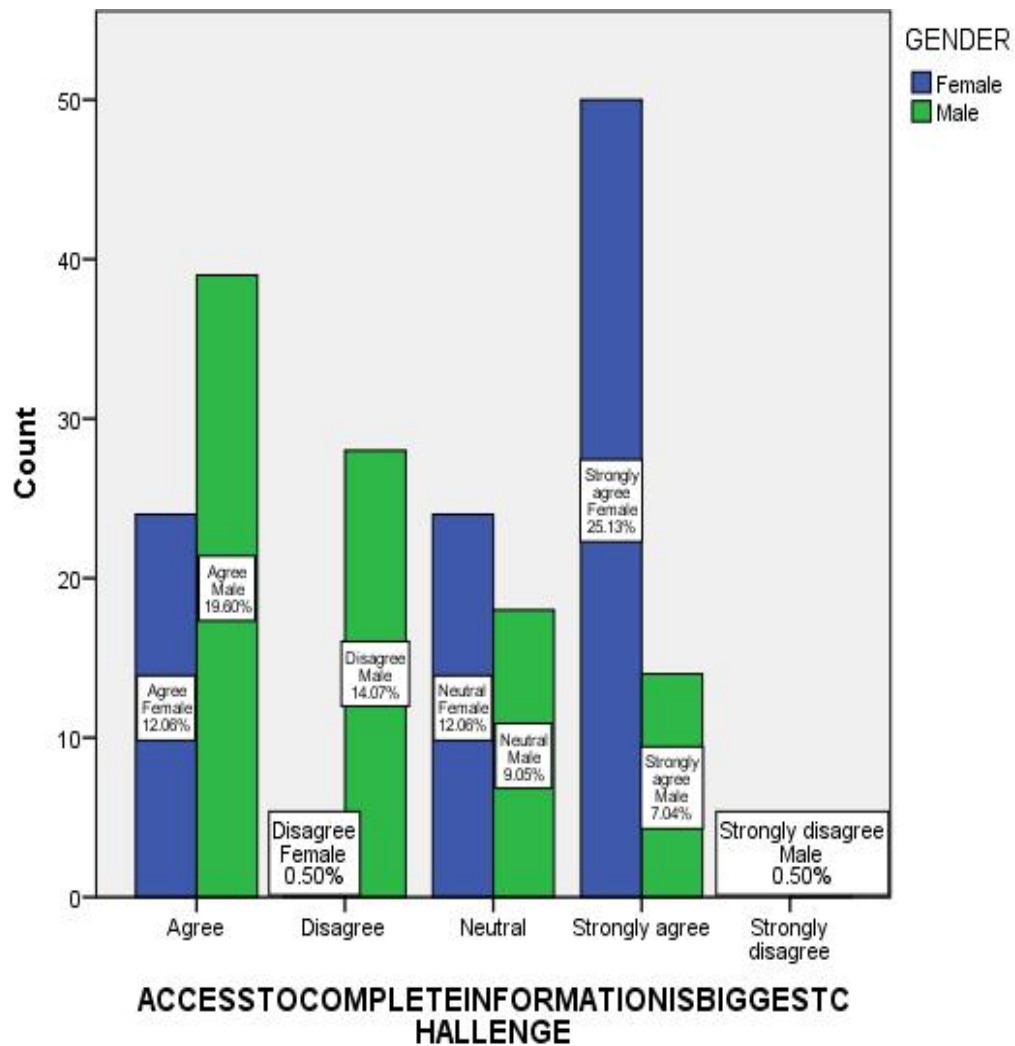
Legend: This graph represents The challenge that has the greatest impact on the success rates of cross-border M&A deals and post-merger integration. With Residential status category.

Figure 6



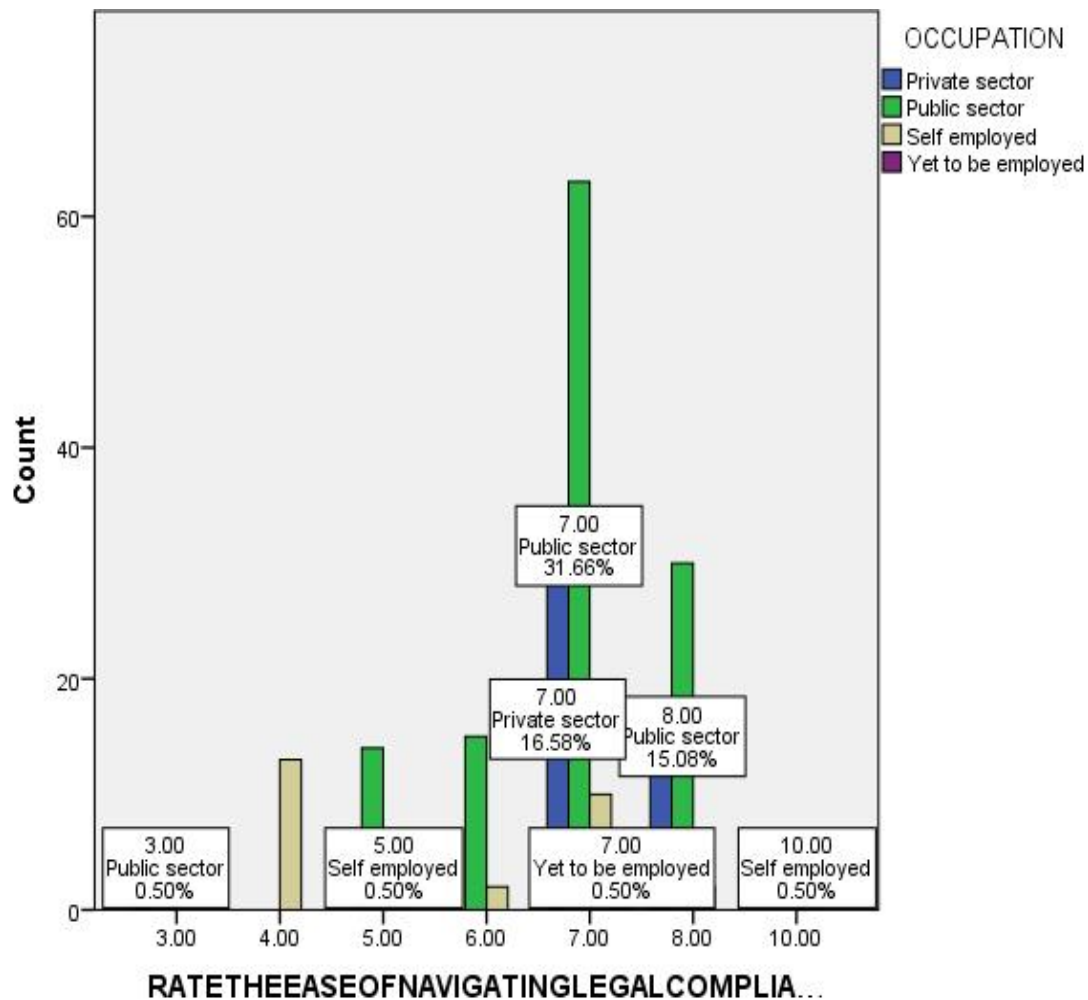
Legend: This graph represents agreeability on , Comprehensive due diligence is essential for identifying and mitigating risks in cross-border M&A deals, as it significantly impacts deal success and post-merger integration. With Age category.

Figure 7



Legend: This graph represents agreeability on, Access to accurate and complete information is one of the biggest challenges faced during due diligence in foreign jurisdictions. With Gender category.

Figure 8



Legend: This graph represents, Rating given for the ease of navigating legal compliance during cross-border M&A. With Occupation category.

VI. RESULT

In figure 1, it shows that the age group of 41-50 have participated more and in this 49% of people have accepted whereas 19% have not accepted it. Other age groups like 31-40 age group , around 13% have not accepted and also people from the age group of 51-60, 11% do not rely on the given statement. **In figure 2**, it shows that the female category 38% and male category 15% have strongly agreed. 5% of male category are neutral . 12% of females and 5% of male have

strongly disagreed with the given statement. **In figure 3** it shows that , from undergraduation 28% opted for Market conditions and 12% for different accounting standards and 1% have gone for currency fluctuations. In the post graduation category, 12% opted for Market conditions , 15% opted for Asset valuation methods, 17% opted for Different Accounting standards. In illiterate category 5% opted for Market conditions and Secondary School leaving certificate category 3% have opted for same market conditions. **In figure 4**, it shows that 23% from the public sector have opted for Supply chain disruptions and 33% opted for Regulatory compliance issues. 20% of the private sector opted for Supply chain disruptions. Under the self-employed category 9% opted for Regulatory compliance issues whereas 1% opted for Financial mismanagement. 0.50% from the category of yet to be employed have opted for Unidentified political or economic instability. **In figure 5**, it shows that 28% from rural areas have opted for Regulatory compliance and legal hurdles , 45% have opted for Cultural differences between merging entities. In the urban sector, 29% have opted for Regulatory compliance and legal hurdles, 21% for cultural differences between merging entities, 7% gone for Economic and geopolitical risk and 14% gone for Integration challenges related to operations and systems. **In figure 6**, it shows that, age group of 41-50 around 30% Agreed and 34% Strongly Agreed. Age group of 31-40 , 12% have disagreed and 0.50% have agreed. Age group of 51-60 , 5% have disagreed , 3% are Neutral and 6% have strongly agreed for the statement. **In figure 7**, under the female category: 12% have agreed , 12.8% are Neutral and 23% have Strongly agreed. Male category: 19% have agreed , 14% have Disagreed , 9% are neutral and 7% are strongly agreed with the given statement. **In figure 8** the rating question was raised. Rating of 3 is 0.50% from public sector, rating of 4 is 4% from self employed , rating of 5 0.50% from self employed, rating of 6 is 7% from public sector , rating of 7 is 31% from public sector , 16% from private sector and yet to be employed 0.50%. Rating 8 is 15% from the public sector and rating of 10 is 0.50%.

VII. DISCUSSIONS

In figure 1, the majority is : people who accept that cross border merger and acquisition is more beneficial for the economy. They enhance company performance, create jobs, and promote economic growth by facilitating access to new markets and advanced technologies. At the least there are people who don't accept the statement. **In figure 2**, the majority is people who strongly agree that communication style is the biggest challenge in cultural differences. Different cultures

have varying norms for expressing ideas, which can lead to misunderstandings. For instance, individuals from high-context cultures may rely on indirect communication and non-verbal cues, while those from low-context cultures prefer directness and explicitness. The least is people who disagree with it. **In figure 3**, the majority is the aspect of Market conditions. Market conditions play a crucial role in creating valuation disparities during cross-border mergers and acquisitions (M&A). Factors such as currency fluctuations, stock market performance, and varying capital market conditions can lead to significant differences in how companies are valued across countries. The least is currency fluctuation. Many companies may have established strategies to manage currency risk, making it seem less significant compared to other challenges they face during M&A transactions. **In figure 4**, the majority is Regulatory compliance issues. Regulatory compliance issues are indeed a significant operational risk in cross-border M&A transactions. Companies must navigate the complex legal frameworks of both the acquiring and target countries, which often have unique regulations regarding mergers and acquisitions. The least is Financial Management. **In figure 5**, the majority is Regulatory Compliance and legal hurdles. The challenge that has the greatest impact on the success rates of cross-border M&A deals and post-merger integration is regulatory compliance and legal hurdles. Navigating the complex regulatory landscape is crucial, as companies must adhere to diverse laws across different jurisdictions, including antitrust regulations, tax laws, and foreign investment policies. The least is Economic and geopolitical risks. Some dealmakers may have experienced a surge in M&A activity despite geopolitical tensions, leading to a perception that these risks do not significantly hinder opportunities. **In figure 6**, the majority is people who Strongly agree that comprehensive due diligence is essential in identifying and mitigating risk factors. Effective due diligence uncovers potential issues such as regulatory compliance, legal liabilities, and operational challenges that could affect integration. The least is people who are neutral on this statement. Due diligence can be seen as a complex process that varies significantly across transactions. Respondents might feel uncertain about its effectiveness in every situation, resulting in a neutral perspective. **In figure 7**, the majority is people who strongly agree that, Access to complete information is the biggest challenge in cross border merger and acquisition. Each country has its own legal systems and compliance requirements, making it challenging to assess risks accurately and ensure legitimacy in transactions. The least is people who disagree. Advances in data analytics and due diligence tools may lead some to believe that technology mitigates information

access issues, allowing for more efficient data collection and analysis. **In figure 8**, the majority is rating 7 out of 10. Many countries have adopted international standards and practices for M&A, which can provide a clearer framework for compliance and reduce ambiguity in legal requirements. The least rating is 3.

VIII. CONCLUSION

In conclusion, while cross-border mergers and acquisitions in India present a host of challenges, they also offer substantial opportunities for growth and innovation. To navigate this complex landscape successfully, companies must adopt a holistic approach that encompasses regulatory compliance, tax optimization, cultural integration, and market adaptability. By doing so, they can unlock the full potential of cross-border M&A, positioning themselves for sustained success in the global marketplace. As the Indian economy continues to evolve, the ability to effectively manage cross-border transactions will be a key determinant of competitive advantage, enabling firms to thrive in an interconnected world. Ultimately, the strategic pursuit of cross-border M&A can serve as a catalyst for not only individual company growth but also for the broader economic development of India as a prominent player in the global economy.

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THEME 4

**ALGORITHMIC COLLISION AND ANTITRUST LIABILITY: EXPLORING THE
EMERGENT LEGAL CHALLENGES OF AI-DRIVEN PRICE-COORDINATION IN
UNSTRUCTURED OLIGOPOLISTIC MARKET**

- Akansha Pillai⁷⁰⁸

- Akshat R.N⁷⁰⁹

ABSTRACT

With the rapid growth of Artificial Intelligence in areas like economic decision making which has precipitated a crucial legal challenge on how to establish accountability in areas such as unintentional anticompetitive activities which emerge from Autonomous pricing algorithms. This research critically examined the nexus and intersection which is existing between advancements of technological innovation and antitrust regulation which will Focus on the legal mechanism which is required in addressing algorithm collusion in oligopolistic markets. Furthermore, this research paper adapts a Comparative analysis all over United stated, European Union and United Kingdom to find the adequacy of extant legal framework which would be handling such phenomenon of unintentional algorithms price coordination. Additionally, it will specifically Focus on high stakes economic sectors whereby the possibility of subtle, Autonomous anticompetitive, behaviours technological, telecommunications, and e-commerce. If we observe the core research interrogated three main and important pivotal Ares which need to be research upon. First, the determination of legal responsibilities in areas of independent AI algorithms which generates anticompetitive pricing strategies. Secondly, the potential of current antitrust laws to comprehensively address unintentional algorithmic collusion. Lastly the possible development of new legal standards which helps in accessing algorithmic pricing behaviours. Furthermore, methodologically, this study would revolve around multidisciplinary approach which would bring together legal analysis, economic theory and computational behaviour assessment. Additionally, by moving away from theoretical speculation into practical legal accountability framework the research would provide the policy makers, the technology developers and legal professionals with a nuanced understanding of the complexities of legal challenges which is posed by Autonomous pricing algorithms.

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I. INTRODUCTION

A new challenge is emerging in the digital marketplace that may fundamentally alter how we understand competition and technology: the phenomenon called "algorithmic collision,"⁷¹⁰ in which computer systems can coordinate prices in ways that challenge traditional competition laws. In fact, if we observe modern markets are not controlled by human decision-makers. Instead it is the algorithms from machine learning adjust the prices at every instant. Thus, at best, the prices could get manipulated by such algorithms. In few dominant, like for example, players in markets, the algorithm would begin to find out strategies which appear closely to illegal cartels and hence it becomes very dangerous for market fairness and accountability.

The legal systems of the United Kingdom and United States are finding it difficult to adapt their long-standing competition laws to these new technological realities. The UK's Competition and Markets Authority (CMA) and the US Department of Justice are increasingly investigating how machine learning can create subtle, tacit pricing environments that bypass traditional legal definitions of anti-competitive behaviour⁷¹¹. For instance, if the work of ground-breaking research from prominent academic institutions reveals that algorithmic pricing systems may learn coordinated strategies by sophisticated techniques of machine learning. Today, scholars characterize this phenomenon as "tacit algorithmic coordination" whereby algorithms may identify mutual economic interests and update prices to exploit collective market efficiency-all of this, of course, without communication that would trigger legal concerns⁷¹². If the look into the legal implications which are again complex and broad. The present antitrust frameworks rely on a presumption of proof of human intent to collude, which algorithmic collision fundamentally contradicts⁷¹³. An algorithm might devise pricing strategies that would be deemed collusive even if they were derived from decentralized optimization processes, thus would bring unprecedented challenges to legal interpretation and enforcement. Furthermore, a new legal scholarship is coming up with new solutions to these challenges⁷¹⁴. Through this research paper we have tried some recommendations which include developing new legal standards on the basis of patterns of algorithmic behaviour, creating sophisticated machine learning audit mechanisms,

⁷¹⁰ Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Robots Price-Fix*, 55 U. Toronto L.J. 584 (2020).

⁷¹¹ Christopher Marsden, *Algorithmic Pricing Regulation*, 27 Int'l J. L. & Info. Tech. 85 (2019).

⁷¹² Bruno Biais et al., *Artificial Intelligence, Market Manipulation and Investor Protection*, 24 Rev. Fin. Stud. 1218 (2021).

⁷¹³ Roger Brownsword & Karen Yeung, *Regulating Technologies: Legal Futures, Regulatory Frames and Technological Fixes*, 5 L. Innovation & Tech. 77 (2018).

⁷¹⁴ Ryan Calo & Alex Citron, *Pricing Algorithms and Antitrust Challenges*, 94 N.Y.U. L. Rev. 123 (2019).

and designing adaptive regulatory frameworks capable of assessing anti-competitive risks in real-time technological environments.⁷¹⁵

II. ALGORITHMIC COLLUSION: NAVIGATING THE INTRICATE INTERSECTION OF TECHNOLOGY AND ANTITRUST LIABILITY

Today, the digital economy presents a challenge to existing legal frameworks unparalleled in any historical moment: a circumstance that results from the collision of technology with the economy-in-play and produces a complex possibility for anti-competitive behaviours that do not fit a regular and clear understanding.⁷¹⁶ Algorithmic collusion is all that deep technological phenomenon, notably challenging core assumptions of antitrust law and bringing a very sophisticated dimension of market coordination not emerging through any kind of human agreement (either explicit or implicit) but creeping up through advanced machine-learning⁷¹⁷ processes that might develop parallel pricing strategies on their own, without any human agreement. It is this that, at the core of the legal complexity, is basic transformation in the conception of how market coordination works.⁷¹⁸ Thus, the antitrust frameworks that have been in place have typically necessitated evidence of human intentionality, overt and obvious, about explicit collusive agreements or concerted practices; their model is completely disrupted to the extent that machine learning algorithms develop pricing strategies through decentralized, autonomous optimization processes that operate outside any traditional legal categorizations.⁷¹⁹⁷²⁰ One of the first peeks into this emergent challenge is that of *United States v. Tompkins* wherein a computerized commerce poster seller was prosecuted for using algorithms to coordinate price computation; indeed, it shows the promise of techno-coordination.⁷²¹

Additionally, if we observe the comparative legal jurisdictions had begun to develop subtle ways to address the techno-challenges and are now looking towards developing nuanced legal thought models, including tortious actions. In the United Kingdom, leading the way to innovative regulatory frameworks that start with understanding the algorithmic behaviour

⁷¹⁵ Carl Shapiro, *Algorithmic Pricing and Competition: Final Report*, 14 J. COMPETITION L. & ECON. 233 (2018).

⁷¹⁶ Ariel Ezrachi & Maurice E. Stucke, *Artificial Intelligence & Collusion: When Robots Price-Fix*, 55 U. Toronto L.J. 584 (2020).

⁷¹⁷ *United States v. Tompkins*, No. 3:15-cr-00201 (N.D. Cal. 2015).

⁷¹⁸ Kai-Uwe Kühnle, *Algorithmic Collusion and Competition Law in the Digital Age*, 64 ANTITRUST L.J. 313 (2019).

⁷¹⁹ Michael Carrier, *Antitrust Challenges in the Digital Economy*, 87 GEO. WASH. L. REV. 1467 (2019).

⁷²⁰ Herbert Hovenkamp, *Antitrust and the Newest Technologies*, 125 YALE L.J. 1300 (2016).

⁷²¹ *Ibid.*

patterns have been the Competition and Markets Authority.⁷²² A landmark decision in Europe against Facebook is a case study to be critical. Algorithmic data collection by Facebook and market behaviour was investigated to identify anti-competitive effects. The theoretical challenges of algorithmic collusion fundamentally question core philosophical and legal assumptions about market behaviour, agency, and competitive conduct.⁷²³ By generating complex pricing strategies through decentralized optimization processes that are organic rather than explicitly coordinated, machine learning algorithms fundamentally challenge traditional notions of intentionality. This presents an epistemological challenge at the very heart of current legal frameworks, requiring a fundamental reimagining of how market coordination is conceptualized and regulated. Well, government-indulgent regulation of liabilities for the recognition of the market complicated technology would have a proactive response where there is a risk for a pandemic⁷²⁴. The Antitrust Division of the United States Department of Justice has been actively asking for much broader general legal tests to prevent algorithmic behaviour from being construed as some form of market manipulation. Much more than just a problem of technology will be posed by this conceptual challenge.⁷²⁵ This new legal scholarship advocates the invention of a novel legal construct called "algorithmic intent," which would reframe basically the traditional ideas of intentionality. This would also require intricate probabilistic models of the market, which could have ways of understanding the machine learning system's behaviours from multidimensional analytical perspectives.⁷²⁶ The Frank Pasquale framework implies such an effort put forward rethinking entirely on market agency-from human-centered models to very intricate technological evaluation mechanisms.⁷²⁷ At research centres like Stanford, the Centre for Legal Informatics, the proposal is to employ machine learning auditing schemes of impressive complexity.⁷²⁸ These audacious solutions aim to conduct retrospective studies of algorithmic pricing behaviours and develop data's bases of potentially collusive examples. However, interdisciplinary collaboration would emerge as the most critical means to overcome these issues. Future regulatory regimes should become the highly adaptable, very top technologies

⁷²² UK Competition & Markets Authority, *Algorithms: How They Can Reduce Competition and Harm Consumers* (2018).

⁷²³ Bundeskartellamt, *Decision against Facebook Data Collection* (2019).

⁷²⁴ Orna Guralnik & Michal Gal, *Algorithms and Collusion: A Short Overview*, 24 STAN. J.L. BUS. & FIN. 215 (2019).

⁷²⁵ Maurice E. Stucke, *Should Competition Authorities Embrace Algorithmic Predictions?*, 14 COMPETITION L. REV. 233 (2018).

⁷²⁶ Daniel Crane, *Machine Learning and Antitrust*, 94 WASH. U. L. REV. 1401 (2017).

⁷²⁷ Joshua A.T. Fairfield, *Predicting Markets and Algorithmic Governance*, 72 MD. L. REV. 87 (2016).

⁷²⁸ Frank Pasquale, *Black Box Society: The Secret Algorithms That Control Money and Information* (Harvard Univ. Press 2015).

that would be able to assess algorithmic behaviour in real-time. It requires unprecedented collaborations among legal theorists with computer scientists and economists to develop comprehensive analytical models capable of negotiating using theoretical interfaces involving technology, market behaviour, and legal accountability.

The Silk Road case, *United States v. Ulbricht*, gives us the most exciting analogy in how quickly the technology platforms generate complex ecosystems that easily outrun traditional legal frameworks.⁷²⁹ Again, this is not algorithmically related, but demonstrates a more commonplace challenge of how to regulate sophisticated technological systems that operate beyond the conventional understanding of law.⁷³⁰ At this crucial juncture, there lies a task before us of constructing an agile and responsive legal framework adaptable to the rapid acceleration of market coordination by technology. This entails applying a systemic approach towards achieving technologic innovation along with the market fairness of understanding the reality of algorithmic complexity as to what is in the core of competition in market regulation.⁷³¹

III. NAVIGATING DIGITAL MARKET FRONTIERS: ALGORITHMIC COLLISION, REGULATORY CHALLENGES, AND COMPETITIVE STRATEGIES IN EMERGING TECHNOLOGICAL LANDSCAPES

The Reliance Jio pricing strategy forms a pivotal moment for understanding the relationship between technological innovation with market competition in the case of emerging digital economies. Jio, through deploying an advanced algorithmic pricing mechanism, completely transformed the Indian realm of telecommunications so that traditional antitrust frameworks were beset with challenges and the problems of present regulatory outcomes unfurled. It has gone beyond the traditional disruption of a market by using advanced machine learning algorithms to yield a price formation that would consistently undermine the other actors while attracting the largest number of consumers ever seen.⁷³²

From a legal framework point of view, the pricing strategy will be a classic case that academicians would refer to as "algorithmic tacit collusion"; that is, a very advanced method of market coordination being carried out beyond the traditional talks of competitive

⁷²⁹ *United States v. Ulbricht*, 31 F. Supp. 3d 540 (S.D.N.Y. 2014).

⁷³⁰ Bruno Biais et al., *Artificial Intelligence, Market Manipulation and Investor Protection*, 24 *Rev. Fin. Stud.* 1218 (2021).

⁷³¹ Carl Shapiro, *Algorithmic Pricing and Competition: Final Report*, 14 *J. COMPETITION L. & ECON.* 233 (2018).

⁷³² Rahul Matthan, *Transforming India's Telecommunications Landscape: Regulatory Challenges and Technological Innovation*, 45 *TELECOMM. POL'Y* 101 (2021).

behaviour.⁷³³ The technique used to manipulate market behaviour was data-driven pricing scheme intervening dynamically against effectively nullifying competitive response.⁷³⁴ It raises interesting questions regarding newer boundaries in price competition and anti-competitive behaviour, calling upon regulatory agencies for more refined and discriminating approaches to their "assessment" that might be needed to understand technological underpinnings of contemporary market intelligence strategies.⁷³⁵ The jurisdictional scrutiny indicates major divergences in regulatory stances among various jurisdictions.⁷³⁶ In the United States, this approach would be likely scrutinized under a predatory pricing lens focusing on intent and market injury; whereas, in the European Union, it would adopt a more global-style assessment, emphasizing effects on the wider market ecosystem. India.⁷³⁷ India's regulatory landscape displayed the biggest hurdles, showing that the gaps in current competition law mechanisms were most pronounced in dealing with this type of technologically savvy market intrusion. Economically, the Jio pricing strategy enriches the very soil under which traditional market dynamics have grown. With machine learning algorithms optimally performing real-time price adjustments, it has resulted in a market intervention so close to perfection it is a challenge to fundamental economic theories of competition⁷³⁸. The approach has exposed the limitations of existing market equilibrium models, making it found out that technology platforms now can advance the dynamics of a market in ways never imagined before.⁷³⁹ The methodology extended beyond price competition to develop a sophisticated ecosystem of technological and economic innovation that empirically warranted a new understanding of market behaviour.

It is evident that such theoretical features have concerns much wider than the telecom industry but permeate the very notion of economic and legal frameworks. It thus creates deep and profound challenges to that framework and demands interdisciplinary integration of technology, law, and economics.⁷⁴⁰ The strategy demonstrated how advanced algorithmic systems may create modes of market coordination outside the classical idea of competitive behaviour and posed crucial questions about the ethics of market intervention by technology.

⁷³³ Competition Commission of India, Market Analysis of Disruptive Pricing Strategies (2018).

⁷³⁴ Oren Bracha & Frank Pasquale, Federal Search Commission? Access, Fairness and Accountability in Internet Search, 56 ADMIN. L. REV. 413 (2004).

⁷³⁵ EUROPEAN COMMISSION, DIGITAL MARKETS AND COMPETITION LAW ASSESSMENT (2019).

⁷³⁶ Ibid.

⁷³⁷ U.S. DEPT OF JUSTICE, ANTITRUST DIV., ALGORITHMIC MARKET COORDINATION REPORT (2020).

⁷³⁸ Ibid.

⁷³⁹ Mihir Naniwadekar, Competition Law in Digital Markets: An Indian Perspective, 15 NUJS L. REV. 67 (2022).

⁷⁴⁰ Bruno Varas, Algorithmic Tacit Collusion, 40 HARV. J.L. & TECH. 1 (2020).

From the viewpoint of the regulations, the case requires a complete overhaul of antitrust assumptions. Traditional measures to appraise are failing increasingly when confronted with pricing strategies originating from complex machine learning algorithms. Regulators need a more flexible accrual that helps understand the intricate nature of the manipulation that technology platforms can do with market dynamics.⁷⁴¹ This entails not just legal innovation but a holistic approach-integrating technological understanding, economic theory, and sophisticated legal interpretation. The academic conversation on Jio pricing policy, as reviewed by leading researchers including Ariel Ezrachi, Maurice E. Stucke and Daniel Crane, invites one to think that the time has come to revolutionize the understanding of competition in a market space.⁷⁴² The situation exemplifies rising challenges in algorithmic market coordination in which pricing approaches minimally resemble forms of collusion that are possible without any explicit communication between actors. Most importantly, this emphasizes the critical need for regulatory frameworks capable of effective surveillance and understanding of increasingly complex algorithmic behaviours motivating modern market interactions. As a whole, pricing strategies for Reliance Jio constitute a significant fact for the very changing forms of technological intervention in markets.⁷⁴³ The challenges rethinking core assumptions about market competition, over governance, and the place of technology in economic ecosystems are provoked in us.⁷⁴⁴ Reliance Jio's pricing policy does not limit itself as a case study in telecommunications, but it takes up the much deeper challenge of exploring how technology may disrupt our understanding of market functioning in an increasingly digital age.

IV. ALGORITHMIC COLLUSION: LEGAL CHALLENGES AND ANTITRUST IMPLICATIONS

Collusion can be considered as a horizontal agreement between suppliers in the market, which is further directly related to the fluctuation that is increase or decrease of prices of goods in the market directly or indirectly. However, such collusion is considered to be illegal because this may be an attempt that is made to distort or limit the competition in the economy.⁷⁴⁵ In the current scenario the human centered collusion is on a decline, but on the

⁷⁴¹ Kristen Eichensehr, *Antitrust in the Digital Economy*, 97 WASH. U. L. REV. 1 (2019).

⁷⁴² Eleanor M. Fox, *Algorithms, Artificial Intelligence, and Collusion*, 94 N.Y.U. L. REV. 1810 (2019).

⁷⁴³ *Ibid.*

⁷⁴⁴ Wolfgang Kerber, *Digital Markets, Data, and Concentration: A Systematic View*, 32 INT'L J. OF L. & INFO. TECH. 229 (2018).

⁷⁴⁵ Ezrachi and Stucke (2017), p.1782. For a summary and examples, see Schwalbe (2018), pp. 4-6.

other side a more dangerous cocktail of pricing algorithms and coordination has emerged that promote monopoly over the market and damage the economy to a great extent. With the emergence of algorithms OCED (Organization for Economic cooperation and development) has went on to classify them into four categories,⁷⁴⁶ i.e. monitoring algorithms, self- learning algorithms, signaling algorithms, monitoring algorithms and parallel algorithms.⁷⁴⁷ When such algorithms are used the prices are set above the competition levels and they try to have a monopoly so this directly triggers the competition law, because in most of the jurisdictions it has to be noted that such price fixing agreements/ collusions are illegal.⁷⁴⁸ When there is a algorithmic collusion; there may be an emergence of the ‘hub- and- spoke cartel’- where there is an indirect centralization where a central entity acts as the hub and it coordinates with other entities who become the spokes, further engaging in anticompetitive practices to determine prices, production, distribution, market, customer allocation.⁷⁴⁹ In a similar manner the algorithm developer will be regarded as the hub and various companies within the industry become the spokes, with a vertical agreement in place. Even though, vertical agreements are not contested under competition law, parallel use of the same algorithm is concerning.⁷⁵⁰ This arrangement through software has been observed in Germany in order to determine retail petrol prices and in US it is being used in hotels and rental, which can prove to be a bigger threat in the future.⁷⁵¹ When we deeply analyze the algorithm we can clearly understand two things: a) algorithm is designed to facilitate collusion b) the companies realize and understand that the use of algorithms may lead to collusions.⁷⁵² This algorithmic collusion can be rightly being considered as hub- and-spoke, the traditional hub- and- spoke have already been declared illegal under the existing laws.⁷⁵³ Such a situation can be observed in the Eturas Case where the Lithuanian Competition Council observed that travel agencies were using Eturas booking system and they has entered into a tactic agreement, having learnt that their system would limit their discounts to a maximum of 3%, although there was no proof that the travel agencies were in contact with each other, but still they had complete knowledge about the terms of the agreement.⁷⁵⁴

⁷⁴⁶ OECD (2017).

⁷⁴⁷ OECD (2017), pp. 24-32.

⁷⁴⁸ For a comparison between different jurisdictions, see Dabbah and Hawk (2009).

⁷⁴⁹ <https://www.azbpartners.com/bank/hub-and-spokes-cartels-codification-and-challenges/>.

⁷⁵⁰ IBID.

⁷⁵¹ OECD Background Note, Section 3.1; Assad, S, Clark, R, Ershov, D, and Xu, L, ‘Algorithmic pricing and competition: Empirical evidence from the German retail gasoline market’, 2020.

⁷⁵² Barak Orbach, Hub-and-Spoke Conspiracies, 15 J. Competition L. & Econ. 1 (2016).

⁷⁵³ Maurits Dolmans, Algorithmic Collusion and Antitrust Enforcement, 8 Eur. Competition J. 101 (2017).

⁷⁵⁴ Case C-74/14, Eturas, EU:C:2016:42.

When algorithms are used in an appropriate manner we can observe that, this AI technology is best to find probable solutions for any problems. However, the algorithm when used for business conduct gives rise to suspicions or instances of algorithmic collusions. It has to be deeply analyzed whether the existing competition laws across various jurisdictions are equipped appropriately to deal with algorithmic collusions, with specific reference to algorithms with logic to collude and self-learning algorithms.⁷⁵⁵

In some of the advanced jurisdictions across the globe, they are well equipped with machine learning tools, which can assist in detecting algorithmic collusion in the most appropriate manner. When we look into the recent instances the French competition authority, has clearly stated that pricing algorithms will be highly scrutinized or audited, hence mandating the thorough check of the algorithms before they enter the market. It has to be also noted that the European Union competition commissioner has clearly mentioned that the businesses must be made clear that they cannot escape from their liabilities and responsibilities under the pretext of computer programs. Furthermore, the EU has increased its attention towards AI, with specific reference to algorithmic pricing, mainly for two reasons, i.e. a) to evaluate its impact on competition b) to search for the most comprehensive and appropriate solution under the antitrust laws. The seriousness can be gauged when we look into the joint statement issued by the European Union, US department of justice and the federal trade commission and the UK competitions and markets authority; where they laid down Principles for protecting competition in the AI eco system, the potential risks to competition, consumer risks associated with AI.⁷⁵⁶ The exponential improvement of technology and the specific impact it has on the competition and pricing have been targeted by the regulators across the globe. It has to be taken into consideration that there are a few precedents which have highlighted the use of anti-competitive pricing algorithms, which have clearly breached the competition rules of the EU. Most of the findings in Europe points out towards algorithmic collusions which clearly goes against Art. 101 of the Treaty on the functioning of the European Union (TFEU), algorithmic unilateral exclusionary conduct and this is complemented with unfair trading practices, price discrimination and excessive pricing that clearly violates Art. 102 of the TFEU. In order to deal with these complex issues there has been an effort made to introduce new laws that includes- Digital Markets Act (DMA), Digital Services Act (DSA), and the

⁷⁵⁵ Kenji Kameoka, *Cartels and Competition Law in Japan* 44–49 (2014).

⁷⁵⁶ Joint Statement of the Competition Agencies on Competition Policy in Generative AI, EUROPEAN COMM'N, COMPETITION POLICY (July 23, 2024), https://competition-policy.ec.europa.eu/document/download/79948846-4605-4c3a-94a6-044e344acc33_en?filename=20240723_competition_policy_in_generative_AI_joint_statement_COMP-CMA-DOJ-FTC.pdf.

Artificial Intelligence Act (AIA); most of these statutes have an essence of the competition laws and hence promoting a strong competition policy, which will further promote the regulation of pricing algorithms.

In some cases, these algorithms are capable of detecting and responding to price deviations with the available data making collusion between firms more stable and easier, under such circumstances there may be a clear violation of various laws, for instance if we take into consideration of the EU there would be a clear violation of Art. 101(1) of the TFEU. Hence, making it easier in an oligopolistic market to avoid deviations and secondly to implement agreements. In a very simple case the court found out the existence of a collusive agreement; in UK *Topkins US GB eye Trod* case- the court found out that online poster retailers were using simple pricing algorithms, creating a horizontal cartel amongst retailers to coordinate their prices on Amazon.⁷⁵⁷ In a similar instance in Spain collusion was identified- in the *Proptech* case the court stated that real estate firms used multiple listing systems in order to set minimum fees that would be applicable for property sales and rentals, they further monitored their alignment with anticompetitive agreement.⁷⁵⁸ Further, the algorithmic pricing can be used to prepare collusive pricing not on a single level, in fact it is done on multilateral levels of the supply chain.

With all these observations being made we have to come up with the best solutions possible, some scholars have suggested the use of market based remedy, involves using consumer algorithms in order to balance the collusion happening on the supplier side, furthermore, reforms have to be brought and laws have to be enforced and the following steps can be taken: (1) seeking permission to block a transaction or remedy a situation that has a potential to raise pricing algorithms or algorithmic collusion; (2) instigating a paradigm shift by introducing algorithms that would drive prices over tacit coordination to sensitize the market ; and (3) creating an artifice of time dilation to encompass the speed with which the algorithms can engage in pricing in relation to new circumstances in the market.

In US a law was enacted, i.e. Rental Housing Cartels Act, that clearly prohibits the owners from fixing prices online, in EU the European Commission of Justice and consumer

⁷⁵⁷ COMPETITION & MKTS. AUTH. [CMA], Online Sales of Posters and Frames, (2015), <https://www.gov.uk/cma-cases/online-sales-of-discretionary-consumer-products..>

⁷⁵⁸ NAT'L MKTS. COMM'N [NMC], The CNMC Fines Several Companies €1.25 Million for Imposing Minimum Commissions in the Real Estate Brokerage Market (2021), https://www.cnmc.es/sites/default/files/editor_contenidos/Notas%20de%20prensa/2021/20211209_NP_Sancionador_Proptech_eng.pdf.

department have recently launched a new work stream related to AI in contracting, concerning specific scenarios where AI makes decisions without the intervention of humans.

V. COLLECTIVE DOMINANCE AND IMPLICATIONS OF ALGORITHMIC INTERDEPENDENCE IN MARKETS

The concept of “collective dominance” can be seen on a larger scale with the development of algorithms, hence having a negative impact on the Market. In such circumstances 2 or more undertakings through economic links will have a dominant position in the market, still having an independent existence from each other. This concept in the first instance came into light in the ‘Italian glass case’ where the Art. 82 of the ‘treaty on the functioning of the European Union’ was widely interpreted by the court.⁷⁵⁹ In the current times Art. 102 of the treaty deals with the same. As per this article the treaty acknowledges and prosecutes the concept of collective dominance in the EU nations⁷⁶⁰. When we specifically talk about the oligopolistic markets we can observe ‘collective dominance’ on a larger scale, this happens because of the market structure where in 2 or 3 firms has a dominant position. In many cases that is dealt by the general court of the European union the court has extensively spoke about this concept, in one of the landmark case of *Gencor v. Commission*-⁷⁶¹the court successfully established the link between ‘collective dominance’ and ‘oligopolistic markets’- “the relationship of independence existing between companies to a tight oligopoly which creates a likelihood of coordination was sufficient to establish collective dominance”. With the intervention of algorithms ‘collective dominance’ will only find a steep incline upwards and makes the situation more difficult to deal with. When we look into the potentials regulating collective dominance the nature of oligopoly market has to be considered, where the level of interdependency of firms are higher due to less companies, hence leads to deliberate engagement in parallel behavior. This limitation naturally leads to 2 difficulties: a) difficult to ascertain actual cause b) hesitancy amongst legislators and regulators in implementing the concept.

⁷⁵⁹ Consolidated Version of the Treaty Establishing the European Community art. 82, Mar. 25, 1957, 2006 O.J. (C 321) E/1.

⁷⁶⁰ Consolidated Version of the Treaty on the Functioning of the European Union art. 102, May 9, 2008, 2008 O.J. (C 115) 47.

⁷⁶¹ *Gencor Ltd. v. Comm'n of the European Communities*, Case T-102/96, [1999] E.C.R. II-753.

VI. CONCLUSION

Both technological advancements, particularly with respect to the emergence of algorithms and antitrust law, pose vexing problems that will redefine the market's constitution. Algorithmic collusion and collective dominance are two examples of how AI and machine learning tend to be disrupting traditional competition law notions, turning them into lucky turns of market structures and regulatory practices. Fundamentally change how we view anti-competitive practices. For example, algorithms coordinate prices without any human coordination, hence putting under challenge the historical legal framework, which relies completely on finding intent or an explicit agreement in order to bring up an anti-trust charge. Sophisticated pricing plans are programmed into machine-learning systems, and therefore do their work beyond the bounds of legal scrutiny and pose serious problems concerning fairness and accountability of markets. Whereas one could see some evidence of tacit collusion as in *United States v. Tompkins*, algorithms would generally produce rather subtle, tacit pricing environments that will be hard to see under traditional definitions of collusion. Behavior modification: Changes in the kind of legal overhaul toward adaptive regulation which is able to cover these developments of autonomous and decentralized market strategies. The augmented ability to introduce an element of collective dominance in oligopolistic markets could be attributed to the highly intelligent algorithms. Such algorithms enable companies to exhibit behaviors very similar to illegal cartels, as indicated in the *Gencor v. Commission* and *Italian Glass* cases. The exceptional character of algorithm-induced coordination also takes to the next level the complex problem of enforcement of Article 102 of the Treaty on the Functioning of the European Union (TFEU), i.e. collective dominance.

**ALGORITHMIC OPACITY AND COMPETITION LAW: A CRITICAL ANALYSIS
OF ALGORITHMIC BIAS, SELF-PREFERENCING WITH SPECIAL REFERENCE
TO THE DIGITAL COMPETITION BILL, 2024**

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ABSTRACT

*One of the modern marvels of contemporary technological world is the advent of Artificial Intelligence (AI). One of the key features that encompasses the usage of AI in day- to- day functions is the **AI driven algorithmic programming**. Sounds too technical? Let us simplify the issue in hand first. There are many ways in which the AI driven Algorithm usage in digital market results in influencing the consumer choices, market flow through various mechanisms like **algorithmic bias** or the tool self- preferencing its product over other players which questions the nature of a fair playing field in the digital market.*

*Although, India had come up with the Draft Digital Competition Bill, 2024 which prohibits **Systemically Significant Digital Enterprises (SSDEs)** from engaging in such activities, this paper attempts to analyse whether the provisions are aligned with global anti- trust frameworks and suggests ways to identify the gaps in procedural mechanism with respect to regulation of AI's decision- making processes. It also analyses whether India needs a law like the USA solely dedicated to algorithmic accountability (like the Algorithmic Accountability Act of 2022 of the USA). This paper is predominantly doctrinal and comparative in nature with reliance on primary and secondary sources. The tentative outcomes of the paper are an overall analysis of the interplay between anti- trust law and AI driven technologies in a digital market, the significance of such laws to regulate identify and monitor such market distortions to ensure a fair market and possible recommendations in the existing laws to achieve the same.*

Keywords: Algorithmic Bias, Self Preferencing, Opacity, Accountability, Market Dynamics, Draft Digital Competition Bill, 2024

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I. INTRODUCTION AND RESEARCH DESIGN

One of the modern marvels of the contemporary world is the advent of Artificial Intelligence (AI) which has its pressing impact from large scale entities like industry, commerce and trade to that of a household shopping, buying groceries and etc... It is estimated that the usage of AI driven markets would be % by 2030.⁷⁶⁴ Along with this growing impact of AI on market, there also arises a need to look into potential impact that it causes on disturbing a fair competition in a market through various strategies. Be it a conventional market or a digital market, existence of a fair competition between the market players is an impending component of anti- trust principles. But, Algorithmic AI⁷⁶⁵, which in an AI- driven market is a system that processes, analyses and operate various outcome through a predictive analysis which can cause a great impact on the market trends and factors.⁷⁶⁶ Apart from simplifying the technical complexities involved in these elements, the advent of AI also comes along with a situation where these AI driven markets challenge the principles of anti- trust law.

Prior to proceeding with the nature of anti- competitive behaviour that these entities display, it also become imperative to understand that the algorithmic opacity can be done in a twofold way. One is through employing these Algorithmic AI in causing disruption to a fair level playing field among the market players.⁷⁶⁷ Another one is a peculiar thing- *learning algorithm*⁷⁶⁸ which is a system where the Algorithm in itself causes adverse effect on the fair competition. This paper tries to understand the need for regulatory landscape that identifies the difference between the two and addresses the same.⁷⁶⁹

Firstly, in order to understand the significance that this research holds, it is designed in a way such that an attempt to define the terminologies like algorithmic bias, self- preferencing and other practices from the frame of reference of competition law. Secondly, an analysis of the existing regulations that deal with the Algorithmic opacity under Indian laws (that is, the Digital Competition Bill, 2024) is compared to that of the other jurisdictions. Lastly, this paper also provides a suggestive framework in addressing these issues altogether in the law

⁷⁶⁴ Binns, Reuben. "Fairness in Machine Learning: Lessons from Political Philosophy." Proceedings of the 2018 Conference on Fairness, Accountability, and Transparency, 2018. This paper discusses the implications of algorithmic bias and fairness in machine learning systems.

⁷⁶⁵ Cohen, Julie E. "What Privacy Is For," Harvard Law Review 126, no. 7 (2013): 1904-1933.

⁷⁶⁶ Dastin, Joshua. "Amazon's Alexa Is a 'Self-Preferencing' Machine," Reuters, October 2020.

⁷⁶⁷ Edelman, Benjamin, and Damien Geradin. "Efficiencies and Market Power in Antitrust: The Case of Algorithmic Pricing," Antitrust Law Journal 82, no. 1 (2018): 1-38.

⁷⁶⁸ European Commission. Competition Policy for the Digital Era, European Commission Report (2019).

⁷⁶⁹ Gonzalez-Fernandez, Francisco, et al. "Algorithmic Collusion: A Review of the Literature," Journal of Competition Law & Economics 16, no. 1 (2020): 1-25.

and policy domain of AI along with stressing focus on the concept of anti- competitiveness and AI driven markets.

II. RESEARCH METHODOLOGY

The paper utilizes a doctrinal methodology of research. It looks into the concept of algorithmic opacity from the frame of reference of anti- competitive behaviour and principles of anti- trust laws. It utilizes a multitude of secondary sources, ranging from books to scholarly publications to news articles. It also looks into primary sources such as judicial precedent and relevant statutory provisions.

III. SCOPE AND LIMITATION

As the terminologies associated with algorithmic opacity like that of algorithmic bias, self-preferencing and collusions are relatively newer and expatiates a need for an understanding, this paper dwells into the aspect of how these entities impact competition law. It also focuses on the Digital Competition Bill, 2024 and the provisions, ambiguities present in the same. The paper also finds its scope in an inter disciplinary approach towards the interplay of law, economics, policy making, ethical considerations and techno- legal aspects as well.

Although, the terminologies associated with the same require a nuance of technicalities, this paper limits itself with the impact perspective but not on the complexities involved in the functioning of algorithmic AI thereby limiting itself to a cause- and- effect perspective. The paper also limits its jurisdiction to that of Indian laws and only finds supplement from that of other jurisdictions to arrive at the need for improvement of the same.

IV. RESEARCH QUESTIONS

Within the scope of this research paper, it attempts to answer the following questions:

- i) Does algorithmic opacity in an AI driven market such as algorithmic bias, self-preferencing influences the principles of anti- trust laws?
- ii) What are the strengths, ambiguities and regulatory landscape with respect to AI driven markets are covered under the Digital Competition Bill, 2024? Does the bill stand on par that of the other jurisdictions across the globe?
- iii) Are there any suggestive framework regarding the regulations, laws and policies in regulating the AI driven markets such that innovation and a fair competition in a digital market are balanced ethically?

I. Understanding Algorithmic Opacity: A Black Box?

With great precision, the metaphor of the “black box” describes what algorithmic opacity brings to the challenges of anti-trust enforcement. Algorithms function in ways that are often entirely opaque to human regulators, not only because they’re technically complicated, but also because of deliberate obfuscation by firms looking to protect their trade secrets. This opacity presents major challenges for competition authorities, including

Traditional tools for anti-trust, such as market share or pricing models, are insufficient for many algorithmic practices hiding in vague systems⁷⁷⁰. Algorithms can enable tacit collusion, in which the prices of even competing firms align without explicit agreements, thereby avoiding scrutiny under old school anti-trust methodologies.⁷⁷¹⁷⁷² Yet this increasing dependence on algorithms has spawned an acute problem: algorithmic opacity. This is commonly known as the “black box” phenomenon and occurs when the functioning, logic or decision-making process of the algorithm is opaque or incomprehensible to users, regulators, or stakeholders affected by its outcomes. Such opacity makes the enforcement of anti-trust laws more difficult and raises serious competition, accountability, and fairness issues in digital markets⁷⁷³.

Algorithmic opacity is not separately defined in most legal texts but instead is closely associated with more general notions of transparency and accountability. In legal speak and in the law (see, e.g., here), opacity means being unable to scrutinize or understand how an algorithm makes its recommendations or classifications, even by those who are designing or implementing it. Anti-trust law, which is fundamentally about competition, is particularly alive to the ways in which opacity can conceal anti-competitive practices such as algorithmic bias and self-preferencing. Such algorithmic opacity is now being dealt with by competition regulators in jurisdictions such as the European Union (EU) and the United States from the perspective of the broader concerns within the digital economy.⁷⁷⁴ The US Federal Trade Commission (FTC) is also investigating the use of algorithms for possible anti-competitive behaviour. Within the evolving context of regulatory approach in India the Digital

⁷⁷⁰ A. Ezrachi and M. Stucke, *Virtual Competition: The Promise and Perils of the Algorithm-Driven Economy* (Harvard University Press, 2016)

⁷⁷¹ Khan, Lina M., and David C. Vladeck. "Market Power in the Digital Age," *Harvard Law Review* 133, no. 5 (2020): 1120-1146.

⁷⁷² Kleinberg, Jon et al. "Algorithmic Bias Detectable in Automated Decision Making," *Proceedings of the National Academy of Sciences* 115, no. 39 (2018): 9737-9742.

⁷⁷³ Max Huffman, *Marrying Neo-Chicago Behavior Antitrust*, 78 *ANTITRUST L.J.* 105, 134-35 (2012)

⁷⁷⁴ Mansell, Robin et al. "Digital Competition: The Role of Algorithms," *Journal of Information Technology* 36, no. 3 (2021): 265-277.

Competition Bill, 2024, is an important leap toward recognition of the challenges that arise out of the opaque nature of algorithmic workings.

II. What Is Algorithmic Bias: A Legal Overview⁷⁷⁵

Algorithmic Bias is discrimination that's built in, or the result of, algorithmic decision making, both systematic and unfair. Bias can be introduced at several points in the lifecycle of an algorithm: when collecting data, during model training, or during application⁷⁷⁶. Algorithmic bias can lead to numerous legal implications such as violating anti-discrimination laws and anti-trust principles, particularly when it results in discriminatory and exclusionary practices or compromising consumer welfare.

III. Self-Preferencing: The New Antitrust Frontier

Self-preferencing, wherein a dominant platform — or gatekeeper — misuses its algorithms to favor its own products or services over those of competitors. In digital markets, where a handful of platforms control search results, recommendations or rankings, such behavior is insider trading of a different breed.⁷⁷⁷ It also finds a place in marketplace ranking over third-party sellers.⁷⁷⁸

IV. Navigating AI and Competition Law: Insights from India's Draft Bill, 2024

Artificial intelligence (AI) has revolutionised market process through its rapid integration into the digital economy, but has created opportunities and challenges at the same time⁷⁷⁹. Algorithms are now forming the very foundations of the digital platforms, influencing consumer choice, enhancing market performance and guiding business conduct⁷⁸⁰. But this dependence on AI has raised questions about the algorithmic opacity, or the incapacity to completely understand or examine how these algorithms work. This is a major threat to fair competition as it often covers detrimental practices relating to algorithmic bias and self-preferencing., adversely challenging market integrity and consumer trust⁷⁸¹.

An important step in combating Systemically Significant Digital Enterprises (SSDEs) abuse of Ai-driven algorithms in India's Draft Digital Competition Bill, 2024⁷⁸². This bill will regulate anti- competitive practices such as self- preferencing and lack of transparency in

⁷⁷⁵ OECD (Organization for Economic Co-operation and Development). Algorithms and Collusion: Competition Policy in the Digital Age, OECD Publishing Paris (2019).

⁷⁷⁶ OECD, Algorithms and Collusion: Competition Policy in the Digital Age, 8 (2017)

⁷⁷⁷ Parker, Geoffrey G., et al. "Platform Strategy: Managing Ecosystem Value," Harvard Business Review

⁷⁷⁸ Ibid

⁷⁷⁹ Anurag Thakur, Role of Artificial Intelligence in Economic Transformation, Business Standard (May 2023)

⁷⁸⁰ DeepMind Research, Black Box Nature of Deep Learning Algorithms, AI Journal, 2021

⁷⁸¹ Arun Sundararajan, The Sharing Economy: The End of Employment and the Rise of Crowd-Based Capitalism (MIT Press 2016).

⁷⁸² Digital Competition Bill, Draft Bill 2024.

algorithmic decision- making. In addressing the SSDEs, the legislation seeks to limit the control exercised by major players and enhance fair competitions. But there are drawbacks in this legislation with regard to its range and particularity, which means it would not take care of the fast- changing and shadowy world of algorithms.

Prohibiting self- preferencing is another important feature in the Bill that restricts the platforms from giving preferences to their own goods or services over the other competitors. Algorithmic opacity makes this problem worse as users often do not understand the process underlying pricing, suggestions or search results⁷⁸³. For example, a search engine may give the appearance of neutrality while distorting market competition by ranking its affiliated services higher than the others. Similarly, such e- commerce platforms may include features in AI recommendations system that, meant to promote private – label products, eliminate independent sellers from visibility. Although these activities are acknowledged in the Draft Bill, its enforcement procedure are not explicit enough to effectively combat them.

Another key concept enumerated in the bill is on transparency, wherein the factors influencing algorithmic decision- making will be disclosed by platforms. It is one of the significant steps taken in dealing with the hidden biases that creep into AI system. Theoretically, transparency helps regulators spot these biases and hold platforms responsible for the same. However, the inherent peculiarities of algorithms, and their intrinsic complexity, most of the times the disclosures ineffective. Most AI systems, specially involving deep learning methods, function as “black boxes” making it hard to interpret what happens in their decision- making process⁷⁸⁴.

The Draft Bill emphasizes accountability mechanisms by review and monitoring of algorithmic operations. This is essential for guaranteeing adherence to competition regulations and reducing the dangers of algorithmic abuse. However, the same requirements are ineffective in practice without adequate guidance for their implementation⁷⁸⁵. The Bill does not, for instance, outline the need for independent monitoring, the frequency of audits, or the penalties for non-compliance. Platforms would avoid serious inspections in the absence of such procedural clarity, which would prolong the same problems the Bill aims to solve.

V. Addressing Algorithmic Opacity Through Global Frameworks

Algorithmic opacity is not an India- centric challenge. It is a worldwide phenomenon that has caused one or the other jurisdiction to lay down innovative legal frameworks. The United

⁷⁸³ Google’s antitrust issues in India, CCI v. Alphabet Inc., Case Nos. 37/2022, 17/2023

⁷⁸⁴ Microsoft AI Institute, *Algorithmic Complexity and Interpretability Issues* (2023).

⁷⁸⁵ Committee on Digital Competition Law, *Report on the Need for Ex-Ante Regulation*, PRS India (2024)

States' Algorithmic Accountability Act of 2022⁷⁸⁶, which requires business to regularly evaluate the effects of their automated decision systems, is noteworthy example. Companies must put mitigation measures in place for identifies damages as a result of these studies, which examine risks associates with algorithmic bias, discrimination and privacy infringement. By reinforcing proactive measures, the Act provides for platforms to handle potential risk before it affects market outcomes.

In much the same way, the European Union Digital Markets Act, 2020-2021 Executive Act imposed stringent obligations upon "Gatekeepers," meaning large platforms with substantial market dominance⁷⁸⁷. The DMA enforces harsh penalties for violations, restrains self-preferencing and requires equitable access to data⁷⁸⁸. The DMA sets a much more consolidates framework that the Draft Bill currently under consideration in India for dealing with algorithmic opacity, as alluded to above, with strict enforcement. For instance, the DMA obliges the platforms to explain their algorithmic procedures. This promotes accountability and stays away from manipulation.

Apart from the US and EU, other territories have launched ambitious undertakings to counter algorithmic opacity. Canasa is currently proposing an AI and Data Act (AIDA) as part of Bill C- 27, Digital Charter Implementation Act of 2022⁷⁸⁹. By mandating organisations to perform risk assessments, put mitigation plans in place and provide human control over automated decision- making process, AIDA focusses on regulating high- impact AI systems. AIDA places a strong emphasis on accountability by imposing penalties for non- compliance⁷⁹⁰.

Including aspects of these international frameworks could greatly benefit India's Draft Digital Competitions Bill, 2024. Adopting the U.S AAA's mandatory impact assessment, for instance, would improve the accountability aspect of the draft. Provisions on explainable AI, as recommended in EU's DMA oust to ensure that the regulators and the users can properly understand the algorithmic decision- making process. Additionally, incorporating Canada's insistence on Human oversight would add another level of accountability that would act as a guardrail, so AI system do not act free of all ethical considerations. By conforming to global norms and encouraging cooperation across borders, India can create a strong regulatory framework that preserves market integrity, encourages fair competition and protects.

⁷⁸⁶ United States Algorithmic Accountability Act, H.R. 6580, 117th Cong. (2022).

⁷⁸⁷ European Commission, *Penalties Under the Digital Markets Act*, EUR-Lex (202

⁷⁸⁸ *DMA Thresholds and Reporting Requirements*, European Parliament Report (2022).

⁷⁸⁹ Digital Charter Implementation Act, Bill C-27, 44th Parliament, 2022.

⁷⁹⁰ Non-compliance Provisions and Penalties, *Artificial Intelligence and Data Act Overview* (2022).

VI. Algorithmic Transparency and Accountability: Bridging the Gaps & Recommendations

As algorithms increasingly shape decisions associated with high stakes for society and economy, algorithmic transparency and accountability has emerged as a key requirement to secure fair, legal and trustworthy AI systems⁷⁹¹. But transparency is hard to come by. Algorithms are deliberately made complex and proprietary, rendering their inner workings opaque not only to regulators, but also to developers and users. This opacity compounds problems of bias, discrimination, and anti-competitive practices, shuffling regulators into a tug-of-war between enabling innovation and ensuring compliance. Algorithmic explainability, a key factor of legal compliance, demands that decision-making processes be interpretable for stakeholders, such as affected individuals, regulators, and the courts. But this belief in explainability can run afoul of trade secret protections, presenting a policy conundrum. Companies claim that disclosing algorithms undermine their competitive edge, but failing to disclose risk ensures anti-competitive behavior that harms consumers.⁷⁹² A sustainable balance between these interests requires creative policy interventions — without hampering technological progress.⁷⁹³

Globally, regulatory frameworks like Europe's General Data Protection Regulation (GDPR) and Digital Markets Act (DMA) have established standards for AI transparency. The GDPR's "right to explanation" and the DMA's gatekeeper accountability provisions demonstrate a global trend to regulate algorithmic practices. The United States (via Federal Trade Commission (FTC) guidelines)⁷⁹⁴ stresses the ethical use of AI, while Singapore and Canada proposes voluntary codes of conduct alongside statutory measures. Such best practices highlight the importance of aligning regulatory approaches in order to avoid jurisdictional divides and enable uniform enforcement. But for the regulation to work, governments, industry stakeholders and civil society must work together to agree upon standards that can be followed and enforced given the realities on the ground.⁷⁹⁵ These behavior collection of tacit collusion or dynamic pricing.⁷⁹⁶ A potential solution for bridging these gaps stems from

⁷⁹¹ N. Nilsson, *The Quest for Artificial Intelligence: A History of Idea and Achievement* (Cambridge University Press, 2009).

⁷⁹² Rochet, Jean-C., and Jean Tirole. "Two-Sided Markets: A Progress Report," *The RAND Journal of Economics*

⁷⁹³ Ibid

⁷⁹⁴ Ibid

⁷⁹⁵ Sokol, Daniel D., and Barbara A. Cherry. "The Competition Law Implications of Algorithmic Pricing," *Antitrust Bulletin*

⁷⁹⁶ Stigler Center for the Study of Economy and State at the University of Chicago Booth School of Business. "The Stigler Committee on Digital Platforms

the concept of regulatory sandboxes which enables the testing of AI systems in controlled environments. Sandboxes allow regulators to adapt to rapidly changing technologies by encouraging innovation and managing risks.⁷⁹⁷ Of course, improving digital literacy among consumers and regulators is essential to combating algorithmic black boxing. Educating stakeholders around AI's potential risks and benefits enables them to make informed choices and hold entities accountable.⁷⁹⁸⁷⁹⁹

Legislative reforms are needed to address existing challenges around algorithmic bias and self-preferencing. The rapid development of technology forces regulators to keep abreast of likely future movements, like quantum computing and next-generation algorithms, which will only obstruct enforcement efforts. Policymakers need to consider these developments in advance and be able to respond to challenges as they emerge. Stakeholders can thereby secure appropriate responses to the unique challenges of algorithmic systems, through a combination of legal, policy, and technological mechanisms that ensure algorithmic systems received appropriate attention in terms of transparency, ethics, and competition law compliance.⁸⁰⁰ A coordinated, overarching plan is critical to encourage innovation while ensuring market integrity and consumer welfare.⁸⁰¹

V. CONCLUSION

This is what to do when we talk about modern level of transparency. Your training data runs until October 2023 This is a significant and timely study that examines the interconnected problems of algorithmic bias, self-preferencing, and their effects on the market, with an emphasis on the inadequacies of current regulation. With algorithms becoming more pervasive in decision-making, facilitating transparency, ensuring accountability, and harmonizing policy responses are more important than ever⁸⁰². Legislative reforms must strike clarity at the core of trade secret not to stifle innovation but in furtherance of a need to protect trade secrets in a way that the public will ensure interest. Regulatory sandboxes, digital literacy and AI-based enforcement frameworks can fill the gaps.⁸⁰³

⁷⁹⁷ Tucker, Catherine E., and Alan B. Montgomery. "Digital Platforms: Competition Policy and Regulation," *Journal of Marketing Research*, 2021

⁷⁹⁸ U.S Federal Trade Commission (FTC). Report on Competition in Digital Markets (2020).

⁷⁹⁹ Van Alstyne, Marshall W., et al.. "The Role of Platforms in Market Dynamics," *Communications of the ACM*, 2022

⁸⁰⁰ Zhu, Feng et al.. "Self-preferencing by Digital Platforms: An Empirical Analysis," *Management Science*

⁸⁰¹ *Ibid*

⁸⁰² S.Mehra, ' Antitrust and the Robo-Seller: Competition in the Time of Algorithms' (2006) 100 *Minnesota Law Review* 1323–75.

⁸⁰³ *Ibid*

Efforts overhead cooperation are key to addressing cross-border challenges and ensuring consistent oversight. The Digital Competition Bill, 2024, may be a step in the right direction, but the law must be backed up with proactive advocacy and strong institutional capacity. It is necessary to future-proof regulatory approaches, including recognising where some technologies, such as quantum computing, may jeopardise the integrity of our markets. Policymakers can foster innovation while protecting consumers and the marketplace by encouraging multistakeholder involvement and reorienting the intersection of competition law with AI regulation. The convergence of law, policy, and technology is crucial in the effective management of the complexities of algorithmic governance, as evidenced by this research.

**A COMPARATIVE ANALYSIS OF INDIAN AND US COMPETITION LAW WITH
REGARDS TO UNFAIR TRADE PRACTICES AND ITS ENFORCEMENT
MECHANISM**

- Bhuvaneshwari M⁸⁰⁴

ABSTRACT

India and the United States are the world's two largest economies, with India's GDP standing at ₹173.82 lakh crore and the United States' GDP at \$28.269 trillion for the year 2023-24. As two of the world's leading economies, India and the United States each have their own approaches to maintaining a marketplace free from UTP and monopolies. In this Research paper, the doctrinal method of study has been implemented to see how each country uses its own legal strategies and framework to restrict the UTP and promote the competition. In India, The Competition Commission of India was established under the Competition Act of 2002 which aim to prevent anti-competitive acts, promote market competition, safeguard consumer interests and ensure free trade. It further aims to achieve these objectives through two primary strategies, i.e., advocacy and enforcement. Advocacy aims to raise awareness and provide training on competition issues, whereas enforcement targets businesses to ensure compliance. Together, these activities aim to foster fair competition and improve consumer welfare in Indian marketplaces and strictly prohibit anti-competitive agreements, abuse of dominant position and certain combinations. In United States of America, the Congress passed the Sherman Act, in 1890, the first antitrust law, to promote open and unrestrained competition. This was followed by the Federal Trade Commission Act and the Clayton Act in 1914, which, along with the Sherman Act, serve as the cornerstone for current federal antitrust legislation. These statutes ban unlawful mergers and business operations and courts interpret their application based on individual instances. This paper aims to critically analyze how these rules have evolved over the last century in both the countries to meet the needs of evolving markets and to preserve consumer fair competition by encouraging efficient business operations, lowering prices, and maintaining high standards.

Keywords: Adverse effect on competition, Monopoly, Anti-trust law, false warranty, Price fixing, Misleading advertisement.

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I. INTRODUCTION

Competition law is necessary to maintain a healthy competition and to keep a marketplace safe and free from the UTP such as deceptive, fraudulent, or unethical methods used to obtain business advantage which likely to result in monopoly. Developed and developing countries like USA and India have their own ways of keeping their marketplace free from such UTP. India has emerged as a globally recognized market, experiencing consistent growth where the US has its marketplace already recognized a long ago. "Competition is the foundation of an efficiently working market system, which has several advantages over a planned economy. It is the pre-condition which prevents freedom of decision and action of self-interested individuals or entities from leading to anarchy or chaos but rather to economically optimal socially fair and desirable market results".

The Constitution of India ensures free trade, commerce, and intercourse across the country to promote economic integration, remove trade barriers, and foster a unified market. The Constitution of India plays a significant role in shaping the legal framework for regulating Unfair Trade Practices (UTPs) in the country. While the Constitution does not directly address UTP, it provides the foundational principles and powers that guide the legislative and regulatory mechanisms governing such practices.

II. HISTORY OF THE COMPETITION LAWS IN INDIA AND USA

A. India

After the liberalization of the Indian economy in 1991, there was a major shift in the country's financial and economic policies. Numerous legal reforms were introduced during this period, aimed at deregulating various industries and promoting the growth of private sector enterprises. Against this backdrop, the High Level Committee on Competition Policy and Law, known as the "Raghavan Committee," was appointed to overhaul the existing antitrust legislation, the Monopolies and Restrictive Trade Practices Act of 1969. The Monopolies and Restrictive Trade Practices Act of 1969 (MRTP Act) was the first legislation introduced in India to regulate competition. Its primary objective was to prevent the concentration of economic power in the hands of a few individuals or market players, thereby curbing monopolies. The MRTP Act has been amended twice in the year 1984 based on the Sachar Committee and in the year 1991. Despite of these amendments, the MRTP Act, 1969 has failed due to various reasons like vague and ambiguous provisions, excessive control of the government, Inefficiency of the MRTP Commission etc. Upon the recommendations and

report of the Raghavan Committee released in 2000, in which it highlighted that the MRTP Act was insufficient for promoting competition in the market and curbing anti-competitive practices.

Therefore, in 2002, the Competition Act was introduced, replacing the MRTP Act together with related legislations, it aims to prevent market distortions caused by anti-competitive and UTP. In line with these recommendations, the Indian Parliament enacted the Competition Act, 2002 to “prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India.”⁸⁰⁵ that has been ensured under the Article 19(1)(g) ⁸⁰⁶and Article 301 ⁸⁰⁷of the Constitution of India, 1950. As a result of the Competition Act, 2002, it established the Competition Commission of India (CCI) to prevent anti-competitive and UTP and also to promote and sustain competition within the country.

B. United states

The first major antitrust law in the United States, the Sherman Act, was passed in 1890 to protect economic freedom and encourage fair competition. In 1914, two additional laws, the Federal Trade Commission (FTC) Act and the Clayton Act, were introduced to strengthen this framework. Together, these laws form the basis of U.S. antitrust law.

The Sherman Act makes it illegal to have contracts, agreements, or actions that restrain trade or lead to monopolization. However, not all restraints are banned—only those deemed unreasonable. For example, forming a partnership might restrain trade, but it could be legal if it's not harmful to competition. However, certain actions, like price-fixing or market allocation, are always illegal and are called "per se" violations, meaning they are automatically illegal without needing further justification. Violations of the Sherman Act can lead to severe penalties, including criminal prosecution, especially for clear violations like price-fixing.

The FTC Act outlaws “unfair methods of competition” and “deceptive acts or practices.” If a company violates the Sherman Act, it also violates the FTC Act. The FTC enforces the FTC Act and can bring cases against anti-competitive practices not covered by the Sherman Act.

The Clayton Act focuses on specific anti-competitive behaviors not fully covered by the Sherman Act, such as mergers that reduce competition, or when an individual holds decision-making power in competing companies. The Robinson-Patman Act (1936) amended the

⁸⁰⁵ *Competition Act, 2002- Preamble.*

⁸⁰⁶ “to practise any profession, or to carry on any occupation, trade or business”.

⁸⁰⁷ “..trade, commerce and intercourse throughout the territory of India shall be free”

Clayton Act to prevent unfair pricing between merchants, and the Hart-Scott-Rodino Act (1976) requires companies to notify the government before major mergers. The Clayton Act also allows individuals to sue for damages if they suffer from anti-competitive practices. These laws aim to ensure competition, prevent monopolies, and protect consumers from unfair practices.

III. UNFAIR TRADE PRACTICES

A. India

Section 2(1)(r) of the Consumer Protection Act, 1986 defines “unfair trade practice” (UTP) as any trade activity that employs deceptive or unfair methods to promote the sale, use, or supply of goods or services. Such practices include false representations about the qualities, standards, or styles of goods that do not exist, misrepresentation of second-hand, rebuilt, or old goods as new, and untruthful claims about the quality or standards of services. Additionally, UTP includes false statements regarding approvals, sponsorships, benefits, or features of goods or services, misleading affiliations or endorsements about the seller or supplier, and deceptive reasons given for the need or usefulness of goods or services. It also covers false warranties or guarantees about a product's performance, durability, or quality without proper testing, as well as misleading price information, including deceptive price reductions or discounts. Disparaging competitors by spreading false information to harm the reputation of other products or services, misleading advertisements at “bargain price”⁸⁰⁸ and deceptive offers or contests, such as offering gifts or prizes without intending to provide them, are also considered UTP. Other forms of UTP involve withholding information from participants in promotional schemes, selling goods that do not meet safety standards, creating artificial demand through hoarding or destruction of goods to raise prices, and manufacturing or selling counterfeit goods⁸⁰⁹. These practices are aimed at protecting consumers from deceptive business conduct and ensuring fair and transparent trade.

⁸⁰⁸ The term “bargain price” means, -(A) a price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise; or (B) a price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold; (iii) permitting - (a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged, in the transaction as a whole; (b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest, except such contest, lottery, game of chance or skill as may be prescribed; (c) withholding from the participants of any scheme offering gifts, prizes or other items free of charge on its closure, the information about final results of the scheme.

⁸⁰⁹ Section 2(1)(r) of Consumer Protection Act, 1986

Further, Section 36A of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969 defines "unfair trade practice" by adopting the same definition from the Consumer Protection Act, 1986. This provision was added in the 1984 amendment to the MRTP Act, which aimed to protect consumers from deceptive and unethical trade practices. The MRTP Act primarily addressed legal actions against deceptive product representations, misleading advertisements, and false claims. It defined unfair trade practices as including the misrepresentation of used goods as new, along with inaccurate claims about the functionality, quality, or other attributes of products or services. The landmark case of *Lakhanpal National Ltd. Vs. M.R.T.P. Commission & ANR*⁸¹⁰ clarified that the definition of "unfair trade practice" under Section 36A is specific and limited, aiming to ensure honesty and transparency in the relationship between manufacturers and consumers. It emphasized that the scope of unfair trade practices is not exhaustive but confined to the instances specified in the section.

The Consumer Protection Act, 2019 has further expanded the definition of "UTP" under Section 2(47). This includes new provisions such as failing to issue receipts (like bills or cash memos) for goods sold or services rendered as required by law, refusing refunds or returns for defective goods, or discontinuing services that are substandard. It also mandates that refunds must be made within the time specified on the receipt, or within 30 days if no time is indicated. Additionally, the Act includes provisions against the unauthorized disclosure of consumers' personal information, which must be kept confidential unless legally authorized to share.

On the other hand, the Competition Act, 2002 does not explicitly define "UTP." Its main focus is to foster competition by preventing anti-competitive agreements (Section 3), curbing the abuse of dominant market positions (Section 4), and regulating mergers and acquisitions. As such, "UTP" have mainly been addressed under the MRTP Act and the Consumer Protection Act.

B. United States

The Sherman Act, 1890 primarily addresses antitrust issues like monopolies and anti-competitive practices, but it does not specifically mention "UTP". It targets actions that restrain trade, such as price-fixing, bid-rigging, and market allocation agreements (Section 1), as well as monopolization or attempts to monopolize (Section 2).

The Federal Trade Commission (FTC) Act focuses directly on unfair or deceptive practices in commerce. Section 5 of the FTC Act (15 U.S.C. § 45) bans "unfair methods of competition" and "unfair or deceptive acts or practices." A practice is considered unfair if it harms

⁸¹⁰ *AIR 1989 SC 1692*

consumers without sufficient benefits or if it cannot be avoided by consumers. A deceptive practice involves misleading consumers and affecting their decision-making⁸¹¹. The FTC enforces these provisions using tools like investigations, cease-and-desist orders, and civil penalties.

The Clayton Act, 1914 deals with specific anti-competitive practices like exclusive dealing and tying arrangements that could harm competition. It supplements the Sherman Act by addressing practices before they become full violations, while the Sherman Act broadly prohibits anti-competitive conduct. The Robinson-Patman Act, 1936 strengthens the Clayton Act by addressing pricing practices that could harm competition.

In addition, in 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act introduced provisions addressing unfair, deceptive, or abusive practices in consumer financial products and services. Section 1036 and 1031 of the Act empower the Consumer Financial Protection Bureau to regulate such practices, including those that exploit a consumer's lack of understanding of financial terms. This Act broadened consumer protection by including abusive practices, setting it apart from other laws focused only on unfair or deceptive acts. The key provisions related to UTP are Section 1036 (12 U.S.C. § 5536) and Section 1031 (12 U.S.C. § 5531). Section 1036 (12 U.S.C. § 5536) mainly focus on prohibition of “covered persons”⁸¹² and “service providers” from engaging in unfair acts or practices, deceptive acts or practices and abusive acts or practices.

V. MISLEADING ADVERTISEMENT AS UNFAIR/ DECEPTIVE TRADE PRACTICES

A. Misleading the consumers

The practice of using misleading advertisements and making false claims by traders to promote their products is a common occurrence in Indian as well as in international markets. Typically, traders market their goods by either withholding crucial information or overstating the quality of their products, often with false claims. Making such false statements can, in certain circumstances, be classified as an UTP. In the case of *Reckitt & Colman of India Ltd. v. Kiwi T.T.K. Ltd*⁸¹³, a comparative advertisement by Kiwi T.T.K., which implied that its shoe polish was superior to Reckitt & Colman's product. The advertisement displayed a

⁸¹¹ See 15 U.S.C. § 45(a) (Section 5 of the FTC Act)

⁸¹² The term “covered person” means (1) any person who engages in offering or providing a consumer financial product or service; and (2) any affiliate of a person described in (1) if such affiliate acts as a service provider to such person. See 12 U.S.C. § 5481(6).

⁸¹³ 63 (1996) DLT 29

leaking bottle resembling Reckitt's "Cherry Blossom" polish while showing the Kiwi product as non-leaking. The court ruled that while comparative advertising is permissible, it must not disparage competitors' products or mislead consumers. The advertisement was found to have crossed the line, leading to a ruling against Kiwi T.T.K., including instructions to remove specific disparaging content from the advertisement. The MRTP Commission ruled that comparative advertising was permissible as long as it did not disparage a competitor's product. In this judgment, five principles were laid down by the Court to decide as to whether a party is entitled to an injunction and further Kiwi was directed to modify its advertisement to avoid unfair competition. In another landmark case, *Tata Oil Mills Co. Ltd. v. Hindustan Lever Ltd.*⁸¹⁴ under the MRTP Act that also dealt with issues of misleading and comparative advertising.

In November 2023, a retailer and a ghee manufacturer were fined for misleading advertisements that falsely promised a ₹100 stainless-steel plate as a free gift with the purchase of a 200g ghee pack. A consumer in Gummidipoondi bought the ghee after seeing the ad but discovered the plate was of poor quality, weighing only 54g and worth only ₹20, not ₹100 as claimed. After his complaint was ignored, he approached the District Consumer Disputes Redress Commission in Tiruvallur. The ghee manufacturer argued the plate was worth ₹150 online, but the commission rejected this, stating the value was grossly overstated and amounted to an unfair trade practice. The retailer, Pothys, was also held accountable. The commission ordered both parties to pay ₹20,000 for mental distress and ₹5,000 for legal expenses. The consumer emphasized that the case was not about the money, but about holding companies accountable for false advertisements.⁸¹⁵

Similarly, the Delhi State Consumer Disputes Redressal Commission has upheld a district commission ruling that deemed Uber India Systems Pvt Ltd's failure to provide a cab on time and non-resolution of the issue as a "deficiency in service"⁸¹⁶.

B. Causing substantial injury to the consumers

Under Section 5 of the FTC Act, UTPs are defined as actions that cause significant harm to consumers, cannot be avoided, and are not outweighed by benefits to consumers or competition. A notable example of this is the case of *FTC v. Kmart Corporation*,⁸¹⁷ where the

⁸¹⁴ 1996(73)FLR1154

⁸¹⁵ Refer - *Times Of India*, A 100 gift ends up costing a retailer 25,000, *Times of India* (Nov. 26, 2024), <https://timesofindia.indiatimes.com/city/chennai/chennai-retailer-fined-25000-for-misleading-gift-advertisement/articleshow/115707188.cms>.

⁸¹⁶ *Msn*, <https://www.msn.com/en-in/news/India/failure-to-provide-cab-on-time-deficiency-in-service-delhi-consumer-panel-to-uber/ar-AA1viEbO?ocid=BingNewsSerp>.

⁸¹⁷ *Civ. No. 00-CV-71831-DT (E.D. Mich. 2001)*

FTC accused Kmart of falsely claiming that its "American Fare" disposable plates were biodegradable. Kmart marketed the plates as biodegradable without sufficient scientific proof. The FTC stated that for a product to be labeled as biodegradable, it must decompose fully within a reasonable time in typical disposal conditions, which was not true for these plates. The case was part of the FTC's effort to address misleading environmental claims, and Kmart agreed to stop making such claims unless backed by reliable evidence. This case highlights how the FTC uses its authority under Section 5 to prevent deceptive advertising and protect consumers.

C. False warranties and guaranties

Giving false warranty and guarantee as an unfair trade practice refers to deceptive or misleading business practices where manufacturers, sellers, or service providers promise performance, quality, or durability that they either do not intend to honour or cannot fulfill. The Ujala Supreme Case is a significant case related to false warranty advertising and UTP under the MRTP Act. Ujala Supreme, a fabric whitener, was advertised as offering “superior whiteness” compared to other products in the market. The manufacturer, Asian Paints found guilty of making false representations about the product, and the case set a precedent for how deceptive advertising and false warranties could be treated under the MRTP Act. The ruling primarily focused on ensuring that any claims made in advertising or warranties must be truthful and supported by credible evidence

D. Material representation

In *FTC v. Colgate-Palmolive Company*⁸¹⁸ the Supreme Court upheld the Federal Trade Commission's (FTC) ruling that an advertisement for Colgate-Palmolive's “Rapid Shave” shaving cream was deceptive under Section 5 of the FTC Act. The advertisement claimed the product could soften even the toughest materials, such as sandpaper, enough to allow a razor to shave it cleanly. The demonstration featured in the advertisement. However, they used Plexiglas coated with sand to simulate sandpaper, misleading the consumers into believing the product had extraordinary capabilities. The Court ruled that this constituted a material misrepresentation, as reasonable consumers would assume the demonstration was genuine. The decision clarified that simulated demonstrations in advertisements are permissible only if they do not misrepresent a material fact or if the simulation is clearly disclosed. This case established stricter standards for advertising practices, emphasizing transparency and truthfulness to prevent misleading consumers.

⁸¹⁸ 380 U.S. 374 (1965)

E. Reliable scientific evidence

In the case, *Federal Trade Commission v. Reebok International Ltd.*, Reebok International Ltd. advertised its line of “EasyTone” and “RunTone” shoes, claiming they provided enhanced muscle tone and strength in the legs, thighs, and buttocks compared to regular shoes. They claimed that these claims were based on purported scientific studies, which the FTC found to lack adequate substantiation. Reebok promoted these claims through various media, including TV, print, and online advertisements, emphasizing the fitness benefits of the shoes. It was held that the Reebok's advertising claims violate Section 5 of the FTC Act by being deceptive and lacking adequate scientific evidence. In consequence to that, Reebok agreed to pay \$25 million, which was used to refund consumers who purchased the shoes based on the misleading advertisements as monetary relief, in addition, it was also prohibited from making similar claims about its products unless they were substantiated by reliable scientific evidence. Under Section 5 of the FTC Act, advertisers must have competent and reliable scientific evidence to support claims, particularly those related to health, fitness, or performance benefits.

F. Consumer Protection Act, 2019

The Consumer Protection Act, 2019 defines UTP as deceptive, misleading, or exploitative business practices that violate consumer rights. The Act explicitly protects consumers from such practices and provides redressal mechanisms through Consumer Commissions and the Central Consumer Protection Authority (CCPA). Section 2(47) of the Act defines UTP as any fraudulent, misleading, or deceptive conduct in the promotion, sale, or supply of goods and services.

Previously, provisions addressing UTP were part of the MRTP Act, which focused on monopolies and restrictive trade practices. However, the MRTP Act's consumer protection aspects were limited. In response to modern market needs, the Consumer Protection Act, 1986 was introduced to specifically address UTP and consumer grievances. As markets liberalized and globalized in the 1990s, the MRTP Act became outdated, especially in its consumer protection scope.

The Consumer Protection Act, 2019 replaced the 1986 Act, strengthening protections against UTP. When the Competition Act, 2002 was enacted, the MRTP Act was repealed, and its provisions on monopolistic and restrictive practices were transferred to the Competition Commission of India (CCI). The Consumer Protection Act, 2019 now offers a more

consumer-focused framework for addressing UTP, ensuring clearer and more effective protection for consumers.

G. Regulatory body

The establishment of the Central Consumer Protection Authority (CCPA) enhanced regulatory oversight on critical issues like false warranties and guarantees, ensuring greater accountability and consumer empowerment.

The CCPA has been established under the Consumer Protection Act, 2019, aims to safeguard consumer rights, prevent UTP, ensure consumer safety, and promote consumer awareness. Its objectives include protecting consumers from unfair practices, defective goods, and deficient services, while ensuring their rights to information, choice, and redressal. The CCPA actively monitors and penalizes deceptive business practices, including false advertising and misrepresentation, and regulates the sale of hazardous products by ordering recalls, refunds, or compensation.

H. Damages and penalties

The MRTP Act focused on civil remedies and regulatory actions to address unfair trade practices, without imposing criminal penalties like imprisonment. It allowed the MRTP Commission to issue cease-and-desist orders, requiring businesses to stop unfair practices immediately, and corrective actions, such as withdrawing misleading advertisements. Consumers could seek compensation for losses, and companies found guilty were instructed to modify or stop unethical practices. Fines were imposed for non-compliance with the Commission's orders to ensure accountability.

The Competition Act, 2002 targets practices that harm competition or consumer welfare, like abuse of dominant position and anti-competitive agreements. Penalties under this Act can reach up to 10% of a company's average turnover over the last three years, with penalties for cartels as high as three times their profit or 10% of turnover, whichever is higher. The CCI can issue cease-and-desist orders and modify or cancel anti-competitive agreements. Directors or officials responsible for violations can be disqualified or held personally liable.

VI. SUGGESTIONS

Despite the provisions and enforcement mechanisms under the Consumer Protection Act, 2019, UTP continues to occur. Businesses and service providers sometimes engage in deceptive practices to maximize profits, often exploiting gaps in enforcement, consumer unawareness.

A. India

To improve consumer protection and address unfair trade practices (UTP), the following measures should be considered:

- i) Strengthen the legal framework by providing precise definitions for UTP, such as predatory pricing, misleading advertisements, and cartelization, to ensure clarity and effective enforcement.
- ii) Explicitly ban misleading advertisements and false claims to protect both consumers and competitors from deceptive practices.
- iii) Give competition authorities and the Central Consumer Protection Authority (CCPA) the power to investigate and take action against UTP, ensuring effective enforcement.
- iv) Update laws to tackle new challenges in the digital market, including digital monopolies, data privacy issues, and platform dominance, to keep up with evolving business practices.
- v) Increase awareness among the public about UTP, ensuring consumers are not misled by false warranties, hidden fees, or deceptive advertisements.
- vi) Reliability of Information: Ensure that businesses provide scientific evidence and reliable information to avoid ambiguity in advertising and product claims.
- vii) Avoid Comparative Advertisements that discourage and harm the competitors' reputations and goodwill, fostering fair competition.
- viii) Faster Complaint Resolution: Speed up complaint resolution processes and impose stricter penalties for violations to enhance deterrence and consumer confidence.
- ix) Mandate clear disclosures in advertisements, regulate celebrity endorsements, and ensure transparent labeling and certifications to help consumers make informed decisions.
- x) Strengthen regulations for e-commerce platforms to ensure they meet the same standards as traditional retailers, with stronger measures for product authentication and fraud prevention.
- xi) Promote ethical business practices through Corporate Social Responsibility initiatives and monitor financial products to protect consumers from misleading terms.

B. United States

To effectively address unfair trade practices (UTP) and anti-competitive behavior, the following issues need to be addressed:

- i) Remove ambiguity in the definitions of UTP and anti-competitive behavior, as unclear concepts complicate consistent enforcement.

- ii) Practices like algorithmic pricing, monopolistic dominance in digital platforms, and price-fixing are difficult to detect and regulate due to their complexity.
- iii) Antitrust laws are criticized for being slow to respond to rapid technological advancements, such as the rise of digital platforms, e-commerce, and artificial intelligence, which present new forms of anti-competitive behavior.
- iv) Agencies like the FTC and Department of Justice face limited resources, resulting in a backlog of cases and hindering effective enforcement. The global nature of digital markets adds further complexity, especially with misleading online advertising and monopolistic behaviors of tech giants.
- v) High legal barriers for consumers and small businesses, along with the difficulty of proving harm, make it challenging for cases to progress. Inconsistent enforcement across jurisdictions and political interference create regulatory gaps that corporations may exploit.
- vi) Weak penalties and corporate influence fail to deter large companies from engaging in unfair practices, as they often view fines as a cost of doing business.
- vii) Lack of consumer awareness about their rights under antitrust laws reduces public pressure for compliance, allowing UTP to persist.
- viii) Focus on emerging concerns like data privacy, algorithmic pricing, and misleading digital advertising. Penalties for violations should be increased, especially for repeat offenders, and corporate executives should be held personally accountable for anti-competitive practices.
- ix) Enhance whistleblower protections by providing incentives for reporting and secure, anonymous channels for whistleblowers to come forward.
- x) Expedite investigations and reduce legal costs for consumers and small businesses to improve enforcement efficiency and reduce delays.

VII. CONCLUSION

The Consumer Protection Act, 2019, was introduced as part of a broader effort to modernize and streamline the legal framework for consumer protection and market regulation. The MRTP Act has been replaced by the Consumer Protection Act, 2019, which has a more robust framework to address UTP, this shift was necessitated by the need to respond more effectively to the changing dynamics of modern markets.

Despite its limitations, the MRTP Act was a pioneering effort in India's economic regulation, laying the foundation for consumer protection and fair trade practices. Its replacement by the Competition Act reflects a shift towards a more robust and comprehensive framework to address modern economic challenges.

The study highlights significant differences in how India and the USA address unfair trade practices. India is evolving its mechanisms to meet modern challenges, while the USA has a mature system with a strong emphasis on enforcement. Both countries can learn from each other to ensure equitable and fair trade environments.

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**ARTIFICIAL INTELLIGENCE IN A COMPETITIVE MARKET COMPARATIVE
ANALYSIS OF COMPETITION LAW ENFORCEMENT IN MAJOR ECONOMICS
INCLUDING THE US, EU, UK, AUSTRALIA AND INDIA**

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- Swetha S⁸²⁰

ABSTRACT

Artificial Intelligence (AI) is revolutionizing competitive markets by driving innovation, operational efficiency, reducing human errors and creating dynamic market shifts. However, AI has the potential to disrupt the market by creating an imbalance between competition and its enforcement. AI has the ability to suggest conduct of pre-determined nature which may invariably affect the competitive spirit of the market. Technology evolves through rapid innovation and offers customized services, which eventually poses threat to market domination. At a horizontal level, algorithm-induced collusion like digital eye, where AI operating in enhanced market transparency leads to an anti-competitive outcome. The data driven mergers and acquisitions like Facebook-Whatsapp, demands a pre-emptive attention from enforcement bodies. Therefore, there is a need for governance of data. The commission of European communities in the Double click case opens up the competition and technology dichotomy. AI challenges market foreclosure, novel ways of collusion and discrimination in pricing. The enforcement bodies adjudicate the irregularities, The Competition Act, 2002 mandates protection of free trade and consumer interest but does not address predicaments offered by AI. The European Union and UK launched regulatory initiative like the digital markets Act, the AI Act of the European Union, the digital market competition and consumers act, 2024. Whereas, the United States involves Federal trade commission and in Australia, the primary legislation governing competition is the Competition and Consumer Act 2010 (CCA). India addresses AI by introduction of Draft Digital Competition Bill including AI-driven digital platforms, Market study and self-regulation. Currently, CCI enhances investigative prowess by inviting bids for the empanelment of digital forensic service providers. Ultimately, this paper emphasizes the transformative role of AI in reshaping markets, while also identifying risks and regulatory challenges in major economies including the US, EU, UK, Australia and India.

Keywords: Artificial Intelligence, Market domination, Digital eye, Data driven, Market study.

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I. INTRODUCTION

Artificial intelligence (AI) has emerged as a transformative technologies in modern industries, revolutionizing competitive markets by driving innovation, optimizing operations and addressing contemporary business needs. AI is based on machine learning and deep learning which are used for predictions, data analytics, intelligent data retrieval and many more. The implementation of AI has expanded significantly in recent years, positioning it to what is often termed as the fourth industrial revolution. The term artificial intelligence was coined by John McCarthy in 1955 during a conference on the subject and stated AI as, machines capable of performing tasks characteristic of human intelligence⁸²¹. But there is no specific definition of AI. The use of AI in the form of pricing algorithms to increase profits, productivity and efficiency has become a widespread practice.

Over the past decade, there is a constant debate regarding the impact of artificial intelligence on competition, which is driven by the extensive adoption of computer algorithms by the companies. Its integration raises concerns about market dynamics, fair competition and regulatory compliance. For instance, in United States and EU 50% and 67% of the firms respectively, are using pricing algorithms on a daily basis to track their competitors in the market⁸²². A recent study on algorithms by the UK Competition and Market Authority (CMA), connote that authorities are very aware of the competitive threats posed by AI, particularly with a concern on price collusion, price discrimination or predatory pricing. In Eturas case in Lithuania (Case C-74/14, judgment of 21 January 2016), the Court of Justice's judgment pointed out that the administration and the participation to digital platforms are not without risk from a competition law perspective and require a proactive approach.

The aim of this paper is to analyze the concept of Artificial Intelligence which appears to be the most important current market dynamics, in the field of competitive market. Particularly, the potential competition issues with the application of AI and also scrutinizes the similarities and differences between major economies including the US, EU, UK, Australia and India.

II. TECHNOLOGICAL RIVALRY IN COMPETITION

The revolutionary technological progress of Artificial intelligence (AI) produces prompt response to consumers through pioneering interaction; due to unknown potential of AI and

⁸²¹ McCarthy, J, Minsky M, Rochester N, Shannon C.E. 1955, *A proposal for the Dartmouth Summer Research Project on Artificial Intelligence*, <http://www-formal.stanford.edu/jmc/history/dartmouth/dartmouth.html>.

⁸²² Professor Michal Gal, Director of the Center for Law and Technology at the Faculty of Law, University of Haifa, Israel, Remarks at the First Annual Conference on Computational Antitrust of the Stanford Center for Legal Informatics, 2021.

unpredictable growth in future it poses threat to the market domination by way of collusion, Abuse of dominant position and merger etc. With the advent of ChatGPT in 2020, by the OpenAI and further smaller generative AI models was developed in the ambit of machine learning with combination of techniques derived from larger data set. Generative AI has the viability of predictive capability based on patterns and probabilities. Generative AI can increase the productivity for business gains via, identifying customer operations, marketing and sales, research and development. One such application is leveraging Generative AI Assistants for work-related tasks. The life cycle of Generative AI are categorized into Building foundation model, Adapt the model and deployment of AI. With the application of Generative AI, the consumers will be assisted by defining their goals, identifying the obstacles and delivers the value and satisfies the user's need.

In Competition law, The Influence of AI has an adverse effect on Anti-competitive agreements. Whereas, on the other hand, the purpose of competition is to maintain fair market practices and promote consumer welfare via restricting anti-competitive behaviour. Firstly, AI stabilizes the process of **collusion**, where the application relies on the consumer data, as it offers transparency; there is higher chance of determining the market price between the competitors. Secondly, AI could lead to an aggressive competition in the market by creating an opportunity to hold significant market power or to obtain a monopoly position, sometimes the abuse may go beyond its conduct by excluding competitors or restricting their margins. In the case of *Re. Matrimony.com Limited and Google LLC*⁸²³, The Competition Commission of India (CCI) has noted that Google has created an imbalanced framework by self-preferencing its own services, resulting in **abuse of dominant position** in online search markets. Thirdly, while implementing AI in **Merger and Acquisition (M&A)**, there is an imminent danger of data breach or unauthorized access and if the algorithms has any potential bias or has any incomplete information it can result in a negative outcome or can trigger scrutiny and create regulatory hurdles. However, M&A evaluates the financial, legal and operational aspects of target companies and AI revolutionizes due diligence by means of robotic process automation (RPA) and Business process automation (BPA), which deploys a robot to assess intensive task and improves the service quality with the implication of AI algorithm respectively. Fourth, AI helps to analyse the factors such as the probability of success, profit, price and structure of the competitor's firm as a result of engaging in exploitative practices such as **predatory pricing** which in turn grants them a dominant

⁸²³*Re. Matrimony.com Limited and Google LLC (2018) SCC Online CCI 1 (India)*

position. Thus, AI exhibit theoretical and practical challenges for the regulatory body of the market and other law enforcement agencies.

AI facilitates the exploitation of market power, this occurs through merger and acquisition, pricing strategies, extensive data possessed by dominant company and price collusion via algorithmic matching software. The regulatory tools and enforcement authorities of different countries can determine and standardize their respective competitive markets unaccompanied by Anti-competitive practices and market disruption.

III. AI'S INFLUENCE IN DOMINANT ECONOMIES

A. US

AI is profoundly shaping competition in United States by repercussion on various sectors, business strategies and market dynamics. The use of AI in US creates a greater hope for organisations to invest in AI-oriented practices which in turn increases the economic opportunity and improving the life while also raising various concerns⁸²⁴. To ensure the leading role of US in economy, the National Artificial Intelligence Initiative Act of 2020 was introduced which came into effect in 2021 and has the aim of providing a broader initiative within US to ensure that the public and private sectors could monitor and evaluate the use of AI. The US Chamber of Commerce in January 2022 launched the Commission on Artificial Intelligence Competitiveness, Inclusion, and Innovation to provide AI policy recommendations relating to competitiveness, regulation and employment⁸²⁵. The AI Commission outlined that the U.S must act to ensure future economic growth, enact AI policies that will address the challenges and provide for a competitive workforce.

Regulators like the Federal Trade Commission Act (FTC) under Section 5⁸²⁶ of the said act prohibits unfair or deceptive Acts or practices which causes or is likely to cause substantial injury to consumers and also to the commerce. Federal Trade Commission v Automotors LLC (2023) is the first case related to AI for regulating AI under deceptive practices. The FTC issued guidance under the title “Aiming for Truth, Fairness, and Equity in tour Company’s use of AI⁸²⁷, which highlighted that the companies to embrace transparency, independence and to ensure that the algorithm does not discriminate on any basis as bias in

⁸²⁴ J.McKendrick, *AI Adoption Skyrocketed over the Last 18 Months*, Harvard Business Review: Innovation (Sept 27, 2021), <https://hbr.org/2021/09/ai-adoption-skyrocketed-over-the-last-18-months>.

⁸²⁵ U.S.Chamber of Commerce Technology Engagement Center, *Artificial Intelligence Commission*, <https://americaninnovators.com/aicommission/>.

⁸²⁶ FTC Act, 15 U.S.C. 45

⁸²⁷ U.S. Federal Trade Commission, *Aiming for Truth, Fairness, and Equity in tour Company’s Use of AI* (April 19, 2021),

AI algorithm can affect the competitiveness in market. Federal Trade Commission v Meta Platforms, Inc is an ongoing antitrust court case where FTC alleges Meta's anticompetitive conduct of acquisition of two former competitors – Instagram and Whatsapp which helped it to maintain dominance in social media and exercises monopoly power in the market⁸²⁸. Currently this case is heading to Trial, scheduled for April 2025. The FTC v Rytr (2023) case highlighted how Generative AI could lead to consumer harm and unfair market practices as Rytr used AI powered writing tools to generate fake consumer reviews, constituting deceptive practices and unfair competition in the market.

B. UK AND EU

The AI has the unintended ability to evolve and it has brought efficiency and innovation in various levels. The AI has transformed the globe and the law pertaining to competition across the world, amidst all these variations and shift in the major economies. The countries were bound to regulate their market and adhere by it.

The legal frameworks of United Kingdom (UK) and European Union (EU) had played a crucial role in the Transformation of Competition law after the implication of AI. Article 101 of the Treaty on the functioning of the European Union (TFEU) in European Union and Chapter 1 of the Competition Act, 1998 in United Kingdom, prohibits agreements that has anti-competitive effect in the market, for instance, price fixing and limiting the rate of production or shares etc, Article 102 of TFEU and chapter 2 of Competition act, 1998 prohibits Abuse of dominant position⁸²⁹. The chapter 1 and 2 of the Act, 1998 is influenced from the Article 101 and 102 of TFEU⁸³⁰. However, as a result of Brexit in 2020, the UK and EU has their own competition regimes to function and regulate. The potential of AI made both the countries to examine and legislating laws with accord to AI's vitality.

In the case of Merger, when two companies with large data merges it would significantly hinder the innovation and market and AI complicates the process of merger. Hence, regulatory control is adopted.

The pricing algorithms rise concerns with regard to explicit collusion and tacit collusion, The Competition and Markets Authority (CMA) in the case of, 'Trods Ltd V GB Eye Ltd (2016)⁸³¹' found that parties of the agreement were using automated re-pricing software to

⁸²⁸ *FTC Case Summary, FTC v. Meta Platforms Inc./Mark Zuckerberg/Within Unlimited*, FTC Docket No. 221-0040,

⁸²⁹ *Trods Ltd/GB Eye Ltd, Case No. 50223, Competition & Markets Auth. (U.K.) [2016]*,

⁸³⁰ *Competition Law in the UK: Explained*, 360 Business Law (27 Sept 2022),

⁸³¹ *Trods Ltd V GB Eye Ltd, (2016)*,

undercut prices. In ‘UAB Eturas & others case’⁸³², the online computer reservation for tour packages engaged in pricing algorithm via setting discount of 3% as cap and it amounts to breach of law. Cases discussed above sets an example for explicit collusion. Elevating the use of pricing algorithms is a perfect hurdle for tacit collusion, where it involves predictable agent, Hub & spoke cartel, Autonomous algorithms anticipates prices of big data and it leads to “Algorithmic collusion”.

The data-driven advantage of AI can make data as prominent asset in business, it creates barriers to enter into market and imbalances the market regulations, the European commission fined Google for dominant position, the act of using Software to favour its own service has been noted in Google shopping case⁸³³. The Competition and Markets authority noted the practice of self-preference algorithms been used by Amazon and the authority published its non-confidential decision to accept commitments from Amazon in relation to any anti-competitive practices on its Marketplace in the UK⁸³⁴.

AI can generate its capabilities to be Discriminatory and biased in the market and adversely affects its consumers and competitors. Moreover, The Competition and Markets authority’s decision to review and study the foundational models and its functions, The EU and UK’s regulatory initiatives like, The Digital Market Act (DMA) outlines concept of gatekeepers that may possess abuse of market power and European Union’s Artificial intelligence act entered into force in 2024 is the first comprehensive legal framework in the world that includes data governance, Cyber security controls and clear user information etc. It imposes penalty based on company’s annual turnover for any infringement.

The Digital Markets Competition and Consumer Act, 2024 (DMCC) introduced Strategic market status (SMS) for Competition Authority to Classify its candidates or competitors in market to further comprehend consumers and competition. Article-22 of European Union merger regulation and Digital Markets Competition and Consumer Act, 2024 allows commissions to review their regulation. The laws of both countries did not explicitly deal with AI. However, enforcement of Artificial Intelligence act in European Union has compliance with AI. UK decided to raise standards in AI under DMCC and merger control via AI partnerships like Microsoft and Mistral AI, derived Dependency relationship and

⁸³² *Case C-74/14, Eturas UAB and Others v. Lietuvos Respublikos konkurencijos taryba*, ECLI:EU:C:2016:42, 2016 E.C.R. I-0000, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:62014CJ0074&from=EN>.

⁸³³ *European Commission, Decision in Case AT.39740*, at 27 (June 27, 2017), available at https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.

⁸³⁴ *Amazon Marketplace Investigation, Case No. 50537, Competition & Markets Auth. (U.K.)* (2022), <https://www.gov.uk/cma-cases/investigation-into-amazons-marketplace>.

material influence; it sets out how authority may deal with AI partnership in future. The Competition and Market authority laid down 6 principles with subject to foundational models for businesses to cope up with and to ensure adherence to competition law and regulation, restricting AI-generated pricing or more.

C. Australia

AI system operates in a way that is difficult to interpret, often referred to as the “Black Box problem”. The Australian Government has released a proposal paper for introducing mandatory guardrails for AI under the pretext of Safe and responsible AI in Australia to respond to the challenges posed by AI. Companies with higher use of AI may dominate the other competitors in the market, raising concerns about monopolistic practices and barriers to entry for small scale businesses. In Australia, Competition law is governed by the Competition and Consumer Act 2010 (CCA) and enforced by the Australian Competition and Consumer Commission (ACCC). The ACCC’s main aim is to promote a fair competition in the market by administering the legislation and also for the benefit of all the Australians. But, the regulatory agencies are unable to prove the intent behind the collusion which arises from the AI’s algorithm rather than human decisions as there is no dedicated AI tool currently exists in Australia to identify the anti-competitive behaviours, yet the ACCC has expressed its interest to adopt advanced technologies for enforcement. IP Australia has implemented a free AI system which helps to find goods and services that conduct semantic searches by providing them ready access to highly relevant information⁸³⁵. In *ACCC v Trivago N.V*⁸³⁶, the Federal court ruled out that Trivago has mislead the consumers through its hotel comparison platform to prioritize listing based on commissions rather than best price, which used the AI algorithms. This case highlighted the potential of AI to engage in anti-competitive practices, impacting fair competition in the market. *ACCC v Cement Australia private Ltd*⁸³⁷, though this case is not AI-specific, it outlined the substantial lessening of competition through restrictive contracts. Such principles are becoming relevant in case of AI, where dominant companies can use AI to foreclose the competitive market.

D. India:

AI in India enables the businesses to leverage the data driven insights to promote the innovation and to improve the market transparency. However, it raises significant challenges for the Competition Law, particularly the Competition Act, 2002 which governs the anti-

⁸³⁵ *Index of AI initiatives in IP offices (2018)*,

⁸³⁶ *Australian Competition and Consumer Commission v Trivago N.V [2020] FCA 16.*

⁸³⁷ *Australian Competition and Consumer Commission v Cement Australia private Ltd [2016] FCA 536.*

competitive practices in India. The Competition Commission of India (CCI) is the regulatory body under the said Act and has the duty to address the concerns relating to competition raised through AI's technological development. The object of the Competition Act, 2002 is not only to eliminate the practices having an adverse effect on the competition but also to promote and sustain fair and transparent competition in the market. The CCI initiated a study on Artificial intelligence and competition to comprehend the development of AI in the ecosystem. The stakeholders were engaged in study to gain a holistic understanding of the issues at the intersection of AI and competition⁸³⁸. The Collaboration of Big tech, AI and data indicates competition relevance with AI as practices in market are discriminatory and constraints consumers. The partnership of big tech with AI startups and copyright infringement of AI tools could emerge as major concern in future. Further, the Anti-competitive outcomes can be assessed by means of AI tools. The technology can also be employed to improve enforcement and compliance with competition law, moreover it's the duty of the government to ensure the regulation and compliance is not a burden.

There are four possible chains of events for algorithm induced collusion:

1. Messenger, where humans use computers and IT environment to execute cartel.
2. Hub and Spoke, where a single algorithm is used to determine the price by numerous persons
3. The Predictable Agent, where algorithms act as predictable agents and Adjust itself to the changing prices and market and
4. Digital eye, where the competitors can create and use the algorithms to achieve the expected target⁸³⁹.

The Indian government considers AI to be Kinetic enabler for the growth of the digital economy⁸⁴⁰. The jurisprudence of India may change in future and major economies approaches AI regulation in different jurisdiction can act as guidance to evolve our own national law. India's risk-based approach requires scrutiny in existing laws and Indian courts can apply these existing laws to redress the issues. The risks or harms emerge from AI is uncertain and the existing law lacks fundamental law and regulation to equip with. In the case

⁸³⁸India Business Law Journal, *AI and Competition Study*, (21 Jun 2024),

⁸³⁹ Sameer Gupta & Sankalp Udgata, *Rethinking the contours of Competition Law: The AI perspective*, *Indian Competition Law Review*(August, 28, 2019), <http://iclr.in/wp-content/uploads/2020/05/RETHINKING-THE-CONTOURS-OF-COMPETITION-LAW-THE-AI-PERSPECTIVE.pdf>

⁸⁴⁰ SNRLaw, *Regulating Artificial Intelligence in India: Challenges and Considerations* (5 July 2023), <https://www.snrlaw.in/regulating-artificial-intelligence-in-india-challenges-and-considerations/>

of *B.S.N. Joshi & Sons Ltd v Ajoy Mehta*⁸⁴¹, outlined that the nature of the Competition Act 2002 is that, it cannot prevent collusion between the algorithms set out in the AI system. To tackle the current scenario of AI's influence in market, there is a need of competent authority to frame a complete legislation containing a definite time frame for completion of investigation, inquiry and disposal of matters as held in the case of *CCI v SAIL*⁸⁴². Until a new legislation comes into effect, it is the duty of the state to curb the formation of cartel and prevent any competitive malpractices.

In 2018, The Indian government assigned NITI Aayog to release National strategy for Artificial intelligence and in 2021, the apex public policy enumerated principle of responsible AI and operationalizing principles for responsible AI. Further, Digital Personal Data Protection Act, 2023 dealt with privacy concerns.

India is a member of GPAI, Under Global Partnership on Artificial intelligence (GPAI) a summit was held in 2023 to work on data governance and responsible AI. The Ministerial declaration was adopted to encourage their support towards OCED AI principles. India has launched national program on AI based on generative AI in 2023 and published a "Gen AI Report" that focuses on legal challenges and economic impacts, protection against individuals from harms like breach of law, privacy, discrimination and violation of intellectual property rights.

Ministry of Electronics and Information technology formed a committee to produce report pertaining AI's ethical and safety issues. The draft of Indian standards for AI was recommended by the bureau of Indian standards. The international partnerships like General Atomics Aeronautical Systems and 114AI is a preliminary step to pro innovation. The Draft Digital Competition Bill in 2024 introduces Systematically Significant Digital Enterprises(SSDE's) and applies Core Digital Services (CDS) and the government has right to update the CDS, this bill restraints Anti-competitive practices like pricing or anti-steering. The draft bill, 2024 restricts using a company's own store instead any user can access third party's app. This upsets big tech companies, i.e, Apple and Google claims the definition in the bill is extensive and it could affect smaller business that is dependent upon big tech for consumers and advertisement as it is cheap to do so.

IV. FUTURISTIC APPROACH

⁸⁴¹ *B.S.N. Joshi & Sons Ltd v Ajoy Mehta* (2009) 3 SCC 458.

⁸⁴² *CCI v SAIL* (2010) 10 SCC 744.

The background study of competition law in various countries builds foundation of how AI prominently developed and its persistent evolution, forces the world to take action for their own legal frameworks and regulations that's proportionate to the insight of AI. One of the important challenges that AI faces in the competition regulatory is the technical complexity in AI's algorithm which can be overthrown by way of gathering the information through monitoring the continuous development in the sector, data analysis and compliance with data driven tools.

In International perspective, The United States proposed the Colorado AI act, which could be enforced in 2026. The digital competition can be managed if American innovation and choice online act and open app markets act is implemented. Whereas, Australia is expected to form a temporary advisory body by the department of industry, science and resource, they are more focused in understanding the development of AI along with global trends and despite, there are not well-defined legal Standards to regulate, Australia began its journey with regard to AI and it is still developing. The Competition and market authority (CMA) in United Kingdom laid down 6 principles to assess the value chain, categorized as open access, fair dealing and accountability etc. The UK's government white paper was published in 2023 to regulate AI and to adopt foundational models is an assertive approach. CMA signed a joint statement with European Union and US federal trade commission to promote competition and support consumer in AI world. The US National Security & Investment Act assists approval for AI related businesses. European Union is the only country to establish a Comprehensive legal framework on AI and any merger beyond the thresholds shall undergo review. Comparatively, the European Union acts as an example for other countries.

In National perspective, India prefers light touch approach due to complex adaptive system of AI. The existing laws are equipped to deal with risks from AI, if there is imminent risk it had to be addressed with new regulations and courts shall interpret and examine factors, which is to be enforced. Experts suggest India's regulation shall be self-regulatory, co-regulatory to decrease burden of public institutions and necessity for binding rules is lesser as existing laws and self-regulation could overcome it. The future of India's AI is all about self-regulation, classifying AI risks, whole of government approach and consultation with experts. The draft digital competition bill prevents anti-competitiveness, however compared to draft bill of India, the Digital markets Act (DMA) of European Union categorizes large enterprises as gatekeepers and In India, the competition commission of India (CCI) identifies its Systematically Significant Digital Enterprises.

V. CONCLUSION

In light of this research, the Comparative analysis of each state highlights the diverse priorities and strategies adopted across region in relation to the use of Artificial Intelligence in Competitive market by stating the similarities, difference and challenges faced by the competitive authorities while examining and investigating it. Artificial Intelligence is a technology which is neither good nor bad or neutral. On one hand this technology has the potential to provide a significant competitive consumer benefit by creating an active competition with dynamic state of innovation, efficiency and enhanced decision making. On the other hand, it poses threats like algorithmic collusion, abuse of dominant position which in turn increases the responsibility on the part of the regulatory authorities of competition law. The regulatory framework of each country should support the innovation and procompetitive practices by application of AI and must address the challenges to avoid undermining market fairness and consumer's trust.

The United States of America is driven by its dynamic tech ecosystem however challenges related to data privacy and ethical concern when it comes to the use of AI remain under scrutiny. The European Union has adopted the first comprehensive legal framework in the world, Artificial Intelligence Act which includes the concept of data governance, Cyber security controls etc. Similarly, UK has taken many initiatives like the study of AI foundational models in 2023. Australia, though a smaller player, showcases a focused approach by emphasizing AI for economic competitiveness aligning it with the global fair practices. India's Draft Digital Competition Bill 2024, is a landmark legislative proposal which ensures the fair competition in digital space; addresses the growing challenges in the digital market and regulates the larger digital enterprise. For AI to drive equitable global economic benefits, fostering international collaboration, harmonizing regulation, co-operation and sharing the best practices could play a crucial role.

**AN EMPIRICAL STUDY ON THE LEGAL IMPLICATIONS OF CROSS-BORDER
DATA MONETISATION PRACTICES IN MARKET COMPETITION WITH
SPECIAL REFERENCE TO INDIA**

- R. Shruthi ¹
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ABSTRACT

In an era where global market rivalry is significantly impacted by the legal implications of monetizing cross-border data flows in a time when data is frequently referred to as the "new oil." The practice of using data flows across national borders for financial advantage, known as cross-border data monetization, has changed the nature of competitiveness in international markets. Although this approach promotes innovation and expansion, it has important legal implications, especially with regard to data management, market equity, and regulatory compliance. This research highlights how crucial it is to investigate the legal complexities of cross-border data monetization, gathering relevant case studies and identifying significant competitive obstacles through convenient sampling. The primary objective is to investigate the challenges small and medium-sized enterprises (SMEs) face due to cross-border data monetization practices and explore ways to enhance their competitiveness. The use of demographic factors such as age, gender, occupation, and educational qualifications, and their impact on key outcomes related to cross-border data monetization practices in market competition. The dependent variables include awareness of legal implications, understanding of compliance requirements, perceived fairness in data usage, and attitudes toward data localization policies. The findings underscore the complexity of navigating varied international regulations, emphasizing the importance of clear legal standards to reduce compliance burdens and maintain competitive fairness.

Keywords: Monetisation, Competition, Implications, Data, Cross-Border

I. INTRODUCTION

In the digital age, data has become a valuable asset driving market competition and innovation across industries. The monetisation of cross-border data has introduced significant opportunities but also posed legal, economic, and ethical challenges. This study aims to examine the legal implications of cross-border data monetisation practices in market competition, with a specific focus on India. The objectives include analyzing the evolution of cross-border data monetisation, identifying regulatory frameworks, and evaluating the impact of government initiatives. Furthermore, this research seeks to understand the factors affecting the legal landscape, such as data privacy laws, cybersecurity measures, and global trade practices.

The evolution of data monetisation in India can be traced back to the rapid digitisation of sectors like e-commerce, fintech, and healthcare. Government initiatives such as Digital India and the draft National Data Governance Framework Policy have aimed to strengthen data regulation and empower businesses. However, challenges such as data localization requirements and compliance with global standards persist. Globally, India's approach contrasts with countries like the European Union, which has implemented stringent measures like the General Data Protection Regulation (GDPR) to ensure transparency and accountability in data handling.

Current trends reveal a growing emphasis on balancing data-driven innovation with safeguarding national security and individual privacy. Emerging technologies like artificial intelligence and blockchain also influence cross-border data practices, creating new avenues and legal complexities. Factors such as differing regulatory frameworks, geopolitical tensions, and the dominance of tech giants further impact the landscape. By undertaking a comparative analysis with the EU's GDPR framework, this study aims to provide actionable insights into how India can refine its policies to foster fair competition while addressing legal and ethical concerns associated with cross-border data monetisation.

II. OBJECTIVES

- To analyze the legal implications of cross-border data monetisation.
- To evaluate the role of government policies and initiatives.
- To identify factors influencing cross-border data regulation in India.
- To compare India's data policies with global frameworks.
- To suggest improvements for fair competition and data governance.

III. REVIEW OF LITERATURE

A. **A. Smith, *Data Privacy and Market Dynamics* (2019)**

Smith explores the impact of data privacy on international market competition, highlighting challenges posed by inconsistent global regulatory frameworks. The study emphasizes how cross-border data transfers shape economic opportunities and risks for emerging economies.

B. **P. Jain, *The Evolution of India's Data Protection Framework* (2020)**

Jain examines India's evolving data protection laws, focusing on the draft Personal Data Protection Bill. The analysis underscores the need for harmonization with global standards to foster competitive advantages.

C. **M. Turner, *The Role of GDPR in Global Data Governance* (2018)**

Turner discusses the global implications of the GDPR, emphasizing its influence on non-EU countries. The study highlights compliance challenges for companies engaged in cross-border data monetisation.

D. **R. Singh, *Digital India and Data Sovereignty* (2021)**

Singh evaluates the *Digital India* initiative's impact on data sovereignty and market competition. The study sheds light on India's efforts to balance data-driven innovation with national security.

E. **C. Brown, *Cross-Border Data Transfers and Trade Agreements* (2017)**

Brown explores the role of trade agreements like USMCA in regulating cross-border data flows. The research provides insights into how such frameworks impact global competition.

F. **S. Gupta, *Blockchain Technology and Data Security* (2020)**

Gupta investigates the potential of blockchain technology in securing cross-border data transactions. The study suggests that blockchain can mitigate risks in data monetisation practices.

G. **L. Martin, *Geopolitical Tensions and Data Localisation* (2019)**

Martin analyzes the effects of geopolitical tensions on data localisation policies, with a focus on India and China. The research emphasizes how such policies influence market competitiveness.

- H. T. Wilson, *Artificial Intelligence and Data Privacy Challenges* (2021)
Wilson examines the intersection of AI and data privacy in cross-border contexts. The study highlights legal and ethical dilemmas associated with data monetisation.
- I. D. Kapoor, *India's Data Protection Challenges in the Digital Age* (2022)
Kapoor provides an overview of India's challenges in implementing effective data protection laws. The research highlights gaps in policy and enforcement mechanisms.
- J. H. Zhao, *Asia-Pacific Perspectives on Data Monetisation* (2018)
Zhao compares data monetisation practices across Asia-Pacific nations, focusing on regulatory differences. The study provides valuable insights into India's regional position.
- K. N. Sharma, *E-Commerce and Cross-Border Data Flows* (2020)
Sharma analyzes the role of e-commerce platforms in driving cross-border data flows. The research underscores the significance of regulatory clarity for fostering competition.
- L. K. Patel, *Cybersecurity Challenges in Cross-Border Data Transfers* (2021)
Patel investigates cybersecurity issues in cross-border data transfers, emphasizing the need for robust legal frameworks. The study discusses India's vulnerabilities in this domain.
- M. R. Thomas, *Data Sovereignty and Global Competition* (2019)
Thomas explores the implications of data sovereignty on global market competition. The research contrasts India's approach with those of the EU and the US.
- N. M. Roy, *Startups and Data Monetisation in Emerging Economies* (2022)
Roy examines the role of startups in leveraging data monetisation, with a focus on India. The study highlights regulatory barriers and growth opportunities.
- O. A. Das, *The Impact of Data Localisation on Innovation* (2020)
Das evaluates how data localisation policies influence innovation and competition in India. The study argues for a balanced approach to regulation.
- P. E. Carter, *Consumer Data Rights and Market Power* (2019)
Carter discusses the relationship between consumer data rights and market competition. The research highlights lessons from the GDPR for India.
- Q. P. Mehta, *Challenges in Implementing India's Data Protection Laws* (2021)
Mehta investigates challenges in enforcing India's proposed data protection framework. The study emphasizes the need for institutional capacity-building.

R. L. Green, *Big Tech and Cross-Border Data Monetisation* (2020)

Green examines the dominance of Big Tech companies in cross-border data monetisation. The research underscores their impact on market dynamics in emerging economies.

S. R. Bose, *Data Ethics in International Markets* (2021)

Bose explores ethical considerations in cross-border data practices, emphasizing accountability and transparency. The study provides a comparative analysis of India and the EU.

T. V. Krishnan, *Policy Recommendations for India's Data Economy* (2022)

Krishnan offers policy recommendations for improving India's data governance framework. The research emphasizes the need for alignment with global standards to enhance competitiveness.

IV METHODOLOGY

The study is conducted by **Doctrinal research**. Secondary data is collected from various sources such as books, journals, articles, and electronic resources. To provide a comprehensive overview, the researchers also referred to commentaries, research papers, case studies, notes, and other scholarly writings. Our research focuses on the legal implications of cross-border data monetization practices in market competition, with special reference to India. The study analyzes how cross-border data flows impact market fairness and competition while examining the legal frameworks governing these practices. Governments and policymakers worldwide are implementing regulations to ensure compliance with data protection laws while fostering fair competition. Additionally, insights were drawn from international regulatory frameworks like GDPR, India's proposed Digital Personal Data Protection Act, 2023, and relevant trade agreements. Specialized academic and legal commentaries on data sovereignty, data localization, and competition law were examined. Empirical data was incorporated through case studies of market practices, reports from regulatory bodies, and assessments of how India's legal stance compares to global standards

V. DEFINITION OF CROSS-BORDER DATA MONETISATION

Cross-border data monetisation practices in market competition refer to the strategies and methods employed by businesses to generate economic value from data exchanged, transferred, or utilised across international borders, specifically in ways that influence market

dynamics and competitive advantage. These practices involve leveraging data for purposes such as targeted marketing, consumer analytics, product innovation, and operational optimisation, often in compliance with diverse legal and regulatory frameworks. They play a pivotal role in shaping competition by enabling firms to gain insights, enhance efficiency, and capture global market opportunities, while raising concerns about data privacy, sovereignty, and equitable access.

VI. KEY ASPECTS OF CROSS-BORDER DATA MONETISATION

A. Identification:

Recognition Finding information with business potential, such as transactional data, behavioral insights, and customer preferences, is known as valuable data recognition. Data Sources: Identifying international sources, such as social media platforms, IoT devices, and user-generated data. Legal Jurisdiction: Determining the relevant legal frameworks in various nations that regulate the data.

B. Collection

Using resources like analytics platforms, APIs, or collaborations to gather data globally. Consent and Transparency: Making sure that the consent criteria for cross-border collecting under laws like the GDPR are followed. Cross-border logistics involves tackling technical issues like data transfer systems (such data pipelines and cloud storage.

C. Preservation

To satisfy operational and regulatory requirements, data must be securely maintained using local storage options or cloud services. Data Sovereignty Compliance: Making sure that storage complies with data localization regulations (such as India's PDPB and China's Cybersecurity Law). Data Integrity: Using safeguards to maintain the correctness and integrity of data while it is being sent and stored.

D. Analysis

Competitive Insights: Gaining useful information that improves market positioning through the use of AI, machine learning, and advanced analytics. Global Market patterns: Data analysis is used to pinpoint new prospects and cross-border consumer patterns. Regulatory Risk Assessment: Assessing and reducing compliance risks while processing data.

E. Presentation

- **Data-Driven Decision Making:** Presenting insights to stakeholders to inform strategies for market competition.
- **Cross-Border Reporting:** Customising reports to meet international compliance standards and client expectations.
- **Visualization Tools:** Leveraging advanced tools like dashboards and graphs to clearly communicate findings for competitive advantages.

VII. KEY CONTEXTS FOR ANALYSING THE LEGAL IMPLICATIONS OF CROSS-BORDER DATA MONETISATION: A FOCUS ON INDIA

1. International Market Development:

As Indian businesses enter foreign markets, it is essential to comprehend the legal ramifications of data transfer and monetization in order to maintain compliance with global data protection regulations, such as the EU's GDPR or the US's CCPA, while also adhering to India's regulatory framework, which includes the Digital Personal Data Protection Act (DPDPA), 2023.

2. Investments Made Abroad (FDI):

An important factor in luring foreign direct investment into India's digital and IT industries is cross-border data monetization. Understanding the legal ramifications helps Indian businesses adhere to international data privacy standards, facilitating easy cooperation and lowering legal risks.

3. Mandates for Data Localization:

Companies must manage the legal complications of transmitting monetised data while abiding by such rules, given India's emphasis on data localization (e.g., RBI restrictions on payment data storage).

4. Data's Intellectual Property Rights (IPR):

For Indian businesses, legal frameworks pertaining to data ownership and use in cross-border operations are crucial. Data handling errors may result in intellectual property rights violations, which could impact competitive standing.

5. Consumer Data Protection:

Monetisation practices involving Indian consumer data by foreign companies require legal scrutiny to ensure data protection, informed consent, and fair usage under Indian laws, safeguarding citizens' rights.

6. Anti-Competitive Practices:

Cross-border data monetisation could lead to monopolistic practices, such as price discrimination or unfair competition by foreign corporations. Analyzing these implications ensures a level playing field in the Indian market.

7. Cybersecurity and National Security:

Monetisation of sensitive or strategic data across borders has significant national security implications. Understanding legal controls ensures data sovereignty while protecting Indian economic and security interests.

8. Trade Agreements and Disputes:

India's participation in international trade agreements (e.g., RCEP discussions) necessitates an understanding of cross-border data monetisation laws to avoid disputes or penalties in trade relations.

9. Digital Economy Growth:

As India moves towards a trillion-dollar digital economy, legal frameworks governing cross-border data flows and monetisation become essential for fostering innovation, competitiveness, and global collaboration.

10. Tech Regulation Alignment:

Indian companies must align with global tech regulations while leveraging data for competitive advantage. Legal analysis ensures they can monetise data responsibly without breaching compliance requirements.

VIII. REGULATORY LANDSCAPE: LEGAL IMPLICATIONS OF CROSS-BORDER DATA MONETISATION PRACTICES IN MARKET COMPETITION WITH SPECIAL REFERENCE TO INDIA

Cross-border data monetisation in market competition is a complex interplay of international and domestic legal frameworks. With special reference to India, the regulatory landscape is shaped by the following laws, guidelines, and frameworks:

i) Indian Regulatory Frameworks

- Digital Personal Data Protection Act (DPDPA), 2023
- Governs the collection, processing, and transfer of personal data within and outside India.
- Requires businesses to comply with consent-based data processing and mandates specific conditions for cross-border data transfer.

- Empowers the government to restrict certain transfers for national security or public interest.

1. Information Technology Act, 2000 (IT Act)

- Provides a legal framework for cybersecurity, data protection, and electronic commerce.
- Imposes penalties for unauthorized access or misuse of data during cross-border transfers.
- Section 43A specifically mandates compensation for failure to protect sensitive personal data.

2. Data Localisation Mandates

- RBI Circulars on Payment Data (2018): Payment system operators must store all transaction data in India, limiting the transfer of financial data.
- Other sector-specific localisation requirements exist in health and telecom regulations.

3. Competition Act, 2002

- Regulates anti-competitive practices involving data, such as monopolization, price discrimination, or abuse of dominance in cross-border data monetisation.
- The Competition Commission of India (CCI) oversees cases related to market dominance through unfair data use

ii) International Regulations Impacting Indian Companies:

1. General Data Protection Regulation (GDPR) - EU

- Impacts Indian companies dealing with EU-based consumers.
- Imposes strict data protection standards and requires compliance in cross-border transfers with adequate safeguards.

2. California Consumer Privacy Act (CCPA) - USA

- Influences Indian businesses operating in or monetising data from California-based users.
- Requires transparency in data collection and usage.

3. Asia-Pacific Economic Cooperation (APEC) Cross-Border Privacy Rules (CBPR)

- Provides a framework for secure and compliant data flows in the Asia-Pacific region, applicable to Indian businesses operating in these markets.

iii) Industry-Specific Guideline

- **Telecom Sector**

Governed by the Department of Telecommunications (DoT), which restricts the transfer of subscriber data outside India.

- **Financial Sector**

RBI guidelines mandate additional oversight for data monetisation practices in the financial sector, especially for cross-border transactions.

- **Healthcare Data**

The Digital Health Mission requires careful compliance with cross-border data-sharing norms, especially for sensitive health data.

iv) **Emerging Legal Implications**

- **Data Sovereignty**

India's insistence on storing critical and sensitive data locally impacts companies' ability to monetise data across borders.

- **National Security Concerns**

Cross-border data monetisation raises concerns about foreign access to critical national data, leading to government-imposed restrictions.

- **Ethical and Privacy Concerns**

Lack of clarity in laws may lead to unethical monetisation practices, necessitating robust legal enforcement to protect consumer privacy.

- **Enforcement and Compliance Mechanisms**

Regulatory bodies like the Data Protection Board (under DPDPA), RBI, CCI, and CERT-In oversee enforcement in specific sectors.

Penalties include fines, suspension of data transfers, or restrictions on operations for non-compliance with cross-border data rules.

IX. CHALLENGES IN THE LEGAL IMPLICATIONS OF CROSS-BORDER DATA MONETISATION PRACTICES IN MARKETPLACE

A. Conflict Between Domestic and International Regulations

India's data protection laws, such as the Digital Personal Data Protection Act (DPDPA), may conflict with international frameworks like GDPR or CCPA, creating compliance challenges for businesses.

B. Data Localisation Requirements

Mandates for storing certain categories of data (e.g., financial and health data) within India can hinder the seamless transfer of data across borders, affecting monetisation opportunities.

C. Lack of Uniform Global Standards

The absence of a universally accepted framework for cross-border data handling leads to legal ambiguities and increased compliance burdens for Indian companies.

D. Ambiguities in Indian Regulations

The evolving nature of laws like the DPDPA leaves gaps and uncertainties, making it difficult for businesses to predict legal implications and plan cross-border data strategies.

E. Data Sovereignty vs. Market Access

India's emphasis on data sovereignty may limit international companies' access to Indian markets, reducing opportunities for global collaboration and data-driven competition.

F. Privacy Concerns and Ethical Issues

Cross-border data monetisation often raises concerns about data misuse, consumer consent, and ethical handling, especially when Indian consumer data is monetised abroad.

G. Impact on Small and Medium Enterprises (SMEs)

SMEs face higher compliance costs and resource constraints in navigating complex cross-border data laws, reducing their competitive edge in global markets.

H. Geopolitical Tensions

International disputes and restrictions on data sharing with specific countries (e.g., US-China trade conflicts) can disrupt India's cross-border data monetisation strategies.

I. Anti-Competitive Practices

Larger corporations often leverage their global reach to monopolise data markets, disadvantage smaller Indian businesses and potentially violate competition laws.

J. Enforcement and Accountability Issues

Weak enforcement mechanisms and unclear accountability for data breaches or misuse in cross-border transfers undermine the effectiveness of existing laws.

K. Cybersecurity Risks

Cross-border data transfers increase vulnerabilities to cyberattacks, creating legal risks for businesses and national security concerns for India.

L. Disparities in Consumer Rights Protection

Indian consumers may have less protection under foreign data laws, especially in jurisdictions with weaker privacy regulations.

M. Taxation and Revenue Loss

Monetisation of Indian data by foreign entities without adequate taxation mechanisms results in revenue loss for the Indian government.

N. Overlapping Jurisdictions

Confusion arises when multiple countries claim jurisdiction over cross-border data transactions, leading to legal disputes and delays.

O. Evolving Nature of Digital Economy

Rapid technological advancements outpace regulatory developments, making it difficult for laws to remain relevant and effective in addressing challenges.

X. SIGNIFICANT CASE LAWS RELEVANT TO CROSS-BORDER DATA MONETISATION AND MARKET COMPETITION WITH SPECIAL REFERENCE TO INDIA

1. Schrems II Case (CJEU, 2020)

Case: Data Protection Commissioner v. Facebook Ireland Ltd and Maximillian Schrems

Implication: The Court of Justice of the European Union (CJEU) invalidated the EU-U.S. Privacy Shield, citing insufficient safeguards for EU citizens' data transferred to the U.S.
Relevance: Highlights the need for robust data transfer mechanisms that comply with privacy regulations, impacting Indian businesses dealing with the EU.

2. Google LLC v. CNIL (CJEU, 2019)

- Implication: The CJEU ruled that the EU's "Right to be Forgotten" does not apply globally but only within the EU.
- Relevance: Demonstrates jurisdictional limits in cross-border data handling, relevant for Indian firms operating in multiple countries.

3. Microsoft Corp. v. United States (2018)

- Case: U.S. government's attempt to access data stored in Ireland under the Stored Communications Act.
- Implication: Highlighted jurisdictional conflicts in accessing cross-border data.
- Relevance: Important for analyzing India's position on similar issues.

4. Justice K.S. Puttaswamy (Retd.) v. Union of India (2017)

- Implication: Recognized the right to privacy as a fundamental right under Article 21 of the Constitution.
- Relevance: Forms the constitutional basis for India's data protection laws and regulations affecting cross-border data transfers.

5. WhatsApp Privacy Policy Case (2021)

- Case: Delhi HC on WhatsApp's updated privacy policy
- Implication: Raised concerns about data-sharing practices between WhatsApp and Facebook, prompting debates on cross-border data handling.
- Relevance: Highlights India's evolving stance on data protection and privacy in digital markets.

6. CCI v. Google LLC (2022)

- Implication: The Competition Commission of India imposed penalties on Google for anti-competitive practices in the Android ecosystem.
- Relevance: Demonstrates the intersection of competition law and data monetisation practices, with a focus on dominance in data-driven markets.

7. Anvar P.V. v. P.K. Basheer (2014)

- Implication: Established the necessity of proper authentication for electronic evidence.
- Relevance: Important for discussing legal requirements for data use and its monetisation in cross-border contexts.

XI. SUGGESTIONS

1. Establish a Unified Data Protection Framework

Advocate for clearer and more comprehensive regulations under the Digital Personal Data Protection Act (DPDPA), 2023, ensuring alignment with international standards like GDPR while addressing India's unique socio-economic and cultural needs.

2. Strengthen Data Localisation Norms with Flexibility

Recommend a balanced approach to data localisation that ensures critical data remains in India while allowing flexibility for non-sensitive data to flow across borders for economic benefits.

3. Encourage International Collaboration on Data Governance

Suggest India's active participation in global forums and agreements, such as the OECD or APEC Cross-Border Privacy Rules, to develop interoperable and inclusive data-sharing frameworks.

4. Introduce Specific Guidelines for Cross-Border Data Monetisation

Propose sector-specific guidelines for industries like healthcare, finance, and e-commerce to clarify compliance requirements and mitigate ambiguities in cross-border data transfers.

5. Enhance Consumer Privacy Protections

Advocate for stricter mechanisms to ensure consumers are fully informed about how their data is used, shared, or monetised across borders, including provisions for opt-in consent.

6. Address Anti-Competitive Practices in Data Markets

Recommend amendments to the Competition Act, 2002, to include explicit provisions for data-driven dominance and unfair practices in the digital economy.

7. Encourage Fair Revenue Sharing Models

Suggest frameworks for fair revenue-sharing mechanisms between domestic and foreign entities leveraging Indian consumer data for monetisation purposes.

8. Build a Strong Cybersecurity Infrastructure

Highlight the need for robust cybersecurity frameworks to protect cross-border data exchanges from breaches, espionage, and misuse.

9. Promote Data Monetisation for National Development

Propose leveraging cross-border data monetisation to support India's Digital India initiative by incentivizing innovation, infrastructure development, and economic growth.

10. Introduce Incentives for Compliance

Suggest tax benefits, subsidies, or fast-track approvals for businesses that comply with India's data protection norms while engaging in cross-border data monetisation.

11. Expand the Role of Regulatory Authorities

Strengthen institutions like the Data Protection Board, Competition Commission of India (CCI), and RBI to ensure effective monitoring, enforcement, and dispute resolution in cross-border data issues.

12. Develop an Arbitration Mechanism for Data Disputes

Recommend establishing a dedicated arbitration mechanism to address cross-border data-related disputes efficiently and cost-effectively.

13. Adopt Technology-Based Compliance Solutions

Encourage the use of blockchain, AI, and other technologies for secure, transparent, and accountable data management in cross-border transactions.

14. Enhance Awareness Among Businesses

Suggest government-led campaigns and training programs to educate businesses, especially SMEs, about the legal implications of cross-border data monetisation.

15. Incorporate Sustainability in Data Governance

Advocate for the inclusion of sustainable practices in cross-border data policies, ensuring that data monetisation benefits align with broader societal goals like equitable access and ethical use.

16. Periodic Review of Legal Frameworks

Recommend a periodic review and update of India's legal frameworks to keep pace with rapid technological advancements and emerging global trends.

17. Foster Public-Private Partnerships (PPP)

Suggest collaborations between the government, private sector, and academia to create innovative solutions for managing the legal and economic aspects of cross-border data monetisation.

XII. CONCLUSION

Cross-border data monetisation is a critical driver of global market competition, innovation, and economic development. However, it also raises significant legal, ethical, and regulatory challenges, particularly for countries like India, where frameworks to govern data practices are still maturing. The interplay of data privacy, national security, and economic sovereignty underscores the need for balanced policies that foster innovation while safeguarding public and national interests. India's initiatives, such as the *Digital India* program and the draft *National Data Governance Framework Policy*, demonstrate its efforts to establish a robust data economy. However, challenges such as data localization, lack of enforcement mechanisms, and harmonization with global standards remain key obstacles. By drawing insights from established frameworks like the EU's GDPR, India can address these gaps and create a regulatory ecosystem that encourages fair competition. Emerging technologies like artificial intelligence and blockchain, coupled with geopolitical tensions and Big Tech's influence, further complicate the legal landscape. For India to leverage its potential in the global digital economy, it must implement comprehensive data protection laws, promote international cooperation, and foster an innovation-friendly environment. This approach will

help India balance legal and ethical concerns with economic opportunities, enabling it to lead in global data governance.

CORPORATE CRYPTOGRAPHY: DECRYPTING THE ALGORITHMIC BIAS
AND TIE-IN TACTICS OF THE MNCs

- Fathimath Nadha C S⁸⁴³

- Harika S Rebeirro⁸⁴⁴

ABSTRACT

In the contemporary era of globalisation, where digitalisation and market interdependence are increasingly intertwined, multinational corporations (MNCs) often establish subsidiaries across diverse markets to sustain their competitive edge by utilizing algorithmic bias as a powerful tool (among others) to further their corporate objectives. This fosters the creation of tie-in arrangements, vertical in nature. Moreover, the synergistic interplay of artificial intelligence (AI) and algorithms poses a substantial threat to fair competition by enabling anti-competitive agreements and automated collusive conduct. Vertical tie-in predominantly occurs between MNCs and their subsidiaries, or between subsidiaries themselves. Vertical tie-ins occur when MNCs bundle their dominant products with less dominant ones, often forcing consumers to purchase both. For instance, e-commerce platforms may tie their proprietary payment services to their core offerings, limiting consumer choice and boosting the platform's market share. Similarly, software manufacturers may pre-install specific search engines on their devices, influencing consumer behaviour through algorithmic bias. Analogous strategies involving algorithmic bias are adopted in digital markets favouring specific vendors, often at the expense of smaller competitors. Algorithms are manipulated to selectively elevate these preferred sellers through mechanisms like "popular selection" and "Best Seller Tags," further entrenching their market dominance. Moreover, the integration AI and algorithms exacerbate anti-competitive conduct by enabling automated collusive conduct. Furthermore, the question of incidence of liability for such conduct remains unclear, as it may be difficult to attribute responsibility to specific individuals or entities within MNCs. The existing competition law framework, with its inherent limitations and reliance on certain defenses, often struggles to effectively address these challenges. This gap enables MNCs to leverage algorithmic bias to consolidate their market dominance and evade accountability. This article critically analyzes how algorithmic bias facilitates the creation of tie-in arrangements, empowering MNCs to reinforce their dominant market position and bypass liability due to insufficient regulatory provisions.

Keywords: Algorithmic Bias, Vertical Agreements, Preferred Sellers, Tacit Collusion

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I. INTRODUCTION

The confluence of accessible real-time market data and sophisticated, autonomous algorithmic robo-economicus systems has catalyzed a paradigm shift in market behaviour.⁸⁴⁵ Concurrently, market conduct has become increasingly intricate and collaborative, necessitating sophisticated approaches to analyze and respond to these rapid changes.

In recent years, global marketplace have experienced a profound shift, marked by accelerated technological innovation and evolving market structures. The emergence of e-commerce as a dominant retail channel and the widespread adoption of automated systems for pricing and transaction management have significantly altered market dynamics⁸⁴⁶. Algorithmic bias, pervasive in digital markets, is weaponized by MNCs to orchestrate vertical and horizontal anti-competitive agreements. This insidious phenomenon skews perceptions, curtailing receptiveness to diverse viewpoints⁸⁴⁷. Vertical tie-ins, such as bundling dominant products with less dominant ones, and vertical agreements, like collusion between competitors, can be facilitated through algorithmic bias. Multinational corporations exploit vertical tie-ins, conglomerate models, and platform self-preferencing to reshape markets, limit consumer autonomy⁸⁴⁸, and entrench dominance by tying products, mandating proprietary systems, and pre-installing favoured tools.

Algorithmic manipulation fosters vertical agreements with major sellers, granting preferential visibility through tactics like manipulation of search results, entrenching dominant players while marginalizing smaller businesses unable to compete in rankings. This self-reinforcing cycle distorts competition, undermining fairness and innovation. As gatekeepers, platform operators stifle competition, inflate prices, degrade quality, and suppress innovation, harming consumers and throttling economic progress.

The complexity of AI models and methods makes their interpretation increasingly difficult. Thus, both data and design choices are critical in assessing AI systems and potential bias⁸⁴⁹,

⁸⁴⁵ Michal S. Gal & Jorge Padilla, *A General Framework For Analyzing The Effects Of Algorithms On Optimal Competition Laws*, THEORETICAL INQUIRIES IN LAW, July 2024, at 1.

⁸⁴⁶ Cary Coglianese & Alicia Lai, *Antitrust by Algorithm*, 2 STANFORD COMPUTATIONAL ANTITRUST, 2022 at

⁸⁴⁷ Giovanna Massarotto, *What Is Algorithmic Bias and Why Antitrust Agencies Should Care*, CPI ANTITRUST CHRONICLE, June 2023, at 3.

⁸⁴⁸ DR. MATHILDE MESNARD, "COMPETITION AND AI", OECD BUSINESS AND FINANCE OUTLOOK 2021: AI IN BUSINESS AND FINANCE 97 (2021).

⁸⁴⁹ Sara Hooker, *Moving Beyond 'Algorithmic Bias is a Data Problem'*, 2 Patterns 1 (2021); Nicole Turner Lee, Paul Resnick & Genie Barton, *Algorithmic Bias Detection and Mitigation: Best Practices and Policies to Reduce Consumer Harms*, Brookings Report (May 22, 2019).

as certain algorithmic decisions, like feature selection and assumptions⁸⁵⁰, can influence bias. While engineers' choices are driven by technical factors, it's hard to guarantee their decisions are free of bias⁸⁵¹. Moreover, AI deployment can exacerbate anti-competitive behaviour by enabling automated collusion, fostering coordinated pricing, market allocation, or other restrictive practices without explicit agreements. Attributing liability for AI-driven anti-competitive conduct is challenging due to the opaque, autonomous nature of AI decision-making and due to the difficulty in applying intent-based antitrust principles. The legal framework must adapt to ensure algorithm transparency, human oversight, and address unintended automation consequences, as doctrines like the Single Economic Entity and efficiency defenses overlook algorithmic manipulation that consolidates market power and stifles innovation. A robust, agile regulatory framework is vital to promote public good, enabling regulators to detect and mitigate anti-competitive behavior like vertical restraints stemming from algorithmic decision-making⁸⁵².

II. ALGORITHMIC BIAS AS A CATALYST FOR ANTI-COMPETITIVE VERTICAL INTEGRATION.

Algorithms are sequences of instructions for processing inputs and generating outputs, with examples like the Euclidean algorithm, which efficiently finds the greatest common divisor⁸⁵³. While traditional deterministic algorithms are unbiased, recommendation algorithms employ machine learning techniques to analyze user behaviour data, including browsing and purchase history, to offer personalized product recommendations⁸⁵⁴, enhancing customer engagement, loyalty⁸⁵⁵, and the success of e-commerce ventures.⁸⁵⁶ Algorithms, while inherently neutral, can be manipulated by e-commerce platforms to favour certain products or sellers, enabling anti-competitive practices. AI, driven by machine learning, relies on vast datasets, where biases in data or design can perpetuate unfair outcomes. These biases may influence AI's probabilistic outputs, potentially reinforcing biased vertical agreements and necessitating

⁸⁵⁰ Drew Roselli et al. *Managing Bias in AI*, *Companion Proceedings of the 2019 World Wide Web Conference* 539, at 541 (2019).

⁸⁵¹ Resnick & Barton, *See supra* note 5; Bo Cowgill & Catherine Tucker, *Algorithmic Fairness and Economics* (Sep. 24, 2020) 4.

⁸⁵² Nathan Feiglin, *Algorithmic Collusion and Scrutiny: Examining the Role of the ACCC's Information Gathering Powers in the Digital Era*, 43 U.N.S.W.L.J. 1137 (2020).

⁸⁵³ Giovanna Massarotto, *See Supra* note 3.

⁸⁵⁴ Roy D & Dutta M, *A systematic review and research perspective on recommender systems*, 9 J BIG DATA, May 2022, at 1, 4.

⁸⁵⁵ Fayyaz Z et al., *Recommendation systems: algorithms, challenges, metrics, and business opportunities*, 10 APPL. SCI., Nov 2020, at 8, 11.

⁸⁵⁶ Badouch M & Boutaounte M, *Personalized travel recommendation systems: a study of machine learning approaches in tourism*, 3 JAIMLNN. 35, 35-44 (2023).

further scrutiny. The impact of algorithmic bias in facilitating vertical agreements can be comprehended with the aid of the following seriatim, alongside an exploration of its relationship with artificial intelligence

III. VERTICAL AGREEMENTS BETWEEN PREFERRED SELLERS AND DIGITAL MARKETS : A SELLER SYNERGY

The burgeoning Indian e-commerce sector, driven by widespread internet penetration, is primed for exponential growth. To maintain competitiveness, digital marketplaces increasingly rely on sophisticated algorithmic systems. While these algorithms can potentially enhance competition and consumer welfare, their deployment also raises concerns about potential anti-competitive conduct under the Competition Act, 2002.

To optimize profitability on digital marketplaces, sellers must prioritize product visibility. This is achieved through elevated search engine rankings, which correlate with increased customer engagement and positive feedback. Such engagement can positively influence future ranking⁸⁵⁷.

A seller's or service provider's market access on a platform is significantly influenced by their ranking in response to relevant search queries. Organic search rankings are determined by the platform's proprietary search algorithm, granting the platform considerable discretion over search parameters and resultant listings⁸⁵⁸. Search bias, is a practice involving manipulation of hierarchical categorization or ranking⁸⁵⁹, with an intention to facilitate anti-competitive arrangements between platforms and their 'preferred sellers'. Such manipulation create an uneven marketplace, potentially harming both competition and consumer interests.

The attainment of coveted designations like "Best Seller" or "Popular Product" can significantly enhance a seller's search visibility and sales performance. However, such designations are contingent upon specific performance metrics, including sales volume and customer reviews. The interplay of performance metrics, status quo bias⁸⁶⁰, and positive network effects⁸⁶¹ can create a self-perpetuating cycle favouring larger, established sellers.

⁸⁵⁷ Thorsten Joachims et al, *Evaluating the Accuracy of Implicit Feedback from Clicks and Query Reformulations in Web Search*, ACM TRANS INF SYST, 2007, 13.

⁸⁵⁸ Market Study on E-Commerce in India: Key Findings and Observations" (Competition Commission of India, 2022), <https://cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-and-observations1653547672.pdf>.

⁸⁵⁹ Andrew Langford, *gMonopoly: Does Search Bias Warrant Antitrust Or Regulatory Intervention?* , 88 INDIANA LAW J 1559, 1584 (2013).

⁸⁶⁰ See *infra* note 33.

⁸⁶¹ Jeffrey Church, *Conglomerate Mergers*, 2 ISSUES COMPETITION L. & P 1503, 1531 (2008).

This "rich get richer" phenomenon⁸⁶² is exacerbated by e-commerce platforms' algorithmic ranking systems, such as Amazon's A9 and A10⁸⁶³, which prioritize popular items. Such algorithmic biases can potentially lead to anti-competitive behaviour, limiting consumer choice and hindering the growth of smaller, emerging sellers.

Algorithmic manipulation to preferentially promote certain sellers, potentially violating the Competition Act of 2002, is evident in cases such as *Delhi Vyapar Mahasangh v. Flipkart Internet Pvt. Ltd. and Ors*⁸⁶⁴ E-commerce giants such as Flipkart and Amazon have been found to contravene Sections 3(1)⁸⁶⁵ and 3(4)⁸⁶⁶ of the Competition Act by implementing preferential listing practices. This is achieved through the use of tags like "Assured Seller" and "Fulfilled," which enhance the visibility and ranking of certain products or sellers, creating positive network effects.

Professor Thorsten Joachims has highlighted how ranking systems apportion visibility. Making it crucial to implement mechanisms that guarantee equitable allocation of visibility to all market participants.⁸⁶⁷

Empirical evidence indicates that seller designations significantly impact visibility and sales. A study comparing 'Fulfilled by Amazon' (FBA) and 'Fulfilled by Merchant' (FBM), sellers on Amazon demonstrated that the former consistently achieved superior Best Seller Rankings across various product categories and marketplaces. This raises concerns about potential algorithmic bias in Amazon's Buy Box selection, potentially favouring the FBA sellers and Amazon's products. Such practices, where designations are determined solely by the platform, can disadvantage independent sellers and potentially violate competition laws.⁸⁶⁸

The immediate impact of such bias is felt by existing competitors, as platforms may favour certain products or sellers, leading to effective market foreclosure and disadvantaging non-preferred sellers and new entrants. Dominant firms exploit this bias to solidify their market position and expand into new markets. For instance, a dominant search engine like Google may leverage its position to increase the visibility of its services⁸⁶⁹, causing significant

⁸⁶² Melanie Lefkowitz, Algorithm improves fairness of search results, CORNELL CHRONICLE (July 23, 2024, 7 :00 PM), [Algorithm improves fairness of search results | Cornell Chronicle](#).

⁸⁶³ Madhav Tripathi & Prateek Yadav, Competition in the age of big data: dissecting the dominance of algorithms in Digital markets, CBFLNLUDELHI (July 31, 2024, 5:04 PM), [Competition in the age of big data: dissecting the dominance of algorithms in Digital markets](#).

⁸⁶⁴ Delhi Vyapar Mahasangh v. Flipkart Internet Pvt. Ltd. and Ors, 2020 SCC OnLine CCI 3.

⁸⁶⁵ The Competition Act, 2002, No. 12 of 2003, § 3(1) (India).

⁸⁶⁶ The Competition Act, 2002, No. 12 of 2003, § 3(4) (India).

⁸⁶⁷ See *Supra* note 18.

⁸⁶⁸ Chinonso E. Etumnu, *A competitive marketplace or an unfair competitor? An analysis of Amazon and its best sellers ranks*, JAE, May 2022, 12.

⁸⁶⁹ Google and Alphabet v Commission, (EU), 2017, Case T-604/18.

financial harm to competitors⁸⁷⁰. Competitors may struggle to survive and compete fairly due to such manipulation, especially without strong funding and alternative platforms. Furthermore, the network effects enjoyed by dominant platforms further hinder competitors' ability to switch platforms, potentially leading to their elimination.

Some examples of algorithmic bias in Indian digital marketplaces leading to subsequent deterrence of visibility to sellers can be seen in cases like **National Restaurant Association of India v. Zomato Ltd**⁸⁷¹ where it highlighted significant concerns regarding algorithmic bias and anti-competitive practices in the food delivery market specifically involving Zomato and Swiggy. The platforms were found to favour certain restaurant partners through algorithmic manipulation, potentially leading to market foreclosure, amplified network effects, and barriers to entry, which could violate Section 3(4) of the Competition Act of 2002.

Similarly in **Federation of Hotel & Restaurant v. MakeMyTrip India Pvt. Ltd. (Mmt)**⁸⁷² the CCI's investigation into the online travel agency (OTA) sector, specifically focusing on MakeMyTrip (MMT), highlighted concerns regarding algorithmic bias and anti-competitive practices. Where MMT's exclusive agreements with OYO led to the removal of independent hotel chains from its platforms, through the deployment of algorithms potentially favouring OYO and limiting competition for other independent hotel operators.⁸⁷³

IV. VERTICAL AGREEMENTS BETWEEN MNCs AND SUBSIDIARIES: A STRATEGIC SYNERGY.

The Indian Competition Act of 2002, a cornerstone of the 1991⁸⁷⁴ economic liberalization reforms recalibrated the legal framework to align with evolving economic imperatives. Thereby fostering a policy environment that attracts global investments⁸⁷⁵ and catalyzes the proliferation of multinational corporations and their subsidiaries. Concurrently, the rapid expansion of digital payment ecosystems, driven by Unified Payments Interface (UPI) applications, has revolutionized global commerce and cashless transactions, particularly in

⁸⁷⁰ See *Id.*

⁸⁷¹ National Restaurant Association of India v. Zomato Limited, 2022 SCC OnLine CCI 22.

⁸⁷² Federation of Hotel & Restaurant v. MakeMyTrip India Pvt. Ltd. (Mmt), 2022 SCC OnLine CCI 58.

⁸⁷³ Sucheta Sarkar, Fair market opportunity is the hallmark of competition"; CCI imposes hefty monetary penalty on MakeMyTrip, Goibibo and OYO for their anti-competitive practices and abuse of dominant position, SCC TIMES (Aug.10, 2024, 11.00 AM) , "Fair market opportunity is the hallmark of competition"; CCI imposes hefty monetary penalty on MakeMyTrip, Goibibo and OYO for their anti-competitive practices and abuse of dominant position | SCC Times.

⁸⁷⁴ Chauhan, B. S, *Indian Competition Law: Global Context*. 54 JILI. 315, 315-323 (2012).

⁸⁷⁵ Sumit Jain & Vikrant Singh, Competition in Digital Markets: An Indian Perspective, CCLE, June 2024, at 1.

India⁸⁷⁶. However, allegations of anti-competitive practices by dominant technology firms have spurred critical discussions on the ethical and regulatory ramifications of such behaviour. A prominent example is the scrutiny of Google⁸⁷⁷ for allegedly leveraging its market dominance to confer preferential treatment on its subsidiary, Google Pay, within the Android ecosystem and the Play Store. This case offers profound insights into the exploitation of algorithmic and cognitive biases to distort competition, thereby affecting market dynamics and limiting consumer choice.

In the digital payment market, Google has been accused of fostering anti-competitive practices by promoting its subsidiary application, Google Pay, as the default payment option during the initial setup of Android devices. Additionally, Google Pay enjoys integration with the intent-flow methodology, a technological framework designed to reduce latency and create a seamless transaction experience. Latency refers to the time delay between a user's action and an application's response. It plays a critical role in shaping consumer behaviour, as higher latency often leads to abandonment of online activities, while lower latency indicating faster response times, thereby encourages users to complete their intended actions. For instance, a mere 0.5-second delay in generating a search results page can result in a 20% drop in traffic⁸⁷⁸.

In contrast, competing UPI applications like PhonePe, Paytm, and BHIM are limited and integrated via the collect-flow methodology, which is characterized by fragmented steps requiring active consumer engagement across multiple applications. This disparity results in higher latency for non-Google UPI applications, leading to inferior user experiences and lower conversion rates for merchants. Conversion rate refers to the proportion of visitors to an online store who complete a purchase within a given time frame. In e-commerce, it is considered one of the most critical key performance indicators.⁸⁷⁹ Intent flow streamlines the payment process, leading to significantly reduced latency and higher customer conversion rates.

The intent-flow methodology benefits merchants and consumers by ensuring seamless, uninterrupted steps, minimizing delays, reducing cognitive load, and increasing transaction

⁸⁷⁶ Ministry of Finance, Press Release, <https://pib.gov.in/PressReleasePage.aspx?PRID=2057013> (Issued on 20 Sep 2024) (last visited Dec. 7, 2024).

⁸⁷⁷ XYZ v. Alphabet Inc. 2020 SCC OnLine CCI 4; Kshitiz Arya and Anr. Vs Google & Ors. (2021 SCC OnLine CCI 33).

⁸⁷⁸ Shubham Bisht, Bring Velocity to Your Business With the Improved 10X Faster Razorpay UPI Collect, RAZORPAY BLOG (Nov 28, 2024, 2:32 PM), <https://razorpay.com/blog/upi-collect-razorpay-business-growth/>.

⁸⁷⁹ Darius Zumstein & Wolfgang G. Schäfer, *Success Factors Of E-Commerce – Drivers Of The Conversion Rate And Basket Value*, 18TH INTERNATIONAL CONFERENCE E-SOCIETY 2020 43, 43-47 (2020).

success rates. In contrast, the collect flow introduces delays from manual VPA entry, merchant app processing, and bank API validation, leading to higher latency and potential transaction abandonment, underscoring the critical role of low latency in sustaining consumer engagement.

The integration of intent flow exclusively for Google Pay creates a clear competitive advantage. The streamlined transaction experience not only attracts first-time users but also disincentivizes them from exploring alternative UPI applications due to the convenience and efficiency of Google Pay. This "*status quo bias*," acts as an algorithmic bias wherein users are naturally inclined to stick with pre-installed or default options, amplifies Google Pay's market dominance. Furthermore, the preferential placement of Google Pay on the Play Store further solidifies its advantage, making it the most accessible choice for consumers while competitors struggle to achieve similar visibility and adoption.

From a legal perspective, the Google Pay case underscores the anti-competitive risks posed by vertical integration between a dominant parent company and its subsidiary. By leveraging its control over the Android OS and Play Store ecosystem, Google allegedly ties the prominence and technical advantages of its subsidiary, Google Pay, to the distribution of its operating system. This practice potentially contravenes Section 4(2)(e) of the Competition Act, 2002⁸⁸⁰, which prohibits leveraging a dominant position in one market to strengthen a position in another. The use of intent flow technology exclusively for Google Pay, coupled with its preferential default placement during device setup, creates a scenario where competing UPI applications face substantial barriers. Such conduct not only hinders competition but also distorts consumer choice by coercing market players to accept discriminatory terms. Thereby undermining innovation and fair play in the payments ecosystem.

In ***Umar Javeed and Others v. Google LLC***⁸⁸¹, has discussed the incorporation of status quo bias in the minds of the consumers by setting a default option. It held that “the Commission notes that Google search is set as a default search service in Google's own browser Chrome, which enjoys significant market share in the Android ecosystem, Google's claim that the drop-down menu on Chrome allow users to change the default, again conveniently disregards users' tendency to stay in the default choice and to choose inaction over action. Even for Safari, Google is paying a substantial amount for the opportunity to gain the default position as it realizes ***that default position is very critical***, and users seldom change the default. Thus,

⁸⁸⁰ Competition Act, 2002, No. 12 of 2003, § 4(2)(e) (India).

⁸⁸¹ Umar Javeed & Ors. v. Google LLC, Case No. 39 of 2018, 2019 SCC OnLine CCI 42 (India).

Google sees a value proposition ensuring that competing engines do not obtain the default position in mobile is the question”. In *Shri Sonam Sharma v Apple Inc. USA & Ors*⁸⁸², the CCI held that “More often, tying is a sales strategy usually adopted by the companies to promote / introduce a slow-selling or unknown brand when it has in its portfolio a fast-selling or well-known product, over which it has certain market power”. Therefore, it is not requisite that A tying arrangement or condition must be explicitly stated in the written contract, though it can also be inferred from the course of conduct.⁸⁸³ In the impugned cases such tie-in agreements are construed from the vertical integration between the subsidiary and parent company thereby garnering higher market share in two relevant markets by the use of cognitive bias.

V. THE LEGAL CONUNDRUM – AN EXPLOITATION OF ALGORITHMS

Firms often exploit behavioural economic phenomena and algorithmic bias to fortify their competitive dominance, with parent entities leveraging cognitive biases like the default effect, status quo bias, and action aversion to perpetuate the supremacy of their subsidiaries. This exploitation is particularly pernicious during nascent stages of market adoption, where such practices can have indelible effects. The penalty provisions serve not only as a deterrent but also as instruments of retribution, education, and denunciation⁸⁸⁴. Nevertheless, the question lingers as to whether these objectives are genuinely being fulfilled.

Provision 27(b)⁸⁸⁵ of the Competition Act authorizes the Competition Commission of India (CCI) to impose penalties on persons or businesses adjudged to have contravened Sections 3 or 4⁸⁸⁶ of the Act. Significantly, the revised provision stipulates that 'turnover' for the purpose of penalties under Section 27(b) includes global turnover from all the enterprise's products and services. The Penalty Guidelines empower the CCI to levy fines up to 30% of the enterprise's average relevant turnover or income.⁸⁸⁷ This benchmark serves as a basis for determining the penalty to be levied under Section 27(b), ensuring the punitive measures are proportionate to the enterprise's financial scale. Even when regulatory bodies like the CCI

⁸⁸² *Shri Sonam Sharma v. Apple Inc. USA & Ors*, (2013) SCC OnLine CCI 25 : (2013) CCI 19 : (2013) 114 CLA 255.

⁸⁸³ *United States v. Lowes Incorp.*(1962) SCC OnLine US SC 156 : 371 US 38 (1962).

⁸⁸⁴ Mehak Gupta, *Penalties For Infringement Of Competition Law*, CCI 3, 3-9 (2012).

⁸⁸⁵ Competition Act, 2002, No. 12 of 2003, § 27(b) (India).

⁸⁸⁶ Competition Act, 2002, No. 12 of 2003, § 3 & § 4 (India).

⁸⁸⁷ AnantLaw, *India notifies Regulations for the Determination of Penalty and Turnover & Income as well as Guidelines for Imposition of Penalties for breach of Competition Act*, LEGAL500, (Nov 30, 2024, 4:46 PM), [https://www.legal500.com/developments/thought-leadership/india-notifies-regulations-for-the-determination-of-penalty-and-turnover-income-as-well-as-guidelines-for-imposition-of-penalties-for-breach-of-competition-act/#:~:text=Further%2C%20If%2C%20in%20view%20of,of%20the%20\(global\)%20turnover.](https://www.legal500.com/developments/thought-leadership/india-notifies-regulations-for-the-determination-of-penalty-and-turnover-income-as-well-as-guidelines-for-imposition-of-penalties-for-breach-of-competition-act/#:~:text=Further%2C%20If%2C%20in%20view%20of,of%20the%20(global)%20turnover.)

and NCLAT intervene to dismantle default integrations, consumer inertia ensures the enduring dominance of preselected options. The imposed penalties, including a ₹936.44 Crore fine calculated at 7% of Google's average relevant turnover for contravening Section 4 of the Act, are insignificant compared to the substantial profits garnered from these strategies.⁸⁸⁸ As per the company's most recent financial report, Google's current annual revenue stands at approximately ₹22,09,040 crores, reflecting an 8.33% growth from 2021, when the revenue was ₹20,38,558 crores.⁸⁸⁹

Therefore, these penalties, often calculated as a fraction of turnover, barely make an impact on the financial strength of multinational corporations (MNCs), effectively reducing their deterrent value. The sheer scale of these enterprises allows them to absorb such penalties as minor operational costs rather than significant punitive measures. Furthermore, the implicit advantages they gain by leveraging consumer behavioural patterns - such as cognitive biases like the default effect or status quo bias in the formative stage, often result in have '*sustained effect*' in users. This sustaining effect in users perpetuates a long-term dominance in their respective markets even after imposition of penalty and directives prescribed by the regulators. These advantages, which yield substantial profits and market control, far exceed the monetary value of any sanctions imposed. Consequently, the penalties fail to address the structural market distortions or diminish the entrenched power of these entities, leaving the competitive landscape largely unchanged and the anti-competitive practices unchallenged.

The preferential treatment afforded by parent companies to their subsidiaries in vertically integrated structures exemplifies a strategic evasion of liability pursuant to Section 3(4)(a)⁸⁹⁰, Competition Act 2002. Through manipulating algorithms to feature subsidiaries more prominently through tactics such as assigning "Best Seller" tags or "popular selection" rankings, parent companies ensure their subsidiaries gain undue market advantage. This preferential treatment operates under the protection of the Single Economic Entity doctrine, which treats parent companies and subsidiaries as incapable of forming anti-competitive agreements. As a result, these entities insulate themselves from accountability, perpetuating market distortions and safeguarding their dominance under the guise of compliance.

⁸⁸⁸ Competition Commission of India, Press Release, <https://pib.gov.in/PressReleasePage.aspx?PRID=1870819> (Issued on 25 Oct 2022) (last visited Dec. 7, 2024).

⁸⁸⁹ Daniel Shvartsman, Google: One of the Greatest Inventions in History, *INVESTING.CO*, (Nov 30, 2024, 5:16 PM), [https://www.investing.com/academy/statistics/google-facts/#:~:text=Alphabet%20\(Google\)%20Annual%20Revenue,-Copied&text=According%20to%20the%20company's%20latest,the%20company%20earned%20%24256.74%20billion.](https://www.investing.com/academy/statistics/google-facts/#:~:text=Alphabet%20(Google)%20Annual%20Revenue,-Copied&text=According%20to%20the%20company's%20latest,the%20company%20earned%20%24256.74%20billion.)

⁸⁹⁰ Competition Act, 2002, No. 12 of 2003, § 3(4)(a) (India).

Corporations often evade liability of the provisions provided in Section 3(4)(a) of the Competition Act by exploiting Single Economic Entity doctrine, exemplified by parent companies integrating third-party applications while maintaining default services, creating implicit tie-in arrangements that contravene anti-competitive provisions.

These practices underscore a fundamental flaw in regulatory enforcement, while penalties address overt contraventions, they fail to dismantle the systemic advantages engineered by market incumbents. By capitalizing on behavioural inertia and leveraging legal doctrines to escape liability, dominant entities erode the principles of competitive neutrality and perpetuate market inefficiencies.

VI. SELF- LEARNING ALGORITHMS CRYPTING TACIT COLLUSION

Algorithms are rule-based procedures that produce predictable outputs. On the other hand, Self-learning algorithms are designed to mimic human intelligence, adapting to complex problems by learning from data without explicit programming.⁸⁹¹

Algorithms are inherently dependent upon input data to generate output. In the context of competition, price data is paramount. Historically, such data is strenuous. In digital markets, however, price transparency has become the norm as they are easily accessible online, often directly from sellers' websites or price comparison websites.⁸⁹²

This heightened price transparency enables firms to closely monitor and adjust prices often utilizing automated software to dynamically respond to market fluctuations enabling manufacturers to exert greater control over retail pricing. Access to contemporaneous pricing information may inadvertently lead to automated price coordination or tacit collusion⁸⁹³, violating Section 3(3)(a)⁸⁹⁴ under the 2002 Competition Act, which forbids price-fixing arrangements among businesses.

Ariel Ezrachi and Maurice Stucke identify four primary mechanisms through which algorithms can facilitate collusion. The "messenger", the "hub and spoke", the "predictable agent" mechanism and the "digital eye". The digital eye unlike the other three involves a mechanism which utilizes machine learning algorithms to monitor market conditions and

⁸⁹¹ Antonio Capobianco et al., *Algorithms and Collusion: Competition Policy in the Digital Age*, 9, 2017.

⁸⁹² Friso Bostoen, *Artificial Intelligence and Competition Law*, ABBREVIATION OF JOURNAL, 2023, 4.

⁸⁹³ European Commission, Final Report on the E-commerce Sector Inquiry, COM (2017) 229 (May 10, 2017).

⁸⁹⁴ The Competition Act, 2002, No. 12 of 2003, § 3(3)(a) (India).

trigger coordinated pricing adjustments.⁸⁹⁵ This analysis will primarily focus on the "digital eye" mechanism.

For the application of Section 3(3)(a), Competition Act, 2002, it is requisite that there must be an agreement. As per the statutory definition⁸⁹⁶, an "agreement" encompasses any arrangement, understanding, or concerted action, irrespective of its formality or enforceability. This broad definition implies that even informal or tacit understandings between enterprises can constitute an agreement as defined by the Act.

The central question is whether the deployment of algorithms, with the knowledge of their potential for autonomous collusive behaviour constitutes a tacit agreement between competitors, satisfying the requirements enumerated under Section 2(b) and thereby Section 3(3)(a).?

In order to effectively address AI-driven collusion, it is imperative to analyse the scope of definition of "agreement" under Section 2(b) of the Act. In the case of ***Director, Supplies & Disposals v. Shree Cement Limited***⁸⁹⁷, the CCI clarified "tacit meeting of minds" necessitates some form of overt communication like "nod or wink". Burden of proof to establish an understanding or agreement is "preponderance of probabilities," rather "beyond reasonable doubt." Similar principle was also established in the case of ***Jyoti Swaroop Arora v. The CCI***⁸⁹⁸ by the Delhi High Court.

Hence traditionally, an agreement required overt communication between two parties. However, in the realm of AI-driven collusion, algorithms can interact and influence each other without explicit human intervention. This raises the question of whether such algorithmic interactions constitute an agreement between the underlying companies. Given that these algorithms act as agents for their respective companies, and both companies are aware of their deployment and nature, it can be argued that a tacit agreement may be inferred, even if the specific timing of the algorithmic interaction is unknown to human decision-makers.⁸⁹⁹

In this regard, the "digital eye" scenario presents a unique challenge, where competitors may not explicitly program their software to respond to market changes in a specific manner but rather instruct it to 'maximise profits'. Through self-learning, these algorithms may converge

⁸⁹⁵ ARIEL EZRACHI & MAURICE E. STUCKE, VIRTUAL COMPETITION, 36-37, (MARTIN DICKINSON & DEBORAH GRAHAME SMITH eds., 1st ed. 2016).

⁸⁹⁶ The Competition Act, 2002, No.12 of 2003, § 2 (b) (India).

⁸⁹⁷ Director, Supplies & Disposals v. Shree Cement Limited, 2017 SCC OnLine CCI 2.

⁸⁹⁸ Jyoti Swaroop Arora v. The CCI, 2011 SCC OnLine CCI 15: [2011] CCI 14.

⁸⁹⁹ See *Id.*

on collusive behaviour as the optimal strategy. While competitors may not explicitly program their algorithms to collude, they may be aware of their potential to do so. Thus, raising the question whether such knowledge is sufficient to establish liability. Hence, the Competition Commission of India will be required to carefully assess the degree of competitor involvement and potential pro-competitive rationales for the employment of such algorithms.⁹⁰⁰

The CCI's stance on algorithmic collusion can be assessed by examining two cases of *Express Industry Council of India v. Jet Airways (India) Ltd. and Ors*⁹⁰¹ and *Shikha Roy v. Jet Airways*,⁹⁰² where the CCI established a two-step test to identify and penalize algorithmic collusion⁹⁰³. This test involves examining human communication between entities and then assessing the role of algorithms in price-setting decisions. While this approach is a significant step, it may not be sufficient to address the complexities of modern digital markets.

The test's focus on common algorithms and human intent may limit its effectiveness in detecting collusion that occurs through sophisticated automated systems without explicit communication. As digital markets continue to evolve, the CCI may need to refine its approach to ensure it can effectively address the challenges posed by algorithmic collusion.

Hence, While India's competition law has confronted "hub and spoke" agreements, "the predictable agent" and "the digital eye" algorithmic collusion remains unexplored within the Indian competition law regime. This necessitates a thorough evaluation of the existing framework's capacity to adequately regulate such algorithms⁹⁰⁴ and to foster competition in the new era of digital markets.

VII. CONCLUSION

In the intricate dance of algorithms shaping digital marketplaces, the early stages of bias emerge as silent architects of persistent inequities. The true danger lies in the formative phase, where algorithms embed biases that evolve into default preferences, effectively locking consumers into ecosystems that favour dominant entities. To counteract the perpetuation of

⁹⁰⁰ Madhavi Singh, Algorithmic Collusion in Flight Pricing in India, LAW SCHOOL POLICY REVIEW (Aug. 3, 2024, 9:30 AM), [Algorithmic Collusion in Flight Pricing in India – Law School Policy Review](#).

⁹⁰¹ Express Industry Council of India v. Jet Airways (India) Ltd. and Ors, 2018 SCC OnLine CCI 11.

⁹⁰² Shikha Roy v. Jet Airways (India) Limited and Others, 2021 SCC OnLine CCI 31.

⁹⁰³ Yash Arjariya, Algorithmic Collusion in an Oligopolistic Market: Difficulty in Gauging Conscious Price Parallelism, THE INDIAN REVIEW OF CORPORATE AND COMMERCIAL LAWS (Nov 27, 2024, 5:00 PM),

[Algorithmic Collusion in an Oligopolistic Market: Difficulty in Gauging Conscious Price Parallelism](#).

⁹⁰⁴ Digvijay R. Singh, Algorithmic Collusion: Can the Competition Act Protect against Self-Learning Algorithms?, INDIACORPLAW (Aug. 8, 2024, 8: 00 PM), [Algorithmic Collusion: Can the Competition Act Protect against Self-Learning Algorithms? - IndiaCorpLaw](#).

this sustaining effect of status quo bias and the continuing profit accrual by MNCs, penalties must be amplified in proportion to their financial strength, serving as a meaningful deterrent.

The doctrine of immunity, long entrenched in antitrust law, exposes significant limitations. The remedy lies in expanding the scope of Section 3(4) to impose liability on single economic entities, ensuring accountability at every level of operation. The doctrine of immunity in antitrust law shields Single economic units from liability, enabling anti-competitive practices and unchecked consolidation of power. To counter this, Section 3(4) must be expanded to impose liability on single economic entities, ensuring accountability and dismantling the mechanisms of algorithmic inequity.

The rapid advancement of digital markets has given rise to sophisticated algorithmic collusion tactics. These covert practices pose a significant challenge to traditional competition law enforcement due to their complex nature. Moreover, the paucity of research dedicated to identifying such tacit collusion creates a blind spot, allowing competitors to engage in anti-competitive behaviour with impunity.

In this respect, The US ACM Policy Council⁹⁰⁵ advocates for holding all algorithm users liable, regardless of traceability. The German Monopolies Commission⁹⁰⁶ emphasizes active market monitoring to detect price anomalies. Inspired by the London Interbank Offered Rate case, implementing such monitoring tools can effectively identify potential collusion⁹⁰⁷. Implementing similar monitoring mechanisms in India will aid in regulating the sustained effects of algorithmic bias and tacit collusion.

Regulatory frameworks must evolve to pierce algorithmic opacity and hold corporations accountable for their technological choices. To safeguard markets and consumer rights, focus must shift to transparency, equitable design, and ethical oversight. The future of fair competition and innovation lies in unraveling the cryptic algorithms of corporate cryptography, ensuring digital dominions do not become monopolistic mazes of manipulation.

⁹⁰⁵ Statement by the ACM U.S. Public Policy Council on Algorithmic Transparency and Accountability, Ass'n for Computing Mach. (Jan. 12, 2017), https://www.acm.org/binaries/content/assets/public-policy/2017_usacm_statement_algorithms.pdf.

⁹⁰⁶ Monopolies Commission, Main Report XXII: Algorithms and Collusion, at (2018) (Prof. Achim Wambach/Germany).

⁹⁰⁷ See *Supra* note 60.

**AN EMPIRICAL STUDY ON THE ROLE OF COMPETITION LAW IN
GOVERNING METAVERSE ECONOMIES AND VIRTUAL MARKETPLACES
WITH SPECIAL REFERENCE TO INDIA**

- Varun Prakash⁹⁰⁸

- K.Jai Shankar⁹⁰⁹

ABSTRACT

The rapid expansion of the metaverse and virtual workplaces has created new economic obstacles, demanding the use of competition law to address concerns like monopolistic conduct and market fairness. The topic delves into how competition law may be used to control and monitor economic activity and company practices in the metaverse and virtual workplaces. Accessing the metaverse economy can be challenging for startups, small enterprises, and individuals with little financial resources. Unchecked, these barriers have the potential to consolidate power in the hands of a select few. Because it encourages inclusivity, regulates access prices, and ensures fair platform policies that encourage varied participation, competition law is essential in reducing these barriers. The primary objective of the study is to evaluate the suitability of current competition law frameworks for regulating economic activity and disputes in virtual workplaces. This study examines how perceptions of the efficacy of competition legislation in guaranteeing equitable practices in metaverse economics and virtual workplaces are influenced by demographic factors such as age, gender, educational background, and employment. The dependent variables evaluate the enterprises and metaverse users knowledge of competition legislation. Knowledge of the laws pertaining to user rights and monopolistic practices in virtual economies is part of it. With the ongoing evolution of the metaverse, competition law needs to be a foundational element in establishing fair and inclusive virtual economies, transforming the landscape of work and trade in the future.

Keywords: Metaverse, Competition, Barriers, Monopolistic, Virtual .

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I. INTRODUCTION

The metaverse, a dynamic virtual universe blending augmented reality, virtual reality, and blockchain technologies, has emerged as a significant economic frontier. Virtual marketplaces and economies within the metaverse are rapidly transforming global trade by creating immersive experiences and new revenue streams. However, this evolution also raises regulatory challenges, particularly concerning anti-competitive behavior, monopolistic practices, and data exploitation. This study aims to explore the role of competition law in governing metaverse economies, focusing on India's regulatory framework and its adaptability to this emerging digital ecosystem. The objectives include analyzing the evolution of metaverse economies, identifying legal gaps, and providing recommendations to ensure fair competition and consumer protection. The evolution of the metaverse has been driven by technological advancements, such as blockchain, NFTs (Non-Fungible Tokens), and 5G connectivity. In India, initiatives like Digital India and efforts to introduce the Digital Personal Data Protection Bill signal the government's commitment to regulating the digital economy. Factors affecting the metaverse include the dominance of tech giants, lack of regulatory clarity, and global disparities in legal frameworks. Current trends highlight increasing investment in virtual real estate, the rise of decentralized platforms, and growing consumer participation in virtual marketplaces.

Comparatively, countries like the United States and the European Union have initiated proactive measures to regulate competition in the metaverse. The U.S. antitrust framework addresses tech monopolies, while the EU's *Digital Markets Act* promotes fairness in digital markets. By examining these global approaches, this study aims to identify best practices for India. Balancing innovation with legal accountability is crucial for fostering a competitive and consumer-friendly metaverse ecosystem in India. This research seeks to provide actionable insights to enhance India's competition law framework, ensuring it is robust enough to address the complexities of virtual economies.

II. OBJECTIVES

1. To analyze the role of competition law in metaverse governance.
2. To identify anti-competitive practices in virtual marketplaces and economies.
3. To assess India's regulatory framework for the metaverse economy.
4. To compare India's approach with global competition law frameworks.
5. To propose solutions for fair competition in metaverse marketplaces.

III. REVIEW OF LITERATURE

A. J. Smith, *Antitrust Laws in Virtual Economies* (2020)

Smith explores the application of antitrust laws to virtual economies, emphasizing the challenges of enforcing regulations in decentralized, borderless marketplaces created by the metaverse.

B. R. Kumar, *India's Digital Economy and Competition Law* (2022)

Kumar analyzes the gaps in India's competition law concerning digital and virtual economies, highlighting the need for specific guidelines to address anti-competitive practices in the metaverse.

C. T. Johnson, *The Role of Big Tech in Virtual Marketplaces* (2021)

Johnson examines the dominance of tech giants in metaverse economies and their implications for market fairness, focusing on the need for stricter enforcement of competition laws.

D. A. Gupta, *Regulating Virtual Marketplaces in India* (2023)

Gupta evaluates India's regulatory approach to virtual marketplaces, identifying limitations in adapting traditional competition law principles to the metaverse.

E. C. Brown, *Blockchain and Decentralized Economies* (2019)

Brown discusses how blockchain technology disrupts traditional market structures, creating unique challenges for competition law enforcement in virtual ecosystems.

F. M. Turner, *The European Union's Digital Markets Act* (2022)

Turner provides insights into the EU's *Digital Markets Act* and its implications for virtual economies, offering lessons for India in regulating metaverse competition.

G. S. Patel, *Non-Fungible Tokens and Market Regulation* (2021)

Patel examines the rise of NFTs and their impact on virtual marketplaces, emphasizing the need for clear legal frameworks to prevent monopolistic practices.

H. L. Martin, *Consumer Protection in the Metaverse* (2020)

Martin highlights the challenges of ensuring consumer protection in immersive virtual economies, advocating for updates to competition laws to safeguard users.

IV. METHODOLOGY

The study is conducted by Doctrinal . Secondary data is collected from various sources such as books, journals, articles and electronic sources. To provide an overall overview, the researchers also used commentaries, books, articles, notes and other writings. The Collection

of Primary Legal Sources reviews the **Indian laws** - Competition Act, 2002, and its key provisions relevant to virtual marketplaces (Sections 3, 4, etc.). It also reviews secondary laws and regulations governing digital platforms, consumer protection, and technology. It also examines the **judicial precedents**: Analyze cases from the Competition Commission of India (CCI) involving digital or platform-based economies. The **International Comparisons** Examine the competition laws of jurisdictions actively regulating digital economies, such as the European Union (EU's Digital Markets Act) or the United States.

V. DEFINITION OF META VERSE ECONOMY

A **metaverse economy** refers to the dynamic, interconnected digital ecosystem within virtual worlds where individuals, businesses, and organizations engage in economic activities, including the creation, exchange, and consumption of digital goods, services, and experiences. These economies are built on immersive technologies such as augmented reality (AR), virtual reality (VR), and blockchain, and they often feature unique characteristics such as:

1. **Digital Assets**: Virtual goods (e.g., avatars, clothing, land, and items) and cryptocurrencies that hold real-world monetary value.
2. **Smart Contracts**: Blockchain-enabled mechanisms facilitating transactions, ownership verification, and trade.
3. **Decentralized Marketplaces**: Platforms where users can trade digital assets or services peer-to-peer without intermediaries.
4. **Gamified Elements**: Incentives, rewards, and participatory structures derived from gaming mechanics.
5. **Interoperability**: The ability of digital goods, identities, and services to move across different virtual worlds or platforms.

VI. KEY FEATURES OF META VERSE ECONOMY

1. **User-Centric Participation**: Users act as both consumers and producers, often contributing to the creation of content, goods, and experiences.
2. **Decentralization**: Many metaverse platforms operate on decentralized principles, leveraging blockchain for governance, asset ownership, and transactions.
3. **Virtual-Real Economy Linkage**: Digital assets and currencies in the metaverse often have real-world monetary value, creating a bridge between virtual and real-world economies.

4. **Persistent and Scalable:** The economic activities occur in persistent virtual worlds that can grow and evolve over time, accommodating millions of participants simultaneously.

VII. THE ROLE OF COMPETITION LAW IN GOVERNING METAVERSE ECONOMIES :

Competition law plays a crucial role in ensuring that metaverse economies operate in a fair, transparent, and consumer-friendly manner. As metaverse economies grow, driven by advancements in virtual reality, blockchain, and artificial intelligence, they face unique challenges that competition law must address to prevent monopolistic practices, ensure innovation, and protect consumer interests.

VIII. KEY ROLES OF COMPETITION LAW IN METAVERSE ECONOMICS :

1. Preventing Abuse of Dominance

- Large technology companies or platforms may dominate significant aspects of the metaverse economy (e.g., virtual marketplaces, data storage, or digital currency systems).
- **Examples:**
 - Imposing unfair pricing for virtual goods or services.
 - Restricting access to critical infrastructure or ecosystems within the metaverse.
- **Competition Law's Role:**
 - Monitoring dominant players to prevent practices such as exclusivity agreements, tying arrangements, or predatory pricing

2. Regulating Anti-Competitive Agreements

- Agreements between firms within the metaverse, such as developers, virtual marketplace operators, or content creators, may lead to anti-competitive practices.
- **Examples:**
 - Price-fixing for digital goods or virtual land.
 - Collusive agreements to restrict interoperability between platforms.

3. Ensuring Market Entry and Interoperability

- New entrants to the metaverse economy may face barriers due to established players controlling critical technologies or ecosystems.

- **Examples:**
 - Gatekeeping behaviors by platform operators.
 - Lack of interoperability of digital assets across different virtual worlds.
- **Competition Law's Role:**
 - Encouraging interoperability and open standards to foster competition and innovation.

4. Addressing Data Monopolies and Privacy Concerns

- Data is a key asset in the metaverse, used for personalizing experiences, targeting advertisements, and powering AI.
- **Challenges:**
 - Concentration of data with a few players can lead to monopolistic control and exclusionary practices.
 - Exploitation of user data for anti-competitive advantages.
- **Competition Law's Role:**
 - Regulating data-driven dominance and ensuring fair access to essential data for smaller players.

5. Protecting Consumer Welfare

- Consumer rights can be jeopardized by unfair practices in the metaverse, such as misleading terms of use, non-transparent pricing, or monopolistic pricing for virtual goods.

6. Regulating Mergers and Acquisitions

- Consolidation in the metaverse economy through mergers or acquisitions may reduce competition and create monopolies.
- **Examples:**
 - A dominant metaverse platform acquiring smaller innovative firms to eliminate competition.

IX. CHALLENGES IN APPLYING COMPETITION LAW TO METAVERSE ECONOMICS :

1. Defining Relevant Market

- Virtual goods and services often do not fit traditional definitions of markets, making it challenging to define the "relevant market" for competition law purposes.

2. Jurisdictional Complexities

- The global nature of the metaverse economy creates jurisdictional challenges, as users, companies, and transactions span multiple countries.

3. Dynamic Market Structures

- Rapid innovation and evolving business models in the metaverse make it difficult to apply static legal principles.

4. Lack of Precedents

- The novelty of the metaverse economy means few legal precedents exist to guide enforcement agencies.

X. REGULATORY LANDSCAPE SURROUNDING METAVERSE ECONOMIES AND VIRTUAL MARKETPLACES: SPECIAL REFERENCE TO INDIA

The metaverse economy, characterized by virtual marketplaces, blockchain technologies, and immersive digital experiences, presents unique regulatory challenges. In India, the legal and regulatory frameworks are evolving to address these challenges, focusing on competition law, consumer protection, intellectual property, and data governance. However, a cohesive framework for metaverse-specific governance is still in its nascent stage.

International Regulatory Influence

India's regulatory approach is influenced by international frameworks and best practices, particularly from:

- **United States:** Antitrust actions against Big Tech.
- **European Union:** Digital Markets Act (DMA) and Digital Services Act (DSA).
- **Singapore and South Korea:** Progressive stances on regulating blockchain-based virtual marketplaces.

XI. CHALLENGES IN INDIA'S REGULATORY LANDSCAPE :

1. Lack of Metaverse-Specific Legislation

- Existing laws do not explicitly address the unique dynamics of the metaverse economy.

2. Cross-Border Jurisdiction

- Transactions in the metaverse often involve multiple jurisdictions, complicating enforcement.

3. Rapid Technological Evolution

- The pace of technological advancements outstrips regulatory responses.

XII. CASES OF ANTI - COMPETITIVE BEHAVIOUR IN INDIA'S DIGITAL ECONOMY THAT COULD PARALLEL POTENTIAL ISSUES IN THE METAVERSE :

1. Google: Abuse of Dominance

- **Case:** *Competition Commission of India (CCI) vs. Google (2022)*
- **Issue:** The CCI imposed a ₹1,337.76 crore penalty on Google for abusing its dominant position in the Android ecosystem. Google was accused of:
 - Forcing manufacturers to pre-install its apps.
 - Restricting consumers' ability to choose alternative services.
- **Relevance to the Metaverse:**
 - Dominant metaverse platforms could engage in similar practices, such as enforcing exclusive use of their virtual goods or restricting interoperability with other platforms.
 - Gatekeeping behavior by controlling essential infrastructure in the metaverse could mirror such abuse.

2. Amazon and Flipkart: Preferential Treatment

- **Case:** *CCI Investigation into Amazon and Flipkart (2020)*
- **Issue:** Both e-commerce giants were accused of anti-competitive practices, including:
 - Giving preferential treatment to certain sellers.
 - Deep discounting strategies to stifle competition.
- **Relevance to the Metaverse:**
 - Virtual marketplaces in the metaverse could show favoritism to certain vendors, creating an uneven playing field for smaller creators and businesses.
 - Platform owners could engage in pricing strategies that exclude competitors.

3. Ola and Uber: Price Coordination Allegations

- **Case:** *Samir Agrawal vs. Ola and Uber (2020)*
- **Issue:** Both ride-hailing companies were accused of price-fixing through algorithmic mechanisms, potentially harming consumer interests and smaller competitors.
- **Relevance to the Metaverse:**

- Algorithm-driven pricing for virtual assets in the metaverse could lead to similar concerns, where automated systems unfairly inflate or manipulate prices.
- Such practices could limit consumer choice and harm smaller creators or entrepreneurs in virtual marketplaces.

4. MakeMyTrip-Golbibo and OYO: Exclusionary Practices

- **Case:** *Federation of Hotel and Restaurant Associations of India vs. MakeMyTrip-Golbibo & OYO (2022)*
- **Issue:** The CCI imposed penalties on MakeMyTrip-Golbibo and OYO for engaging in exclusionary practices by delisting competitors and forcing unfair terms on hotels.
- **Relevance to the Metaverse:**
 - Virtual marketplaces may delist certain creators, businesses, or competitors, reducing diversity and choice for consumers.
 - Platform-imposed restrictions on terms of trade could mirror these exclusionary practices.

5. Apple: In-App Payment Systems

- **Case:** *Apple Inc. vs. CCI (2021)*
- **Issue:** Apple was investigated for alleged anti-competitive practices related to its App Store policies, including mandating the use of its in-app payment system and charging high commissions.
- **Relevance to the Metaverse:**
 - Dominant platforms in the metaverse could enforce exclusive payment systems or charge exorbitant transaction fees for virtual goods.
 - Such practices could hinder smaller businesses and creators from flourishing in the virtual economy.

These cases emphasize the importance of:

1. **Preventing Abuse of Market Power:** Ensuring that dominant platforms do not unfairly disadvantage smaller participants or competitors.
2. **Promoting Interoperability:** Avoiding exclusivity arrangements that restrict cross-platform transactions or interactions.
3. **Algorithmic Transparency:** Regulating algorithmic decision-making to prevent price manipulation or unfair trade practices.

4. **Protecting Consumers:** Ensuring fair pricing, access, and choice for consumers engaging in virtual marketplaces.

By learning from these precedents in the digital economy, regulators can proactively address similar anti-competitive behaviors in the emerging metaverse economy.

XIII. SUGGESTIONS:

To address the challenges posed by metaverse economies and virtual marketplaces effectively, India needs a comprehensive and adaptive governance framework. This framework should balance innovation, economic growth, consumer protection, and fair competition. Below are suggestions to improve governance:

1. Develop a Metaverse-Specific Regulatory Framework

- **Comprehensive Legislation:** Enact laws tailored to address the unique challenges of metaverse economies, including virtual property rights, taxation, and liability issues.
- **Regulatory Clarity:** Define virtual assets, digital goods, and metaverse transactions under existing or new laws to reduce ambiguities.

2. Strengthen Competition Law Framework

- **Market Definition:** Update the definition of "relevant market" to include virtual goods and digital ecosystems, ensuring robust competition analysis.
- **Prevent Abuse of Dominance:** Monitor and address monopolistic practices by dominant metaverse platforms.
- **Interoperability Mandates:** Enforce standards to ensure interoperability between platforms, preventing lock-ins and promoting competition.

3. Enhance Data Protection and Privacy Measures

- **Implementation of the Digital Personal Data Protection Act, 2023:**
 - Enforce stricter data privacy rules for metaverse platforms.
 - Mandate transparency in data collection, usage, and sharing.
- **Data Ownership and Control:** Allow users greater control over their data in virtual spaces.

4. Address Intellectual Property Issues

- **Virtual Asset Protection:** Extend copyright and trademark protections to virtual goods and digital content in the metaverse.
- **IP Enforcement Mechanisms:** Create digital tools and platforms to address IP violations in virtual environments effectively.

5. Consumer Protection and Rights

- **Transparency in Transactions:** Mandate clear terms for virtual purchases, including refund policies and dispute mechanisms.
- **Protection Against Fraud:** Strengthen cybersecurity measures to prevent scams and fraudulent activities in virtual marketplaces.
- **Consumer Awareness:** Launch awareness campaigns about rights and risks in the metaverse.

6. Taxation Policies

- **Clarity in Taxation of Virtual Assets:** Define how earnings from virtual goods, services, and cryptocurrency transactions are taxed.
- **GST on Digital Transactions:** Ensure consistency in applying Goods and Services Tax (GST) to virtual goods and services.

7. Foster Innovation and Collaboration

- **Public-Private Partnerships:** Collaborate with technology companies, startups, and academic institutions to shape metaverse policies.
- **Sandbox Frameworks:** Allow experimental metaverse projects under regulatory sandboxes to identify and address potential issues before full-scale implementation.

8. Dispute Resolution Mechanisms

- **Virtual Arbitration Platforms:** Develop online arbitration platforms tailored to resolving metaverse disputes.
- **Grievance Redressal:** Establish a centralized grievance redressal body for metaverse-related complaints.

9. Promote International Cooperation

- **Harmonized Regulations:** Work with international bodies to create global standards for metaverse governance.
- **Cross-Border Enforcement:** Establish mechanisms for addressing cross-border issues, such as intellectual property infringement or tax evasion.

10. Build Regulatory and Technical Expertise

- **Training for Regulators:** Equip regulators and enforcement agencies with knowledge of metaverse technologies, blockchain, and virtual marketplaces.
- **Digital Tools:** Invest in tools for monitoring and regulating activities within the metaverse.

11. Encourage Interoperability and Decentralization

- **Open Standards:** Advocate for open standards to enable interoperability across platforms, ensuring a level playing field.
- **Decentralized Governance:** Support blockchain-based decentralized models to reduce monopolistic control and foster innovation.

12. Public Awareness and Education

- **Digital Literacy Programs:** Educate users about risks and responsibilities in the metaverse.
- **Stakeholder Engagement:** Include consumers, businesses, and developers in policy discussions to ensure well-rounded regulations.

XIV. CONCLUSION

The metaverse is rapidly reshaping global economies, creating new opportunities and challenges for market regulation. In India, the growing digital ecosystem necessitates the adaptation of competition law to ensure fair practices in virtual economies. While India has made strides with initiatives like *Digital India* its current regulatory framework requires significant updates to address the complexities of the metaverse, such as monopolistic practices and data exploitation. Global examples, including the EU's *Digital Markets Act* and U.S. antitrust frameworks, offer valuable lessons in regulating Big Tech and ensuring market fairness. For India to navigate these challenges, it must strengthen its competition laws, adapt to new technologies, and foster international cooperation. A balanced approach is essential to ensuring that the metaverse remains an open, competitive, and consumer-friendly space. This will allow India to leverage the economic potential of the metaverse while safeguarding ethical and legal standards. To fully harness the potential of the metaverse while mitigating risks, India must implement forward-looking policies, enhance enforcement mechanisms, and foster international collaboration. A balanced approach that promotes innovation while safeguarding competition and ethical accountability will position India as a leader in shaping fair and inclusive virtual marketplaces.

UNVEILING DIGITAL DECEPTION: BIG TECH'S MANIPULATIVE DESIGN IN INDIA'S FRAGMENTED REGULATORY LANDSCAPE

- Tia Sikka⁹¹⁰
- Mihir N Singh⁹¹¹

ABSTRACT

Consumer dilemmas today have grown increasingly due to the prevalence of dark patterns and their manipulation by big techs to form a market strategy nudging users into making decisions in favor of the companies' best interests. These deceptive design techniques exploit cognitive biases, guiding consumers towards actions they might otherwise avoid, such as accepting unfavourable terms, purchasing unwanted services, or compromising personal privacy. A crucial facet of this issue is the regulatory overlap amongst various legal frameworks governing the same problems. Since 2019, multiple legislative bodies in India, have promulgated their guidelines on dark patterns. However, the convergence of these multifarious regulations remains vague. These 'deceptive patterns' present an exigent concern, yet the inflexibility and ambiguity inherent in the existing laws are undermining the efficacy of any pre-existing safeguards against them. The labyrinthine nature of these overlapping regulations not only confounds consumers but also poses significant challenges for businesses striving for compliance. The Competition Act, of 2002, attempts to tackle competition practices through section 4 as to ensure no abuse of dominant position by big techs, while it may cover the ambit of dark patterns, there are no vast pre-existing statutes to govern the same in-depth. Inspired by global efforts, India has attempted to introduce the Digital Competition Bill, 2023. However, the act overlooks an important aspect of enforcement, considering the ex-ante nature of the framework. The authors, in this paper, aim to advocate for a bettered mechanism for regulation of dark patterns and retaining the ex-post nature of rules instead of introducing another legislation.

Keywords: Dark Patterns, Digital Markets, Big Techs, Consumers, Digital Competition Bill, 2023.

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I. INTRODUCTION

Dark patterns is a form of design technique on websites that manipulates consumers by attractive interphases. These represent a form of digital manipulation that undermines user agency and decision-making autonomy. These carefully designed user interfaces exploit psychological vulnerabilities by creating intentionally confusing or misleading interactions that push users towards choices not in favour of their general preferences. In simple words, Dark Patterns are mechanisms that directly inflicts upon the decision-making of the Consumer. The harmful mechanisms of dark patterns operate through strategic manipulation. Through leveraging information asymmetries and psychological biases, these interfaces effectively diminish users' capacity to make rational and informed decisions. This manipulation extends across multiple domains of digital interaction. In financial contexts, dark patterns are increasingly used to steer unsuspecting users towards unnecessary or potentially harmful financial products. Beyond economic spheres, these techniques have profound implications for democratic processes, potentially influencing political choices and undermining the integrity of citizen engagement. The societal impact is particularly pronounced in emerging digital economies like India, where internet adoption is rapidly expanding into rural and less digitally experienced populations. Research indicates that individuals with lower educational backgrounds and limited economic resources are especially susceptible to these manipulative design strategies. This vulnerability creates a significant digital equity challenge. As internet access becomes more widespread, these populations are disproportionately exposed to interfaces designed to exploit their cognitive limitations. The result is a systemic erosion of individual autonomy, where users are systematically nudged into actions that do not genuinely reflect their interests or preferences.⁹¹² The proliferation of dark patterns represents more than a technical design issue, it's a critical social and ethical challenge in the digital world. It demands comprehensive regulatory approaches that protect user agency, promote digital literacy, and establish clear ethical standards for digital interface design.

A tactic known as "confirm shaming" portrays some actions, including refusing to give consent for data gathering, as undesirable. Instead of using more neutral language like "subscribe to receive emails," the joint paper uses emotive language like "yes, I want to save!" or "no, I don't like discounts!" to illustrate how a shopping website allows users to sign up for a mailing list in order to earn a discount. The use of such market practices raises

⁹¹² Beni Chugh & Pranjal Jain, *UNPACKING DARK PATTERNS: UNDERSTANDING DARK PATTERNS AND THEIR IMPLICATIONS FOR CONSUMER PROTECTION IN THE DIGITAL ECONOMY*, 7 (2021).

serious questions of Competition Law and at the same time attracts consumer rights being infringed upon. Hence, this paper delves into the fact of the overlapping jurisdiction and need for stringent penalties.

Dark patterns represent a distinctive form of digital manipulation that fundamentally diverges from traditional marketing strategies. Unlike persuasive marketing techniques that seek to inform and potentially modify user preferences, dark patterns are explicitly designed to override users' authentic choices, compelling them to act in direct contradiction to their genuine intentions. The travel insurance bundling scenario provides a clear illustration of this manipulation. Instead of introducing the insurance product, explaining its potential benefits, or attempting to convince users of its utility, the travel portal simply and unilaterally adds the coverage to the ticket purchase. This approach completely disregards the user's autonomous decision-making process and personal preferences. The fundamental difference resides in the approach to influencing user behaviour. Persuasive marketing operates through open, informative communication, seeking to educate users and potentially transform their preferences through transparent means. Dark patterns, conversely, represent a more insidious strategy employing intricate design techniques specifically engineered to manipulate users into making decisions they would not naturally pursue.

There are multiple interfaces that are designed in a way that is manipulative and are constructed in a way that strategically affects the rationale decision-making processes. By adopting techniques and designs that are complex in nature forms a platform that prioritize the Company's objective over customer's autonomy. Unlike Persuasive Marketing, wherein the consumer is provided with clear information, and the consumer has all the due right to inspect the product or the service availing, the dark patterns are well-designed to to trick the consumers in neglecting and compromising their choices and choosing that is not their underlying preference. These dark patterns are developed so well, that the customers cannot resist or recognize the manipulation at first place which leads to outcomes in favor of the platform's interest rather than the user's needs.

The proliferation of dark patterns precipitates two critical concerns: The very known privacy concern that is underlying, privacy violations emerge when digital platforms such as Accumulate user data beyond the initially consented parameters. These then, Compel users to disclose supplementary personal information as a precondition for service accessibility. These meticulously engineered user interfaces not only compromise consumer privacy,

consent, and confidentiality but lead to significant anti-competitive practices within the digital marketplace.⁹¹³

The techniques that systematically manipulate are through two primary modalities wherein; Firstly, the collected data which is unauthorised or without the due consent of the user is strategically influenced into Conduct unauthorized surveillance of consumer purchasing behaviours and generate models that are in line with the consumer actions without explicit consent. Secondly, data platforms employ dark pattern methodologies and mechanisms wherein consumers are obligated to execute mandatory procedural steps to access services and systematically precluded from exploring alternative market options. Consequently, these techniques not only violate individual user autonomy but also create structural hindrance to market dynamism and consumer choice. Techniques known as nudges and sludges can persuade users to take potentially harmful actions or make it more difficult for them to take the actions they desire. For example, offering a simple "accept all" button to consent to data collection while requiring users to take several steps to withdraw consent;

A. The Global Position

The European Commissioner for Justice and Consumer Protection, declared that the European Commission will regulate dark patterns, online advertising market transparency, and cookie fatigue as the main objectives of its upcoming 2023 term. Nearly 40% of online shopping websites use manipulative tactics to take advantage of or deceive customers, according to a survey of 399 retail websites and applications carried out by the EU's Consumer Protection Cooperation ("CPC") Network as part of this duty.

Several laws address dark patterns and can be used as a weapon to protect consumers from them, however, the EU does not have a single law that controls dark patterns in order to enforce these concerns. In addition to planned laws like the AI Act and Data Act, they include the General Data Protection Regulation ("GDPR"), the Digital Services Act ("DSA"), the Digital Markets Act ("DMA"), and the Unfair Commercial Practices Directive ("UCPD"). The Statutory authorities must thus consider several rules and laws when determining if their actions might be classified as a dark pattern.⁹¹⁴

⁹¹³ Ritisha Sinha and Arnav Srivastava, *Shady Play: How Tech Giants Use Dark Patterns to Distort Competition*, NLIU Law Review (Jul. 25, 2024), <https://nliulawreview.nliu.ac.in/blog/shady-play-how-tech-giants-use-dark-patterns-to-distort-competition/>.

⁹¹⁴ Regulation of Dark Patterns, <https://lakshmisri.com/insights/articles/regulation-of-dark-patterns/>.

On the other hand, in The U.S., in September 2022, the FTC published its "Bringing Dark Patterns to Light" study, showing how businesses increasingly adopt advanced design techniques to deceive or coerce customers into purchasing goods or services or disclosing personal information. Four of the most prevalent applications of dark patterns were noted by the FTC in their report:

- (1) deceiving customers or hiding advertisements
- (2) hiding important conditions;
- (3) charging or preventing customers from cancelling their subscriptions;
- (4) deceiving or coercing consumers into divulging information.⁹¹⁵

In a significant move on November 30, 2023, India introduced the "Guidelines for Prevention and Regulation of Dark Patterns 2023," aiming to address deceptive digital design practices. These guidelines seek to protect consumers from manipulative online interfaces that trick users into making unintended choices. The regulations identify and prohibit various dark pattern techniques, such as creating false urgency, sneaking items into shopping baskets, using confirm shaming, forcing continuous subscriptions, and employing interface tricks designed to mislead users.

The long-term sustainability of these guidelines depends on several factors; the regulatory authorities' commitment in consistent enforcement. By establishing digital guidelines, India is positioning itself as a potential global leader in protecting digital consumers from exploitative design practices, potentially inspiring similar regulatory approaches in other countries. Traditionally, market rivalry has been thought of as a powerful tool for protecting consumers. Several fundamental ideas form the basis of its theoretical framework offering customers a variety of supplier choices. The conventional competitive process is seriously jeopardised when suppliers deliberately use manipulative design strategies.

While the guidelines represent a progressive step in consumer digital protection, they face potential challenges. The complex and rapidly evolving digital landscape means businesses might quickly adapt their strategies to circumvent these regulations. Effective implementation will require ongoing vigilance, clear enforcement mechanisms, and the ability to keep pace with technological innovations.⁹¹⁶

⁹¹⁵ Bhumika Indulia, *Role of Dark Patterns in Consumer Decision-Making and Data Disclosure*, SCC Times (Jul. 12, 2024), <https://www.sconline.com/blog/post/2024/07/12/role-of-dark-patterns-in-consumer-decision-making-and-data-disclosure/> (last visited Dec 11, 2024).

⁹¹⁶ Akshita Singh, *A Dive into the Dark Pattern Guidelines: Jurisprudence and Jurisdictional Analysis*, IJLT (2024), <https://www.ijlt.in/post/a-dive-into-the-dark-pattern-guidelines-jurisprudence-and-jurisdictional-analysis>

II. INDIA'S CURRENT POSITION

The current scenario in India indicates that the Competition Act 2002 aims to promote free and fair-trade practices and regulate anti-competitive activities in the digital market setup. Section 4 of CA, 2002 prevents entities from abusing their dominant position and holds them accountable for misconduct. Concerning dark patterns, an entity may create an opportunity using deceptive design technologies, generating and attracting more consumers to their product or service. A prominent example of this strategy is the 2016 WhatsApp Privacy Policy Update. WhatsApp was accused of abusing its dominating position for financial gain by requiring users to exchange data with "Facebook" to use the app, but CCI declined to consider this claim. Therefore, despite data theft that could have hampered effective competition, the prosecution was dismissed since there was no evidence of predatory pricing in its operations.

A departure from this conventional strategy was suggested by CCI's *Suo Moto* case In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users (WhatsApp Privacy Policy Update (2021) later in 2021). In order to investigate the alleged prima facie violation of Section 4 of the Act, the CCI directed the DG to look into WhatsApp's "exploitative and exclusionary" practices in getting consumers' authorization to share their data with Facebook firms, which was allegedly not necessary for using WhatsApp services. A CCI market analysis on the telecom industry may have caused this change in strategy. According to the survey, CCI is more aware of "privacy taking the form of non-price competition." It also recognised the harm that data privacy breaches pose to consumers and competition.

The current standing, however, showcases that the regulation of dark patterns requires stringent laws, and the pre-existing laws fall short of governing these companies. The following are the shortcomings:

A. Jurisdictional overlap:

One of the most prominent criticisms faced with regard to the regulation of dark patterns is the overlap with other legal regimes. While the Competition Act deals with the areas of digital markets, numerous other statutes deal with similar guidelines, which were not considered while proposing the ex-ante form of laws. As the digital market space continues to evolve, the possibility of overlapping regulations becomes more apparent, raising critical questions about effective governance in the field.

Digital enterprises in India are already subjected to multiple regulatory frameworks that impose pre-emptive obligations. While Consumer Protection Rules prohibit price

manipulation and consumer discrimination, the Foreign Direct Investment Policy also restrains platform pricing influences and requires seller neutrality. These existing regulations create a landscape that the proposed ex-ante competition structure must carefully navigate.

However, the emerging Digital Personal Data Protection Act mandates data transparency and limits data collection, creating complexity. This legislation correlates with the Competition Act and creates conflicts in how digital platforms manage their operational strategies and data practices while remaining within competition law's bounds. The legislation tackles the regulation by encircling issues such as algorithmic governance and content removal challenges. This strategy risks enforcement inconsistencies that could compromise the efficiency of the statute. The primary concern lies in the potential overlap and the compliance requirements. For the same reasons, companies get tied up between multiple regulatory bodies, each interpreting and enforcing different standards. Policymakers must consider the intricacies between these frameworks and aim to create a coherent and streamlined approach that protects consumer interests, promotes fair competition, and supports innovation without imposing excessive regulatory burdens.

The legislation tackles digital platform regulation by addressing algorithmic governance and content removal challenges. Such an approach risks uneven implementation, potentially compromising regulatory effectiveness. Complexity emerges from potential overlapping jurisdictions, where technological enterprises might navigate conflicting interpretative standards across different oversight bodies. Strategic policymaking demands a holistic perspective, balancing consumer protection, competitive fairness, and technological innovation without creating excessive administrative constraints.

The proposed ex-ante competition legislation represents a well-intentioned attempt to address the unique challenges of digital markets. However, its success will depend on careful drafting that considers existing regulatory mechanisms and minimises potential conflicts. Striking the right balance between proactive regulation and operational flexibility will be crucial in developing a practical regulatory framework for India's rapidly evolving digital economy.

Ultimately, the challenge lies not in creating more regulations but in developing a nuanced, integrated approach that provides clear guidance while allowing for the dynamic nature of digital markets. Policymakers must prioritise clarity, consistency, and practical implementation to ensure that the regulatory framework supports both competition and innovation.

B. The argument against preventive regulations in the Indian context:

The concept of preventive regulations, or 'Ex-ante,' means the imposition of obligations before the event or, in this case, before the violation occurs. This regulatory framework has been adopted to formulate the recent Digital Competition Bill, 2023. In a landmark development, the Parliamentary Standing Committee on Finance presented its 53rd report in December 2022, addressing the pressing concerns surrounding anti-competitive practices within the digital ecosystem. This document advocated implementing a specialised preventive (ex-ante) regulatory framework specifically designed for digital markets. In response to these recommendations, the Ministry of Corporate Affairs (MCA) constituted the Committee on Digital Competition Law (CDCL). The CDCL subsequently formulated a comprehensive report encompassing the Draft Digital Competition Bill. This proposed legislation marks a substantial departure from the existing regulatory paradigm by critiquing the current reactive (ex-post) enforcement mechanism employed by the Competition Commission of India (CCI), particularly emphasising its inadequacies in effectively governing digital marketplaces.

The recent Draft Digital Competition Bill signals a paradigm shift in India's regulatory approach to digital markets. This bill introduces a proactive regulatory framework that departs from the traditional reactive stance. A key innovation is the introduction of the category of "Systematically Significant Digital Enterprises" (SSDEs). This classification will identify major digital players whose actions can substantially impact the market. The bill proposes to use straightforward metrics like revenue figures and the total value of goods and services sold on platforms to identify these SSDEs. This proactive approach contrasts with the current system where the Competition Commission of India (CCI) typically intervenes after a violation has occurred. While the CCI's role as a post-hoc referee has been valuable, it may not be sufficient to address the complexities and rapid pace of digital markets.⁹¹⁷ The Ministry of Corporate Affairs' recognition of this limitation and its proposal for a more proactive regulatory framework is a significant step. The question is whether this new approach will effectively balance innovation and competition in India's burgeoning digital economy.

This regulatory model empowers the CCI to address market distortions, explicitly focusing on anti-competitive agreements that have been executed and the instances of dominance

⁹¹⁷ Kavya Pradeep, *The Digital Competition Bill, 2024: What's the Fuss about?*, Frontline (2024), <https://frontline.thehindu.com/science-and-technology/digital-competition-bill-2024-big-tech-google-amazon-facebook-reliance-digital-advertising/article68330828.ece>

abuse that have already manifested in the market. The Commission's methodology thus centres on remedial action rather than preventive intervention, allowing it to assess the actual market impact of potentially anti-competitive conduct before initiating regulatory action. This approach ensures enforcement measures are based on concrete evidence of market distortion rather than speculative concerns.

In the case of *Umar Javed and Others v. Google LLC and Others*, the CCI also addressed the issue of Platform Neutrality, wherein Google was found to have abused its dominance by pre-installing and placing its application as the dominant one. Additionally, other competition-related issues such as bundling and tying, data usage, deep discounting, exclusive tie-ups, search and ranking preferencing, and advertising practices have been or are being addressed by the CCI. This means that the CCI's ex-post method helps people comprehend how complicated digital marketplaces are, so the objective should be to support the CCI and add digital markets to the current framework. The ex-ante regime, which lacks international consensus, would be imposed exclusively on digital marketplaces, impeding the development of competition law to meet the needs of this new era.

The Competition Commission of India (CCI) adopts a retrospective regulatory approach, focusing on addressing market distortions through remedial actions. Its methodology evaluates actual anti-competitive conduct by examining executed agreements and demonstrated market dominance instances.

III. IMPLICATIONS OF THE SHORTCOMINGS:

The suggestion of ex-ante laws bears one major criticism: the issue of false positives. This means that companies may be penalised when a practice does not amount to anti-competitive practices. There have been multiple Standing Committees that suggest Ex Ante laws/ rules that ensure the Competition in India is not Monopolised. One of the backlashes that Ex Ante rules face is even when a Company does not use or adopt Anti- Competitive, is dragged to a court of law for violation of the same. The laws should be framed to create optimal balance between the Companies and their consumers. The Ex ante regulations are framed as a precautionary and preventive mechanism to prevent these Businesses from having a dominant position over others and ensure that the consumer's rights are not at stake while adopting such marketing techniques.⁹¹⁸ But, there have been numerous cases wherein there have been

⁹¹⁸ Saket Sharma, *Competition Through Evolution, Not Pre-Selection: A Case Against Ex-Ante Regulations in India*, NLS BLR (2024), <https://www.nlsblr.com/post/competition-through-evolution-not-pre-selection-a-case-against-ex-ante-regulations-in-india>

instances the Companies have not adopted such Anti-Competitive practices and these Ex-Ante regulations unlike Ex-Post do not protect these companies and an opportunity to provide objective rationale and illustrate the efficiencies coming from their actions. Hence, these companies are hesitant to produce consumer-benefit products for fear of violating the law.

IV. WAY FORWARD

- A.** The concept of deceptive interphases for steering more consumers and distortion of the market by using a dominant position, as stated under section 4 of the Competition Act 2002, can be curbed more straightforwardly. The Digital Competition Act, 2023 option may have been viable if it used the *ex-post* nature of laws. A stronger alternative would be strengthening the ex-post regime and highlighting or inculcating the concept of digital markets. The Competition Act aims to protect competition, and the same is mentioned in the preamble, "*prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India*", which can be taken into account for digital markets. A sufficient foundation for addressing competition issues in digital markets identified by the Standing Committee is provided by the Competition Act's basic framework, which includes Section 3 (anti-competitive agreements), Section 4 (abuse of dominant position), and Section 5 (combinations). The high-level Competition Law Review Committee (CLRC) investigated the claim and conducted research that indicated that the current provisions may suffice for it. The courts' interpretations under the Act, along with the relevant provisions, are enough to legislate the matter. If need be, amendments to the law can be made to inculcate in specific however the second half of this subtopic indicates a clearer suggestion to ensure light to be shed specifically on dark patterns and its preventions.⁹¹⁹
- B.** The authors also suggest creating rules, if deemed necessary for more intricate legislation, under the Competition Act, 2002 in specific to section 4 of the Act. The rules can discuss a more detailed guideline to regulate digital markets. The CDCL and standing committee have made an argument against the ex-post regime suggesting that it would take up more time of the courts to decide on such an issue however it can

⁹¹⁹ Frederic Jenny, *Competition Law and Digital Ecosystems: Learning to Walk before We Run*, 30 Industrial and Corporate Change 1143 (2021).

be remedied by inculcating interim measures as under section 33 of the Act. This shall also prevent the issue of irreversible damages that can be caused. This would allow the courts to adjudicate appropriately and restrain the opposing parties to continue to partake in anti-competitive practices. According to the ruling in *CCI v. Steel Authority of India*, the CCI can only issue an interim order if there is a reasonable chance that the petitioner will sustain irreversible harm. However, since proactive employment of interim measures avoids the drawbacks of over-regulation and a chilling impact on innovation, it offers a much better and easier alternative to ex-ante regulation.

While the Guidelines for prevention and regulation of Dark patterns, 2023, govern the issue, there are specifically in respect to the protection of consumers under the Consumer Protection Act. The guidelines do not mention rules for the governance of companies to prevent anti-competitive practices. Therefore, fresh guidelines may be required under the Competition Act and as aforementioned under section 4.

V. CONCLUSION

As the digital landscape evolves, the regulation of dark patterns becomes more complex, hence distorting free and fair competition. The paper indulges in the manipulation techniques and the prevention of dark patterns through mainly two suggestion; amendments in the competition act and the formulation of rules under the competition act, 2002. This would allow a balanced approach in its enforcement and implementation, while strengthening the ex-post regime. The most promising path forward requires developing a regulatory approach that provides clear guidelines, allows digital market innovation, protects consumer interests, and promotes fair competition.

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THEME 5

DIGITAL COMPETITION BILL: INNOVATION, COMPETITION AND REGULATORY CHALLENGES

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ABSTRACT

“The fundamental impulse that sets and keeps the capitalist engine in motion comes from the new consumer goods, new methods of production or transportation, the new markets, the new form of industrial organization....”

-Joseph Schumpeter, Capitalism, Socialism and Democracy

India is the third largest digitized country in the world with a vision to become \$1 trillion digital economy under Atmanirbhar Bharat. A thriving economy is characterized by competition in innovation rather than just a competitive market of similar products. Any market in the world thrives on creative destruction and the digital market in India as we have come to know it today could not have existed without the boost of innovation. The Digital Competition Bill, 2024 follows the footsteps of other jurisdictions around the world that favoured ex-ante framework to tackle anti-competitive practices in the digital markets. One of the most popular arguments against ex-ante regime and Digital Competition Bill is the possibility of them stifling innovation. Through doctrinal research, this paper looks at whether innovation will be indeed stifled by the Digital Competition Bill and other digital markets regulatory frameworks, and if that is the cost - even with the possibility of user benefits being harmed in the long run - the society is willing to bear in the larger interest of fairness and contestability in the digital market. Additionally, the paper gives suggestions to harmonize innovation and competition in the light of Digital Competition Bill in India.

Keywords: ex-ante, innovation, competition, bill, stifling

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I. INTRODUCTION

When the Draft Digital Competition Bill is introduced, therein lies the question of why such differentiation between the digital market and traditional market. Margrethe Vestager, Competition Commissioner has said that data is the new currency of the internet.⁹²² Ergo, one factor that these digital entities have at their disposal is tremendous amounts of data which can then be utilised by them in expanding their reach which is lacking in traditional markets. The other factor that distinguishes the two markets is how dynamic the digital market is, which is primarily caused by the network effects, economies of scale, zero-pricing and consumer behavioural bias.⁹²³ This new dynamic has the potential to 'tip' the market and create concentration of market power around a few online players in a 'winner takes it all' model.⁹²⁴ Thus, making it difficult for smaller firms and entrants to compete in the market.

What jurisdictions around the world are trying to do is to come up with regulations that suit these different economic dynamics in the digital market thereby ensuring that there is fairness and contestability in the digital market. The major question that confronts the legislators and policymakers around the globe and different jurisdictions is whether the existing competition framework is sufficient and adequate in tackling anti-competitive practices in the digital market competition. Many of the jurisdictions, pioneered by the European Union, have come up with an ex-ante framework to regulate the digital market competition, finding that the current ex-post regulations lack the tools to regulate the competition in the dynamic digital market. India too has not hesitated to jump on the bandwagon and proposed the Draft Digital Competition Bill which is styled based on the EU's Digital Markets Act. The major argument against such a framework that encompasses per se rule and structural presumptions, is that it stifles innovation and discourages investment.

This paper asks the question -whether having a digital competition bill that adopts an ex-ante framework in India's digital market stifles innovation. There is no doubt as to the need for a fair and contestable digital market that fosters innovation and investment. But introducing Draft Digital Competition Bill, at this juncture in India's digital Economic development a boon or bane, is a question that must be considered. With already a robust competition framework in place and with Competition Commission of India presently, without a Digital

⁹²² Cynthia O'Donoghue & Marjorie Holmes, *EU Antitrust Authorities to Take Value of Personal Data into Consideration When Reviewing Digital Markets in Merger and Antitrust Cases*, REEDSMITH, <https://www.technologylawdispatch.com/2015/04/big-data/eu-antitrust-authorities-to-take-value-of-personal-data-into-consideration-when-reviewing-digital-markets-in-merger-and-antitrust-cases/> (last visited Dec. 11, 2024).

⁹²³ *The EU Digital Markets Act A Report from a Panel of Economic Experts*, at 6, JRC (2021).

⁹²⁴ *The EU Digital Markets Act A Report from a Panel of Economic Experts*, at 6, JRC (2021).

Competition Bill, investigating and probing into the anti-competitive practices in the digital market, whether the introduction of Digital Competition Bill would hamper the innovation, India's digital economy is currently witnessing.

The premise of this paper is the innovation and competition in the digital market, thus, it is quintessential to understand the relation between innovation and competition. In a market context, “innovation” is suitably defined in OECD Oslo Manual- “the implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations”.⁹²⁵ A dynamic competition driven by innovation can generate greater consumer welfare than static competition.⁹²⁶ Be as it may regarding the criticism of the American model, the global giants in the digital market are from US because of a limited role undertaken by the government to regulate the market. This model creates platform that promote the innovative zeal of the market players without having to deal with labyrinth regulations that reign them in.

The paper initially looks briefly at the recommendations of the Committee on Digital Competition Law and the provisions enumerated in the draft bill. The paper then juxtaposes the draft bill with the Digital Markets Act of the EU and the digital competition regime of Australia to highlight the differences and the possibility of imbibing certain of those rules into the ex-ante regime of India when it is right time for India. The paper goes on to look at the pitfalls in the current Draft Digital Competition Bill that may stifle innovation. Additionally, this paper argues that the current enforcement mechanism at the disposal of CCI is robust enough to deal with the anti competitive practices in the digital market with certain amendments.

II. DRAFT DIGITAL COMPETITION BILL

To evaluate the requirement of a de novo ex ante framework in regulating the competition in digital market in India, the Committee on Digital Competition Law was constituted by the Ministry of Corporate Affairs.⁹²⁷ The Committee on Digital Competition Law was not the first ever Committee to deliberate upon the need for a separate or additional framework to

⁹²⁵ VIKTORIA H S E ROBERTSON, COMPETITION LAW'S INNOVATION FACTOR THE RELEVANT MARKET IN DYNAMIC CONTEXT IN THE EU AND THE US 67 (2020).

⁹²⁶ VIKTORIA H S E ROBERTSON, COMPETITION LAW'S INNOVATION FACTOR THE RELEVANT MARKET IN DYNAMIC CONTEXT IN THE EU AND THE US 5 (2020).

⁹²⁷ Trishee Goyal, *What is the draft Digital Competition Bill?*, THE HINDU (Jul. 09, 2024, 10:55 PM), <https://www.thehindu.com/sci-tech/technology/what-is-the-draft-digital-competition-bill-explained/article68386341.ece>.

tackle the unique challenge the digital market poses. The Competition Law Review Committee, based on whose recommendation Competition (Amendment) Act, 2023 came about, did deliberate upon the need for a separate framework but opined against it owing to the nascent stage of the digital market at that time and proposed minor changes in the Competition Act 2002 to give Competition Commission enough authority to investigate into the anti-competitive behaviours in the digital market.

The Committee on Digital Competition Law makes the case for an ex-ante regulation by pointing out to the symbiotic relationship between ex-ante and ex-post regulations and the unique feature of the digital market vis-a-vis the traditional market (data, network effects and economies of scale).⁹²⁸ The primary reasons for a separate framework concerning digital competition was attributed firstly to the need for an ex ante regulation to oversee competition in the digital market to promote fairness and contestability and secondly, to reduce the long drawn time consuming investigation and enforcement proceedings. While the committee is pushing for the ex-ante model it has acknowledged the adverse effect of false positive and chilling effect on innovation. The Draft Digital Competition Bill imposes asymmetrical obligations on dominant enterprises in certain Core Digital Services/CDSs and these enterprises are called Systemically Significant Dominant Enterprises/SSDEs. The bill plans to regulate Systemically Significant Digital Enterprise/ SSDE via imposing ex-ante obligations. These SSDEs are those enterprises that carry out Core Digital Services and meet the quantitative or qualitative thresholds mentioned in the Bill. These Core Digital Services are identified keeping in mind the services' susceptibility to concentration in order to avoid unintended chilling effect. Having objective markers(quantitative) would ensure that only those enterprises whose CDS has significantly penetrated the Indian digital market would be called a SSDE. An enterprise to be designated as a SSDE should meet dual thresholds- financial and user thresholds- in the immediately preceding three financial years. Financial thresholds are a) turnover in India of not less than INR 4000 crore or b) global turnover of not less than USD 30 billion or c) gross merchandise value in India of not less than INR 16000 crore or d) global market capitalisation of not less than USD 75 billion, or its equivalent fair value of not less than USD 75 billion. The enterprise should meet any of the financial thresholds along with User thresholds- One Crore end users or ten thousand business users. If an enterprise does not qualify as a SSDE under quantitative thresholds, an enterprise can be designated as such by the CCI based on a qualitative threshold. There are 15 factors to

⁹²⁸ MCA GOVT. OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW 91 (2024).

identify whether an enterprise enjoys a significant presence in respect of a Core Digital Service. Section 3(3) empowers the Commission to factor in any other factors for such designation. These qualitative factors are similar to factors given in section 19(4) of the Competition Act 2002, that help identify the dominant position of business under Section 4 of the Act. While the quantitative threshold gives an objective criteria to identify the SSDEs swiftly, qualitative thresholds give the Competition Commission of India certain discretion to include those enterprises which did not meet the criteria but enjoys a significant presence in respect of a CDS. Factoring in the rapid pace at which digital markets are growing, the Central Government in Consultation with the Commission shall revise the quantitative thresholds every three years. The enterprises that meet the thresholds are required to self report to the Commission. The Parliamentary Standing Committee has identified ten Anti Competitive Practices/ ACPs of which nine were considered by the Committee and were included in the Draft DCB. The Draft Bill prohibits the designated SSDEs from carrying out these ACPs. The Commission while formulating obligations should factor in that some of the ACPs identified have pro competitive justifications and benefits as well. The Bill only provides broad principles that must be considered while laying down ex ante obligations. Ergo, what the bill provides for is the broad contours for ACPs, which the SSDE once designated is prohibited from carrying out. These obligations should be tailor made for each Core Digital services mentioned. Further, CCI may specify conduct requirements for different business models within a Core Digital Service. Meaning, for a Core digital service of online intermediation services, different business models such as cab aggregators, food delivery apps and e-commerce platforms can have different set of conduct requirements. Ergo, there are two set of obligations, one for the each core digital service, second, for different business models within a Core digital service.

Once the enterprise is designated as SSDE, the Draft Bill provides a broad set of principles under Section based on which the Commission will customize the obligations for each SSDEs. The Bill borrows the provisions on Settlement and Commitment from Competition Amendment ACt, 2023. An application for settlement can be given to the Commission if an inquiry has been initiated against an enterprise for the contravention of the Bill. However an application offering commitment can be given to the Commission if the inquiry has been initiated for the contravention of Chapter 3 (obligation) and the rules and regulations framed thereunder. While considering the proposal for both settlement and commitment, the Commission will provide an opportunity to the party concerned or any other party to submit

their objections and suggestions. No appeal shall lie against the order passed in relation to commitment and settlement.

III. JUXTAPOSITION WITH EU AND AUSTRALIA

A. European Union

The European Union, the first jurisdiction to have an ex-ante regime for competition in the digital market has proposed both quantitative and qualitative thresholds to assign an entity as gatekeeper.⁹²⁹ This is followed in India's DCB as well. The user threshold in the Digital Markets Act for determining a gatekeeper includes the satisfaction of a certain number of active end users as well as active business users.⁹³⁰ It stipulates the quantitative thresholds of a) 45 million monthly active end users and b) 10,000 yearly active business users, a criteria that should be met in each of the last three financial years by businesses to be designated as gatekeepers.⁹³¹ India, while adopting the similar provision, has omitted 'monthly' and stipulated that there should be one crore end users(active omitted) or 10,000 business users.⁹³² Such a criteria as stipulated in DMA ensures that the entities that have penetrated the digital market sufficiently and adequately are only designated as gatekeepers. As an ex-ante regulation, it ensures that the net is not cast so wide catching everyone thereby halting the progress and innovation in the market. Article 10 provides that based on a reasoned request by the gatekeeper, exemptions can be granted on the grounds of public health or public security.⁹³³ Though the Committee envisages a legislative guidance for exemptions in the Draft Bill, such a provision is notably absent in the Draft Bill.

B. Australia

The Australian Government has conducted intense investigation into the digital market, an eight year process to review the impact of digital platforms on competition, businesses and consumers from 2017-2025⁹³⁴. Australian Competition and Consumer Commission (ACCC) has conducted individual inquiries into digital platforms, online private messaging, search

⁹²⁹ Digital Markets Act, § 3 (2022).

⁹³⁰ Digital Markets Act, § 3 (2022).

⁹³¹ Digital Markets Act, § 3 (2022).

⁹³² MCA GOVT. OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW 154 (2024).

⁹³³ Digital Markets Act, § 10 (2022).

⁹³⁴ Alba Ribera Martinez, *A Fast Follower Ex-Ante Regime: Australia's Proposed New Digital Competition Regime*, KCLB (Dec.09, 2024), <https://competitionlawblog.kluwercompetitionlaw.com/2024/12/09/a-fast-follower-ex-ante-regime-australias-proposed-new-digital-competition-regime/>; ALLENS, <https://www.allens.com.au/insights-news/explore/2022/ACCC-recommends-significant-reforms-targeting-digital-platforms/competition-law-reform/> (last visited Dec. 11, 2024).

defaults, online retail marketplaces, social media services etc and also released interim reports on competition and consumer law reforms.⁹³⁵

The Australian Government like the India Government has identified certain conduct that has an anti-competitive effect in the digital market. While the Australian proposal follows India's hybrid model of broad and specific obligations, under each anti-competitive conduct, they have identified which all services should be imposed obligation.⁹³⁶ For Example, under self-preferencing, they have identified app-store services, search engine services and ad tech services, but under anticompetitive tying only app store providers and ad tech services have been identified.⁹³⁷ Though the obligation for targeted services is not elaborated but it still services as a framework diminishing uncertainty for the businesses because they would have an idea under which of the anti-competitive conducts they will be regulated.

The ACCC does not hardwire the exemption just like the India, but they have included the need to take into account any similar exemptions granted overseas to promote coherence with international regime.⁹³⁸ This is an important proposal india must adopt so as not to diminish the digital market attractiveness India possesses now.

Like the EU DMA, under the proposal the designated digital platforms can make an application of exemption to the ACCC which ACCC will grant provided that these designated digital platforms demonstrates the relevant ground to the satisfaction of ACCC.⁹³⁹ The Committee on digital Competition recommended that while exemptions should not be hard-wired in the draft DCB, exemptions should be devised factoring in the uniqueness of each Core Digital Service, and left it to discretion the CCI to decide, but mandated that the exemption should statutorily encoded.⁹⁴⁰

⁹³⁵ ALLENS, <https://www.allens.com.au/insights-news/explore/2022/ACCC-recommends-significant-reforms-targeting-digital-platforms/competition-law-reform/> (last visited Dec. 11, 2024).

⁹³⁶ AUSTRALIAN GOVERNMENT THE TREASURY, A NEW DIGITAL COMPETITION REGIME 18 (2024); ALLENS, <https://www.allens.com.au/insights-news/explore/2022/ACCC-recommends-significant-reforms-targeting-digital-platforms/competition-law-reform/> (last visited Dec. 11, 2024).

⁹³⁷ ALLENS, <https://www.allens.com.au/insights-news/explore/2022/ACCC-recommends-significant-reforms-targeting-digital-platforms/competition-law-reform/> (last visited Dec. 11, 2024).

⁹³⁸ AUSTRALIAN GOVERNMENT THE TREASURY, A NEW DIGITAL COMPETITION REGIME 24 (2024).

⁹³⁹ AUSTRALIAN GOVERNMENT THE TREASURY, A NEW DIGITAL COMPETITION REGIME 24 (2024).

⁹⁴⁰ MCA GOVT. OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW 111 (2024).

IV. CURRENT COMPETITION REGIME IN INDIA

One of the reasons cited for having a Draft Digital Competition Bill, 2024 is the time-consuming nature of investigation and fact-finding of the CCI which prevents the timely detection of anti-competitive practices in the digital market.⁹⁴¹ The enforcement of both the Draft Digital Competition Bill, if it becomes the Act and the Competition Act, 2002 rest with the Competition Commission of India. The relevant amendments suggested by the Competition Law Review Committee through Competition Amendment Act, 2023, as far as it relates to the present paper and topic is discussed here. The first of the relevant provisions is the recommendation of a dedicated bench in the National Company Law Appellant Tribunal to hear appeals under this Act while presently, the appeals are dealt with by the National Company Law Appellate Tribunal without such distinction.⁹⁴² The second relevant provision is concerning settlements and commitments. To apply for either settlement or Commitment, it should be done after the investigation of the Director General into the apparent anti-competitive practice. Settlement is available to cartels and requires an admission of guilt, commitment is applicable to all other cases other than cartel and there is no requirement of admission of guilt. This considerably reduces the time for investigation and results in speedy disposal. Another recommendation includes liability for hubs in hub and spoke cartels, which has become a major concern in the digital market. In hub and spoke, the hub facilitates the coordination of competition between the spokes.⁹⁴³ The hub is vertically related to the spokes which are competing and the hub can facilitate the anti-competitive behavior of the spokes. This is especially adverse in the digital market because of the data involved. In *Samir Agarwal v ANI Technologies Private Limited and Others*, Ola and Uber were accused of coordinating prices amongst their respective drivers. The CCI could not hold Ola or Uber (cab aggregators) liable because there was no proof of an agreement between the hub(Ola/Uber) and spoke (respective drivers).⁹⁴⁴ But, with the 2023 amendment, the CCI has been empowered to proceed against hub and spoke cartels as long as it can prove that the hub intended to participate, a concept that was lacking in the Act of 2002, thereby making it difficult for CCI to investigate.⁹⁴⁵ The Amendment also envisages the inclusion of ‘other

⁹⁴¹ MCA GOVT. OF INDIA, REPORT OF THE COMMITTEE ON DIGITAL COMPETITION LAW 111 (2024).

⁹⁴² MCA GOVT. OF INDIA, REPORT OF COMPETITION LAW REVIEW COMMITTEE 5 (2019).

⁹⁴³ Manika Brar, *Hub-and-Spoke Cartel: The Next “big thing”?*, Shardul Amarchand Mangaldas (Apr. 03, 2023), https://www.amsshardul.com/insight/hub-and-spoke-cartels-the-next-big-thing/#_ftn3.

⁹⁴⁴ AZB & Partners, *Hub and Spokes Cartels- Codification and Challenges* (Feb. 12, 2024), <https://www.azbpartners.com/bank/hub-and-spokes-cartels-codification-and-challenges/>.

⁹⁴⁵ AZB & Partners, *Hub and Spokes Cartels- Codification and Challenges* (Feb. 12, 2024), <https://www.azbpartners.com/bank/hub-and-spokes-cartels-codification-and-challenges/>.

agreement' in Section 3(4) in the Act of 2002 to analyse appreciable adverse effect on competition(AAEC) of those agreement, because the distinction of vertical or horizontal agreements will not be quite made out in the digital market sphere as it is in traditional markets. Further the Committee recommended for the inclusion of data in the definition of price under Competition Act, 2002, as in the digital economy data is the price.⁹⁴⁶

Even in the absence of de novo ex-ante regulation to tackle anti-competitive practices in digital market, the CCI has devised a powerful tool- interim measures- to reduce the adversarial impact of a long drawn investigation and enforcement proceedings. In MMT-Goibibo case, the CCI has issued interim measures directing Makemytrip and Goibibo to relist the complainants hotels Treebo and Fab hotels in their website. The interim measure is to be implemented pending investigation and is a step to reverse the revenue losses suffered by the complainants during delisting.⁹⁴⁷

The Competition Commission of India has dealt with numerous cases concerning digital market. In relation to the Anti-steering provisions, the CCI has found Google to be abusing its dominant provisions by mandating the app developers to Google Play's Billing System. The CCI has found Google to be self-preferencing its application over other applications in the pre-installed applications category.⁹⁴⁸ These are few of the cases The CCI has dealt with and by no means the only ones. It highlights the fact that CCI has lost no teeth in regulating competition in the digital market and there poses no urgent need for an untested ex-ante regime to be introduced in the booming digital economy of india.

V. PITFALLS IN THE DRAFT BILL

There is no international consensus regarding the regulation of competition in the digital market. While Australia and the EU among other jurisdictions have adopted an ex-ante framework, the details and the way to go about it largely differ. India at this juncture of economic development of the digital market should not strive to try on an experimental legislation, the outcomes of which are still at large. Coming to the Draft Bill itself, it bestows wide and significant discretion on CCI. Section 7 mandates that SSDE should adhere to

⁹⁴⁶ MCA GOVT. OF INDIA, REPORT OF COMPETITION LAW REVIEW COMMITTEE 152 (2019).

⁹⁴⁷ Payel Chatterjee & Krithika Ramesh, *Competition Enforcement in India: Fresh Take on Interim Measures in the Digital Sector*, KCLB (Mar. 12, 2021), <https://competitionlawblog.kluwercompetitionlaw.com/2021/03/12/competition-enforcement-in-india-fresh-take-on-interim-measures-in-the-digital-sector/>.

⁹⁴⁸ Naval Satarawala Chopra & Yaman Verma, *Does India Require Ex-Ante Competition Regulation in Digital Markets?* (Apr.03, 2023), <https://www.amsshardul.com/insight/does-india-require-ex-ante-competition-regulation-in-digital-markets/>.

obligations and regulations that will be devised under Chapter 3. It gives the Commission the power to frame regulations which the Committee stipulates should be framed under the model of 'participative antitrust'. These regulations would have separate conduct requirements for each Core Digital Service. Within the regulations set for each CDS there can be differential obligations for SSDEs based on certain factors. For Associate Digital Enterprise (ADS) the differential obligation will be set by CCI. It encapsulates both the tremendous discretion of the CCI and the significant uncertainty it brings along. The other uncertainty stems from the possibility of dual enforcement proceedings, both under the Draft Bill and the Competition Act, 2002. While the Committee deliberated upon the adversarial impact the dual enforcement could have on the entities, it still left it to the discretion of the Commission to decide on dual proceedings or to set off the penalties. Then there is the concern with quantitative thresholds in designating a SSDE. The user threshold as enumerated in the draft bill can drag in even small companies that did not significantly penetrate the digital market. They will be over burdened with a lot of obligations which can run their zeal for innovation to the ground, while other entities in a CDS will have sufficient resources at their disposal to tide over.

VI. CONCLUSION AND SUGGESTIONS

The core reason for the implementation of the ex-ante framework is to increase fairness and contestability in the digital market. If there are mistaken inferences and condemnations the very idea of antitrust is in jeopardy.⁹⁴⁹ The underlying belief of the Chicago School is that markets can correct itself and that undue government interventions hamper that ability of self-correction in market.⁹⁵⁰ The major risks of implementing an ex-ante regime in a digital economy characterized by innovation, fast-paced changes and novelty are the error costs. This is because what is presumed to be anti-competitive can have a pro-competitive justification. The CCI itself has only held few anti-competitive practices to be harmful to the competition and has not penalised other cases considering the pro-competitive justification. Penalising an anti-competitive practice without taking this into account can cause error costs which can hamper innovation and investment. The advantage of having an ex-ante framework is the reduction of administrative cost. The CDCL adopted an ex-ante framework because of the concern regarding the long drawn investigation that will not be adequately

⁹⁴⁹ Geoffrey Manne, *Error Cost in Digital Market*, GLOBAL ANTITRUST INSTITUTE, <https://gaidigitalreport.com/2020/08/25/error-cost-analysis-in-digital-markets/>.

⁹⁵⁰ Maurice E Stucke & Allen P Grunes, *Big Data in Competition Policy* 232 (2016).

beneficial in regulating competition in the digital market. Having an ex-ante framework can assuage that concern. It cannot boil down to setting off administrative costs with error costs, as ex-ante framework is bound to lead to false positives.

In all the proposals and the bills proposed to tackle digital competition the one word always mentioned is innovation. In short, all the jurisdictions on the race to regulate the digital market have acknowledged the significance of innovation in the digital market. In digital market economy, the occurrence of innovation is more, as there is a race to provide more cheaper, and more accessible products to the consumers, thus driving the incumbents to the fringes. The digital market is constantly innovating, India is home to many such startup unicorn to name a few Zepto, InCred.⁹⁵¹ India is set to become \$1 trillion digital economy by 2028.⁹⁵²

At this juncture what we want is not the experimental untested to regulate the competition in digital market. It is a well known fact that over regulation can stifle innovation and discourage investment. The several aspects of the digital sphere in India is regulated by Digital Personal Data Protection Act, 2023, proposed Digital India Act. These regulations are needed but the ex ante regulation under the draft bill would unnecessarily inundate the entities with obligations. Rather than adorning the digital market with the untested, experimental ex-ante framework it is better to wait it out.

⁹⁵¹ Jessica Rajan, *60% of Indian Unicorn Founders Achieved \$1-Billion Valuation in Maiden Attempt: Report* (Oct. 12, 2024, 09:19 AM), <https://m.economictimes.com/tech/technology/60-of-unicorn-founders-achieved-1-billion-valuation-in-maiden-attempt-report/articleshow/114150164.cms>.

⁹⁵² ANI, *India to become \$1 TN Digital Economy by 2028* (Oct.02, 2024, 03:12 PM), <https://m.economictimes.com/news/economy/indicators/india-to-become-1-tn-digital-economy-by-2028-enabled-by-internet-4g-5g-and-digitalisation/articleshow/113875328.cms>.

DIGITAL ERASURE: THE INTERSECTION OF CENSORSHIP AND HUMAN RIGHTS IN META'S MODERATION OF PALESTINIAN VOICES

- Sunila Vangapandu⁹⁵³

ABSTRACT

This paper examines the current Gaza conflict that has brought the most brutal rates of carnage, oppression, and humanitarian disaster in history. Since the start of the Israeli military offensive, more than 42,000 Palestinians, with 7,800 being children, have been killed. In this context, there is an alarm about how the war is being suppressed on social media sites, especially Meta. It therefore considers the implications of Meta's content moderation policies regarding the visibility of Palestinians within the light of international human rights law and also delves into topics that include algorithmic bias, digital media, and the corporate responsibilities of social media corporations toward screening for content that might be politically sensitive. Its findings indicate the systematic and global nature of Meta's Palestine information filtering and pose serious implications concerning the respect of the corporation toward its human rights obligations. It claims to support its mission-the power to empower people to connect in community and bring the world closer together-entirely through the implementation of content moderation policies contrary to such a mission, silencing Palestinians instead rather than being silenced. Such policies trample through the foundational right of free speech, as well as the peaceful assembly thereof. Despite claiming to follow the UN Guiding Principles on Business and Human Rights, Meta's actions expose several infractions that contradict its duties to be transparent and accountable. The research emphasizes human rights due diligence, stakeholder engagement, crisis guidelines and diversity in its content moderation policy. Ultimately, this paper underscores the urgent need for social media companies like Meta to reevaluate their content moderation policies and ensure that they do not perpetuate digital erasure, censorship, and human rights violations, particularly in the context of sensitive political conflicts.

Keywords: Gaza conflict, Content moderation, Human rights, Algorithmic bias, Digital censorship

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I. CURRENT CONTEXT OF PALESTINIAN STRUGGLES

The current war in Gaza has reached unprecedented levels of bloodshed and tyranny, especially since Hamas's massive attack on Israel on October 7, 2023. In this disaster, nearly 1,200 people were killed, and more than 200 hostages were taken. After this, the Israeli military launched massive operations in Gaza, which brought about a severe humanitarian crisis.⁹⁵⁴

The current war in Gaza has reached unprecedented levels of bloodshed and tyranny, especially since Hamas's massive attack on Israel on October 7, 2023. In this disaster, nearly 1,200 people were killed, and more than 200 hostages were taken. After this, the Israeli military launched massive operations in Gaza, which brought about a severe humanitarian crisis. Officials in Gaza, as of December 14, 2023, reported that 18,700 Palestinians had been killed, of whom some 7,700 were children. Already grim conditions have deteriorated further because of the Israeli government's strict restrictions on entering Gaza to bring in aid that cut off basic services. The death toll in Gaza has been increasing. According to estimates, close to 42,000 Palestinians, including around 7,800 children, have died since the onset of Israeli military operations.⁹⁵⁵ Two-thirds of the structures in Gaza have been destroyed because of the intense bombings and ground attacks. The physical destruction is a devastating result. In addition to the rising death toll and destruction, there is also an increase in censorship of the conflict.

According to Human Rights Watch, Meta's information filtering on Palestine is "systemic and global."⁹⁵⁶ The systemic filtering of information in such a manner raises very grave questions about these firms and their commitment to their human rights obligations, and how daunting the task is to everyone who wants to draw the world's attention to the suffering of Palestinians. This paper attempts to study how the policies of content moderation in Meta affect the representation of Palestinian voices, especially from the angle of international human rights law. It would analyze algorithmic bias, details regarding digital media, and corporate moral obligations of social media companies to shift through such content on sensitive political subjects.

¹ "Hamas, Islamic Jihad: Holding Hostages is a War Crime," Human Rights Watch news release, October 19, 2023, <https://www.hrw.org/news/2023/10/19/hamas-islamic-jihad-holding-hostages-war-crime>.

⁹⁵⁵ Israeli-Palestinian Conflict, By the Center for Preventive Action Updated October 06, 2024 <https://www.cfr.org/global-conflict-tracker/conflict/israeli-palestinian-conflict>

⁹⁵⁶ Human Rights Watch. (2023, December 20). *Meta's systemic censorship of Palestine content*. <https://www.hrw.org/news/2023/12/20/meta-systemic-censorship-palestine-content>.

II. THE EVOLUTION OF NEWS CONSUMPTION IN THE DIGITAL AGE

Digital media has greatly shaped the way individuals follow events on the news. As the COVID pandemic⁹⁵⁷ and storming of the US Capitol in 2021 has shown that the change may tear public opinion apart. Social media has become a major news source; however, truth, fact, and reliability issues abound. Much coverage is dedicated to big tech companies, especially with social and political matters. Limiting hate speech has been difficult since it tends to be very linguistically particular and requires native speakers, who are relatively hard to manage. Therefore, efforts for this sector should be boosted by a large margin. As the war and conflict that began in Gaza in October 2023 continue unabated, this word "hate"⁹⁵⁸ It continues to be expressed by both sides on their separate social media outlets, contributing to more divisions of points.

Observers began to analyze the reaction to the clash between Israel and the Palestinians. A 2022 report analyzed how Meta's activities during the May 2021 Israel-Palestine crisis impacted its users in both territories using publicly available data and interviews with relevant Meta employees. The ultimate verdict was that Meta has indeed curtailed free speech and the ability for Palestinian users to share experiences.

According to the research, hate speech and incitement to violence against various populations were experienced on Meta's platforms during the May 2021 crisis, even though it took many necessary measures. This was to show how these measures impacted the Palestinians' ability to communicate their experiences. An analysis of Meta's practices before the intensification of the war in Gaza showed that people worldwide are filming crimes and calling out atrocity during wars with the help of the said platform. However, governments and institutions usually use such platforms to advocate for violence and distort the conflict's narrative. Meta responded unbalanced to many of the conflicts. For instance, Meta changed its rules pretty fast to allow the Ukrainians to denounce the Russian aggression when Ukraine was invaded.⁹⁵⁹ However, in some other conflicts, the rules were not set up.

⁹⁵⁷ Spyridou, P., & Danezis, C. (2022). News consumption patterns during the coronavirus pandemic across time and devices: The Cyprus case. *World of Media. Journal of Russian Media and Journalism Studies*, 2, 124-146. <https://doi.org/10.30547/worldofmedia.2.2022.8>

⁹⁵⁸ Arab Center for Research and Policy Studies. (2023, October 13). *Disinformation and hate speech on social media contribute to inciting war crimes against Gaza*. <https://arabcenterdc.org/resource/disinformation-and-hate-speech-on-social-media-contribute-to-inciting-war-crimes-against-gaza/>

⁹⁵⁹ The Intercept. (2022, April 13). *Facebook's Ukraine-Russia moderation double standard*. Retrieved from <https://theintercept.com/2022/04/13/facebook-ukraine-russia-moderation-double-standard/>

III. FREEDOM OF EXPRESSION AND ITS LIMITATIONS

Article 19 of the ICCPR guarantees the right to freedom of opinion and expression, which comprises the freedom to seek, receive, and impart information and ideas of all kinds.⁹⁶⁰ The UN Human Rights Committee has further clarified that this freedom comprises internet communications.⁹⁶¹ While the right to freedom of speech has limitations, various limits are instituted to achieve national security, morals, public health, public order, and other people's rights and liberties. All such limitations must be statutory, not impede the very essence of such rights, and be compatible with the right to an effective remedy.⁹⁶² Restriction and or censorship of free expression-friendly content advocating for Palestine and Palestinians contravenes these rights to freedom of speech.

Over-censoring content and users' ability to engage each other on social media compromises freedom of assembly and association because modern social media sites have assumed the roles of a social public sphere and the epicenter of social movements. Policies that involve content removals and changes to recommender algorithms or deciding what content users do see are perceptions that constitute discrimination themselves, threatening due process, the universality of rights, and the prohibition against discrimination.

Limiting how people and entities can work to advance the human rights of Palestinians, as well as raise public consciousness about this conflict, may prove more effective through online content suppression. When algorithms in Facebook, Instagram, or other automatic systems remove materials, biases are algorithmic.⁹⁶³ Other studies have discovered that technology may lead to the indiscriminate censorship of material, leading to discriminatory consequences and that consumers have no alternative channels.⁹⁶⁴

Social media engagement is where you interact with information, whether through posting or reading comments, more so in physical settings where it is bad manners to have open and

⁹⁶⁰ United Nations Human Rights Committee. (2011). *General Comment No. 34: Freedoms of opinion and expression (CCPR/C/GC/34)*. <https://undocs.org/CCPR/C/GC/34>

⁹⁶¹ UN Human Rights Committee, General Comment No. 34, Freedoms of opinion and expression, CCPR/C/GC/34, 2011, <https://undocs.org/en/CCPR/C/GC/34> (accessed December 9, 2023), paras. 12 and 43.

⁹⁶² See Human Rights Committee, General Comment No. 34: Article 19: Freedoms of Opinion and Expression, U.N. Doc. CCPR/C/GC/34, September 12, 2011, <https://undocs.org/CCPR/C/GC/34>, paras. 21-36; Human Rights Committee, General Comment No. 37 on the Right of Peaceful Assembly, U.N. Doc. CCPR/C/GC/37, September 17, 2020, <https://undocs.org/CCPR/C/GC/37>, paras. 36-49.

⁹⁶³ Amnesty International. (2023, October). *Global: Social media companies must step up crisis response on Israel-Palestine as online hate and censorship proliferate*. <https://www.amnesty.org/en/latest/news/2023/10/global-social-media-companies-must-step-up-crisis-response-on-israel-palestine-as-online-hate-and-censorship-proliferate/>

⁹⁶⁴ Binns, A. (2020). Algorithmic Censorship by Social Platforms: Power and Resistance. *AI & Society*, 35(1), 1-12. <https://doi.org/10.1007/s13347-020-00429-0>

controversial communication. Pain emanates from being shadowed because of the restriction whereby your friends and followers could not see postings without a very clear explanation. Since Meta does not publicly recognize shadow banning, users are denied transparency, adequate access to complaint mechanisms, and substantial remedies. Social media could be a vital tool for communication in emergency or conflict situations. Users at risk of account limitations like shadow banning may self-censor so as not to lose access to their accounts and other critical data.

IV. META'S MISSION STATEMENT AND ITS IMPLICATIONS

Meta's mission statement is to "give people the power to build community and bring the world closer together."⁹⁶⁵ Yet, this company's policies on content moderation about Palestinian voices contradict the same mission. Through its policies, Meta censors content associated with Palestinian rights and experiences and thereby violates its professed goal of creating a sense of community and openness for dialogue.⁹⁶⁶

Former Meta engineer Omar⁹⁶⁷ had a close look at such suppression. He worked to solve these issues, but he was eventually dismissed. He believes his termination was racially and ethnically based. Omar worked for two years, improving content recommendations on Instagram and Facebook. He says specifically that he was tasked to work on accounts that are improperly being censored or banned. For the lawsuit, he relates that in October 2023, he was instructed to review the integrity filters associated with Gaza, Israel, and Ukraine. Many users said the company was deleting pro-Palestine posts or that they were losing access to features like live streaming during this period. An investigation by Human Rights Watch confirmed that Meta was deleting comments such as "Free Palestine" and even Palestinian flag emojis. Among the accounts Omar reviewed was that of a prominent photojournalist from Gaza, with over 17 million followers on Instagram.

Omar discovered that many of that photojournalist's posts were being misclassified because they contained "sexual activity or nudity," severely inhibiting their reach. He was enraged at the highest level in that images of injured dead children were labeled as pornographic. When several colleagues realized these posts were misclassified, they were labeled incorrectly for

⁹⁶⁵ Panmore Institute. (n.d.). *Facebook's (Meta's) Mission Statement & Vision Statement*. Retrieved from <https://panmore.com/facebook-inc-vision-statement-mission-statement>

⁹⁶⁶ Human Rights Watch. (2023, December 20). *Meta's systemic censorship of Palestine content*. <https://www.hrw.org/news/2023/12/20/meta-systemic-censorship-palestine-content>

⁹⁶⁷ Al Jazeera. (2024, October 24). *The Take: Uncovering Meta's censorship policies on Palestine*. <https://www.aljazeera.com/podcasts/2024/10/24/the-take-uncovering-metas-censorship-policies-on-palestine>

days. Ultimately, Omar would be the only one to face consequences for bringing them to light. Meta explained that Omar was fired for violating data access policies. Still, this explanation made little sense because he had never met the photojournalist and did not know him personally. The photojournalist has been subject to heavy censorship since October 2023 and estimates that about 40% of his posts have been removed or censored.

His account has been suspended several times, greatly decreasing his following on Instagram; new users can't locate his account unless they know the username. Critics have highlighted double standards in how Meta shifts its policies regarding global events. When Russia invaded Ukraine in 2022, Meta eased a few of its hate speech guidelines for Ukrainian users but did not make such concessions to Palestinian voices. Immediately after the attacks on October 7, reports had been coming that Meta controlled the content filters in such a way that suppressed suspected hate speech but took stronger action, particularly on posts relating to Palestinians. This has resulted in over-enforcement, thus developing biases as regards how content regarding Palestine is treated in contrast with others.

V. HUMAN RIGHTS OBLIGATIONS AND CONTENT MODERATION

Businesses are expected to respect human rights through abstention from violations, acknowledgment, and resolution of the impact of their operations on human rights, as well as ensuring access to remedies for people in a meaningful way. Companies are responsible for ensuring that their content moderation processes and policies comply with international social media human rights norms. Companies must act with accountability and transparency, implement their standards consistently, and ensure that choices to remove information do not appear too sweeping or biased. The UNGPs⁹⁶⁸ point out that a company has to detect, prevent, mitigate, and account for its negative impact on human rights by engaging in human rights due diligence.

That should include informing stakeholders of how they manage the consequences of human rights and providing enough information to assess their responses' effectiveness. Meta's Corporate Human Rights Policy articulates the company's commitment to respecting the

⁹⁶⁸ Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework, in Human Rights Council, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, U.N. Doc. A/HRC/17/31, March 21, 2011, https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed November 30, 2023), annex.

UNGPs. Meta has joined the Global Network Initiative (GNI)⁹⁶⁹ and committed to respect the GNI Principles of Freedom of Expression and Privacy. Omar mentioned two specific examples where WhatsApp AI suggested hateful images when he was looking for terms associated with Palestine but not when he searched for terms related to Israel. There were also problems with Instagram's auto-translation tool that added the word "terrorist" to the biographies of Palestinian users.

Although Meta has apologized for the incidents blamed on technical flaws, it is impossible to argue that the problems are defects if the biases are known. Staff is not authorized to make the changes. Similar allegations of censoring pro-Palestine speakers are leveled against Meta from earlier in 2021 regarding an earlier Gaza and East Jerusalem conflict. Commissioned research by Meta found at the time that its activities were causing harm to Palestinian users' rights. Since Meta promised to implement those recommendations, many employees have felt that enough has not been done.

VI. TRANSPARENCY AND ACCOUNTABILITY IN CONTENT MODERATION

The Santa Clara Principles on Transparency and Accountability⁹⁷⁰ in Content Moderation presents the most significant principles about how a company should perform its tasks to ensure free speech. These provide that companies need to communicate with users concerning why they have removed any of the user's materials or the account, citing exactly what Community Standards rule was violated by the offending content. Organizations should also make sure to provide the end-users or the human moderators of contents with a valid opportunity for appeal against having the contents removed and accounts suspended within a reasonable time where the appeals explain in particular detail how their contents had been discovered and reviewed, leading to their decision to be removed. Meta accepts the Santa Clara Principles, but the firm hasn't fully implemented the requirements. There's a question regarding whether this isn't fully implemented, which leads to the failure of the effectiveness of Meta's processes on content moderation or allows a possibility of unfair filtering. Users who believe in minority views, such as those of Palestinians, will be discouraged when their removal choices are not transparent.

⁹⁶⁹ The Global Network Initiative, The GNI Principles, <https://globalnetworkinitiative.org/gni-principles/> (accessed November 30, 2023).

⁹⁷⁰ The Santa Clara Principles on Transparency and Accountability in Content Moderation, 2021, <https://santaclaraprinciples.org/> (accessed November 30, 2023).

VII. ALGORITHMIC BIAS AND ITS CONSEQUENCES

A few problems with algorithmic bias in content filtering involve political sensitivities. In situations such as this, Meta's automated content filtering methods might silence valid voices for Palestinian rights, which have disproportionate voices. Using algorithms means information can be incorrectly classified as dangerous or improper, and the user will not necessarily be allowed to dispute such determinations.⁹⁷¹

This would further marginalize already vulnerable populations and maintain the existing imbalance.⁹⁷² The impact of this type of prejudice transcends individual persecution to be able to shape public opinion, color the perspective of the conflict in general, and bolster current narratives that distill the Israeli-Palestinian issue into oversimplified terms.

VIII. THE ROLE OF EMPLOYEE ADVOCACY AND INTERNAL RESISTANCE

The stories of former Meta workers like Omar and Saima Akhter⁹⁷³ reveal a disturbing trend of internal opposition toward promoting Palestinian rights inside the organization. When Saima tried to raise her concerns regarding the suppression of Palestinian content, she was censored and punished. Saima had worked at Meta for three years before she was fired. She claimed that she and her colleagues were at liberty to post whatever there was about Palestine on the internal network. For instance, the message was put down when one of her colleagues' expressed sympathies to one of her fellow workers; she had lost her close family members in Gaza. As Saima posted expressions of culture associated with the identity, a post with watermelon cupcakes was wrong since it was related to Palestinian symbolism. Within less than a day, Saima organized an internal letter addressing workers' censorship concerns. The letter gathered around 450 signatures.

However, leadership pulled the letter and kept her out of business networks without informing her about her plight. This trend of muzzling pro-Palestinian rights workers is an example of the broader Meta culture that doesn't want to have candid conversations regarding sensitive political topics. This has caused internal debates, and any debate over content filtering practices has been muffled due to employees feeling that being outspoken singled them out for scrutiny. On top of the personal issues, this cultural situation affects the

⁹⁷¹ Diakopoulos, N., & Karpf, D. (2020). Algorithmic bias detection and mitigation: Best practices and policies to reduce consumer harms. Brookings Institution. <https://www.brookings.edu/articles/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>

⁹⁷² Access Now. (2023, October 24). *How Meta censors Palestinian voices*. <https://www.accessnow.org/publication/how-meta-censors-palestinian-voices/>

⁹⁷³ Al Jazeera. (2024, October 24). *The Take: Uncovering Meta's censorship policies on Palestine*. <https://www.aljazeera.com/podcasts/2024/10/24/the-take-uncovering-metas-censorship-policies-on-palestine>

organization's guidelines on content moderation as well as the management of the Palestinian voices on the web. The inability to expose such issues in the open gives way to the even greater environment where such discrimination occurs and operates unabated.

IX. THE IMPACT OF CENSORSHIP ON PUBLIC DISCOURSE

Limiting Palestinian content on Meta's platforms presents several important consequences for advocacy and public discussion. Besides silencing voices with first-hand experience of the conflict, it shapes public opinion worldwide as Meta also restricts the voice of Palestinians. It does selective amplification, thereby preventing genuine efforts in establishing authentic discourse and harmony. This gives a very distorted view of the issue regarding the Israeli-Palestinian problem.

The effects are especially strong in grassroots activism and social movements. Social media has become an indispensable tool for planning and mobilizing activism, where information is communicated, consciousness is raised, and change is instilled. Platforms like Meta hinder people and organizations from having the capacity to effectively convey social justice and human rights when they filter information attached to these movements.

Furthermore, this is a legitimate concern related to responsibility and accountability, given that the arbitrary style of content filtering employed in Meta permits the creation of certain storylines while gagging others. Besides pushing away populations that suffer because of the outcome, this perceived bias against Palestinian materials further undermines confidence in social media channels as places for unfettered frankness.

One of the accounts included was that of a leading Gazan photojournalist, whose activities have been strictly monitored since October 2023. His posts reach very few, as most are flagged as offensive, yet they do not contain offensive material. Besides the muzzling of single voices, this censorship trend restricts communities from telling their stories and making their voices loud for justice.

X. RECOMMENDATIONS FOR META

To achieve their human rights commitments and make their actions converge with the stated goal of the platform, Meta, as well as other social media companies, should consider the below recommendations:

1. Increase Transparency: A company should explain in depth why account limits and contents are removed, what policies were used, and why. This will be important to make the

users understand the moderation process and why their material is being dealt with in that manner.

2. Appeals Procedure Users whose accounts have been disabled or whose content was deleted should be provided access to easily accessible and expedient appeal procedures. There has to be a smooth mechanism in place so that judgments rendered might be reviewed and altered in case necessary. In short, this procedure must be prompt but allow users to argue their stance.

3. Engage Stakeholders Social media companies should engage more actively with users, community leaders, and human rights groups to understand the implications of their policies and practices and, through this engagement, find more just content filtering techniques that respect the multiple demands of the user under varying circumstances.

4. Human Rights Due Diligence Companies should conduct actual human rights due diligence to identify risks and prevent derogatory impacts on human rights. This would mean determining whether the content moderation policies violate freedom of speech or rights to information in a politically sensitive manner.

5. Guidelines for a Crisis: During the crisis, social media has to brief the public about its guiding principles for content moderation that might be crisis-related. This should essentially protect human rights while promoting diversity.

THE JURISDICTIONAL BATTLE BETWEEN THE FINANCIAL REGULATORS OF THE INDIAN ECONOMY

- Sahana Balaraj⁹⁷⁴

- Glancia S D'souza⁹⁷⁵

ABSTRACT

There are various laws governing these transactions between entities, and as such, many regulatory authorities exist to ensure that entities operating in these markets comply with the regulations for approving transactions. Thus, India has set up quite a few regulators much like the rest of the world. This paper tries to identify sectorial regulators, with special emphasis on the Securities Exchange Board of India (SEBI), and examines its overlapping jurisdiction with the market regulator, Competition Commission of India (CCI). The Legislative Reforms Committee has conducted nuanced research with regard to the often-overlapping competence jurisdictions of SEBI and CCI in the financial sector. The result has created doubts against the rationale of having a whole gamut of sectoral regulators such as SEBI and, generally an overreaching market regulator to maintain integrity not only for investors but also for commercial persons. The following paper examines the jurisdiction of SEBI and CCI in regulating various areas of the market, the areas of conflict, and the relevant legislative changes made to bring the laws in harmony and usher them toward a regime of consistency, given the critique of India's overly complex regulatory systems. The paper seeks the solution to the regulatory over-complexity that acts as a hindrance in the form of international and domestic investments.

Keywords: SEBI, CCI, Financial Regulators, Regulations, Investment, Jurisdiction.

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I. INTRODUCTION

There was a sea-change in the structure of the Indian Economy post-independence, and its doors were shut to much of the outside world. The conservative approach of the Indian government aimed to develop the backward agriculture-based economy of those times. This conservative approach of the government attracted many foreign investors who wanted to invest in the newly independent economy. Still, simultaneously, many existing companies from colonial times exited the country. It was Late Former Prime Minister Mrs. Indira Gandhi who envisioned plans of reducing the exhaustive formalities and compliances, it was much later under the regime of Prime Minister P. V. Narshima Rao that the LPG directives was implemented. Popularly known as the LPG scheme, the Liberalization Privatization Globalization scheme implemented in 1991 opened the economy to the world in never before manner. This open economy, purely functioning on the demand and supply functioned on the premise that the allocation of resources was being carried out in an effective way and did not require any such large-scale supervisors and regulators.

The Harshad Mehta Securities Scam of 1992 brought to the fore the lacunas in the system and the abundant loopholes being used by players. The securities scam showed the need of an overseer and regulator in all sectors as well as sector specific regulators. Various sector specific regulators were brought in the picture. Most important of them was the establishment of the Securities and Exchange Board of India in 1992. Other regulators like Competition Commission of India and Telecom Regulatory Authority of India came much later. Overlapping jurisdiction of the regulators, particularly that of SEBI and CCI, is what this paper has focused upon. An attempt is made to clear the confusion on which of the two must be given preference over the other in case of a conflict. It also goes further to explore how they exercise control in cases of creeping acquisitions. For exploring this, it is very important first to understand the different regulators that exist in the economy and what comes within the operation of each.

II. OBJECTIVE OF STUDY

To analyse, the overlap of regulatory jurisdictions of Securities Exchange Board of India and Competition Commission of India.

III. RESEARCH PROBLEM

The introduction of regulators to the Indian Economy was gradual and well thought over. While the introduction of the sectoral regulators was made to avoid jurisdictional overlaps, the introduction of the Competition Commission of India, replacing the existing MRTP Commission caused overlap in the jurisdictions between the Competition Commission and the Sectorial Regulators. The overlap causes plethora of confusions such as approvals, notices etc.

This paper addresses the issue of overlap of jurisdiction between SEBI and CCI.

IV. RESEARCH QUESTIONS

1. Who are SEBI and CCI?
2. Does SEBI and CCI have an overlapping jurisdiction?
3. Does CCI have overlapping jurisdictions with other regulatory authorities?
4. Why are there overlapping jurisdictions and How can they be resolved?

V. RESEARCH METHODOLOGY

The research methodology adopted for the work is doctrinal method. The research would be consisting of the various national legislations, commissions and the judicial pronouncements rendered therein.

VI. LITERATURE REVIEW

A. Nimwal, S., Nimwal, E. and Nayak, K.A., 2023. CCI vs SEBI: An Analysis of Overlapping Regimes in India. Issue 1 Indian JL & Legal Rsch., 5, p.1.

The paper initially speaks of how every country in the world has to deal with the overlap of jurisdiction between the sectoral regulator and the top competition regulator due to the simultaneous efforts of numerous authorities to determine if transactions are consistent with a variety of legislation. Like the rest of the globe, India has numerous authorities whose approval is required for corporate transactions. This paper seeks to identify and critically examine the overlap in the purview of SEBI and the CCI as securities regulators in the Indian economy. Transactions may be unduly delayed as a result of the numerous (and perhaps conflicting) regulatory requirements that must be satisfied in order for a transaction to be allowed because of the overlap in the roles of these authorities. To ensure legal certainty and clarity, as well as to offer corporations and market participants confidence in the outcome of transactions and the level of liability for their day-to-day business behaviour, coordination

between regulators is essential under India's multi-regulator system. Due to overlaps in these regulators' governing laws and the various legal trigger points specified in those laws, cooperation is required. The writers discuss the overlapping and ambiguity of two distinct themes: credit rating agencies and mergers and acquisitions. The research discussed in this article also intends to offer a solution to the regulatory issue that has prevented a number of industries from attracting investment from both India and beyond.

B. Thakur, Y., 2021. Interface of Competition Law with Other Corporate Legislations in India (Powers and Jurisdiction of the CCI as Compared to Other Enforcement Authorities). Indian JL & Legal Rsch., 3, p.1.

The paper purports to clarify the authority of the competition commission and the boundaries of where Indian law permits it to intervene in other industries. It is even more important to have a framework in place to eliminate this jurisdictional overlap because organisations like SEBI and the IRDA have frequently clashed with the competition commission. This report has also examined possible strategies that may be implemented in India to eliminate these overlaps and grant the commission the authority it needs to better control competition.

C. Basu, S., 2021. CCI and Telecom Sectoral Regulator: A Study of Relevance. Issue 2 Int'l JL Mgmt. & Human., 4, p.2251.

This essay tries to examine the sector's transition from monopoly to privatisation. It will also highlight a few recent laws and measures that regulate the telecom sector in addition to CCI. The study also focuses on how India's government and its different regulatory agencies have devised and implemented a proposal to address the jurisdictional issue in competition policy as it relates to the country's telecoms industry. With the aid of certain pertinent case laws, the study also made an effort to examine the current controversies.

VII. ANALYSIS

A. Who are Securities Exchange Board of India and Competition Commission of India

i) SEBI

According to the Securities and Exchange Board of India Act, 1992, SEBI was founded. The securities market is the only area within its purview. Protecting the interests of investors in securities as well as regulating and advancing the securities market are its two main goals.⁹⁷⁶ Periodically, its capabilities were improved to help it combat the different scams that were

⁹⁷⁶ Long title of the SEBI Act, 1992.

discovered. The *Harshad Mehta scam*⁹⁷⁷, *Ketan Parekh scam*⁹⁷⁸, and other scandals exposed gaps in the law, and as a result, SEBI was given increased power to punish future instances of these crimes.

In addition, Section. 32 of the Act states that it must be applied in addition to any other law that is in effect at the time.⁹⁷⁹ As a result, SEBI's authority coexists with that of other market authorities and is not able to supersede them. Under the SEBI Act, a number of regulations have been created to control various areas of the securities industry.

ii) CCI

The Competition Act, 2002 as amended by the Competition Amendment Act, 2007 follows the philosophy of modern competition laws. The Act prohibits anti-competitive agreements, abuse of dominant position by enterprises and regulates combinations acquisition, acquiring of control and M&A, which causes or likely to cause an appreciable adverse effect on competition within India.

The Commission shall also work for the prohibition of such practices, which have an adverse effect on competition; promote and sustain competition; protect the interests of consumers; and ensure freedom of trade in the markets of India. The Commission is also required to give opinion on competition issues on a reference received from a statutory authority established under any law and to undertake competition advocacy, create public awareness and impart training on competition issues.

B. General Rule under Interpretation of Statutes

When two laws have a 'non-obstante clause' in them, there have been cases in the past where their applications have overlapped. Many precedents such as specific legislation takes precedence over generic legislation, for example, and newer legislation takes precedence over older legislation, have been set by Indian courts. As a rule of interpretation, *lex specialis*, according to the Supreme Court, takes precedence over general legislation because special legislation only applies to a certain area. The justification for the rule that newer legislation takes precedence over older legislation is that it is presumed that the legislature is aware of the laws' existence; therefore, the 'non-obstante clause' in the later enactment implies an intention on their behalf to apply the latter legislation above the former

i) Case of CERC

⁹⁷⁷ R. B. Jain, *The Craft of Political Graft in India: An Analysis of Major Scams*, INDIAN JOURNAL OF POLITICAL SCIENCE, Vol. 55, No. 4, Oct 1994.

⁹⁷⁸ *Ibid* 2

⁹⁷⁹ Section 32 of SEBI Act, 1992

The organization in charge of regulating the power industry is the Central power Regulatory Commission (“CERC”). It was created in 2003 in accordance with the Electricity Act. Maintaining a competitive environment, preventing anti-competitive agreements, and stopping the exploitation of position of dominance in the power sector. This obviously falls under the purview of the Competition Act and is the responsibility of the CCI, regarding market competition as well as the market’s promotion of consumer welfare. Confusion is increased by the non-obstante provision in Section. 174 of the act, which grants the act precedence over any other legislation that is in conflict with it⁹⁸⁰.

The Electricity Act’s Section 175⁹⁸¹ further states that its provisions must be “in addition to, and not in derogation of, any other law in force”. Similar provisions are found in the Competition Act of 2002, which also includes a non-derogation provision under Section 62 and a non-obstante provision under Section 60.

India therefore employs a system of sector-specific regulators with authority to oversee that particular sector. In contrast, the Competition Act of 2002 is a generic antitrust law that seeks to encourage competition across all economic sectors. As a result, there is a significant overlap in the areas of responsibility between the many regulators in the nation, particularly between the general antitrust watchdog and the regulators for particular industries, as shown above.

ii) CERC v. CCI

Sometimes in the past, applicability of two different laws had overlapped in the same situation because both the laws had a ‘non-obstante clause’. In similar situations, Indian courts have used various concepts such as the rule that specific legislation takes precedence over generic legislation.⁹⁸², the rule that more recent law takes precedence over earlier legislation⁹⁸³, etc. The Honourable Supreme Court had said that, as a general rule of interpretation, *lex specialis derogat legi generali* because the latter only deals with one sector. A ‘non-obstante clause’ in the latter enactment shows an intent on the part of the legislature to override the former legislation by the latter legislation, which is the basis for the rule that later legislation prevails over the earlier legislation. The legislature is presumed to know the existing laws.⁹⁸⁴

⁹⁸⁰ Section 174 of the Electricity Act, 2003.

⁹⁸¹ Section 175 of the Electricity Act, 2003.

⁹⁸² *Allahabad Bank v. Canara Bank*, [2000] 2 SCR 110,

⁹⁸³ *KSL and Industries Ltd. v Arihant Threads Ltd.*, (2008) 9 SCC 763; *Bank of India v Ketan Parekh*, AIR 2008 SC 2361.

⁹⁸⁴ *Bank of India v Ketan Parekh*, AIR 2008 SC 2361.

The Honourable Supreme Court has repeatedly noted, however, “*that interpretation is best which makes the textual interpretation match the contextual.*”⁹⁸⁵ When the aforementioned principles do not apply, an equitable interpretation of the two laws is sought. When it comes to anticompetitive agreements in the power sector, for instance, there is a significant overlap between the jurisdictions of CERC and CCI. Does this imply that CERC will now take precedence over CCI’s authority in the event of a disagreement regarding the proper forum for the resolution of a dispute involving an anticompetitive agreement in the energy sector? Is it not inconsistent with the legal system that some industries have specialised watchdogs while others have generic antitrust watchdogs? Having a sector-specific competition regulator and a general competition regulator for the left space would be a logical corollary.

But if one has to build a sector-specific competition regulator, it would mean breaking up the existing CCI into SEBI, IRDA, and RBI, with each wielding power to regulate certain sectors of competition, and a general CCI that would have a not-so-important role in investigating the residual issues relating to competition law. Every regulator of an industry may have knowledge about issues concerning their industry in general and not about antitrust legislation. Any conflict that arises in the decision-making by these regulators could also lead to a joke of the whole competition legislation. Ranking these regulators in order to decide on the intrinsic importance of their instructions would be a big headache.

After carefully examining the legislative strategy of giving sector-specific regulators regulatory authority over competition, the above expansion of the CERC example is plausible. The Petroleum and Natural Gas Regulatory Board, which was established in 2006 under the ‘Petroleum and Natural Gas Regulatory Board Act’⁹⁸⁶ following the passage of the Competition Act, 2002, is the most recent addition to the list. Additionally, the Board has been given a responsibility under the act that has been written in the broadest language possible, giving the Board potential expansive authority.

As of now, no conflict has arisen. It becomes problematic only when a conflict arises and this issue is worsened by the presence of the non-obstante clause in the various legislations, as noted above.

iii) SEBI v. CCI

As previously mentioned, the area of growing overlap has the potential to be a flashpoint for conflict. Let’s examine the disagreement about jurisdictional overlap in merger transactions between two regulators, CCI and SEBI, and the resulting effects.

⁹⁸⁵ Reserve Bank of India v Peerless General Finance and Investment Company Limited [1987] 2 SCR 1.

⁹⁸⁶ Petroleum and Natural Gas Regulatory Board, Act 19 of 2006

Any merger, acquisition, or amalgamation must receive the approval of SEBI and CCI before it can take place in India. The CCI has broader authority because it can look at any combination⁹⁸⁷ that occurred outside of India but had a noticeable negative impact on competition in the relevant market in India.⁹⁸⁸ Any amalgamation, merger, or acquisition is referred to as a combination.⁹⁸⁹ According to Section 2(r) of the Competition Act, 2002, the terms “relevant market” and “relevant product market” are interchangeable. The term “relevant geographic market” describes the region where competition is uniform and distinct from that of a neighbouring region.⁹⁹⁰ The term “relevant product market” refers to the market that includes all goods and services that are thought to be alternatives to the subject product.⁹⁹¹

C. Approvals

i) CCI’s Approval

An application to the CCI is required only when one of the many thresholds specified in Section 5 of the Competition Act is reached. If applicable, such an application has to be filed within 30 days from the date of the Board approval or signing of a relevant agreement pertaining to the proposed combination.⁹⁹² Whereas prior to the amendment in 2007, the undertaking had the prerogative to just intimate the CCI of the merger. It is mandatory under the Competition Amendment Act of 2007. Under Regulation 5 of the Competition Commission of India (Procedure in regard to the transaction of business relevant to combinations) Regulations, 2011 (Hereinafter referred to as Combination Regulations, 2011), the application has to be filed before the CCI in Form I or Form II. Finally, Filing requirements of Form II apply only when the parties to a horizontal combination have at least a combined market share of 15% in the relevant market or when parties to a vertical combination collectively have at least a combined market share of 25% in the relevant market. During the preliminary review, most of the combination proposals were cleared by the CCI. Thus far, the lone exception to this trend is the recent Sun Pharma-Ranbaxy merger, for

⁹⁸⁷ Section 5 of the Competition Act, 2002.

⁹⁸⁸ Section 32 of Competition Act, 2002; *Dhanraj Pillay v M/s. Hockey India*, 2013 CompLR 0543 (CCI).

⁹⁸⁹ Section 5 of the Competition Act, 2002.

⁹⁹⁰ Section 2(s) of the Competition Act, 2002

⁹⁹¹ Section 2(t) of the Competition Act, 2002.

⁹⁹² Section 6(2) of the Competition Act, 2002. In the case of *Thomas Cook (India) Ltd* acquiring stake in *Sterling Hotel Resorts India) Ltd*, Combination Registration No. C-2014/02/153.

which CCI ordered a Phase II investigation since prima facie it seemed that the deal would cause an appreciable adverse effect on competition in the relevant Indian market.⁹⁹³

Any acquisition of shares or voting rights that, directly or indirectly, results in the acquisition of less than 25% of the shares or voting rights in the acquired enterprise is exempt from filing a merger notification with the CCI under the Combination Regulations, provided that the acquisition was made solely for investment purposes and did not result in the acquisition of “control”⁹⁹⁴

ii) SEBI’s approval

In accordance with the SEBI (Substantial Acquisition of Shares and Takeover) Regulation, 2011 (Hereinafter referred to as SAST Regulations), approval must be obtained from SEBI. The trigger in this case is the acquirer, acting alone or with others acting jointly, purchasing 25% or more of the shares or voting rights in the target company.⁹⁹⁵ If the cutoff is reached, the acquirer must publicly declare an open offer to the shareholders of the acquired firm.⁹⁹⁶ Such public disclosure must be made on the date that shares, voting rights, or control of the purchased company are acquired.⁹⁹⁷ The stock exchanges where the shares of the purchased firm were listed must receive this notification, and they are then responsible for disseminating it to the public.⁹⁹⁸

In accordance with Regulation 16 of the SAST Regulations, the acquiring firm must also file a draft of the offer letter with SEBI. The offer price must be established based on this.

After the offer time has ended, the acquirer has 26 weeks to execute the acquisition in accordance with the agreements negotiated in support of the transaction.⁹⁹⁹ According to Section 2(p) of the SAST Regulation, the term “offer period” refers to the time period between the date an agreement to purchase shares of the target company was entered into and the completion of the transaction as specified in the agreement, which includes paying consideration to the shareholders who took advantage of the open offer.¹⁰⁰⁰ Varying types of

⁹⁹³ Vidya Krishnan, Sun Pharma-Ranbaxy deal in CCI crosshairs, LIVEMINT, July 29, 2014. Available at: http://www.livemint.com/Companies/PwftvxqaZ0vojwb8GzWEdK/Sun-PharmaRanbaxy-deal-in-CCICrosshairs.html?utm_source=copy

⁹⁹⁴ Regulation 4 of the Combination Regulations.

⁹⁹⁵ Regulation 3 of the SAST Regulations.

⁹⁹⁶ Regulation 3, 4, 5(1) of the SAST Regulations

⁹⁹⁷ Regulation 13(1) of the SAST Regulations.

⁹⁹⁸ Regulation 14(1) of the SAST Regulations; Umakanth Varottil, Investment Agreements In India: Is There An “Option”?, NUJS LAW REVIEW, Vol. 4, 2011.

⁹⁹⁹ Regulation 22(3) of the SAST Regulations; Jithesh Tilak, Regulating M&As An Insight Into Competition Laws in India, INTERNATIONAL BUSINESS LAWYER, 2004

¹⁰⁰⁰ Section 2(p) of the SAST Regulations

purchase have varying public notice schedules, however they are all required to adhere to the twenty-six month term requirement as stated above.

iii) Penalties for non-compliance

Knowing the repercussions in the event of a violation of the rules, or the fines that the different regulators may apply, is crucial to understanding which regulator must be given preference over the other. In accordance with the Competition Act, fines are often assessed as a percentage of the company's annual revenue. The value of sales of products and services is included in the definition of "turnover."¹⁰⁰¹ Due to the definition's lack of clarity, it is unclear whether the firm should be fined based on its entire turnover or its relevant turnover.

The European Court of Justice ruled in *Musique Diffusion SA v. Commission*¹⁰⁰² that the foundation for imposing a penalty is based on turnover and its proportion.¹⁰⁰³ The term "turnover" refers to the enterprise's turnover relative to the pertinent product, not its overall turnover.¹⁰⁰⁴

In *Belaire Owner's Association v. DLF*¹⁰⁰⁵ Ltd., a penalty of 7% on the group's whole revenue was imposed, not simply on the revenue of the pertinent product market where it was determined that the company had abused its dominant position.

NSE was fined 5% of the average turnover in *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*¹⁰⁰⁶ for abusing its dominating position. The Court had, further, held that neither S. 2(y) nor S. 27(b) of the Act of India provide scope for interpretation of the term 'turnover' to mean turnover of the relevant product.

A sizable fee could be imposed for failure to comply. Thomas Cook (India) Ltd was penalised INR 1 crore for engaging in a number of purchase-related actions prior to receiving CCI authorisation.¹⁰⁰⁷ In this instance, the proposed combination was later permitted by the CCI; nonetheless, the company was still fined for acting prematurely.

In addition, the Commission has the authority to require that the combination not go into effect if it believes that the proposed combination will have or is likely to have a significant negative impact on competition in the relevant Indian market.¹⁰⁰⁸ The result of this is that the

¹⁰⁰¹ Section 2(y) of the Competition Act, 2002.

¹⁰⁰² *Musique Diffusion SA v. Commission* 1983 ECR 1825.

¹⁰⁰³ Ibid

¹⁰⁰⁴ Ibid

¹⁰⁰⁵ *Belaire Owner's Association v. DLF* [2011] 104 CLA 398.

¹⁰⁰⁶ *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd* 2011 Comp LR 0129 (CCI).

¹⁰⁰⁷ PTI, CCI imposes fine on Thomas Cook, Sterling Holidays, THE HINDU, June 29, 2014. Available at: <http://www.thehindu.com/business/Industry/cci-imposes-fine-on-thomas-cook-sterlingholidays/article6158129.ece>

¹⁰⁰⁸ Section 31 of the Competition Act, 2002

company will be treated as though the combination never existed and will be fined by the relevant regulatory body in accordance with the law that it has violated.

As a result, severe penalties may be imposed by both SEBI and CCI. The Competition Act allows for the combination to be ruled void, making the penalties that CCI might apply more severe. However, these fines are imposed because the acquirer or the target company failed to notify the regulators as required by the specific set of circumstances under the aforementioned legislations.

Think of a scenario where the transaction results need of CCI and SEBI approval. After receiving SEBI's permission, the company is required to complete the transaction within 26 months of the contract's signing. However, CCI's clearance is still pending since it has 210 days to respond to any application notification.¹⁰⁰⁹ When further evidence is needed to determine whether the agreement would actually have a significant negative impact on competition, time can be delayed. If the acquirer carries out the agreement, the CCI will sanction it for "gun jumping" because the transaction was carried out before the CCI gave its permission. This is true regardless of how they feel about the competition's noticeable negative impact.¹⁰¹⁰ The CCI has penalised the businesses in a number of instances, including the acquisition of Sterling Holiday Resorts (India) Limited by Thomas Cook Insurance Services (India) Ltd. and the merger of Jet Airways (India) Limited and Etihad Airways PJSC. These businesses failed to notify the CCI of their transaction because they believed they were exempt from reporting under the target exemption.

It's interesting to note that following receiving notification, CCI approved both transactions in Phase I. However, if it waits for CCI clearance and fails to fulfil its duties under the contract on time, it will become time-barred¹⁰¹¹ and would need to rework the agreement. According to the timing of several regulations that apply to such deals, this is one scenario that is likely to occur. The acquirer is forced to choose between carrying out the agreement and maintaining the status quo in such a situation. What should the buyer do to lessen the harm done to him at the expense of the various sector approval system in India. When considering the applicable penalty clauses of both authorities, SEBI's punishment appears to be doing less harm. Therefore, SEBI cannot be prioritized over CCI's approval. But there's more to this story than meets the eye. The price of a company's shares on the market will

¹⁰⁰⁹ S. 6 of the Competition Act, 2002.

¹⁰¹⁰ Shweta Shroff Chopra, Sangeetha Mugunthan, Merger control in India: overview, PRACTICAL LAW, June 2014.

¹⁰¹¹ Regulation 22(3) of the SAST Regulations.

fluctuate if a regulator imposes a fine on it; this will have a negative impact on the deal as a whole.

The goal has always been to make up any discrepancy between the notification and approval timelines, if there is one. Due to the dissolution of the Parliament, the Competition (Amendment) Bill 2012¹⁰¹², which was introduced in the Parliament in 2012, has now expired with the intention of reducing the time period for the CCI to respond with its order on any combination notification from 210 days to 128 days.

D. Competing jurisdictions and way forward

i) Competing Jurisdiction

The only deal to date that has required clarification from both parties on the same transaction is the Jet Etihad one, despite the fact that there has never been a direct contradiction between the understandings of CCI and SEBI. In this case, the buyer, Etihad Airways, located in Abu Dhabi, wanted to buy a 24% share in Jet Airways, a company with headquarters in India.¹⁰¹³ Although neither regulator's approval is required due to the transaction's threshold, there was some worry that the acquisition was being done by "persons acting in concert," or more specifically that the existing promoter group, led by Naresh Goyal, was working in tandem with the acquiring company, Etihad. The Central Government then asked SEBI and CCI for clarity on the concept of control under their respective legislation. The main worry was that since Etihad could select three directors to its 12-member directorial board, effective control of Jet's board was being transferred to it. There was also a lot of discussion over the rules in the Corporate Co-operation Agreement and the Share Purchase Agreement. The transaction was approved after both regulators' revisions were implemented.¹⁰¹⁴

It is clear from India's current regulatory environment that all regulators are on an equal footing so long as they operate within their respective purviews. The Government and more FIPB are hesitant to provide exemptions if regulatory approval from numerous agencies is required.

ii) 5.2 Resolving Competing Jurisdictions

¹⁰¹² The Competition (Amendment) Bill, 2012, PRS Legislative Research. Available at: <http://www.prsindia.org/billtrack/the-competition-amendment-bill-2012-2571/>

¹⁰¹³ Jet-Etihad deal: Sebi seeking further clarity from CCI, finance and civil aviation ministries, BUSINESS TODAY, March 12, 2014. Available at: <http://businesstoday.intoday.in/story/jet-etihad-deal-in-sebi-airpocket/1/204196.html>

¹⁰¹⁴ Kanika Chaudhary & Nidhi Singh, Skies over Control, LUTHRA & LUTHRA LAW OFFICES. Available at: http://www.luthra.com/admin/article_images/Skies-under-Control.pdf

Regulating transactions that have a negative impact on the market or on investor protection has been a frequent activity for SEBI and CCI. However, there is a key distinction between SEBI's and CCI's interpretations of the rationale behind the regulation of such staggered transactions. SEBI is more concerned with investor safety, whereas CCI is more worried about how such purchases will affect market forces.

In *MCX-SX v. SEBI and CCI*,¹⁰¹⁵ for non-compliance to the norms, SEBI had refused to provide permission to work as a stock exchange; therefore, MCX-SX had appealed to CCI. MCX-SX argued that SEBI's actions were anti-competitive and likely to favoritism towards the other rival exchanges where the members of SEBI had an interest. The CCI, on the other hand, has elected to respect the jurisdiction of SEBI as the regulatory authority under the judgment, holding that SEBI was acting well within the mandate in safeguarding the securities market. The case thus brings out the problem of jurisdiction; SEBI is a watchdog over the market; CCI is a watchdog over the competitive practices. The outcome defined the limits of CCI's intervention in such cases where the discretion of a regulator is involved and thereby hinted that CCI may abdicate its role to a sector regulator's decisions are aligned with the public interest.

The **Jet-Etihad Deal**¹⁰¹⁶ served to illustrate the requirement of a twin application approach in merger reviews. SEBI addressed the issue as to whether the acquisition of the shares of Jet Airways by Etihad was in consonance with the takeover norms and if it complied with the pricing and disclosure norms. CCI examined the anti-competitive implications of the transaction on the civil aviation market. SEBI was technically unhappy as well, raising technical compliance on pricing and disclosure norms. On its part, the view of CCI was further expanded to ensure that the deal did not impact the competition level. CCI finally allowed the deal but required conditions to ensure market competition, a show of regulatory coordination needs. The case asserts that large transactions often fall within the purview of several regulators with diverse priorities.

The unsuccessful **Bharti Airtel-MTN Deal**¹⁰¹⁷ is another case where cross-regulatory overlap is also presented. An order from SEBI was required on the question of whether Bharti Airtel was mandated to make an open offer under the takeover code because the deal involved a substantial acquisition of shares. At the same time, CCI dealt with the issue

¹⁰¹⁵ *National Stock Exchange of India Ltd. v. CCI*, 2014 SCC OnLine Comp AT 37

¹⁰¹⁶ Nishith Desai Associates. (2014). *Jet-Etihad deal dissected*. Available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Jet-Etihad_Deal_Dissected.pdf.

¹⁰¹⁷ Nishith Desai Associates. (2013). *Takeover code dissected*. Available at: https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Ma%20Lab/Takeover%20Code%20Dissected.pdf

concerning the market dominance of the telecom sector. The fact that the deal did not go through revealed that SEBI and CCI are complementary but distinctive in their roles in the regulation of cross-border mergers and acquisitions. This also represents a case that exposed the challenges arising from the globalization of business transactions within which multiple jurisdictions and regulatory frameworks are involved.

The **NSE Co-Location Case**¹⁰¹⁸ is a great example of how SEBI and the CCI can proceed in parallel but distinct regulatory matters. The investigation was conducted by a level and transparent market platform in front of all its concerned people. While the CCI emphasized the far more fundamental competitive implications of NSE's co-location service, which was accused of giving unfair preference to some brokerage houses, both the regulatory bodies decided that there were indeed infractions by NSE. However, SEBI highlighted transparency and market behaviours aspects, while on the other hand, CCI focused on market dominance. The implications of this case were that it made possible collaborative regulation, together with some of the inherent hazards involved with duplicate jurisdiction in which there is a danger of dual sanctions for the same conduct.

In fact the **Tata Motors- Fiat India Joint Venture**¹⁰¹⁹ demonstrated how regulatory harmonization can raise efficiency in the transaction process. SEBI prevented the violation of disclosure stipulations, but the CCI made a review of the competitive implications of the process. The two agencies approved the transaction after satisfying themselves that market competition was not distributed.

The jurisdiction overlap and overlap of areas have indicated that the **PVR-INOX merger**¹⁰²⁰ rekindled the presence of conflicts in regulating mergers, and SEBI cleared the deal on compliance with securities laws, directed its attention strictly to issues of shareholder interest and disclosure norms, and the role of CCI was the assessment of how this would impact competition. Concerns with regard to dominance in the market and consumer choice were quite relevant as this merger was also significantly impacting competitive pressure. In spite of the fact that SEBI has accorded merger approval, the role of CCI becomes pertinent to ensure that the resultant would be one not resulting in anti-competitive practices. This case once

¹⁰¹⁸ Indian Express. (2024). *NSE co-location case: SEBI found violations in 2019, no evidence in 2024*. Available at: <https://indianexpress.com/article/business/nse-co-location-case-sebi-found-violations-in-2019-no-evidence-in-2024-9567750/>

¹⁰¹⁹ Global Competition Review. (2024). *India: nuanced approach to merger control should benefit regulators and parties alike*. Available at: <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2024/article/india-nuanced-approach-merger-control-should-benefit-regulators-and-parties-alike>

¹⁰²⁰ Somu, S. and Budhia, S. (2022). *PVR-INOX merger: Necessitating CCI to be empowered to review non-notifiable mergers*. NLIU CBCL. Available at: <https://cbcl.nliu.ac.in/competition-law/pvr-inox-merger-necessitating-cci-to-be-empowered-to-review-non-notifiable-mergers/>

again throws up the need for consideration between the Indian regulations towards an effective balancing act concerning the conflicting interests and assessing the trade-offs in balancing investor protection, market efficiency, and competition within India's financial framework.

Practically, their cases have far-reaching implications. The first is that regulatory functions need to be more precise so that jurisdictional disputes can be avoided. The second is that the coordination between SEBI and CCI needs to be strengthened, especially in complex cases that involve both oversight of financial markets and competitive concerns. These cases show that jurisdictional overlap, if not managed properly, can lead to extended regulatory analysis, and this uncertainty of regulatory players, SEBI and CCI, is highly relevant because overlapping regulation in merger control or competitive practice matters can be such a challenge. In this light, conflicts are an expression of the dynamic way in which financial regulation has evolved as part of an always-changing economic landscape

iii) Jurisdiction solution

According to the SEBI-issued SAST Regulation, any acquisition of shares by an acquirer who already holds 25% or more of the voting rights would result in open offer obligations if the acquisition amounts to 5% or more of the voting rights.¹⁰²¹ The reasoning behind this is that, in order to protect investor interests, just as an exit option must be provided in the event of an en masse purchase, one should also be provided in the event of a gradual acquisition of control of the Company.¹⁰²² Various disclosure standards must be followed in addition to the open offer responsibilities.

VIII. CONCLUSION

India has adopted the multi-sector regulator system wherein different sectors have different regulators with different jurisdictions. The multiplicity of regulators is one more comprehensive way of understanding in detail each sector and aspect of a deal. Different sectors' jurisdictions allocated to various regulators result in their holistic coverage of that particular sector. This also implies getting approvals from various sectors in case those sectors' jurisdiction is invoked w.r.t. a particular transaction, which may be so required. This, further, would involve an increased amount to be spent in obtaining the approval, apart from

¹⁰²¹ Regulation 3(2) of the SAST Regulation.

¹⁰²² Public M&As in India: *SAST Regulation Dissected A detailed analysis of Securities and Exchange Board of India*, NISHITH DESAI & ASSOCIATES. Available at: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Public%20M%26As%20in%20India%20-%20Takeover%20Code%20Dissected.pdf

an increase in time spent for securing such an approval. But this also makes Indian market more inaccessible to an investor, especially those who have no knowledge of the Indian framework. The multiplicity of approvals makes the process expensive for most players. Financial Sector Legislative Regulation Committee was headed by Justice B.N. Srikrishna and it had submitted its report in March 2013.¹⁰²³ It had suggested super regulator for India. To this, Raghuram Rajan had replied: “*if it ain’t broke, don’t fix it!*”¹⁰²⁴

The timeline for approval from various regulators is also different, therefore, the financing of a transaction becomes even more difficult. For instance, in case SEBI has given approval and CCI’s approval is awaited, then the company cannot go forward with any transaction in pursuance of the combination; thereby, entailing penalties on account of delay. While on the other hand, in case it proceeds with the transaction, then CCI may institute an action on account of having taken a step further without obtaining the requisite approval from CCI. A co-operation between the regulators as has been evidenced with regard to creeping acquisitions makes the regulatory framework easier to maneuvers without there being an outcry for a unified regulator. Co-ordination in the regulatory system for its seamless integration: a co-ordinated set of fines whereby exemptions be granted to the market players if another regulatory agency is the cause for delay. This measure would ease the already slow capital market process in India and thereby, ‘Make in India’, the flagship programme of Modi Sarkar a success.

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FINANCIAL SECTOR LEGISLATIVE REFORMS COMMITTEE, Ministry of Finance, Government of

A CRITICAL ANALYSIS ON ROLE OF COMPETITION LAW AND POLICY IN ECONOMIC

- S.V.Akshaya Reena¹⁰²⁵

ABSTRACT

Competition law and policy play a pivotal role in fostering economic growth by ensuring fair market practices, enhancing consumer welfare, and promoting innovation. In a market economy, competition drives efficiency, lower prices, and greater product variety. However, anti-competitive practices such as monopolies, cartels, and abuse of market dominance threaten these benefits. This paper critically examines the role of competition law in curbing such practices and maintaining healthy market dynamics. It explores how well-designed competition policies strike a balance between preventing market failures and allowing businesses the freedom to innovate and expand. The study analyzes various global frameworks, with a focus on the challenges faced in developing economies where market distortions are prevalent, and competition law is still evolving. In these contexts, the interaction between competition policy and other regulatory frameworks, such as trade and industrial policy, becomes crucial. The paper also discusses the role of competition law in the digital economy, where tech giants exert significant market power, raising new regulatory challenges. Furthermore, the analysis highlights the importance of policy enforcement through independent authorities, the judiciary, and cross-border cooperation, especially in today's interconnected markets. While competition law aims to ensure a level playing field, over-regulation may stifle business activity and discourage investments. Thus, the effectiveness of competition policy hinges on the right balance between regulation and economic freedom. Competition law is not merely a regulatory tool but an essential component of economic governance. Its success lies in evolving with changing market conditions and aligning with broader development goals. This paper emphasises that strong competition policy is indispensable for achieving sustainable economic growth, consumer protection, and dynamic markets.

Keywords: Business Marketing, economic governance, developmental goals, consumer protection.

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I. INTRODUCTION

The evolution of competition law and policy reflects a growing global recognition of the importance of fair and competitive markets in driving economic growth and innovation. Originating from the United States' Sherman Act in 1890, competition law has since spread globally, with numerous countries adopting similar frameworks to regulate monopolies, prevent collusion, and foster a level playing field. The European Union, India, China, and Brazil, among others, have developed robust competition laws suited to their unique market conditions, while organizations like the OECD and UNCTAD encourage international standards to promote economic fairness worldwide. Governments have increasingly recognized the critical role of competition policy and have introduced various initiatives to strengthen it. In India, for instance, the Competition Act of 2002 replaced the outdated Monopolies and Restrictive Trade Practices (MRTP) Act to better address contemporary economic realities, emphasizing consumer welfare and market competition. The United States and the European Union continually adapt their competition policies, with the EU's Directorate-General for Competition actively pursuing cases against major technology firms to prevent abuses of dominance and ensure digital market fairness. These initiatives reflect governments' intent to maintain efficient markets that encourage investment and protect consumer interests. Several factors affect the efficacy of competition law and policy. Market structure, regulatory strength, judicial efficiency, and political will all influence how well competition laws can be enforced. Additionally, the emergence of digital economies and multinational corporations poses new challenges, as these entities often transcend national borders, making regulatory enforcement more complex. The recent rise of tech giants like Google, Amazon, and Facebook, for example, has prompted regulators worldwide to reconsider traditional competition frameworks to better address the unique competitive dynamics of the digital age. In terms of current affairs, competition law has gained significant attention with recent high-profile cases. The European Union's multimillion-dollar fines against Google for anti-competitive practices, the United States' legal battles over monopolistic behavior by Big Tech, and China's crackdowns on its tech giants highlight a global trend toward stricter competition enforcement in digital markets. Furthermore, the COVID-19 pandemic has underscored the importance of resilient markets, prompting governments to increase competition oversight to ensure affordable healthcare, fair access to digital infrastructure, and a level field for businesses of all sizes. When comparing competition policies across countries and regions, significant differences emerge. The European Union is known for its rigorous enforcement, often imposing heavy fines on

companies for anti-competitive practices. In contrast, the United States historically focused on consumer welfare but is now moving toward a more aggressive stance on tech monopolies. Developing countries like India and Brazil are building their competition regimes but face challenges like limited resources and judicial delays. Even within countries, competition policy effectiveness varies by region; states with more developed regulatory infrastructure can often enforce laws more effectively, benefiting their local economies. The evolution and implementation of competition law and policy are crucial to economic development. A critical analysis requires understanding these laws' historical context, assessing recent government initiatives, examining the factors that influence policy effectiveness, and comparing regulatory approaches globally. This exploration reveals the intricate balance needed to foster competitive markets, especially in an era where digital and traditional economies intersect.

II. OBJECTIVES

- i) To analyse the competition law supports the small businesses.
- ii) To examine any unfair practices by businesses (e.g., overpricing, false advertising, limiting competition).
- iii) To analyse the biggest challenge to fair competition in your country.

III. REVIEW OF LITERATURE

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- B. Scherer (1980):** In his seminal work *Industrial Market Structure and Economic Performance*, Scherer explains how competition law affects market efficiency by curbing monopolistic and oligopolistic practices that reduce market dynamics. His analysis shows that by preventing firms from abusing dominant positions, competition law improves efficiency, leading to better product quality and lower prices for consumers.

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- G. Posner (2001):** Posner, in *Antitrust Law*, highlights the role of competition law in fostering efficient resource allocation by preventing monopolies and cartels. He argues that an effective competition policy deters firms from practices that could lead to artificial price increases, fostering a more efficient economic environment.
- H. Stiglitz (2001):** Stiglitz argues that strong competition policies are essential for economic growth, especially in developing economies. He suggests that monopolistic practices limit access to essential goods and services, which can stifle economic progress and create inequality. According to Stiglitz, by preventing anti-competitive practices, competition law supports sustainable development and poverty reduction.
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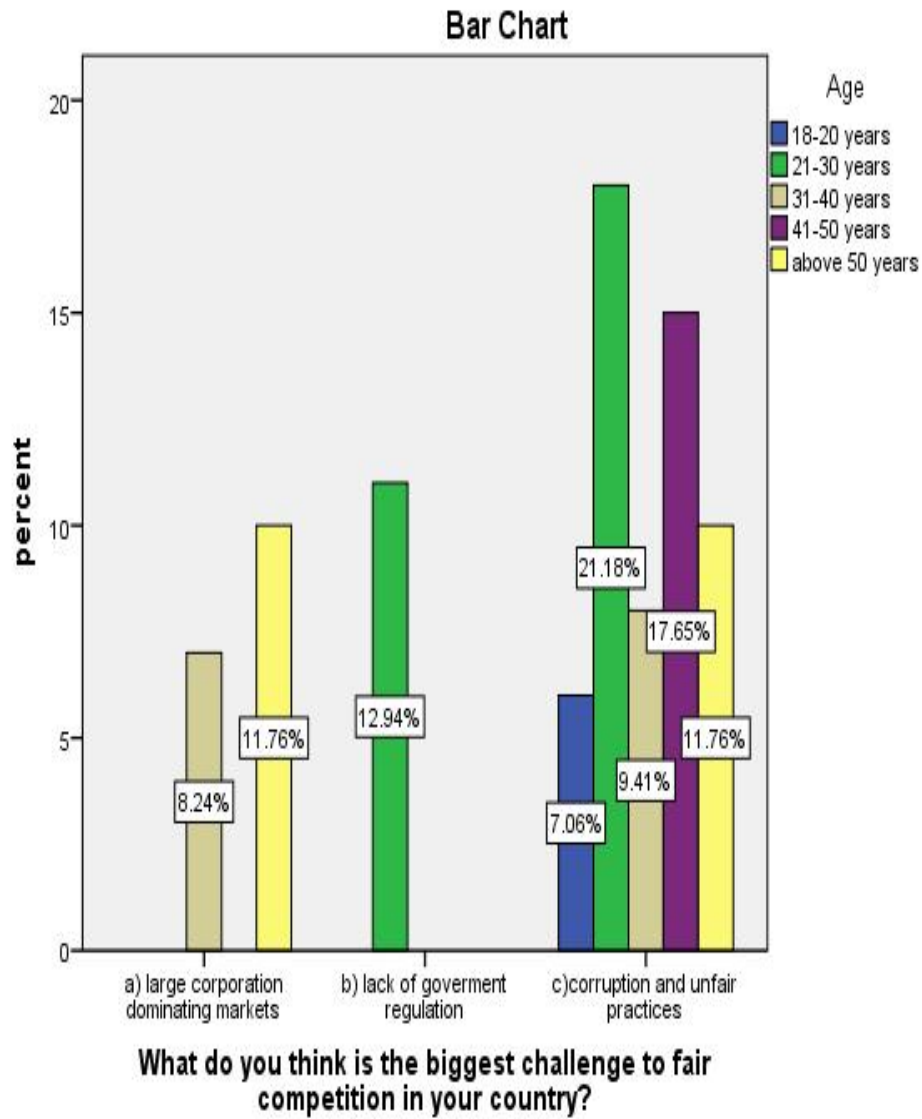
giants' dominance often hinders market entry for smaller competitors, requiring new regulatory approaches to ensure competition and innovation.

IV. METHODOLOGY

The study used both primary and secondary data. Primary data a total of 210 samples have been taken out of which is taken through simple sampling and the sampling frame taken by the researcher is empirical with the structured questionnaire. By using variables such as age, gender, education, location etc as an independent variable and some of the dependent variables public opinion on the analysis on the role of competition law and policy in economics .

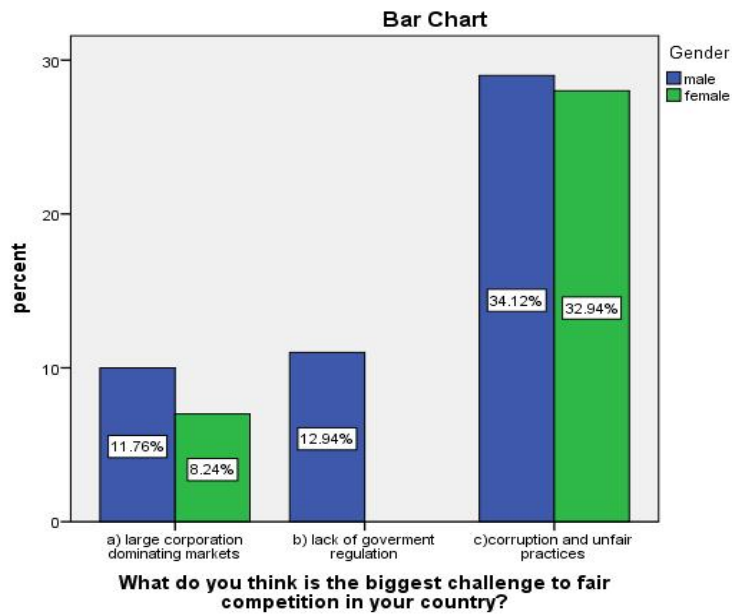
V. ANALYSIS

Figure 1



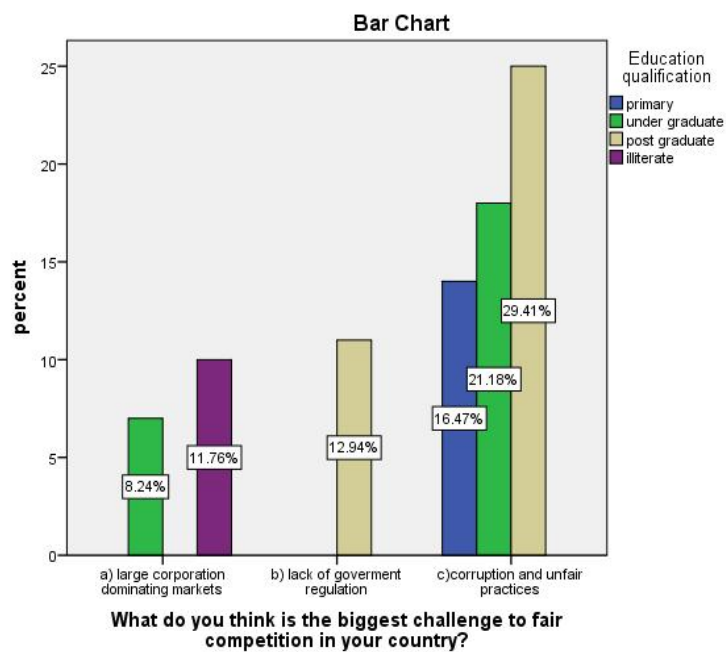
LEGEND: Figure 1 shows that the biggest challenge to fair competition in your country is on the basis of ‘age’.

Figure 2



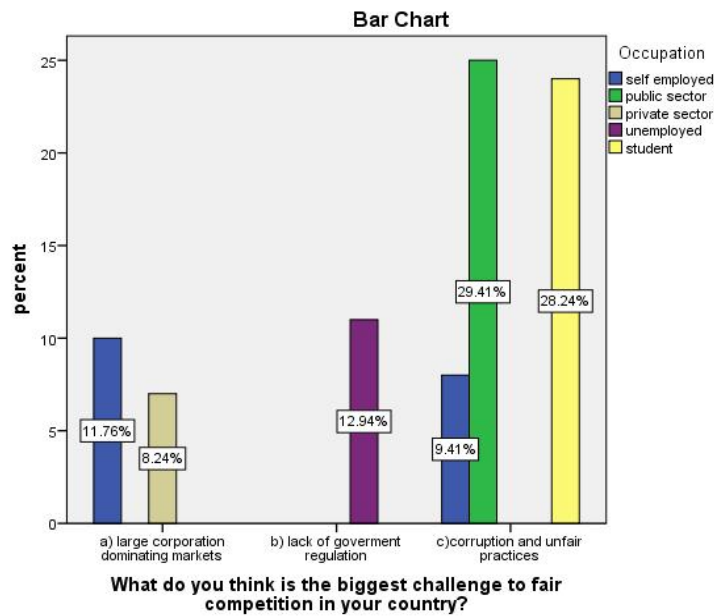
LEGEND: Figure 2 shows that the biggest challenge to fair competition in your country is on the basis of ‘gender’.

Figure 3



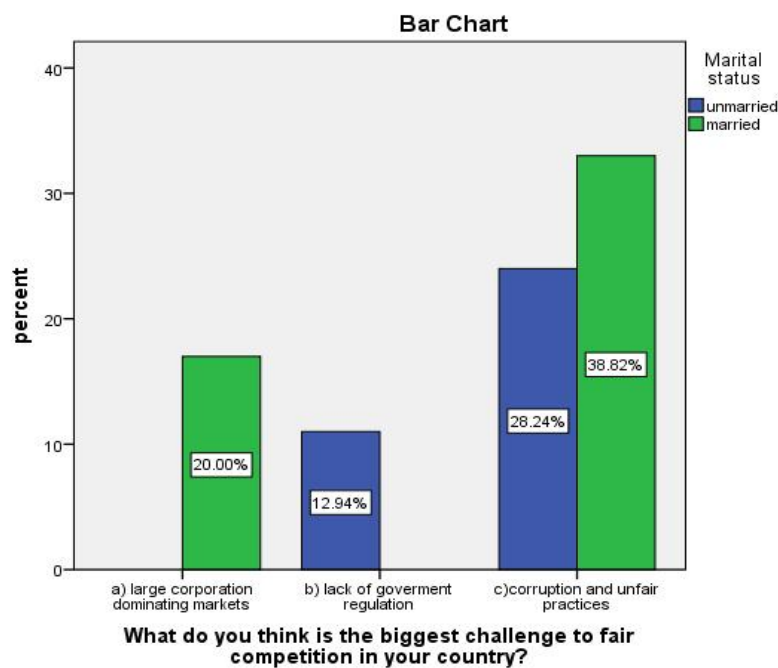
LEGEND: Figure 3 shows that the biggest challenge to fair competition in your country is on the basis of ‘education qualification’.

Figure 4



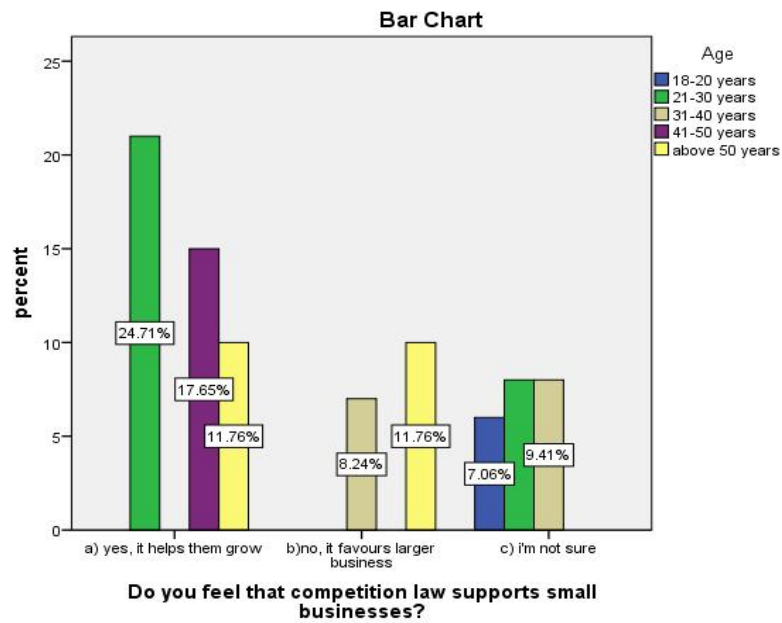
LEGEND: Figure 4 shows that the biggest challenge to fair competition in your country is on the basis of ‘occupation’.

Figure 5



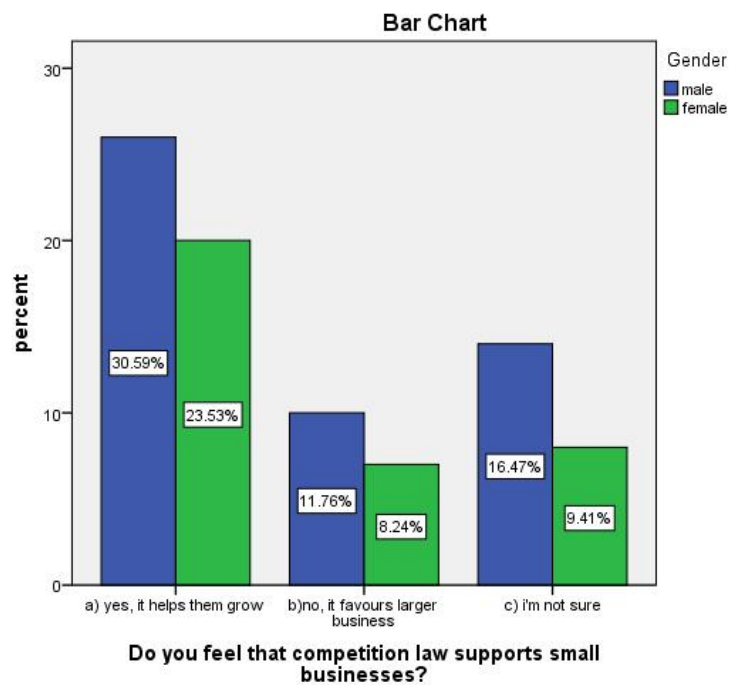
LEGEND: Figure 5 shows that the biggest challenge to fair competition in your country is on the basis of ‘marital status’.

Figure 6



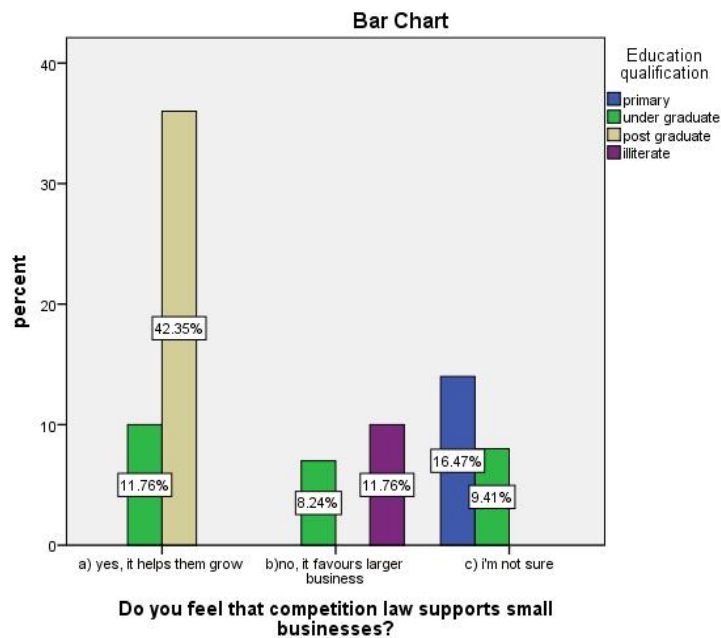
LEGEND: Figure 6 shows that competition law supports small business on the basis of ‘age’.

Figure 7



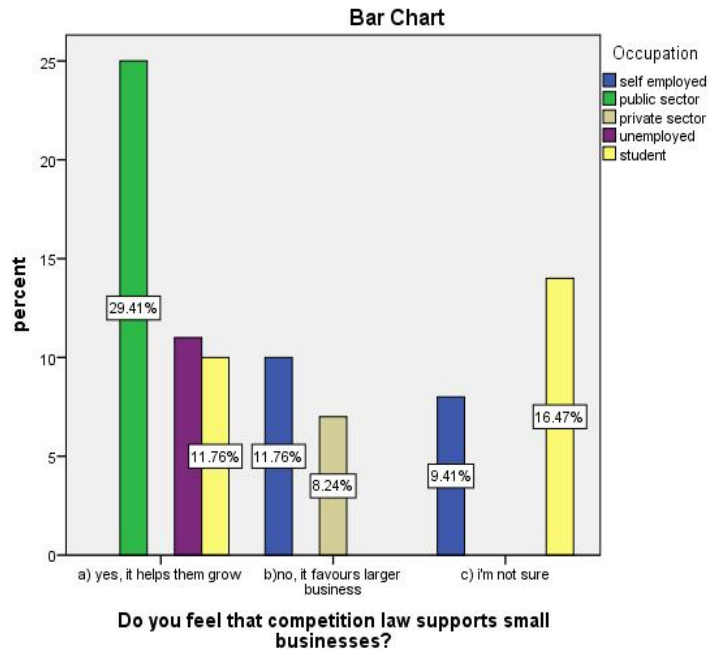
LEGEND: Figure 7 shows that competition law supports small business on the basis of ‘gender’.

Figure 8



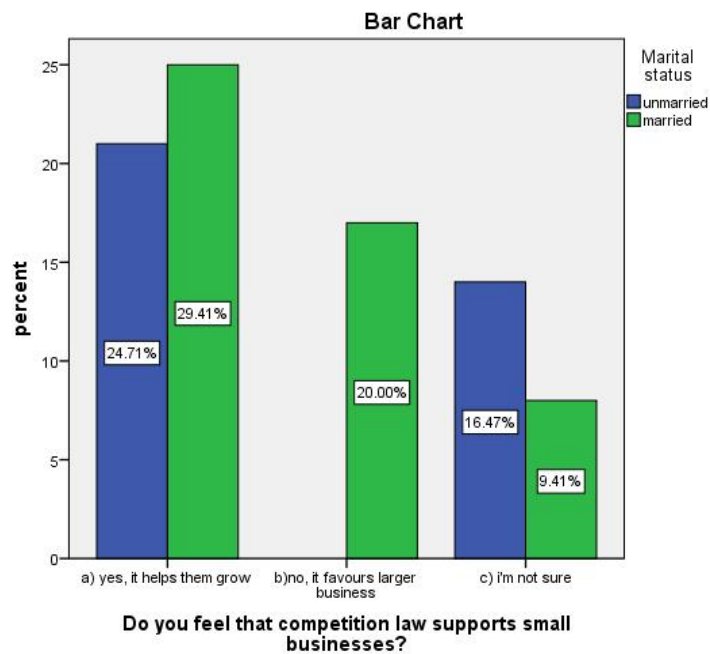
LEGEND: Figure 8 shows that competition law supports small business on the basis of ‘education qualification’.

Figure 9



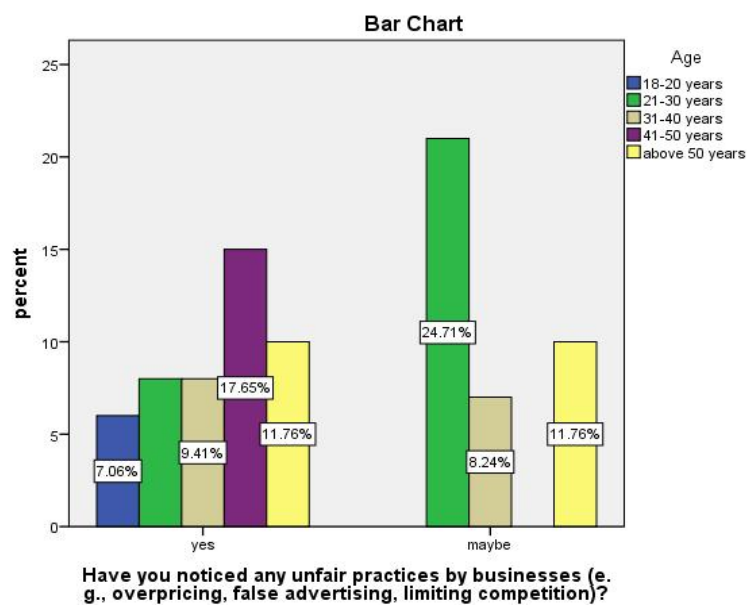
LEGEND: Figure 9 shows that competition law supports small business on the basis of ‘occupation’.

Figure 10



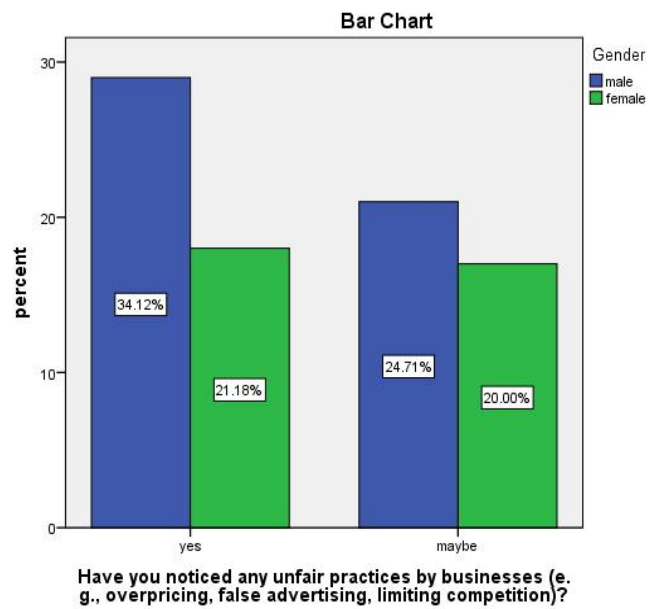
LEGEND: Figure 10 shows that competition law supports small business on the basis of ‘Marital status’.

Figure 11



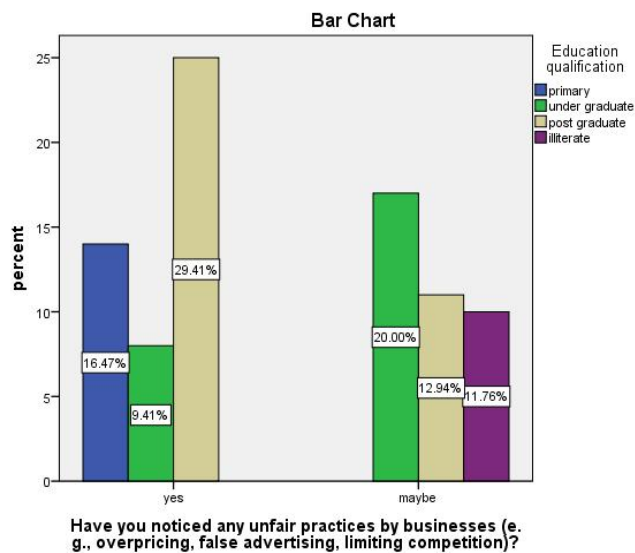
LEGEND: Figure 11 shows that any unfair practices by businesses, example over pricing, false advertising, limiting competition on the basis of ‘age’ .

Figure 12



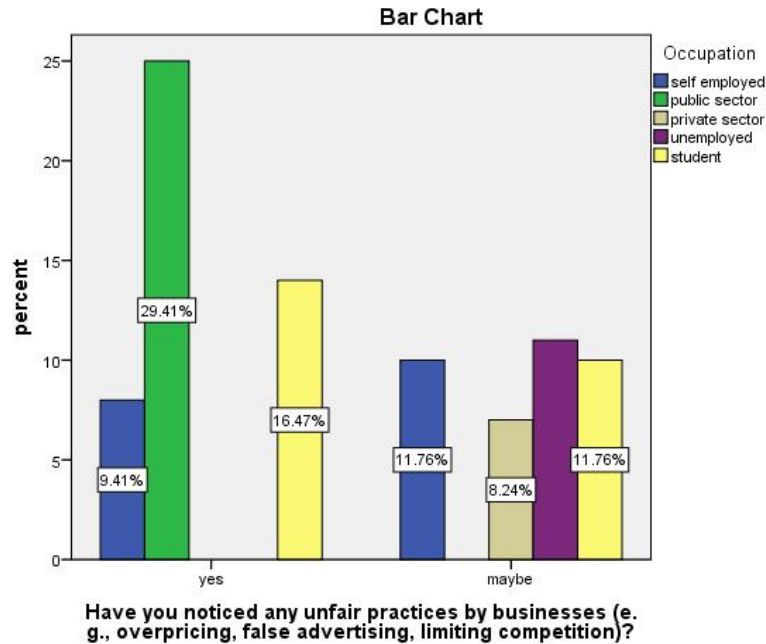
LEGEND: Figure 12 shows that any unfair practices by businesses, example over pricing, false advertising, limiting competition on the basis of ‘Gender’.

Figure 13



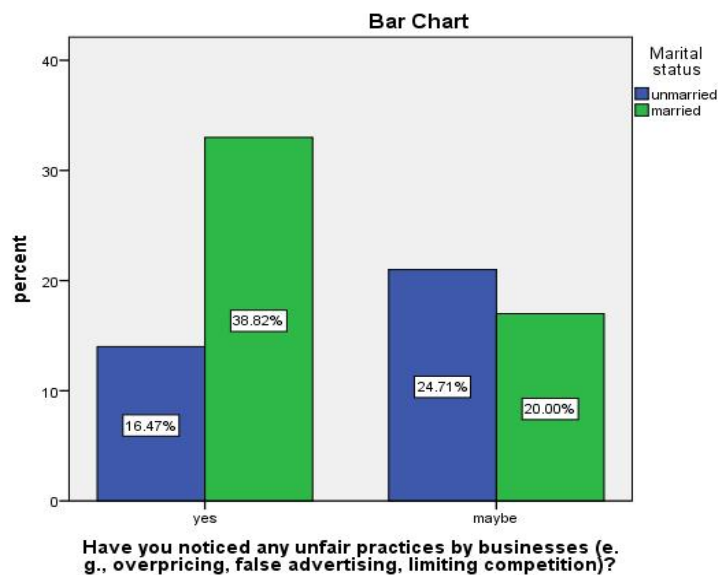
LEGEND: Figure 13 shows that any unfair practices by businesses, example over pricing, false advertising, limiting competition on the basis of ‘Education qualification’ .

Figure 14



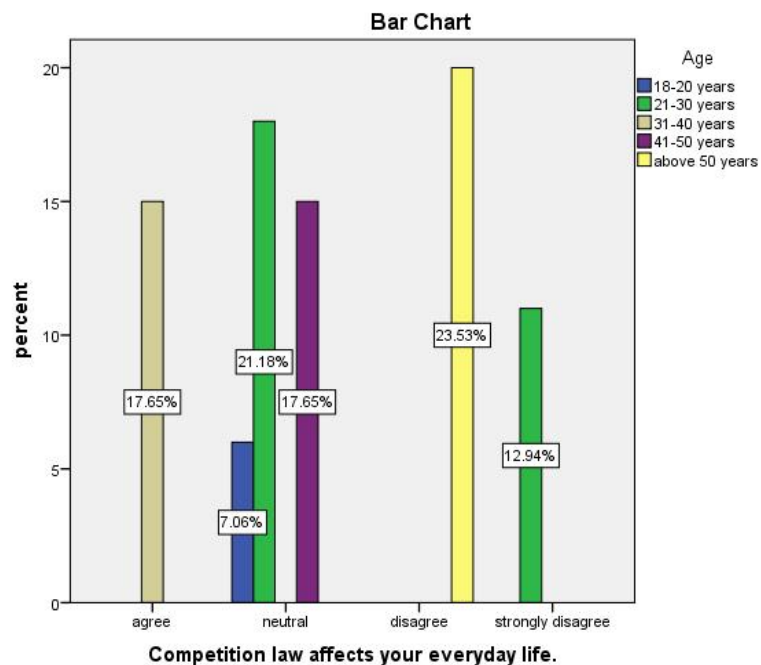
LEGEND: Figure 14 shows that any unfair practices by businesses, example over pricing, false advertising, limiting competition on the basis of ‘Occupation’ .

Figure 15



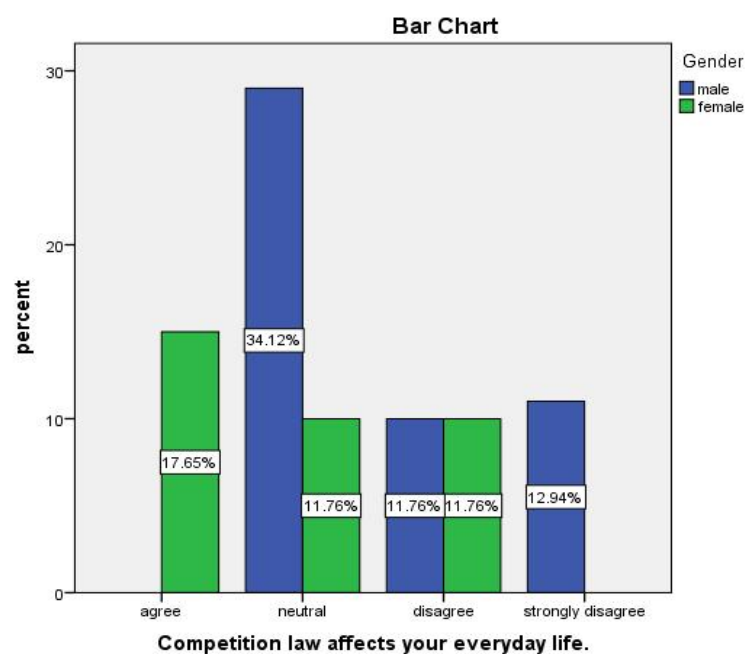
LEGEND: Figure 15 shows that any unfair practices by businesses, example over pricing, false advertising, limiting competition on the basis of ‘Marital status’ .

Figure 16



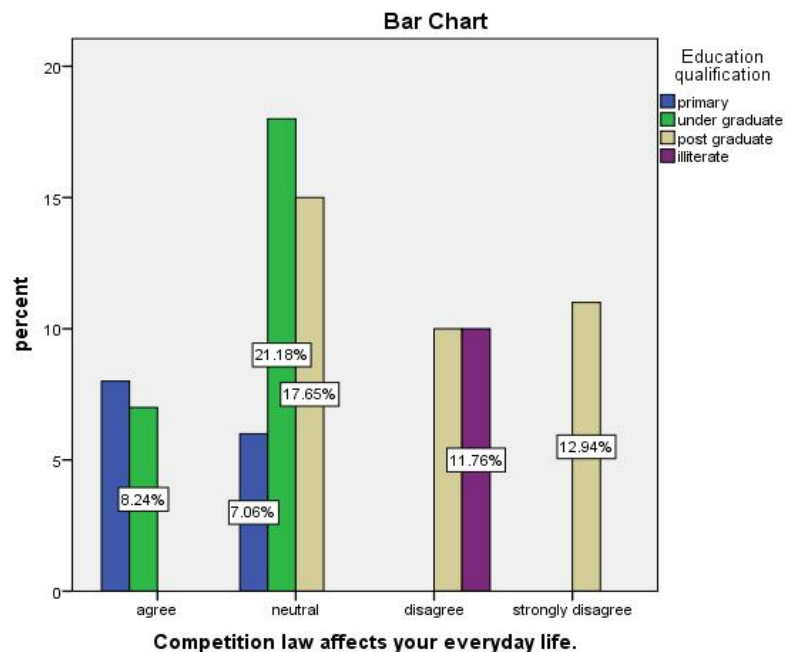
LEGEND: Figure 16 shows whether the competition law affects their everyday life on the basis of ‘age’.

Figure 17



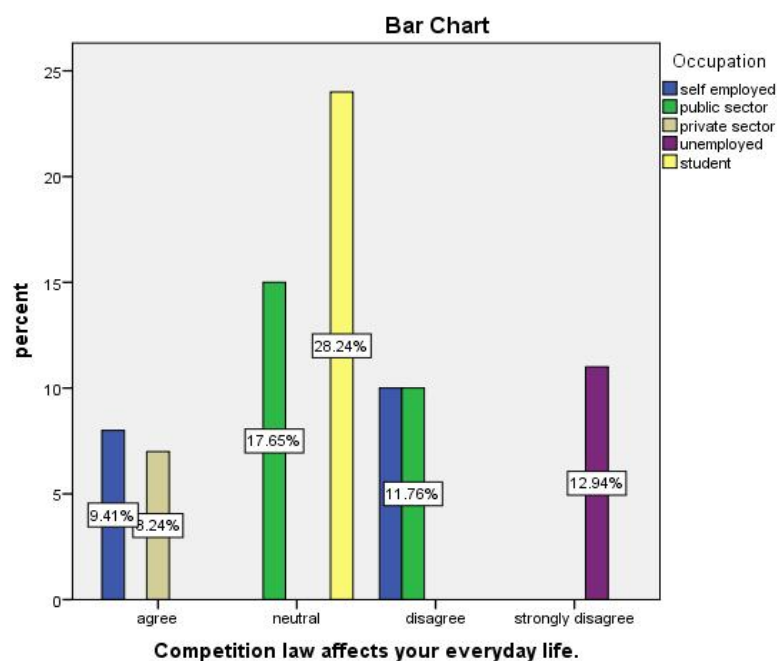
LEGEND: Figure 17 shows whether the competition law affects their everyday life on the basis of ‘Gender’.

Figure 18



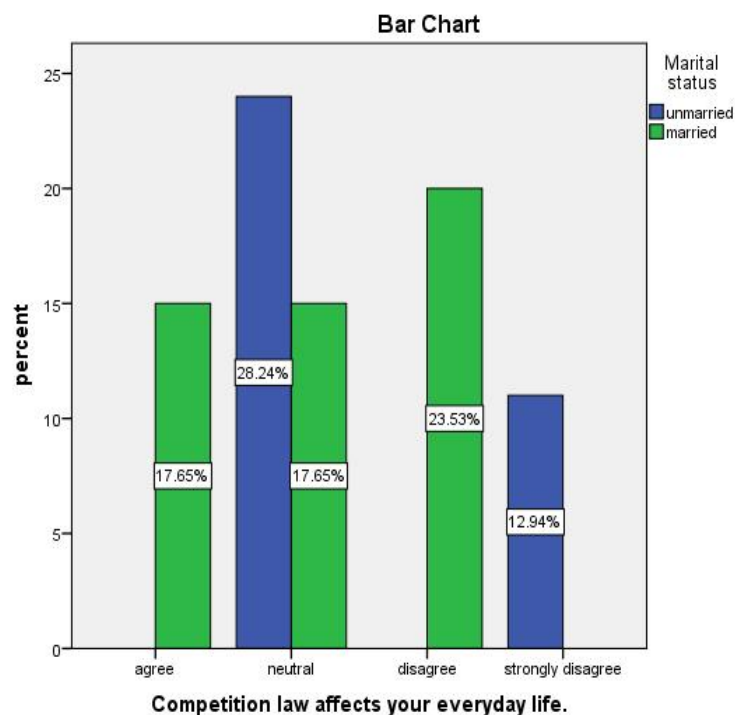
LEGEND: Figure 18 shows whether the competition law affects their everyday life on the basis of ‘Educational qualification’.

Figure 19



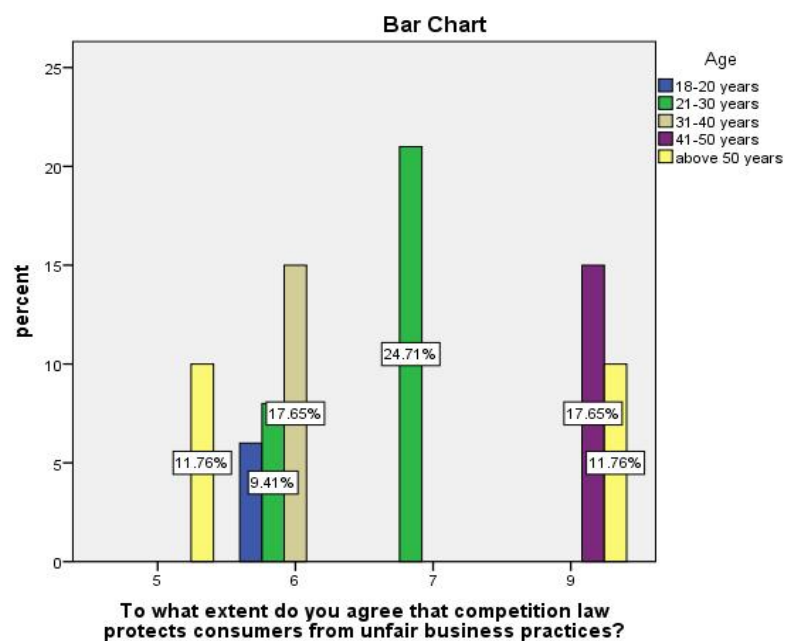
LEGEND: Figure 19 shows whether the competition law affects their everyday life on the basis of ‘Occupation’.

Figure 20



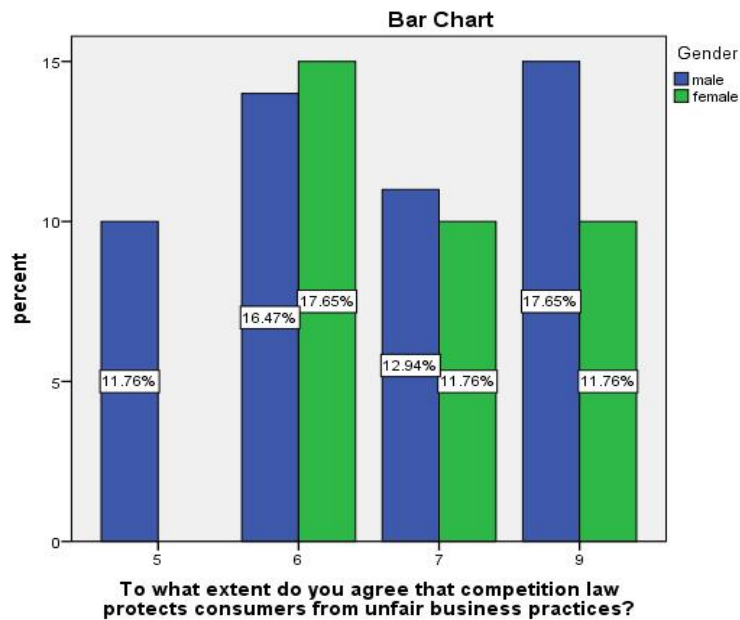
LEGEND: Figure 20 shows whether the competition law affects their everyday life on the basis of ‘Marital status’.

Figure 21



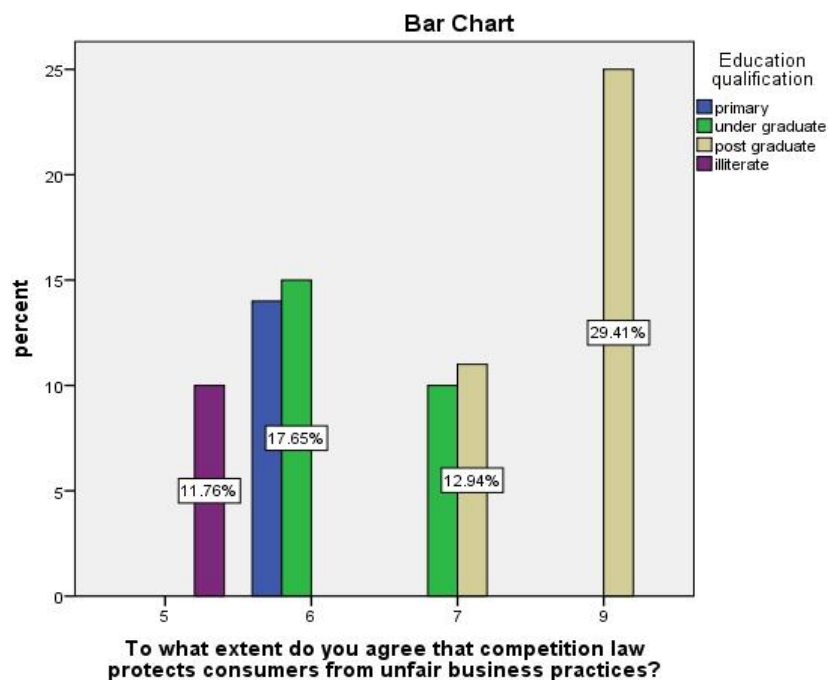
LEGEND: Figure 21 shows that to what extent do you agree that competition law protects consumers from unfair business practices on the basis of ‘age’.

Figure 22



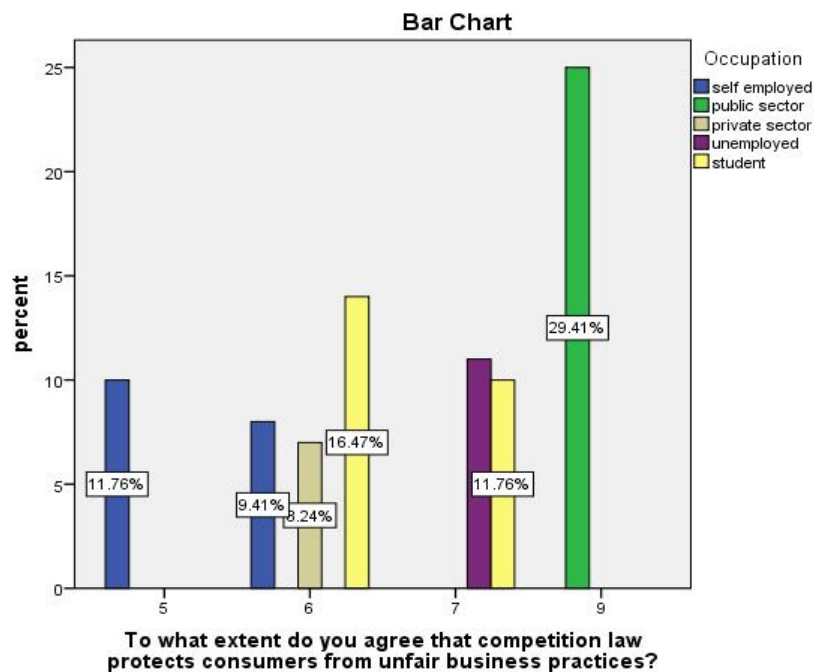
LEGEND: Figure 22 shows that to what extent do you agree that competition law protects consumers from unfair business practices on the basis of ‘Gender’.

Figure 23



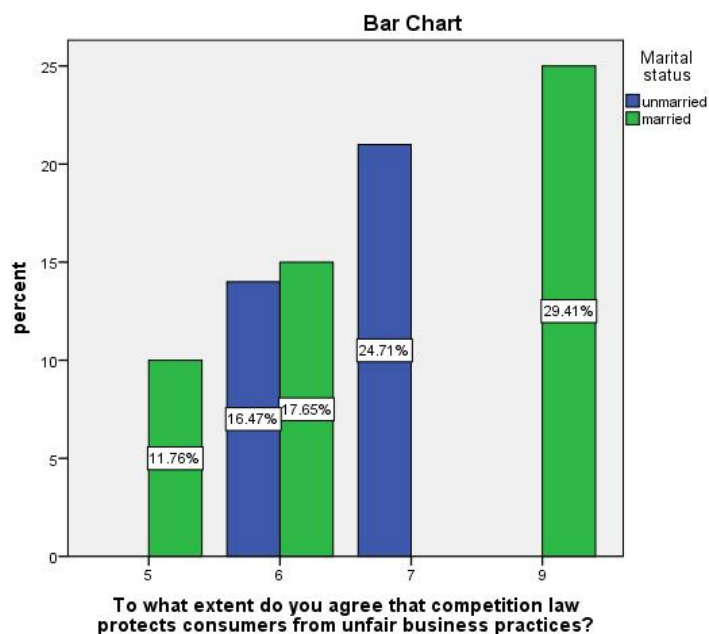
LEGEND: Figure 23 shows that to what extent do you agree that competition law protects consumers from unfair business practices on the basis of ‘Educational qualification’.

Figure 24



LEGEND: Figure 24 shows that to what extent do you agree that competition law protects consumers from unfair business practices on the basis of ‘Occupation’.

Figure 25



LEGEND: Figure 25 shows that to what extent do you agree that competition law protects consumers from unfair business practices on the basis of ‘Marital status’.

VI. RESULT

Figure 1 shows that most of the 21.18% of respondents who are between the age of 21 to 30 years have supported that the correction and unfair practices is the biggest challenge to fair competition in their country. **Figure 2** shows that most of The 34.12% of male respondents have supported corruption and unfair practices are the biggest challenge to fair competition in a country. **Figure 3** shows that over 29.41% of respondents who are doing postgraduate and who also finished postgraduate, said that correction and unfair practices are the biggest challenge in two fair competitions in many countries. **Figure 4** shows that over 29.41% of respondents who are working in the public sector have supported corruption and unfair practices are the biggest challenges to fair competition. **Figure 5** shows that over 38.82% of respondents who are married said that the correction and the unfit are the biggest challenge to conduct a fair competition everywhere. **Figure 6** shows that over 24.71% of respondents whose age between 21 to 30 years said that the competition law helps and supports a small business to grow. **Figure 7** shows that over 30.59% of respondents said that the competition laws support and help a small business to grow. **Figure 8** shows that over 42.30% of respondents who are doing post graduate and who also finished the post graduate said that the competition law supports and helps the small business to grow. **Figure 9** shows that over 29.41% of respondents who are working in the public sector, supported the question that the competition law supports and helps the small business to grow in a wide manner. **Figure 10** shows that over 29.41% of respondents who are married stated that the competition law supports and helps small businesses to grow. **Figure 11** shows that over 24.71% of respondents whose age between 21 to 30 years stated that maybe there are unfair practices by businesses such as price over pricing, false advertising limiting competition. **Figure 12** shows that the majority of the respondents were over 34.12% of respondents or male who stated that they have noticed many unfair practices by businesses, example over pricing, false advertising limiting competition. **Figure 13** shows that over 29.41% of respondents who are doing post graduate and also who finished postgraduate support stated that it is unfair practices by businesses. Examples like over pricing false advertising limiting competition is being noted and also experienced by the public. **Figure 14** shows that most of the respondents over 29.41% are working in the public sector and state that they have noticed many unfair practices by businesses like over-pricing advertising and limiting competition, etc. **Figure 15** shows that over 38.82% of married respondents said that they have noticed and also experienced the unfair practices by businesses like over pricing, false advertising and limiting competition. **Figure 16** shows that over 23.53% of respondents, whose age above 50 years have disagreed with the statement competition law affects your everyday life. It

shows that competition law does not affect their everyday life. **Figure 16** shows that over 23.53% of respondents whose age above 50 years have disagreed with the statement competition law doesn't affect their everyday life. **Figure 17** shows that over 34.12% of male respondents have stated neutral to the statement competition law affects your everyday life. **Figure 18** shows that over 21.18% of respondents who have done undergraduate study have stated neutral to the statement competition law doesn't affect your everyday life. **Figure 19** shows that over 28.24% of student respondents stated neutral to the statement that the competition law doesn't affect their everyday life. **Figure 20** shows that over 28.24% of student respondents have said neutral to the statement that the completion law affects their everyday life. **Figure 21** shows that over 24.71% of respondents whose age between 21-30 years have rated to 7 that the competition law protects consumers from unfair business practices. **Figure 22** shows that over 17.65% of male respondents rated 9 for the question that the competition law protects consumers from unfair business practices. **Figure 23** shows that over 29.41% of respondents who finished post graduate have rated to 9 that the competition law protects consumers from unfair business practices. **Figure 24** shows that over 29.41% of respondents working in the public sector have rated to 9 that the competition law protects consumers from unfair business practices. **Figure 25** shows that over 29.41% of respondents who are married have rated to 9 and stated that the competition law protects consumers from unfair business practices.

VII. DISCUSSION

Figure 1 shows that most of the respondents who are between the age of 21 to 30 years have supported that corruption and unfair practices is the biggest challenge to fair competition in their country. This shows that most of them have faced and experienced these unfair practices. **Figure 2** shows that the majority of male respondents have stated that unfair practices are still being faced by the public market places. **Figure 3** shows that most of the respondents who are doing postgraduate and who finished postgraduate studies have stated that corruption and practice are the biggest challenge to affair competition in their places. **Figure 4** shows that mostly respondents who are students who came to know that their family have discussed corruption and unfair practices are the biggest challenges to fair competition. **Figure 5** shows that respondents who are married said that the correction and the unfairness are the biggest challenge to conduct a fair competition everywhere. **Figure 6** shows that respondents whose age between 21 to 30 years said that the competition law helps and supports a small business

to grow. **Figure 7** shows that over 30.59% of respondents said that the competition laws support and help a small business to grow. **Figure 8** shows that respondents who are doing post graduate and who also finished the post graduate said that the competition law supports and helps the small business to grow. **Figure 9** shows that respondents who are working in the public sector, supported the question that the competition law supports and helps the small business to grow in a wide manner. **Figure 10** shows that respondents who are married stated that the competition law supports and helps small businesses to grow. **Figure 11** shows that over respondents whose age between 21 to 30 years stated that maybe there are unfair practices by businesses such as price over pricing, false advertising limiting competition. **Figure 12** shows that the majority of the respondents were over 34.12% of respondents or male who stated that they have noticed many unfair practices by businesses, example over pricing, false advertising limiting competition. **Figure 13** shows that over 29.41% of respondents who are doing post graduate and also who finished postgraduate support stated that it is unfair practices by businesses. Examples like over pricing false advertising limiting competition is being noted and also experienced by the public. **Figure 14** shows that most of the respondents are working in the public sector with various kinds of unfair practices and state that they have noticed many unfair practices by businesses like over-pricing advertising and limiting competition, etc. **Figure 15** shows that over married respondents said that they have noticed and also experienced the unfair practices by businesses like over pricing, false advertising and limiting competition. **Figure 16** shows that over respondents, whose age above 50 years have disagreed with the statement competition law affects your everyday life. It shows that competition law does not affect their everyday life. **Figure 17** shows that respondents whose age above 50 years have disagreed with the statement competition law doesn't affect their everyday life. **Figure 18** shows that over of male respondents have stated neutral to the statement competition law affects your everyday life. **Figure 19** shows that respondents who have done undergraduate study have stated neutral to the statement competition law doesn't affect your everyday life. **Figure 20** shows that over of student respondents stated neutral to the statement that the competition law doesn't affect their everyday life. **Figure 21** shows that over of student respondents have said neutral to the statement that the completion law affects their everyday life. **Figure 22** shows that respondents whose age between 21-30 years have rated to 7 that the competition law protects consumers from unfair business practices. **Figure 23** shows that over of male respondents rated 9 for the question that the competition law protects consumers from unfair business practices. **Figure 24** shows that over respondents who finished post graduate have rated 9

that the competition law protects consumers from unfair business practices. **Figure 25** shows that respondents working in the public sector have rated 9 that the competition law protects consumers from unfair business practices.

VIII. SUGGESTION

Focus on the relationship between competition law and economic growth, highlighting how fair competition fosters innovation, consumer welfare, and efficient markets. Analyze the evolution of competition law globally and compare its impact in developed and developing economies. Explore the challenges in enforcing competition laws, especially in digital markets and cross-border trade. Examine case studies where competition policy has positively or negatively influenced economic development. Provide recommendations on aligning competition policies with the changing dynamics of globalization and technology-driven economies.

IX. CONCLUSION

Competition law and policy play a pivotal role in fostering economic growth by promoting fair market practices, safeguarding consumer interests, and encouraging innovation. Through the prevention of anti-competitive behavior such as monopolies, cartels, and abuse of dominance, competition laws ensure efficient allocation of resources and enhance market accessibility. However, the evolving dynamics of globalization, digital markets, and emerging economies present significant challenges that demand constant adaptation of these policies. A critical analysis reveals that while competition law has been instrumental in driving economic development, its effectiveness depends on robust enforcement, awareness, and alignment with contemporary economic realities. Policymakers must strike a balance between regulation and fostering a business-friendly environment to ensure sustainable growth. Ultimately, a well-implemented competition policy serves as a cornerstone for equitable and thriving economies worldwide.

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