

**Report  
Of  
Competition Law Review Committee**

July, 2019



Ministry of Corporate Affairs  
Government of India

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## REPORT OF THE COMPETITION LAW REVIEW COMMITTEE-2018

New Delhi, 26 July, 2019

To,

The Hon'ble Union Minister of Finance and Corporate Affairs

Madam,

We have the privilege and honour to present this report of the "Competition Law Review Committee" set up on 1<sup>st</sup> October, 2018 to review the Competition Act and Rules and Regulations framed thereunder. The Committee has been tasked with the responsibility to review and recommend a robust competition regime, by taking the inputs of key stakeholders, and suggest changes in both the substantive and procedural aspects of the law.

2. The Committee had the benefit of participation by various organizations such as industry chambers, professional institutes, Government Departments/ Ministries, and experts of various disciplines specially law and economics. The views of stakeholders were also sought online by the Ministry which has been duly discussed by the Committee and addressed in the Report.

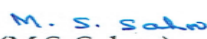
3. It has been endeavoured to take a holistic and comprehensive view while suggesting amendments in the Act and sub-ordinate legislation bearing the changing business environment and stakeholder concerns in mind. The idea of such Report is to address the issues that have or may be concerns in the anti-trust regime in future and to make the Act more effective and robust.

4. We thank you for providing us an opportunity to present our views on Competition Law in India and related matters.

Yours sincerely,

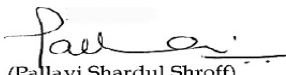
  
(Injeti Srinivas)  
Chairperson

  
(Ashok Kumar Gupta)  
Member


  
(M.S. Sahoo)  
Member

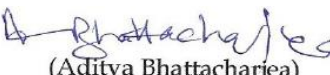
  
(Haigreve Khaitan)  
Member


  
(Harsha Vardhana Singh)  
Member

  
(Pallavi Shardul Shroff)  
Member

  
(S. Chakravarthy)  
Member

  
(Anand S. Pathak)  
Member

  
(Aditya Bhattacharjee)  
Member

  
(KVR Murty)  
Member Secretary

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## **REPORT OF THE COMPETITION LAW REVIEW COMMITTEE**

### **PREFACE**

Over the last decade or so, the Indian economy has transformed into one of the largest and fastest growing economies in the world. This was possible due to liberalised trade, investment and economic policies that catered to a steadily growing market-oriented economy. The pace of economic growth has been sustained by the competitive advantages of a large market duly supported by innovation and technology development.

To reap the full benefits of a market economy and ensure economic efficiency, optimal allocation of resources and equitable outcomes for consumers, an effective and modern competition law regime is vital. The move to ensure competitive outcomes has been enabled by the shift to a modern competition law regime from the “command and control” regime under the Monopolies and Restrictive Trade Practices Act, 1969. The thrust now is to build an active competitive environment in which businesses can thrive and innovate keeping pace with new age developments in digital markets. The effectiveness of competition law in accomplishing its primary functions of promoting competitive growth and enhancing consumer welfare needs to be examined in light of the upcoming challenges of the next decade.

Based on the enforcement experience gained over the last decade, certain issues have come to the forefront, including new and emerging challenges. For instance, our markets have seen the growth of newer and disruptive models of businesses and practices that are not adequately covered by the current regulatory framework. There is also a need to revisit the regulation of combinations, in light of the growing importance of mergers and acquisitions in the country.

In order to draw from past experience and to prepare for future challenges in the enforcement of competition law framework in India, the Competition Law Review Committee was constituted by the Ministry of Corporate Affairs. It has been tasked with the responsibility to review and recommend a robust competition regime, by taking the inputs of key stakeholders, and suggest changes in both the substantive and procedural aspects of the law. Some of the key suggestions of the Committee are as below:

- (i) The Committee has sought to introduce regulatory best practices in the structure and composition of the Competition Commission of India (CCI). The CCI is a regulator that has an amalgam of advocacy, regulatory, investigative as well as adjudicatory functions. The introduction of well-defined structures within the CCI to perform its diverse functions will help achieve greater levels of efficiency and accountability. Accordingly, it has been recommended that the CCI must have a governing board that oversee advocacy and quasi-legislative functions, leaving the performance of adjudicatory functions to the

whole-time members of the CCI. Further, the Committee has recognised that the Director General's office need not function as a separate body as it aids the CCI in discharging an inquisitorial rather than adversarial mandate. Recent jurisprudence has also recognised that the Director General's office functions as a specialised investigative wing of the CCI. In line with the above understanding, the Committee has recommended that the Director General's office be integrated with the CCI, to bring about administrative efficiencies in the direction and scope of investigation. Such merger should be accompanied by adherence to certain best practices such as functional autonomy for office of the Director General and meaningful internal division of investigation and adjudication functions.

- (ii) In recognition of the fact that the effectiveness of any regulator depends greatly on its accessibility, it has been suggested that the regulatory infrastructure of the CCI should be boosted by opening a couple of regional offices for carrying out non-adjudicatory functions such as investigation, advocacy, etc. Similarly, in order to ease the capacity constraint experienced in the NCLAT vis-à-vis competition cases, it has been suggested that a dedicated bench of the NCLAT should be set up to expeditiously hear and dispose of competition appeals.
- (iii) A significant change has been recommended in the form of a 'Green Channel' for combination notifications, in recognition of the need to enable fast-paced regulatory approvals for vast majority of mergers and acquisitions that may have no major concerns regarding appreciable adverse effects on competition. Empirical evidence shows that most combinations need not be subjected to standstill obligations in the first place, and hence they may simply disclose their transaction to the CCI and proceed to consummate it. The aim is to move to a 'disclose and comply' regime with strict consequences for not providing accurate or complete information. Further, it was also recommended that combinations arising out of the insolvency resolution process under the Insolvency and Bankruptcy Code should be eligible for the Green Channel.
- (iv) The review of competition law has also sought to address the shift in traditional market realities, by widening the net for identification of anti-competitive conduct. It has been suggested that express provisions be introduced to identify 'hub and spoke' agreements as well as agreements that do not fit within typical horizontal or vertical anti-competitive agreements. This would be a significant step towards covering varied business structures and models synonymous with new age markets.
- (v) Certainty in interpretation of the law and predictability of outcomes are vital to ensure effective enforcement. It has been noted that a majority of the penalties imposed by the CCI remain unrecovered due to litigation. Apart from

addressing the capacity constraints at the appellate stage leading to backlog of appeals regarding penalty as discussed above, it has been proposed that the CCI must be mandated to issue guidelines on the imposition of penalty. The twin efforts are aimed at ensuring more transparency and faster decision making with a view to encouraging compliance by businesses.

- (vi) In the interests of speedier resolution of cases of anti-competitive conduct, the Committee has sought to incorporate additional enforcement mechanisms. These are in the form of settlement and commitment mechanisms that may be achieved outside of an otherwise relatively lengthy enforcement process. Such a framework will ensure procedural efficiencies by enabling swifter resolution of cases.
- (vii) When considering non-notifiable mergers, the Committee has also suggested the introduction of additional thresholds to review combinations of business that are not structured traditionally- especially where they form part of digital markets. The Committee has suggested that even if the traditional asset and turnover thresholds are not met, where the transaction value or the deal value of a combination exceeds a certain limit, then it could be brought within the ambit of merger review. This is a forward-looking recommendation that seeks to take into account new age indicators of business activity.

Given the forward-looking scope of the recommendations, and also the rigorous review of the existing competition law framework that has been carried out and is reflected in this Report, I am hopeful that recommendations of the Committee will be well received. It is hoped that this Report will build consensus and understanding among stakeholders and help update the competition law framework in India to make it more effective to deal with new and emerging trends in the markets and economy.

  
Injeti Srinivas

Secretary, Ministry of Corporate Affairs, and  
Chairperson, Competition Law Review Committee  
New Delhi, 26 July, 2019

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## **ACKNOWLEDGMENTS**

The Committee takes this opportunity to thank all stakeholders who provided insightful comments and suggestions through the dedicated email facility set up by the Ministry of Corporate Affairs to invite comments on the Competition Act and Rules and Regulations framed thereunder. The Committee would also like to thank all the industry chambers, professional institutes, law firms, academicians and other experts who made valuable suggestions for the improvement of India's competition law framework.

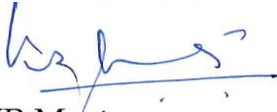
The Committee expresses gratitude to the members of the four Working Groups set up under its aegis who contributed immensely to this project. The leadership and dedicated efforts of the Chairpersons of the Working Groups- Dr. M. S Sahoo, Dr. S. Chakravarthy, Dr. Aditya Bhattacharjea and Dr. Harsha Vardhana Singh as well the Convenors of the Working Groups Ms. Smita Jhingran, Mr. P. K. Singh, Ms. Jyoti Jindgar, Mr. Manoj Pandey and Ms. Payal Malik resulted in insightful and detailed Working Group reports, which provided a structured framework for the Committee's discussions and helped in shaping this report. Full details of the composition of the Working Groups is provided in Annexure III of this Report. In addition to the members of the Working Groups, the Committee benefitted immensely from the contributions made by special invitees to the Committee. The Committee's initial deliberation on scoping of this project was aided by a presentation made by Vidhi Centre for Legal Policy which was based on a concept paper prepared at the behest of the Ministry.

The Committee would like to specially place on record its appreciation for the expertise, leadership and support demonstrated by the Competition Commission of India under the able leadership of its Chairman, Shri Ashok Kumar Gupta.

The Committee appreciates the valuable contribution of the team from Vidhi Centre for Legal Policy comprising of Ms. Vedika Mittal Kumar, Ms. Shehnaz Ahmed, Ms. Aishwarya Satija and Ms. Manmayi Sharma in the review process by participation in meetings for deliberation on legal issues, conducting legal research and providing drafting support, which was very useful to the Committee.

The Committee is grateful to the Ministry of Corporate Affairs for providing logistical support and would like to make a special mention of the dedicated efforts put in by the team of officers of the Competition Division at the MCA comprising Mr. Abhijit Phukon, Director, Mr. Rakesh Kumar, Under Secretary, Mr. Dinesh Kumar, Assistant Section Officer, Ms. Shilpa Thakur, Research Associate, and Ms. Ridima Gupta, Young

Professional for collating suggestions, facilitating discussions and providing administrative and technical support for smooth functioning of the Committee.



KVR Murty

Joint Secretary, Ministry of Corporate Affairs, and  
Member- Secretary, Competition Law Review Committee  
New Delhi, 26 July, 2019

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# BACKGROUND

## 1. INTRODUCTION

- 1.1 The financial and economic policies of India went through a significant change post liberalisation of the Indian economy in 1991. Many legal reforms made at this time were directed towards deregulation of various industries and boosting growth of private sector businesses.<sup>1</sup> In this backdrop, the High Level Committee on Competition Policy and Law ("**Raghavan Committee**") was tasked with reforming the antitrust law in operation at the time - the Monopolies and Restrictive Trade Practices Act, 1969 ("**MRTP Act**").
- 1.2 The Raghavan Committee encapsulated its recommendations in a report released in 2000 ("**Raghavan Committee Report**") which noted that the MRTP Act was inadequate for fostering competition in the market and reducing anti-competitive practices.<sup>2</sup> The Raghavan Committee recommended large scale reforms to bring the antitrust law in line with the new domestic economic policies and global best practices. Based on these recommendations, the Competition Act, 2002 ("**Competition Act/Act**") was enacted by the Parliament 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."*<sup>3</sup>
- 1.3 The rubric of the Competition Act has four essential compartments - anti-competitive agreements, abuse of dominance, regulation of combinations, and competition advocacy.<sup>4</sup> The Act marks a drastic shift from its predecessor statute. For instance, the Act penalises abuse of dominance instead of dominance itself; promotes a rule of reason approach over a *per se* approach; involves both ex-ante and ex-post regulation; focuses on competition issues and not on unfair trade practices; and clearly defines violations and offences

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<sup>1</sup> Charan D. Wadhva, 'Political economy of post-1991 economic reforms in India' (2000) *South Asia: Journal of South Asian Studies* 23: s1, 207-220 <<https://www.tandfonline.com/doi/pdf/10.1080/00856400008723409>> accessed 29 May 2019.

<sup>2</sup>Raghavan Committee Report (2000) <[https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)> accessed 19 May 2019.

<sup>3</sup> Competition Act, Preamble.

<sup>4</sup> S. Chakravarthy, 'MRTP Act Metamorphoses into Competition Act', p. 12 <<https://cuts-international.org/doc01.doc>> accessed 29 May 2019.

involved.<sup>5</sup> The enactment of the Competition Act, also noted to be “close to state-of-the-art” by the Organisation for Economic Co-operation and Development (“OECD”)<sup>6</sup>, was thus symbolic of the shift in India’s economic policies. The Act also established a comprehensive regulatory framework including the Competition Commission of India (“CCI”), an expert body to oversee the functioning of the Act, and the National Company Law Appellate Tribunal (“NCLAT”), a tribunal tasked with being the appellate authority.

- 1.4 In the years since operationalisation of the Act, it has contributed immensely towards the development of competition and fair play practices in the Indian market.<sup>7</sup> However, there has been significant growth of Indian markets in the last decade and a paradigm shift in the way businesses operate and interact with markets with the emergence of new age markets involving technology. Keeping this in mind, the Ministry of Corporate Affairs (“MCA”) has constituted the Competition Law Review Committee (“**Committee**”) to ensure that the Act “*is in sync with the needs of strong economic fundamentals.*”<sup>8</sup> A copy of the constitution order of the Committee is at Annexure II.
- 1.5 In line with its mandate, the Committee has reviewed the existing competition law framework in view of the changing business environment, and analysed relevant international best practices. In doing so, the Committee has consolidated views and recommendations from a gamut of stakeholders. Based on this detailed study, the Committee has prepared this report (“**Report**”) which recommends several amendments to the Act and subordinate legislations which are imperative for the smooth functioning of the Act.

## 2. WORKING PROCESS OF THE COMMITTEE

- 2.1 The Committee first met on 31.10.2018 and decided that four working groups be formed to deliberate on various topics. The first working group chaired by Dr. M. S Sahoo discussed issues related to the regulatory structure under the Act. The second working group discussed substantive issues in competition law and was chaired by Dr. S. Chakravarthy. Prof. Aditya Bhattacharjea chaired the third working group which discussed issues related to advocacy

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<sup>5</sup> *Ibid*, p. 26.

<sup>6</sup> OECD, ‘OECD Economic Surveys: India’ (2007) p. 109.

<sup>7</sup> Government of India, MCA, ‘Government constitutes Competition Law Review Committee to review the Competition Act’ (30 September 2018) <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=183835>> accessed 29 May 2019.

<sup>8</sup> *Ibid*.

and advisory functions of the CCI under the Act. The fourth working group was chaired by Dr. Harsha Vardhana Singh and discussed issues related to new age markets and big data. The composition of all four working groups has been provided in Annexure III. The Committee has also considered comments that the MCA invited through a dedicated e-mail facility which was initially open from 16.11.2018 to 07.12.2018 and was further extended till 14.12.2018.

- 2.2 Each working group submitted a report to the Committee outlining various issues within their topics and suggesting the manner of resolving these issues. The working groups also perused the public comments received and incorporated them into their suggestions. The Committee then met on 18.01.2019, 30.04.2019 and 01.05.2019 to deliberate on the suggestions made by the working groups.
- 2.3 The MCA engaged Vidhi Centre for Legal Policy to assist the Committee in reaching informed decisions by carrying out legal research on the principles involved as well as international practices, and for providing drafting assistance.

### 3. STRUCTURE OF THE REPORT

- 3.1 The Report deals with the recommendations of the Committee and the rationale for such recommendations, in relation to the Act and the relevant subordinate legislation. The views regarding recommendations in this Report reflect the views of a majority of members of the Committee. With respect to recommendations where certain members did not concur with the majority view, the views of the concerned members have been separately annexed to the Report.
- 3.2 The Report is divided into ten Chapters, which contain topic-wise discussions and recommendations of the Committee. The Report also contains four annexures: **Annexure I** comprising of a Summary of the Recommendations; **Annexure II** comprising of the notification dated 01.10.2018 constituting the Committee; **Annexure III** providing composition of working groups formed by the Committee and **Annexures IVA, IVB and IVC** containing observations of some members of the Committee on certain issues.

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# CHAPTER 1: REGULATORY ARCHITECTURE

## 1. BACKGROUND

- 1.1. The nature of the CCI has undergone significant changes since the enactment of the Competition Act. When it was passed, the Act established the CCI as the authority for dealing with disputes under the Act. However, due to some contradictory positions in the Act at the time, it was unclear if the CCI was a judicial body or an expert regulatory body. Following the decision of the Supreme Court in *Brahm Dutt v. Union of India*<sup>9</sup>, the Parliament amended the Competition Act to clarify that the CCI is an expert body established as a regulator.<sup>10</sup>
- 1.2. This position of the CCI being an expert body has also recently been echoed by the Delhi High Court in the *Mahindra* case<sup>11</sup> wherein it affirmed that CCI is a regulator, and noted -

*“CCI is structured and set up as an expert regulatory body performing the role of independent regulator/watchdog for the economy in the same mould as Securities and Exchange Board of India (hereinafter referred to as "SEBI") performs qua the Securities market. In the course of its functioning CCI undertakes "executive adjudication" in juxtaposition to judicial adjudication in respect of all aspects entrusted under the Competition Act. Therefore merely because CCI also performs adjudicatory functions it does not acquire the character of judicial tribunal or Court.”*<sup>12</sup> (Emphasis supplied)

- 1.3. While the judgment of the Delhi High Court has been appealed before the Supreme Court<sup>13</sup>, the Committee has taken note of the law laid down by the Delhi High Court and *inter alia* discussed that certain regulatory best practices may be incorporated in the Competition Act by analysing practices followed by other regulators in India. While this Chapter recommends such best practices in relation to the broader regulatory architecture, the next Chapter discusses recommendations in relation to the internal functioning of the CCI.

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<sup>9</sup> (2005) 2 SCC 431.

<sup>10</sup> 2007 Amendment Act.

<sup>11</sup> *Mahindra & Mahindra Ltd. v. CCI & Anr.* (2019) SCCOnline Del 8032.

<sup>12</sup> *Ibid*, para 52.

<sup>13</sup> *Fiat India Automobiles (P) Ltd. v. CCI & Anr.* SLP (C) No. 12938/2019; *Mahindra & Mahindra v. CCI & Anr.* SLP (C) No. 10346/2019 and *Tata Motors Ltd. & Anr. v. CCI & Anr.* SLP (C) No. 11478/2019.

## 2. INTRODUCING A GOVERNING BOARD

- 2.1. As per Section 8 of the Competition Act, the CCI shall consist of a Chairperson and not less than two and not more than six other members who will be appointed by the Central Government. The Chairperson and members of the CCI are required to have special knowledge and professional experience of not less than 15 years in *inter alia* economics, law, commerce, finance, competition matters, including competition law and policy.<sup>14</sup> The Chairperson and members are whole time members (“WTMs”).
- 2.2. The Supreme Court of India has observed that the CCI is a regulator vested with inquisitorial, investigative, regulatory, adjudicatory and advisory jurisdiction under the scheme of the Competition Act.<sup>15</sup> As noted above, the Delhi High Court<sup>16</sup> recently in the *Mahindra* case examined the powers and functions of the CCI to determine if it is a tribunal (as alleged by the petitioners) or an expert body partly exercising adjudicatory functions. After a detailed study of the powers and functions of the CCI as envisaged under the Competition Act and mapping such powers and functions against existing regulators in India, the Court held that the CCI is a “body that is in parts, administrative, expert (having regard to its advisory and advocacy roles) and quasi-judicial.”<sup>17</sup> The Committee took note that under the Competition Act, the CCI has been entrusted with multifarious functions that extend to directing or overseeing investigation, conducting inquiry, imposing penalties, issuing regulations, advising Government on competition policy and promoting competition advocacy. In light of the multifaceted role being performed by CCI, the Committee deliberated on the need to introduce a governing board with part-time members (“PTMs”) (including ex-officio members) in the CCI to bring in an external perspective, objectivity and more transparency in the functioning of the CCI.
- 2.3. The Committee agreed that the CCI has been effectively discharging its functions under the Competition Act since its inception. However, it was felt that with the evolution of Indian markets, the role of the CCI will become more critical. Accordingly, this is an opportune moment to revisit the regulatory design of the CCI to incorporate best practices in its structure and functioning so that it is better equipped to respond to competition concerns of the Indian

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<sup>14</sup> Competition Act, Section 8(2).

<sup>15</sup> *CCI v. Steel Authority of India Ltd.* (2010) 10 SCC 744.

<sup>16</sup> *Mahindra & Mahindra Ltd. v. CCI & Anr.* (2019) SCCOnline Del 8032.

<sup>17</sup> *Ibid*, para 85.

economy. While tracing the evolution of different regulators in India, the Delhi High Court observed that there is “no one size fits all” approach for regulatory design and that the design of regulatory institutions must respond to the dynamics of a rapidly changing economy with the imperatives of global trade and its interface with technology.

- 2.4. With a view to drawing from domestic experience, the Committee reviewed the regulatory architecture of other regulators in India. The review of the composition of different Indian regulators indicates that many regulators have PTMs and ex-officio members in their composition. For instance, the Reserve Bank of India (“**RBI**”), Securities and Exchange Board of India (“**SEBI**”), Insurance Regulatory and Development Authority of India (“**IRDAI**”), Pension Fund Regulatory and Development Authority (“**PFRDA**”) and Insolvency and Bankruptcy Board of India (“**IBBI**”) have PTMs and ex-officio members. The Committee also took note that the Competition and Markets Authority (“**CMA**”) which is the competition regulator in the United Kingdom (“**UK**”), also has a board structure.
- 2.5. The Committee agreed that the introduction of a governing board with PTMs will ensure a more robust governance structure for the CCI by bringing in an external perspective as well as strengthening the democratic legitimacy and accountability of the CCI. While the CCI will continue to perform its adjudicatory functions without any interference of the governing board, the presence of PTMs and ex-officio members will better equip the CCI to perform other functions, particularly advocacy and quasi-legislative functions, by bringing in more rigour and objectivity in decision making.
- 2.6. **In light of the above discussion, the Committee recommended that Section 8 of the Competition Act should be amended to provide for a governing board consisting of a Chairperson, six WTMs and six PTMs (which will also include *ex-officio* members). Based on a review of the composition of other regulators in India as discussed above, it was agreed that four ‘eminent persons’ and two ex-officio members (one representative from the MCA, which is the nodal ministry for implementation of the Competition Act, and a representative of the Department of Economic Affairs, Ministry of Finance) should be included as PTMs in the governing board of the CCI. Further, qualifications for members of the CCI as provided in Section 8(2) of the Act may be retained and additional qualifications such as ability and knowledge in relation to ‘administration’ and ‘technology’ may be inserted. Given that the CCI currently performs multiple functions, including administrative, quasi-legislative and adjudicatory functions, the Committee agreed that the functions of the governing board should be clearly delineated. With a view**

to maintaining a clear separation between the exercise of executive, quasi-legislative and adjudicatory functions of the CCI, the Committee recommended that while the governing board will perform quasi-legislative functions, drive policy decisions and perform a supervisory role, it should not be involved in the discharge of the adjudicatory functions of the CCI.

### 3. DELEGATION OF FUNCTIONS

3.1. In a modern regulator, different matters depending on their importance are usually disposed of at different levels in the hierarchy of the organisation. The Committee noted that the enabling statutes of many Indian regulators allow them to delegate executive and administrative tasks to maintain efficiency and enable timely action. For instance, regulators like SEBI,<sup>18</sup> IBBI<sup>19</sup>, and PFRDA<sup>20</sup> are explicitly permitted to delegate certain powers and functions to their officers or members. **The Committee discussed that the Competition Act should enable sharing of responsibility among members and delegation of powers to different functionaries in the organisation. Based on this, it was agreed that the CCI should be permitted to delegate certain functions to its members and officers.**

3.2. The Committee then deliberated if there are any functions which should not be permitted to be delegated. It was noted that in line with the Committee's recommendation of establishing a governing board in the CCI, appropriate distinction should be created between the functions of this board and the functions of the WTMs. As discussed above, functions related to adjudication (where the CCI exercises its quasi-judicial functions) are to be exercised by WTMs (including Chairperson), and not by the governing board. **The Committee recommended that quasi-judicial functions to be exercised by the WTMs should not be permitted to be delegated. It was noted that these functions are an intrinsic part of the CCI's powers, and involve adjudication of competition issues which may impact rights of persons, and should therefore not be delegated. With respect to other functions of the CCI, it was discussed that quasi-legislative functions to be exercised by the governing board should also not be delegated as they are related to making of regulations.**

### 4. MERGER OF DIRECTOR GENERAL'S ("DG") OFFICE WITH CCI

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<sup>18</sup> SEBI Act, Section 19.

<sup>19</sup> IBC, Section 230.

<sup>20</sup> PFRDA Act, Section 49.

- 4.1. Section 16 of the Competition Act empowers the Central Government to appoint the DG to assist the CCI in conducting inquiry into contravention of provisions of the Act. The manner of appointment of other officers and staff in the DG office, their salary, allowance and other terms and conditions of service are prescribed in the CCI (DG) Recruitment Rules, 2009 and CCI (Number of Additional, Joint, Deputy or Assistant Director-General other officers and employees, their manner of appointment, qualification, salary, allowances and other terms and conditions of service) Rules, 2009 (“**DG Office Rules**”) framed under Section 16 of the Act.
- 4.2. Presently the legislative framework envisages a scenario wherein the DG is appointed by the Central Government and is accountable directly to the Central Government and not to the CCI. For example, in addition to appointment of the DG, the Central Government has been provided a key role in the Departmental Promotion Committee constituted under the DG Office Rules for appraisal of the DG and its other officers.<sup>21</sup> These Rules also provide the Central Government the power to govern other matters related to human resources for the office of the DG.
- 4.3. The Committee was apprised that such separation between the investigative and other functions of a regulator in an inquisitorial system was not prevalent in certain international competition regulators such as the European Commission (“EC”) as well as in other domestic regulatory bodies such as SEBI, IRDAI, PFRDA, etc. Moreover, it emerged that though the office of the DG is institutionally under the Central Government as per existing statutory framework, this was not the case in practice. Once the DG was appointed, it was in fact the CCI that monitored the activities as well as administrative matters of the office of the DG. This position has also been recognised by courts of law which have dealt with the institutional framework under the Competition Act. For example, the Supreme Court in the *SAIL* judgement has noted, “*The Director General appointed under Section 16(1) of the Act is a specialized investigating wing of the Commission.*” (emphasis supplied).<sup>22</sup> This position was recently reiterated by the Delhi High Court in the *Mahindra* case.<sup>23</sup> The

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<sup>21</sup> Schedule III of DG Office Rules prescribes composition of the departmental promotion committee consisting of (i) Secretary, Additional Secretary, Joint Secretary of the MCA, as may be applicable (ii) Representative of the CCI not below the prescribed level (iii) expert nominated by the MCA member.

<sup>22</sup> *CCI v. Steel Authority of India Ltd.* (2010) 10 SCC 744, para 8.

<sup>23</sup> *Mahindra & Mahindra Ltd. v CCI & Anr.* (2019) SCCOnline Del 8032, para 82.



Committee noted that there is a need to align the divergence in the *de jure* and *de facto* position here.

4.4. The Committee then discussed the three most common institutional frameworks adopted by competition regulators globally, namely the:<sup>24</sup>

- *Bifurcated Judicial Model* - In this model the competition authority has investigative powers and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts.
- *Bifurcated Agency Model* - In this model the competition authority has investigative powers and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts.
- *Integrated Agency Model* - In this model the competition authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies.

4.5. Commentators note that the Bifurcated Judicial Model has been adopted by countries such as Australia<sup>25</sup> and Jamaica<sup>26</sup>, the Bifurcated Agency Model has been adopted by countries such as South Africa<sup>27</sup>, Chile<sup>28</sup> and Canada<sup>29</sup> while the Integrated Agency Model has been adopted by countries including European Union ("EU")<sup>30</sup>, China<sup>31</sup>, United States ("US") (Federal Trade Commission ("FTC"))<sup>32</sup> and Brazil.<sup>33</sup>

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<sup>24</sup> UNCTAD, Intergovernmental Group of Experts on Competition Law and Policy (2011), para 8

< [https://unctad.org/en/Docs/ciclpL2\\_en.pdf](https://unctad.org/en/Docs/ciclpL2_en.pdf) > accessed 29 May 2019.

<sup>25</sup> UNCTAD, Model Law on Competition Chapter IX (2010), page 4  
< [https://unctad.org/en/Docs/tdrbpconf7L9\\_en.pdf](https://unctad.org/en/Docs/tdrbpconf7L9_en.pdf) > accessed 10 July 2019.

<sup>26</sup> *Ibid.*

<sup>27</sup> Eleanor M Fox, Michael J Trebilcock, *The Design of Competition Law Institutions* (1st edn., Oxford University Press, 2013), p. 5.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> Krisztian Katona & Diego Herrera Moraes (US FTC), 'Reforms Achieved, but Challenges Ahead: Brazil's New Competition Law', *International Committee ABA Section of Antitrust Law*, 2011 Vol. 3

- 4.6. The Committee noted that there exists precedent for countries switching from one model to another in order to streamline their institutional framework. For example, Brazil moved to the integrated agency model in 2012 by unifying the three existing competition authorities into a single enforcement agency.<sup>34</sup> The antitrust enforcement functions of three competition authorities (Secretariat of Economic Law of the Ministry of Justice (“SDE”), Secretariat for Economic Monitoring of the Ministry of Finance (“SEAE”), and Administrative Council for Economic Defence (“CADE”)) were concentrated into a single agency, the new CADE.<sup>35</sup>
- 4.7. The Committee was cognizant of the fact that each of the above models has its pros and cons. For example, the bifurcated agency and integrated agency models may provide greater expertise in adjudication but may also entail a higher chance of confirmation bias by adjudicators. Even internationally, it has been noted that given that the institutional design greatly depends on the specific State’s context, there is no single model that is optimal for all countries.<sup>36</sup>
- 4.8. In their discussions, members of the Committee recognised that the DG even presently is not a separate body, and is *de facto*, a part of the CCI. The Committee also took note of stakeholder comments that highlighted the divergence in the institutional set up of the CCI and other competition regulators globally as well as domestic regulatory bodies. Stakeholders have argued that the Act must dispense with two separate power centres - one for investigation and the other for adjudication. The Committee discussed that formally adopting the integrated agency model may result in considerable administrative efficiency and reduce timelines. Merging the DG’s office with the CCI may also result in improvement in domain expertise of the DG as this

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<<https://www.ftc.gov/system/files/attachments/key-speeches-presentations/2011katona-brazil.pdf>> accessed 30 May 2019.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Ibid.* Post the reform, within CADE, investigation is headed by a Superintendence General and decision making is entrusted to the Administrative Tribunal. The Department of Economic Studies provides economic opinions and carries out studies. Earlier SDE was in charge of investigating anticompetitive practices and issuing non-binding opinions in merger cases. SEAE’s main responsibility was to provide non-binding economic opinions in merger cases, carry out advocacy functions and in some instances, investigate anticompetitive practices. CADE, an administrative tribunal composed of seven Commissioners, was the decision-making body in both mergers and cases involving anticompetitive practices.

<sup>36</sup> UNCTAD, ‘Intergovernmental Group of Experts on Competition Law and Policy’ (2011), para 6.

<[https://unctad.org/en/Docs/ciclpL2\\_en.pdf](https://unctad.org/en/Docs/ciclpL2_en.pdf)> accessed 29 May 2019.

model may lead to appointment of DG through means other than deputation. It was highlighted that since currently appointment of the DG is through deputation, at times it can result in lack of domain expertise and institutional memory. Moreover, competition regulators in several developed jurisdictions such as EU, UK, US (FTC) and developing countries such as Brazil have successfully relied on the integrated agency model. **Consequently, the Committee recommended that the office of the DG should be formally folded into the CCI as an ‘Investigation Division’. However, the Committee was mindful that integration of the office of the DG within CCI would need to be accompanied by certain best practices to ensure adherence to due process. These include:**

- (i) Functional autonomy for the office of the DG. The DG should report directly to the Chairperson of CCI;**
- (ii) Meaningful internal division of investigation and adjudication functions (appointment of different personnel and maintenance of firewalls);<sup>37</sup>**
- (iii) Adequate right of representation to parties and the right to examine evidence;**
- (iv) Strong appellate forum, staffed with persons with relevant expertise;**
- (v) Issuance of guidance on issues like imposition of penalty to ensure certainty and reduce discretion.**

## **5. OFFICES OF THE CCI**

5.1. Though the Competition Act allows the CCI to have its offices in multiple locations, the CCI currently only operates from Delhi.<sup>38</sup> A centralised place of operations may be prudent in the nascent years of a regulator to maintain consistency and coherence. However, limited local presence may also hinder accessibility, reach and awareness of the regulator. To overcome this, the CCI

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<sup>37</sup> For example, even in the UK, which follows an integrated agency model there is a clear division of responsibilities. A Senior Responsible Officer (“SRO”) is responsible for authorizing the opening of a formal investigation and taking certain other decisions, including, where the SRO considers there is sufficient evidence, authorizing the issue of a Statement of Objections. The SRO is never made a member of the 3-member Case Decision Group, to ensure that the final decision is taken by officials who were not involved in the decision to issue the Statement of Objections. See ‘Guidance on CMA’s Investigation Procedures in the UK Competition Act cases’ (18 January 2019), para 11.32 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/771970/CMA8\\_CA98\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771970/CMA8_CA98_guidance.pdf).> accessed 15 May 2019.

<sup>38</sup> Competition Act, Section 7(4).

undertakes many advocacy and awareness activities like releasing advocacy booklets, organising interactive discussions, holding video-exhibitions, and conducting roadshows in various parts of the country.

- 5.2. The Committee noted that advocacy activities undertaken by the CCI have gone a long way in creating awareness of the CCI's functions in various parts of the country. However, the Committee discussed that given the wide jurisdiction of the CCI in terms of geography and subject matter, local presence may be essential for the CCI to continue being a proactive regulator. Such local presence may help increase accessibility, which will allow more informants to reach the CCI and reduce costs for parties involved in proceedings.
- 5.3. **Based on the above discussion, the Committee suggested that the CCI should have offices at multiple locations. This will facilitate advocacy and awareness activities, improve accessibility, increase efficiency of investigations, and boost interaction with sectoral regulators, State Governments and local-self Governments. The Committee also discussed that the CCI may exercise most of its functions like investigation, accepting filings, advocacy, etc. through these new offices. Additionally, it was agreed that the CCI may also develop capacity and use technology to ease accessibility, for instance, through video conferencing and e-filing mechanisms.**

## **6. PERFORMANCE REVIEW AND METRICS FOR PERFORMANCE ASSESSMENT**

- 6.1. The incorporation of mechanisms for accountability and performance review of agencies and regulatory authorities helps document as well as assess the impact of their efforts. This in turn enables such authorities to remain agile and make appropriate changes as and when required. Since its formation, the CCI has put in significant efforts that have served to improve competition compliance as well as awareness. The CCI has also played an efficient and responsive role in the regulation and approval of combinations.
- 6.2. The CCI's current arrangements to ensure accountability have also been well implemented by it. Currently, under Section 52 of the Competition Act, the CCI is mandated to prepare an annual statement of accounts. Rules have been formulated under this section to mandate the CCI to prepare financial statements along with necessary schedules, etc. in accordance with the notes and instructions for compilation of financial statements prescribed by the Government of India, Ministry of Finance, Controller-General of Accounts.<sup>39</sup>

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<sup>39</sup> The CCI (Form of Annual Statement of Accounts) Rules, 2009, Rule 5.

The CCI is also mandated to prepare an annual report giving an account of its activities<sup>40</sup> in the form prescribed in the rules.<sup>41</sup>

- 6.3. The Committee noted that many competition authorities are subject to some form of external evaluation of their performance.<sup>42</sup> A relevant example of performance assessment can be found in the UK, where the CMA must prepare an annual plan for each financial year that amongst other things sets out the CMA's main objectives for the year and indicates the relative priorities of each of those objectives.<sup>43</sup>
- 6.4. **Therefore, in the interest of further strengthening the mechanisms for accountability and performance review of the CCI, the Committee suggested that the CCI may submit a more structured annual report with performance targets and other data as may be prescribed in rules in addition to financials disclosures required. This would serve as a metric to measure and review the CCI's effectiveness and performance. The annual report may be divided into two parts, one dealing with financial aspects and the other with non-financial aspects. The Committee recommended that a quarterly progress report must also be placed before the governing board in addition to the annual report.**

## 7. FINANCIAL INDEPENDENCE

- 7.1. The Committee discussed that the CCI, as a regulator and watch dog of anticompetitive conduct, must have adequate capability and resources to perform its functions efficiently. Such financial independence allows a regulator to *"have the required flexibility and human resources that are more difficult to achieve within a traditional government setup."*<sup>44</sup> A regulators' independence on financial matters also allows it the "freedom to allocate the resources in the manner that it considers most appropriate to meet its regulatory objectives."<sup>45</sup>
- 7.2. The Committee noted that while sectoral regulators are often able to ensure financial independence by levying fee on regulated entities, the CCI does not

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<sup>40</sup> Competition Act, Section 53.

<sup>41</sup> The CCI (Form and Time of Preparation of Annual Report) Rules, 2008.

<sup>42</sup> ICN, 'Competition Agency Evaluation' (April 2016).

<sup>43</sup> UK Enterprise and Regulatory Reform Act, 2013, Schedule 4, paras 12-15.

<sup>44</sup> Government of India, *Report of the Financial Sector Legislative Reforms Commission* (Vol 1, March 2013), para 3.5.

<sup>45</sup> Government of India, *Report of the Financial Sector Legislative Reforms Commission* (Vol 1, March 2013), Table of Recommendations 3.8.

have a ready base of regulated entities. The CCI only collects fees from filings in relation to combinations. Till date, the CCI has charged fees at a flat rate for its combination related filings. It was noted that some Indian regulators charge an *ad valorem* fee. For example, the SEBI charges a fee based on offer size in the case of open offers.<sup>46</sup> In other jurisdictions such as Singapore<sup>47</sup> and the US<sup>48</sup>, fee on merger filings is graded on turnover and the size of the transaction, respectively.

7.3. The Committee considered that the CCI should also have a one-time corpus fund contributed by the government in order to secure its financial independence. Going forward, financial independence of the CCI may be bolstered with revenues from fee earnings. The Committee kept in mind that a balance must be struck between the need to bolster the CCI's funding and the total cost incurred by businesses for combination filings. **Accordingly, the Committee recommended that CCI may be granted a one-time corpus fund. The Committee also recommended that CCI be empowered to charge an *ad valorem* fee for combination filings, with specification of slabs with upper limits. It was also discussed that since the *ad valorem* fee may have a significant impact on businesses, the Board of the CCI must ensure that an adequate cost/benefit analysis is conducted while formulating details of the proposed fee.**

7.4. The requirement to ensure financial independence of the regulator also links to the requirement to exempt the regulator from the burden of paying tax. Most regulators such as SEBI,<sup>49</sup> PFRDA,<sup>50</sup> Telecom Regulatory Authority of India<sup>51</sup>

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<sup>46</sup> Government of India, *Report of the Financial Sector Legislative Reforms Commission* (Vol 1, March 2013), para 3.5.

<sup>47</sup> Competition (Fees) Regulation, 2007, Regulation 3 read with the Second Schedule. *Also see* CCCS website <<https://www.cccs.gov.sg/approach-cccs/notifying-a-merger/how-much-does-its-it-cost>> accessed 24 May 2019.

<sup>48</sup> US FTC, 'Filing Fee Information' for Pre-merger notification (03 April 2019). <<https://www.ftc.gov/enforcement/premerger-notification-program/filing-fee-information>> accessed 24 May 2019. *Also see* Federal Register Notice of the updated filing thresholds (84 FR 7369) (04 March 2019) p. 7369-7370 <<https://www.govinfo.gov/content/pkg/FR-2019-03-04/pdf/2019-03395.pdf>> accessed 24 May 2019. Section 7A of the Clayton Act, 15 U.S.C. 18a requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Clayton Act, to file notification with the FTC and the Assistant Attorney General. Section 7A(a)(2) requires the FTC to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5) of the Clayton Act.

<sup>49</sup> SEBI Act, Section 25.

<sup>50</sup> PFRDA Act, Section 34.

<sup>51</sup> TRAI Act, Section 32.

("TRAI") and the RBI,<sup>52</sup> have similar provisions within their respective statutes which exempt them from payment of certain taxes. For regulators such as the IRDAI and the Central Electricity Regulatory Commission ("CERC"), an exemption has been provided in the Income Tax Act, 1961 itself.<sup>53</sup> Similarly, the Central Goods and Services Tax Act, 2017 has also notified exemptions in favour of the PFRDA, RBI, IRDAI and SEBI.<sup>54</sup> **Based on the treatment meted to other regulatory bodies, the Committee agreed that the CCI should be provided similar exemption from taxes.**<sup>55</sup>

- 7.5. **Further, in view of the financial autonomy being proposed, it was also recommended that matters pertaining to human resources that are presently decided by the Government may be decided by the Board, which will in any case have an ex-officio member from the MCA. Such matters may be governed by way of relevant subordinate legislation.**

## **8. APPELLATE AUTHORITY**

- 8.1. As noted above, the appellate functions under the Competition Act were earlier performed by the COMPAT that was constituted under Section 53A of the Competition Act. However, by means of the Finance Act, 2017<sup>56</sup>, these appellate functions were transferred to the NCLAT.
- 8.2. The NCLAT was originally envisaged as an appellate authority for only company law related appeals. Later, it was given the mandate to handle appeals arising under the Competition Act and also the Insolvency and Bankruptcy Code, 2016 ("IBC"). With this extensive mandate, the merger of the COMPAT with the NCLAT has thrown open some pertinent questions regarding the overall efficacy of the NCLAT to handle competition appeals.

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<sup>52</sup> RBI Act, Section 48.

<sup>53</sup> Section 10(23BBE) and Section 10(BBG).

<sup>54</sup> In terms of Notification No. 12/2017- Central Tax (Rate) issued under Section 11(1) of the Central Goods and Services Tax Act, 2017.

<sup>55</sup> Presently, the CCI is exempt from paying tax under the Income Tax Act, 1961 up to 31 March 2021 pursuant to a notification dated 19 February 2016 issued by the Central Board of Direct Taxes, Department of Revenue, Ministry of Finance under Section 10(46) of the Income Tax Act. However, this mechanism of providing exemption is based on ad-hoc notifications issued from time to time instead of a permanent exemption as provided to certain other regulators.

<sup>56</sup> Finance Act, 2017, Part XIV of Chapter VI.

- 8.3. The Committee also noted that the constitutional validity of the Finance Act, 2017 has been challenged and is currently pending before the Supreme Court.<sup>57</sup> At the same time, the Government has been making efforts to introduce additional members to build capacity of the NCLAT to expeditiously hear and dispose of competition appeals.<sup>58</sup>
- 8.4. Owing to the problems presented by this scenario, the Committee considered suggestions to increase the overall efficacy of the appellate mechanism under the Competition Act. It was agreed that there is a great time lag in the appellate procedure and this must be cut short for the competition law regime to remain effective in today's rapidly evolving economic scenario.<sup>59</sup> It was also noted that Section 53(B)(5) of the Competition Act specifically provides that appeals filed before the appellate tribunal shall be dealt with as expeditiously as possible and an endeavour shall be made by it to dispose of appeals within six months from the date of receipt of the appeal.
- 8.5. The Committee agreed that efforts should be made to enable such expeditious disposal of competition appeals by the NCLAT, and that the appellate tribunal must be adequately staffed in line with the Government's efforts at capacity building. It was deliberated whether a dedicated bench should be allotted to consider all appeals arising from CCI's orders.
- 8.6. **The Committee concluded that the NCLAT was undoubtedly overburdened with a large number of appeals under varied statutes. In this context, the Committee was apprised of the efforts of the Government to introduce additional members to build capacity of the NCLAT to expeditiously hear and dispose of competition appeals. In furtherance of this initiative of the Government, the Committee echoed that it was prudent to introduce a bench of the NCLAT that is dedicated to hear appeals under the Competition Act.**

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<sup>57</sup> *Kudrat Sandhu v. Union of India and Anr.* WP(C) No. 279/2017.

<sup>58</sup> MCA Notification No. A-12023/I/2019-Ad.IV (10 May 2019) <<https://nclat.nic.in/Useradmin/upload/8283449575cd96a8d66298.pdf>> accessed 30 May 2019.

<sup>59</sup> Many stakeholders have noted the need for expertise and dedicated benches at the appellate stage. See for example, Vedika Mittal, Shehnaz Ahmed, Param Pandya, Debanshu Mukherjee, Joyjayanti Chatterjee and Ritwika Sharma, 'Systematizing Fairplay, Key Issues in the Indian Competition Law Regime' (Vidhi Centre for Legal Policy, 2017) p. 17-19 <<https://static1.squarespace.com/static/551ea026e4b0adba21a8f9df/t/5a2e5cfe0852291eaf0cfe9d/1512988017577/Systematizing+Fairplay+-+Key+Issues+in+the+Indian+Competition+Law+Regime+%28November+2017%29.pdf>> accessed 02 June 2019.



## CHAPTER 2: FUNCTIONING OF THE CCI

### 1. FUNCTIONING OF THE GOVERNING BOARD

#### *Meetings of the Governing Board*

- 1.1. As noted above, the governing body of CCI is currently comprised of only WTMs and the Chairperson.<sup>60</sup> Decisions related to discharge of the functions of the CCI, including adjudication, are taken by them in meetings.<sup>61</sup> As recommended in the previous Chapter, certain key functions of the CCI should be exercised by a governing board (not including adjudication and investigation). **The Committee discussed that decisions in relation to these functions may be taken by the governing board in its meetings. Such meetings should be called by giving adequate notice and the relevant agenda to all the members. Decisions taken in these meetings should be taken by majority of the members present and voting. While key provisions on procedure for meetings of the governing board should be provided in the Act, a detailed procedure may be provided in subordinate legislation. It was also agreed that the Act should provide the quorum for such meetings, which shall be two-third of the strength of the governing board.**

#### *Minutes of Meetings of the Governing Board*

- 1.2. The Committee also discussed that appropriate safeguards may be provided to ensure accountability. In this regard, it was mentioned that to promote transparency, minutes of the meetings of the governing board should be maintained. The Committee took note that though it is not a statutory requirement, some regulators in India routinely put out the agenda of, and the respective decisions taken in, the meetings of their governing bodies.<sup>62</sup> It was suggested that the CCI may also consider publishing a summary of the agenda and appropriate decisions of the meetings of its governing board.

### 2. QUASI-LEGISLATIVE FUNCTIONS

#### *Providing for the Manner of Issuing Regulations*

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<sup>60</sup> Competition Act, Section 8.

<sup>61</sup> Competition Act, Section 22.

<sup>62</sup> See SEBI, 'Board Meetings' <<https://www.sebi.gov.in/sebiweb/about/AboutAction.do?doBoardMeeting=yes>> accessed 23 May 2019.

- 2.1. Currently, the CCI is empowered to issue regulations for discharging its functions under the Competition Act.<sup>63</sup> The Committee noted that recent practices in India and other jurisdictions indicate that there is a growing need to have a procedural framework to guide the issuance of such subordinate legislation. Such a framework should ensure transparency and accountability in the issuance of regulations which is done after fairly and equitably balancing various considerations. The Supreme Court in the *Cellular Operators Case*<sup>64</sup> emphasized the need for following transparent processes including stakeholder consultations while formulating subordinate legislation. The Court recommended that the Parliament should introduce an overarching law like the Administrative Procedures Act, 1946 (“APA”) of the US, which provides for the manner of drafting and issuance of all kinds of subordinate legislation.
- 2.2. It was brought to the attention of the Committee that several regulators in India have begun to incorporate best practices in regulation making. For example, the IBBI has issued regulations requiring it to *inter-alia* publish draft regulations for public comments, along with a statement of objectives of the regulations, economic analysis, etc. Further, the IBBI is required to consider public comments in finalizing the draft regulations and publish a general statement of its response to the comments on its website. Similarly, the Airports Economic Regulatory Authority of India Act, 2008 also mandates stakeholder consultation.<sup>65</sup> The Electricity Act, 2003<sup>66</sup> also requires previous publication of draft regulations and the regulation issuing authority is required to consider suggestions received on the same.<sup>67</sup> Notably, in 2014, the Ministry of Law & Justice issued a pre-legislative consultation policy which requires Central and State Government departments to publish laws and subordinate legislation for public consultation.<sup>68</sup>
- 2.3. Even internationally, in the UK the Statutory Instruments Act, encourages stakeholder consultation while issuing subordinate legislation if mandated under the parent statute. Such consultations and best practices are also widely

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<sup>63</sup> Competition Act, Section 64.

<sup>64</sup> (2016) 7 SCC 703.

<sup>65</sup> Section 13(4).

<sup>66</sup> Section 176.

<sup>67</sup> Electricity (Procedure for Previous Publication) Rules, 2005.

<sup>68</sup> Decisions taken in the meeting of the Committee of Secretaries held on 10th January, 2014 under the Chairmanship of Cabinet Secretary on the Pre-Legislative Consultation Policy (PLCP), (5 February 2014) < <http://legislative.gov.in/sites/default/files/plcp.pdf> > accessed 12 May 2019.

followed in the US<sup>69</sup> as well as in Australia<sup>70</sup>. The US APA provides a framework for rule making by administrative agencies<sup>71</sup> of the federal government in the US.<sup>72</sup> The FTC, in the US, while exercising its rule-making authority<sup>73</sup> is required to comply with such processes. Accordingly, the FTC, through its website, actively requests for public comments on proposed rules, regulations and updates and other agency activities, and provides a link/portal for submission of such comments.<sup>74</sup> Moreover, the FTC has a system in place for retrospective review of its rules and guidelines where it looks in to the economic impact, the continuing need for the rules or guidelines, and also invites stakeholder participation for the same.<sup>75</sup>

- 2.4. While the Committee was apprised that CCI issues draft regulations for public consultation, in light of the aforesaid discussion and in line with best practices, the Committee recommended adoption of a formal framework incorporating transparency and accountability in the issuance of regulations by the CCI. This includes provisions to publish draft regulations for public consultations and review of such subordinate legislation every few years. It was also agreed that certain exceptions from the requirement to conduct stakeholder consultation would be carved out, such as regulations that govern purely internal matters, in cases of emergency and for reasons of public interest.**

*CCI to Issue One Form of Subordinate Legislation and Guidance Notes*

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<sup>69</sup> Administrative Procedure Act, 5 U.S. Code § 553, Section 4 ‘Rule making’.

<sup>70</sup> The Legislative Instruments Act, 2003, Section 18. Pursuant to this law, before a rule-maker makes a legislative instrument, the rule-maker must be satisfied that appropriate consultation that is reasonably practicable to undertaken has been undertaken

<sup>71</sup> The American Administrative Procedure Act adopts a wide and inclusive approach and defines agency as any U.S. governmental authority that does not include Congress, the courts, the government of the district of Columbia, the government of any territory or possession, courts martial, or military authority.

<sup>72</sup> Under 5 U.S. Code § 551 “rule” is *inter-alia* defined to mean an agency statement to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing.

<sup>73</sup> Federal Trade Commission Act, S. 18, 15 U.S.C. Sec. 57a and 15 U.S.C. Sec. 46. S. S. 6(g)

<sup>74</sup> FTC ‘Public Comments’ <<https://www.ftc.gov/policy/public-comments>> accessed 27 May 2019.

<sup>75</sup> FTC ‘Retrospective Review of FTC Rules and Guides’ <<https://www.ftc.gov/enforcement/rules/retrospective-review-ftc-rules-guides>> accessed 27 May 2019.

- 2.5. The CCI, as an expert and regulatory body is expected to function with consistency and transparency in the application of the law. This requirement also assumes significance in its function of issuance and drafting of subordinate legislation. At present, the CCI issues subordinate legislation by way of regulations, and has also issued certain frequently asked questions (“FAQs”) and a guidance note.
- 2.6. **The Committee felt that to ensure that the CCI’s quasi-legislative powers are exercised uniformly and with the same regulatory rigour, the CCI should continue to issue only one type of subordinate legal instrument in the form of regulations, which are binding and have the force of law. The Committee agreed that this will ensure predictability, transparency and consistency in the discharge of quasi-legislative functions of CCI.**
- 2.7. The Committee agreed that the aforesaid recommendation should not be interpreted as a restriction on the CCI’s power to issue non-binding guidance or FAQs. The Committee noted that the Raghavan Committee Report recommended “*publication of enforcement guidelines articulating how the CCI will interpret and apply the law.*”<sup>76</sup> Similarly, the Eleventh Five Year Plan (2007-12)<sup>77</sup> while reviewing the role of CCI in creating awareness on the benefits of competition law observed that it “*should formulate, publish and post in the public domain, guidelines covering various dimensions related to competition law for enhancing public awareness. Such guidelines will help enterprises by bringing greater clarity about the provisions of the competition law and the manner of its enforcement*”. The Supreme Court has also highlighted the need for such guidances in the case of *Excel Crop Care v. CCI*<sup>78</sup> while dealing with the lack of clarity in the manner of determining ‘turnover’ for imposition of penalty under the Competition Act.
- 2.8. Other, mature competition law jurisdictions such as the UK and the EU provide various guidances/guidelines. For example, the EC has issued guidelines on

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<sup>76</sup> Report of the High-Level Committee on Competition Policy and Law, 2000, para 6.4.6.

<sup>77</sup> Planning Commission Government of India, *Eleventh Five Year Plan 2007-12*, Vol. 1.

<sup>78</sup> (2017) 8 SCC 47.

horizontal agreements<sup>79</sup> and vertical restraints<sup>80</sup>, computation of penalty,<sup>81</sup> etc. In the UK, the CMA has issued detailed guidances on issues such as consumer protection,<sup>82</sup> CMA's investigation procedure,<sup>83</sup> notification of mergers,<sup>84</sup> the determination of penalty<sup>85</sup> and so on. Section 52 of the Competition Act, 1998 ("**UK Competition Act**") obliges the CMA to prepare and publish general advice and information about the application and enforcement of competition law. The Singapore Competition Act, 2004 ("**Singapore Competition Act**") through Section 61 gives the Competition and Consumer Commission of Singapore ("**CCCS**") the discretion to publish relevant non-binding guidelines to further competition compliance.

- 2.9. **Having noted the above and in line with international best practices, the Committee agreed that in order to foster certainty in the interpretation of the Competition Act, the CCI must endeavour to provide non-binding guidance on certain key issues. Insofar as guidance on penalty is concerned, please refer to discussion at Chapter 5.**

### 3. QUASI-JUDICIAL FUNCTIONS

#### *Meetings of the Panel*

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<sup>79</sup> EC, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2011/C 11/01) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114\(04\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011XC0114(04)&from=EN)> accessed 24 May 2019.

<sup>80</sup> EC 'Guidelines on Vertical Restraints' (2010/C 130/01) <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:130:0001:0046:EN:PDF>> accessed 24 May 2019.

<sup>81</sup> EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29>> accessed 24 May 2019

<sup>82</sup> CMA, 'Consumer protection enforcement guidance: CMA58', 12 March 2014. <<https://www.gov.uk/government/publications/consumer-protection-enforcement-guidance-cma58>> accessed 24 May 2019.

<sup>83</sup> CMA, 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8', 18 January, 2019, <<https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases>> accessed 24 May 2019.

<sup>84</sup> CMA, 'Mergers: How to notify the CMA of a merger' (31 March 2014) <<https://www.gov.uk/guidance/mergers-how-to-notify-the-cma-of-a-merger>> accessed 24 May 2019.

<sup>85</sup> CMA, 'CMA's guidance as to the appropriate amount of a penalty' (18 April 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/700576/final\\_guidance\\_penalties.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf)> accessed 09 May 2019

- 3.1. The CCI currently takes decisions in relation to adjudication of matters before it during its meetings, in which parties may be present.<sup>86</sup> These decisions are taken by the WTMs and the Chairperson.<sup>87</sup> Though Section 22 of the Act provides that the quorum for such meetings is three members, in practice the CCI takes quasi-judicial decisions with all members present. Taking note of this, the Committee deliberated on the appropriate quorum for meetings in relation to adjudication.
- 3.2. It was discussed that a single member or officer may be appointed to undertake quasi-judicial decisions in many Indian regulators.<sup>88</sup> The Committee noted that determination of competition issues – antitrust as well as combinations – involves sifting through large volumes of papers, consideration of a large number of factors, and adherence to principles of natural justice.<sup>89</sup> Such issues may also involve cross-cutting sectoral knowledge depending on the kind of business and market the enterprise is operational in. **Therefore, it was agreed that a balance should be struck between efficient distribution of work and plurality of views. The Committee concluded that the Chairperson and WTMs may sit in panels of three for meetings in relation to adjudication. The composition of the panel may be determined by the Chairperson to ensure that the best equipped set of members is appointed to dispose of a matter.** The attention of the Committee was drawn to the decision of the Delhi High Court in the *Mahindra* case, where the Hon'ble Court held that the CCI shall ensure that at all times, during the final hearing, a judicial member is present and participates in the hearing. In this regard, the Committee noted that necessary action may be considered by the Central Government.
- 3.3. **The Committee noted that the Competition Act currently gives the Chairperson a casting vote in matters of adjudication.<sup>90</sup> The Committee noted that a casting vote should not be provided for decisions related to adjudication of matters before the CCI. This view has also recently been expressed by the Delhi High Court in the *Mahindra* case.<sup>91</sup>**

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<sup>86</sup> Competition Act, Section 22; General Regulations, Regulation 30.

<sup>87</sup> Competition Act, Section 22.

<sup>88</sup> SEBI Act, Section 15I; Insurance Act, 1939, Section 105C; PFRDA Act, 2013, Section 30.

<sup>89</sup> Competition Act, Section 36.

<sup>90</sup> Competition Act, Section 22(3).

<sup>91</sup> *Mahindra Electric Mobility Limited and Ors. v. Competition Commission of India and Ors.*, (2019) SCCOnline Del 8032, para 81.

### *Manner of Forming Prima Facie View by the CCI*

- 3.4. The Competition Act allows any person having information about any contravention of the Competition Act to provide such information to the CCI. As a part of this process, the informant provides all details, including evidence that is within its possession that may be relevant for CCI to establish a *prima facie* case. The CCI is also empowered by way of regulations<sup>92</sup> to call such an informant and such other person as is necessary, to conduct a 'preliminary conference' to obtain any further information or assistance it may require to form an opinion on whether a *prima facie* case exists. Given that unlike courts, CCI does not decide a traditional *lis* which is premised on adversarial proceedings (also observed by the judgment of the Delhi High Court<sup>93</sup>); proceedings before the CCI are more inquisitorial in nature. Against this background, the Committee deliberated on the role of the informant in the proceedings. The Committee agreed that the informant should not be burdened with substantiating allegations. Instead the CCI should review the information submitted by the informant on merits without mandating her presence.
- 3.5. In this light, the Committee considered whether the conduct of preliminary conferences is desirable. While the Supreme Court in *CCI v. SAIL*,<sup>94</sup> had recognised the CCI's power to conduct a preliminary conference prior to issuing an order under Section 26(1), it also stressed that time and resources must not be wasted by elaborate hearings prior to the issuance of a *prima facie* order under Section 26(1) of the Act. Therefore, the Committee discussed if dispensing with the requirement of preliminary conference will help cut down the time taken to arrive at a *prima facie* decision and will ensure a more inquisitorial proceeding with limited role of the informant.

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<sup>92</sup> General Regulations, Regulation 17.

<sup>93</sup> *Mahindra Electric Mobility Limited and Ors. v. Competition Commission of India and Ors.*, (2019) SCCOnline Del 8032, para 145

<sup>94</sup> (2010) 10 SCC 744.

- 3.6. In this regard, the attention of the Committee was drawn to other jurisdictions. The Committee noted that in the UK<sup>95</sup> and the EU<sup>96</sup> the respective competition authorities can obtain further information from the complainant itself, before initiating formal proceedings.
- 3.7. The Committee also noted that unlike other sectoral regulators in India that regulate a more definite and fixed constituency of persons<sup>97</sup>, CCI exercises its mandate over a wide range of stakeholders. To be specific, the CCI has to look at competition issues that cut across multiple sectors, markets and industries and hence, it does not have any prior or fixed sources of information. **Therefore, it was agreed that preliminary conferences do serve an important function and should not be disallowed. While the Committee agreed that such preliminary conferences do not change the nature of proceedings before CCI from inquisitorial to adversarial, it suggested that such preliminary conferences be conducted in a time-bound manner in order to combat any possible delays.**
- 3.8. A similar discussion also took place regarding the role of the informant during the adjudication process. The informant is currently a 'party' to a matter before the CCI and is allowed to participate in the process.<sup>98</sup> It was noted that, in line with the inquisitorial functions of the CCI, involvement of the informant should be at its own discretion. It was pointed out that though informants are often willing to participate, involvement of multiple parties may result in increasing the time taken for proceedings.
- 3.9. **The Committee agreed to retain the power of the CCI to hold preliminary conferences, as these may be necessary for the CCI to understand the issues at hand and for the CCI to form its *prima facie* view. The Committee agreed that a balance must be struck between timely disposal of cases and the**

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<sup>95</sup> CMA, 'Guidance on the CMA's investigation procedures in Competition Act 1998 cases: CMA8', 18 January, 2019, <<https://www.gov.uk/government/publications/guidance-on-the-cmas-investigation-procedures-in-competition-act-1998-cases>> accessed 24 May 2019. The CMA has the discretion to send out informal information requests, clarification requests or invitation to meet the CMA prior to ordering an investigation. At this stage, the CMA relies more on voluntary cooperation at this stage, rather than use of its formal powers to gather information.

<sup>96</sup> EC 'Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty' (2004/C 101/05), Para 55, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:101:0065:0077:EN:PDF>> accessed 24 May 2019. The EC can collect further information informally or ask the complainant to expand on her allegations after providing her with the EC's initial reaction.

<sup>97</sup> Such as the SEBI in respect of stakeholders in the securities market or the TRAI in respect of the telecommunications industry.

<sup>98</sup> General Regulations, Regulation 2(1)(i).



efficiencies brought in by the involvement of informants. It was concluded that instead of being prescriptive about the informant's involvement, focus should be on reducing the time taken for proceedings. In this regard, it was agreed that detailed timelines for the various stages of the enforcement process should be prescribed through subordinate legislation, and the CCI should adhere to such detailed timelines as may be prescribed.

#### *Inter-regulatory Consultation*

- 3.10. The Committee looked into the use and potential for inter-regulatory consultation between the CCI and other regulators under Sections 21 and 21A of the Competition Act. Such inter-regulatory references gain significance owing to the fact that the CCI as a cross-cutting competition regulator must interact with various sectoral regulators, especially when their functions can impact the broader scope and objectives of competition policy. For example, the TRAI is empowered to 'facilitate competition' in the telecommunications sector.<sup>99</sup>
- 3.11. Sections 21 and 21A of the Competition Act, 2002 provide for references between sectoral regulators and the CCI. The Committee noted that there has been sparse use of these provisions and deliberated whether the standard for references should be lowered and the grounds for inter-regulatory consultation be widened. Presently, under Sections 21 and 21A of the Competition Act, a reference lies only when a potential or past decision of the CCI or a sectoral regulator contradicts with the other's governing statute. However, in several cases, the CCI or sectoral regulators may want to consider and refer issues that are pending for consideration even otherwise. The need to wait till the time the regulator reaches or is about to reach a final decision only increases uncertainty. It was also suggested that the scope of such consultation be broadened so that it refers not just to a proceeding but includes any inquiry or investigation for which such reference may be required. It was also agreed that the scope for inter-regulatory consultations can be bolstered by allowing regulators to enter into Memorandums of Understanding with each other. **Having considered the above, the Committee recommended that necessary revisions may be made to Sections 21 and 21A of the Competition Act so that the CCI and sectoral regulators may make references whenever an issue of competition law or other relevant matter is raised before each other, and not only in respect of a proceeding. Such a reference should be allowed even in the absence of any**

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<sup>99</sup> TRAI Act, Chapter III, Section 11

**contradiction or conflict between the ambit of the CCI and the sectoral regulators.**

#### **4. SETTLEMENTS AND COMMITMENTS**

4.1. In recent years, many competition authorities have been granted with the power to accept remedies from parties to an antitrust proceeding. The terminology and form of such negotiated remedies may vary from jurisdiction to jurisdiction - some refer to them as commitment decisions, others as settlement or consent orders.<sup>100</sup>

4.2. The EU which provides for both settlement and commitment in antitrust proceedings, makes a distinction between the two mechanisms. In the EU, while a settlement procedure is available for cartels,<sup>101</sup> commitment decisions are typically permitted in all antitrust cases, except cartels.<sup>102</sup> Further, while a settlement decision establishes an infringement and requires an admission of guilt from the parties, a commitment decision does not establish an infringement and does not require any admission by the parties.<sup>103</sup> The EC notes that typically parties opt for a settlement decision when they are convinced of the strength of the EC's case in view of the evidence gathered

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<sup>100</sup> OECD, 'Commitment Decisions in Antitrust Cases' (23 June 2016) <[https://one.oecd.org/document/DAF/COMP\(2016\)7/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)7/en/pdf)> accessed 23 May 2019.

<sup>101</sup> Regulation 622/2008 of 30 June 2008 amending Regulation (EC) No 773/2004, as regards the conduct of settlement procedures in cartel cases *read* with Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, as amended by the EC Communication dated 05 July 2015. Please note that in the case of *Alstom Recycling Austria*, CASE AT.39759 – ARA Foreclosure decided by EC on 20 September 2016, a case on abuse of dominance, a reduction in fine was awarded by invoking paragraph 37 of the EC 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003'. Notably, these Guidelines are separate from the EU settlement framework. The EC notes that while there is no structured framework to award cooperation in antitrust cases other than cartels, cooperation by parties in such cases may be rewarded within the EC guidelines on setting of fines, as was done in the instant case. Please see, EC, 'Antitrust: reduction of fines for cooperation', <[http://ec.europa.eu/competition/antitrust/ara\\_factsheet\\_en.pdf](http://ec.europa.eu/competition/antitrust/ara_factsheet_en.pdf)>, accessed on 10 July 2019.

<sup>102</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 12 *read* with EC, 'Antitrust: commitment decisions - frequently asked questions' (8 March 2013), <[http://europa.eu/rapid/press-release\\_MEMO-13-189\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-189_en.htm)> accessed 10 July 2019.

<sup>103</sup> EC, 'Cartel Case settlement', <[http://ec.europa.eu/competition/cartels/legislation/cartels\\_settlements/settlements\\_en.html](http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html)> accessed 23 May 2019.

during investigation and of their own internal audit. In such cases, they may be ready to admit their participation in a cartel and accept liability for it.<sup>104</sup>

4.3. Under the existing framework, while CCI has been empowered to grant leniency in cartel cases, subject to satisfaction of certain conditions, the Competition Act does not expressly recognise settlements or commitments. Against this background, the Committee deliberated if there is a need to amend the Competition Act to empower CCI to pass settlement or commitment decisions or both. The Committee deliberated on the advantages of such negotiated remedies. The Committee agreed that procedural economy and efficiency of enforcement action<sup>105</sup> are driving factors for recognising settlements and commitments in the Competition Act. Such mechanisms are likely to enable the CCI to resolve antitrust cases faster and consequently, also free up its scarce resources. Further, businesses can avoid long investigations and uncertainty. Such negotiated remedies also enable authorities to impose innovative deterrents upon respondents while achieving equitable remedies for victims. Therefore, the Committee agreed that such a mechanism should be introduced in India.

4.4. It was brought to the attention of the Committee that in *Tamil Nadu Film Exhibitors Association v. CCI*,<sup>106</sup> the Madras High Court held that the scheme of the Competition Act allows parties to enter into a compromise or settlement and CCI may accept such compromise or settlement. The Court relied on Section 27 as conferring wide powers on CCI to pass residuary orders. The Committee noted that on a plain reading of Section 27, it does not expressly envisage a settlement or commitment process within the framework of the Competition Act. Further, the Committee noted that typically such powers are separately and expressly provided in the law since the process of settlement and commitment requires extensive and detailed guidelines to function in an equitable manner that gives due regard to public interest.

4.5. The Committee discussed the settlement mechanism as envisaged under the SEBI Act, 1992<sup>107</sup> (“SEBI Act”) and regulations issued thereunder. Under the

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<sup>104</sup> EC, ‘Cartel Case settlement’, <[http://ec.europa.eu/competition/cartels/legislation/cartels\\_settlements/settlements\\_en.html](http://ec.europa.eu/competition/cartels/legislation/cartels_settlements/settlements_en.html)> accessed 23 May 2019.

<sup>105</sup> OECD, ‘Commitment Decisions in Antitrust Cases’ (23 June 2016) <[https://one.oecd.org/document/DAF/COMP\(2016\)7/en/pdf](https://one.oecd.org/document/DAF/COMP(2016)7/en/pdf)> accessed 23 May 2019.

<sup>106</sup> 2015 SCC OnLine Mad 7099.

<sup>107</sup> SEBI Act, Section 15JB read with the SEBI (Settlement Proceedings) Regulations, 2018.

SEBI framework, the settlement terms may include a settlement amount and/or non-monetary terms. The non-monetary terms may include suspension of business activities, exit from management, disgorgement on account of action or inaction of the applicant, lock-in of securities, etc.<sup>108</sup> Other than SEBI, the Income Tax Act, 1961 also sets out a settlement framework.<sup>109</sup> The Committee also took note of the position in other jurisdictions and noted that EU,<sup>110</sup> UK<sup>111</sup> and Singapore<sup>112</sup> also provide for a settlement mechanism for antitrust cases.

- 4.6. **Therefore, in light of existing precedents and in the interest of procedural efficiencies associated with settlement mechanisms as discussed above, the Committee recommended that the Competition Act should be amended to expressly enable CCI to accept settlements from parties and provide for a settlement mechanism. The settlement framework should be applicable for alleged contraventions of agreements under Section 3(4) and the abuse of dominance under Section 4 of the Competition Act. The Competition Act should empower CCI to pass settlement orders subject to certain conditions which may include settlement amount and/or non-monetary terms. With regard to timelines for submission of an application for settlement, it was agreed that the application may be filed only after receipt of the DG Report and within such time before the passing of a final order by the CCI, as may be specified by subordinate legislation. The Committee also agreed that an order granting or rejecting a settlement application should not be made**

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<sup>108</sup> SEBI (Settlement Proceedings) Regulations, 2018, Regulation 9.

<sup>109</sup> Income Tax Act, Section 245B read with Income Tax Settlement Commission (Procedure) Rules, 1997.

<sup>110</sup> Settlement process is set out in EC Regulation 622/2008 of 30 June 2008 amending EC Regulation No. 773/2004, as regards the conduct of settlement procedures in cartel cases by inserting Article 10a into that regulation <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32008R0622>> accessed 23 May 2019. This must be read with the EC's Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of EC Regulation No. 1/2003 in cartel cases, <[https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0702\(01\)](https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52008XC0702(01))> accessed 23 May 2019.

<sup>111</sup> Rule 9 of the Competition Act 1998 (Competition and Markets Authority's Rules) Order 2014 read with CMA, 'Competition Act 1998: Guidance on CMA's investigation procedures in Competition Act 1998 cases' (18 January 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/771970/CMA8\\_CA98\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771970/CMA8_CA98_guidance.pdf)> accessed 23 May 2019.

<sup>112</sup> CCCS, 'CCCS Practice Statement on the Fast Track Procedure for Section 34 And Section 47 Cases' (Effective 1 December 2016) <<https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-fast-track-procedure-for-section-34-and-section-47-cases.pdf?la=en&hash=8F8B4CA2E1CA70DDDDA146A61A0FFA090AEC7973>> accessed 23 May 2019.

**appealable to the Appellate Tribunal. Detailed procedure for the settlement mechanism should be set out in subordinate legislation.**

4.7. It was brought to the attention of the Committee that certain jurisdictions like the EU,<sup>113</sup> the UK<sup>114</sup> and Singapore<sup>115</sup> also provide for commitment decisions. Typically, commitments may be structural or behavioural in nature, or a combination of both.<sup>116</sup> Against this background, the Committee deliberated if an enabling provision empowering the CCI to accept commitments may be introduced in the Competition Act. The Committee noted that commitments may enable the CCI to save its resources and may also lead to a swifter resolution of cases. It was brought to the notice of the Committee that between May 2004 to February 2014, the EC adopted 34 commitment decisions and 19 infringement decisions.<sup>117</sup>

4.8. **Based on its discussion, the Committee recommended that the Competition Act should be amended to empower the CCI to accept commitments from parties alleged to have contravened the provisions of Section 3(4) and Section 4 of the Competition Act. With regard to timelines for submission of an application for commitment, it was agreed that it should be submitted after an order under Section 26(1) of the Competition Act has been passed so that the parties are aware of the proceedings. It was further agreed that such application can be submitted within such period prior to the submission of the DG report as may be specified in subordinate legislation. The Committee also recommended that the CCI should have the discretion to accept or reject the application for commitments. Further, it was agreed that the law should enable the CCI to review its decision to accept commitments in certain circumstances, including where the concerned party has acted contrary to the terms of commitment, when there is a material change in facts on the basis of which the commitment decision was passed or where the commitment**

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<sup>113</sup> Article 9 of EC Regulation No 1/2003 dated 16 December 2003 on the implementation of the rules on competition law laid down in Articles 81 and 82 of the Treaty establishing the European Community.

<sup>114</sup> UK Competition Act, Section 31A and CMA, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases', 18 January 2019, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/771970/CMA8\\_CA98\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771970/CMA8_CA98_guidance.pdf)> accessed 30 May 2019,

<sup>115</sup> Singapore Competition Act, Section 60A read with Section 60B and Section 85.

<sup>116</sup> CMA, 'Competition Act 1998: Guidance on the CMA's investigation procedures in Competition Act 1998 cases' (18 January 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/771970/CMA8\\_CA98\\_guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/771970/CMA8_CA98_guidance.pdf)> accessed 30 May 2019.

<sup>117</sup> EC, 'To commit or not to commit? Deciding between prohibition and commitments' (March 2014) <[http://ec.europa.eu/competition/publications/cpb/2014/003\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/003_en.pdf)> accessed 30 May 2019.

**decision was based on false, misleading or incomplete information provided by the concerned party.**

## CHAPTER 3: DEFINITIONS

### 1. BACKGROUND

- 1.1. The definitions provided within any law are vital aids to statutory interpretation. A review of such definitions is an important exercise that helps bring clarity to the meaning and effect of the provisions of an enactment. With this objective, the Committee deliberated upon possible changes to a few definitions that are provided in Section 2 and in certain other provisions of the Competition Act.
- 1.2. The Committee took cues from the decisional practice of the CCI, and saw it fit to incorporate express provisions that will aid in the future use and interpretation of the Competition Act and also prevent inconsistency and uncertainty in interpretation. It was also felt that for definitions that have been subject to extensive deliberation and interpretation by courts, the meaning and intent of such provisions as brought out by the courts may be captured by express provisions, if required.
- 1.3. It must be clarified though that the exercise of review of the various terms defined in the Competition Act has been carried out in most cases not because of any particular enforcement gap in the use and effect of the current definitions, but in the interests of clarity and comprehensiveness. It was felt that these changes will help better express the meaning and ambit of various provisions of the Competition Act.

### 2. CARTEL

- 2.1. Section 2(c) of the Competition Act defines a 'cartel' to include an association of producers, sellers, distributors or service providers, but makes no reference to buyers. The absence of the term 'buyers' in the existing definition of cartel means that the current definition does not expressly refer to the possibility of 'buyers' cartels. The Committee noted that the CCI has recognized buyers' cartels in its decisional practice and has explicitly clarified that Sections 3(1) and 3(3) of the Competition Act cover both sellers' and buyers' cartels.<sup>118</sup> While the CCI has not faced any enforcement gap on account of the current definition of 'cartel', in order to make the definition more comprehensive and in line with the decisional practice of the CCI, the Committee considered whether the

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<sup>118</sup> CCI order dated 04.07.2018 in Case No. 05 of 2018

express recognition of buyers' cartels by adding the term 'buyer' to the definition of cartel in the Competition Act was desirable.

- 2.2. The recognition of the liability of buyers' cartels also accords with the practice in the EU.<sup>119</sup> Even in the US, courts have assessed the possibility of buyers' cartels and then subjected them to a *per se* approach,<sup>120</sup> especially where they possess monopsony power.<sup>121</sup>
- 2.3. The Committee noted that the express inclusion of the term 'buyers' in the definition of cartel can help draw attention towards cartelisation practices on the buyers' side<sup>122</sup> and clarify that such buyers' cartels are within the ambit of the Competition Act. Consequently, it was also agreed to include the term 'buyers' in the proviso to Section 27(b), which deals with the imposition of penalty on the entities involved in a cartel and in Section 46 which deals with lesser penalty applications.
- 2.4. **Accordingly, in line with the decisional practice of CCI, and in the interests of comprehensiveness, the Committee recommended to incorporate the word 'buyer' in the definition of 'cartel' in Section 2(c) of the Competition Act. Flowing from this, the Committee observed that the express recognition of buyers' cartel also necessitates amendment to the proviso to Section 27(b) and to Section 46.**

### 3. CONSUMER

- 3.1. Presently, Section 2(f) of the Competition Act defines a consumer to mean any person who buys goods or hires or avails any services. The definition of consumer encompasses 'any person' and the term 'person' is inclusively defined in Section 2(l) of the Competition Act. While there has been no gap in the enforcement and interpretation of the term 'consumer', the Committee noted that there is no express mention of a department of Government within

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<sup>119</sup> Case AT.40018 *Car battery recycling* [2017] C(2017) 900. As the EU's fining regime is based only on the value of sales, which would not apply for a buyers' cartel, the companies involved were fined on the value of the purchases, rather than the value of sales

<sup>120</sup> Such anti-competitive conduct is assessed within the ambit of Section 1 of the Sherman Antitrust Act, 1890 which in broad terms declares agreements that unreasonably restrain trade to be illegal.

<sup>121</sup> In *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948) in respect of a buyer cartel of sugar refiners that possessed monopsony power and were subject to *per se* treatment.

<sup>122</sup> CCI order dated 07.10.2011 in Case No 03 of 2010. This case saw allegations of anti-competitive practices against the buyers of rail fastening systems, but the CCI did not make any finding of infringement, one of the reasons being the lack of any express reference to the purchasing activity of a consumer in the Competition Act.



the definition of 'person' or 'consumer'. The Committee discussed if there is a need to amend the definition of 'consumer' to expressly refer to a department of the government as a 'consumer' under the Competition Act. The Committee noted that this may be relevant, especially in cases of procurement bids by the Government. For instance, in an allegation of bid rigging of a public bid, the CCI noted that the Government being the procuring entity is a consumer and must be covered within the definition of consumer in Section 2(f) of the Competition Act.<sup>123</sup>

- 3.2. **Therefore, in the interest of clarity, the Committee recommended that the definition of consumer in Section 2(f) of the Competition Act should be amended to include reference to a department or an agency of the Government. Further, in line with the guidelines issued by the EC,<sup>124</sup> it was agreed that the definition of the term 'consumer' may be amended to refer to both direct and indirect users of goods and services.**

#### 4. ENTERPRISE

- 4.1. Section 2(h) of the Competition Act currently defines enterprise to mean a person or a department of the Government. The Supreme Court in the *Coordination Committee Case*,<sup>125</sup> has stressed that the term 'enterprise' in the Competition Act is broad enough to refer to "*any entity regardless of its legal status or the way in which it is financed and, therefore, it may include natural as well as legal persons.*" Similarly, CCI in its decisional practice has also noted the wide and inclusive nature of the definition of enterprise, which encapsulates any activity relating to the carrying on of business.<sup>126</sup> Further, in the *Coordination Committee Case*, the Supreme Court also clarified that any entity regardless of its form, constitutes an 'enterprise' within the meaning of Section 3 of the Competition Act when it engages in economic activity.<sup>127</sup>

- 4.2. The Committee took note of the aforesaid observations of the Supreme Court and considered whether they should be made explicit by way of amendment to the current definition of 'enterprise'. **While the CCI has faced no gap in**

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<sup>123</sup> CCI order dated 16.04.2012 in Case No. 43 of 2010.

<sup>124</sup> Commission Notice on the Guidelines on the application of Article 81(3) of the Treaty (2004/C 101/08) para 84. <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0427\(07\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0427(07))> accessed 20 May 2019.

<sup>125</sup> *CCI v. Coordination Committee of Artists and Technicians of W.B. Film and Television* (2017) 5 SCC 17.

<sup>126</sup> CCI order dated 16.02.2012 in Case No. 52 and 56 of 2010; CCI order dated 11.06.2012 in MRTP Case No. C-127/2009/DGIR (4/28).

<sup>127</sup> The Supreme Court observed that 'economic activity' includes any activity, whether or not profit making that involves economic trade.

enforcement and interpretation of the current definition of 'enterprise', the Committee agreed that the aforesaid observations of the Supreme Court have crystallized the understanding of the definition and hence, this understanding may be expressly incorporated in the definition in the interest of clarity and comprehensiveness. Therefore, the Committee recommended to amend the definition of enterprise in Section 2(h) of the Competition Act to expressly clarify that the legal form of an entity or the way it is financed are not relevant factors to determine if an entity is an enterprise. Further, it was recommended that in line with the observations of the Supreme Court, the definition may refer specifically to engagement in any economic activity.

## 5. PARTY

- 5.1. The Competition Act at present does not define the term 'party' though it is referred to in multiple places in the Act, such as Section 4 which deals with the abuse of dominance, Section 5 which refers to combinations and also Section 26, which lays down the inquiry procedure under the Competition Act. Though no enforcement gap has been observed in this regard, till date, the Committee deliberated on the need to have an express definition of the term 'party' in the interest of making the provisions of the Act more comprehensive.
- 5.2. The term 'party' is defined in the CCI (General Regulations), 2009 ("**General Regulations**"). However, the definition includes an intervener as well as the DG, which may not be appropriate in the context in which the term 'party' is used in different places in the Competition Act. For instance, party in Section 33 which deals with the power of CCI to issue interim orders cannot include the DG.
- 5.3. The Committee also noted that an intervener is typically a non-party who is allowed to join in litigation or proceedings to assist the court or the concerned authority and accordingly, an intervener may not be equated with a party. For instance, an intervener does not have the same scope of rights as the parties involved in the inquiry procedure under Section 26 of the Competition Act. The Committee noted that in the interest of clarity, there should be a definition for the term 'party' that is specific to its use in the provisions of the Act.
- 5.4. **The Committee recommended insertion of a new definition of the term 'party' in Section 2 of the Competition Act that is specific to its use in the provisions of the Act. This definition must be in line with the existing definition of 'party' under the General Regulations without the words 'intervener' and 'director-general' for reasons discussed above.**

## 6. RELEVANT MARKET

6.1. Section 2(r) of the Competition Act states that the relevant market may be determined with reference to either the relevant product market or the relevant geographic market or with reference to both the markets. The Committee considered whether Section 2(r) should be amended to expressly mandate that the relevant market is to be determined with reference to *both* the relevant product market and the relevant geographic market, and not just either of the two. Further, it was pointed out that Section 19(5) of the Act requires that the CCI shall have due regard to the “relevant geographic market” and “relevant product market” for determining whether a market constitutes a relevant market. Accordingly, the Committee noted that typically the CCI in its decisional practice defines both the relevant product market as well as the relevant geographic market.<sup>128</sup>

6.2. **Noting the decisional practice of the CCI read with the requirement of Section 19(5), the Committee deliberated whether Section 2(r) of the Act requires to be amended. The Committee agreed that as no enforcement gap has arisen till date out of the current formulation of Section 2(r), there is no need to amend the existing definition of ‘relevant market’ under Section 2(r) of the Competition Act.**

## **7. RELEVANT PRODUCT MARKET**

7.1. The current definition of “relevant product market” under Section 2(t) of the Competition Act focuses on substitutability of the product from a consumer side or a demand side perspective. The Committee felt that it is equally important to consider the supply side perspective while assessing substitutability between different products. For instance, suppliers may be able to switch production from other products to the product in question, in the short term and without incurring significant costs and risks. In cases where a supplier is able to easily switch production and market the products without incurring significant cost or risk, the additional production will have an impact in the market and should be considered as part of the relevant product market. Thus, while there is no enforcement gap in the current provision, the Committee deliberated amendment of the definition of “relevant product market” to include supply side substitutability, in the interests of comprehensiveness.

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<sup>128</sup> *Matrimony.com Ltd. v. Google Inc.* CCI order dated 08.02.2018 in Case nos. 7 and 30 of 2012; *House of Diagnostics v. Esaote* CCI order dated 27.09.2018 Case No. 9 of 2016.

7.2. It was brought to the notice of the Committee that the CCI, in its decisional practice also recognises such supply side substitutability.<sup>129</sup> Internationally, the EC<sup>130</sup> as well as the International Competition Network (“ICN”<sup>131</sup>) also recognize such supply side substitutability, when defining relevant markets.

7.3. **The Committee, therefore, agreed to recommend explicit reference to supply side substitutability in the definition of “relevant product market” in Section 2(t) of the Competition Act.**

## 8. SHARES

8.1. The Competition Act defines shares in Section 2(v) and relies on it at several places like in the definition of group,<sup>132</sup> threshold for combinations<sup>133</sup> and in relation to several exemptions under the CCI (Procedure in Regard to the Transaction of Business Relating to Combination) Regulations, 2011<sup>134</sup> (“**Combination Regulations**”). Presently, the Competition Act does not provide any clarity on how the shareholding percentage in an enterprise should be calculated, i.e. whether it should be on a ‘fully diluted’ basis or an ‘as-issued’ basis. It was noted that this is a lacuna in the law as shareholding percentage may vary significantly based on the approach adopted in calculating the shareholding.

8.2. Calculation of shareholding on an as-issued basis may not accurately indicate the value of the shares in the market as it does not account for dilution and conversion of shares after its issue. While referring to calculation of shareholding, other regulators, such as RBI<sup>135</sup> and SEBI<sup>136</sup>, refer to value of

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<sup>129</sup> CCI order dated 12.07.2018 in Reference Case No. 01 of 2015; CCI order dated 18.02.2016 in Combination Registration No. C-2015/10/322.

<sup>130</sup> EC Notice on the definition of relevant market for the purposes of Community competition law (OJ C 372, 9.12.1997) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN)> accessed 28 May 2019.

<sup>131</sup> ICN Merger Working Group, Analytical Framework Subgroup ‘Project on Merger Guidelines’ (April 2004) <<https://www.internationalcompetitionnetwork.org/uploads/library/doc950.pdf>> accessed 28 May 2019.

<sup>132</sup> Competition Act, Explanation (b) to Section 5.

<sup>133</sup> Competition Act, Section 5.

<sup>134</sup> Combination Regulations, Schedule I.

<sup>135</sup> RBI, ‘Frequently Asked Questions’ (7 May 2018) question 13 <<https://m.rbi.org.in/Scripts/FAQView.aspx?Id=26>> accessed 20 May 2019.

<sup>136</sup> SEBI, ‘Frequently Asked Questions on SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011’ question 29

shares on a fully diluted basis. This may be because considering shareholding on a fully diluted basis accounts for the potential alterations in shareholding owing to dilution or conversion. Therefore, it may provide a more accurate depiction of the value of the shareholding on a long-term basis. **Based on this, the Committee recommended that Section 2(v) of the Act be amended to clarify that the shareholding percentage has to be calculated on a fully diluted basis.**

## 9. TRADE

- 9.1. The term 'trade' under Section 2(x) of the Competition Act has been defined to mean any trade, business, industry, profession or occupation relating to the production, supply, distribution, storage or control of goods and includes the provision of any services. In the *Coordination Committee Case*, the Supreme Court emphasised on the importance of economic activity, which according to the Court is "central to the concept of Competition Law."<sup>137</sup> The Supreme Court referred to it as including any activity, whether or not profit making that involves economic trade. The Court observed that the objective of competition law is to frown upon activities of those enterprises who while undertaking their economic activities, indulge in practices which affect the competition adversely or take advantage of their dominant position.
- 9.2. The Committee also discussed possible amendments to make the definition of trade comprehensive enough to cover all related economic activities that are mentioned in the Act, such as sale, acquisition, use of goods and services, and the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of a body corporate.
- 9.3. **The Committee noted that neither the CCI has faced nor the Supreme Court in its decision in the *Coordination Committee* case noted any enforcement gap with respect to the existing definition of 'trade'. Further, given the scale of amendments discussed above and with a view to better assessing if such amendments to the definition of trade are likely to have any ramifications across other legal or policy frameworks, the Committee felt that such changes cannot be recommended at this stage without detailed consultation with relevant ministries such as Ministry of Commerce and Industry. Therefore, the Committee agreed that no such change may be recommended at this stage.**

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<[http://www.aibi.org.in/SEBI\\_Regulations/FAQ%20on%20SEBI\(%20Substantial%20Acquisiton%20of%20Shares%20and%20Takeovers\)%20Regulations,%202016.pdf](http://www.aibi.org.in/SEBI_Regulations/FAQ%20on%20SEBI(%20Substantial%20Acquisiton%20of%20Shares%20and%20Takeovers)%20Regulations,%202016.pdf)> accessed 20 May 2019.

<sup>137</sup> (2017) 5 SCC 17 Para 39.

## 10. TURNOVER

- 10.1. The definition of turnover, as provided in Section 2(y) of the Competition Act, includes the value of sale of goods or services. Unlike some other definitions in the Act, the definition of turnover is broad and does not clearly indicate the manner of calculating it. As per CCI's FAQs, indirect taxes, income from ancillary operations, and intra-group sales are excluded from the calculation of turnover.<sup>138</sup> The FAQs also clarify that export related turnover is to be included in the calculation of turnover.<sup>139</sup>
- 10.2. The Committee noted that 'turnover' has been relied on in multiple provisions, including in thresholds for filing of combinations<sup>140</sup> and for computation of penalties that may be imposed on parties<sup>141</sup>. Though some exclusions and inclusions have been clarified by CCI through FAQs, they only go so far in providing certainty as they are not binding instruments and are just meant for guidance of the parties. It was felt that it may be necessary to provide some clarity on the manner of calculation of turnover.
- 10.3. The Committee discussed various exclusions from calculation of turnover and considered intra-group sales, indirect taxes, trade discounts and revenue generated outside India. The below was noted, in this regard, -
- (i) *Intra-group sales*: Intra-group transactions are transactions between companies belonging to the same group. An OECD background paper by the Secretariat, while discussing turnover thresholds in merger, notes "*it also leads to taxes and the proceeds of business dealings within a group being excluded from the relevant turnover (as to avoid double counting), in order to provide a better picture of the real economic weight and power of the merging parties.*"<sup>142</sup> Therefore, intra-group sales are often excluded from

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<sup>138</sup> CCI, 'FAQs', <<https://www.cci.gov.in/node/2847>> accessed 27 April 2019.

<sup>139</sup> *Ibid.*

<sup>140</sup> Competition Act, Section 5.

<sup>141</sup> Competition Act, Sections 27(b), 43A.

<sup>142</sup> OECD, 'Local Nexus and Jurisdictional Thresholds in Merger Control, Background paper by the Secretariat', (July 2016) <[https://one.oecd.org/document/DAF/COMP/WP3\(2016\)4/REV1/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3(2016)4/REV1/en/pdf)> accessed 20 May 2019.

computation of turnover in many jurisdictions like the EU<sup>143</sup>, UK<sup>144</sup> and China.<sup>145</sup>

- (ii) *Indirect taxes*: As mentioned above, indirect taxes are often excluded by jurisdictions in computing turnover to avoid double counting. In this regard, the Committee took note that the EU<sup>146</sup>, UK<sup>147</sup>, China<sup>148</sup> and South Africa<sup>149</sup> exclude indirect taxes while calculating turnover in relation to merger control.
- (iii) *Trade discounts*: Trade discounts are the amount by which the price of a good is reduced when selling to another seller (e.g. a distributor or a wholesaler).<sup>150</sup> Trade discounts, or sales rebates, are excluded from turnover in relation to merger control in the EU<sup>151</sup>, UK<sup>152</sup> and South

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<sup>143</sup> EUMR, Article 5; EC, 'Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings' (2008) <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416\(08\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08)&from=EN)> accessed 27 April 2019.

<sup>144</sup> Mergers: Guidance on CMA's Jurisdiction and Procedure, B.19 and 20. Though intra-group sales are usually excluded in UK, the competition regulator may in certain situations include it.

<sup>145</sup> Richard Blewett and Yong Bai, 'Clifford Chance and Practical Law China, Merger Control in China: A Practical Guide' (2017) p. 4 <[https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/Merger\\_control\\_in\\_China\\_a\\_practical\\_guide\\_2017\\_final.pdf](https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/Merger_control_in_China_a_practical_guide_2017_final.pdf)> accessed 20 May 2019.

<sup>146</sup> EUMR, Article 5.

<sup>147</sup> Mergers: Guidance on CMA's Jurisdiction and Procedure, B.11.

<sup>148</sup> Richard Blewett and Yong Bai, 'Clifford Chance and Practical Law China, Merger Control in China: A Practical Guide' (2017) p. 4 <[https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/Merger\\_control\\_in\\_China\\_a\\_practical\\_guide\\_2017\\_final.pdf](https://www.cliffordchance.com/content/dam/cliffordchance/PDFDocuments/Merger_control_in_China_a_practical_guide_2017_final.pdf)> accessed 20 May 2019.

<sup>149</sup> Government Gazette, Republic of South Africa (2017) p. 12 <<https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-627-no-41124-dated-2017-09-15.pdf>> accessed 20 May 2019.

<sup>150</sup> KPMG, 'GST Updates, Is 'trade discount' an eligible deduction under Model GST Law' (September 2016) <<http://www.in.kpmg.com/taxflashnews/GST-Update-Is-trade-discount-an-eligible-deduction-under-Model-GST-Law-2.pdf>> accessed 20 May 2019.

<sup>151</sup> EUMR, Article 5.

<sup>152</sup> Mergers: Guidance on CMA's Jurisdiction and Procedure, B. 11.

Africa<sup>153</sup>. Further, they are also permissible deductions while computing taxable turnover under the Karnataka Value Added Tax Act, 2003.<sup>154</sup>

- (iv) *Revenue generated outside India*: The current clarification under the FAQs does not address the anomaly created by inclusion of revenue generated by a foreign subsidiary of an Indian company making and selling a product in a foreign country (as a result of consolidation of financial statements).<sup>155</sup> The general rule for calculation of turnover in the EU is that turnover should be attributed to the place where the customer is located. Therefore, turnover is calculated for products and services when the customer is located in that country.<sup>156</sup> Even in the UK, revenue generated within UK is counted while calculating turnover.<sup>157</sup>

**10.4. The Committee recommended that intra-group sales, indirect taxes, trade discounts, and revenue generated outside India should be excluded while calculating turnover. It was discussed that these exclusions, agreed upon by the Committee, may be prescribed by way of rules. In this regard, the Act may be amended to enable the Central Government to prescribe rules for calculation of turnover.**

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<sup>153</sup> Government Gazette, 'Republic of South Africa' (2017) p.12 <<https://archive.opengazettes.org.za/archive/ZA/2017/government-gazette-ZA-vol-627-no-41124-dated-2017-09-15.pdf>> accessed 20 May 2019.

<sup>154</sup> *M/s Maya Appliances (P) Ltd now known as Preethi Kitchen Appliances Pvt. Ltd. v. Addl. Commissioner of Commercial Taxes & Ors.* (2018) 2 SCC 756.

<sup>155</sup> CCI, 'FAQs', <<https://www.cci.gov.in/node/2847>> accessed 27 April 2019.

<sup>156</sup> European Commission, 'Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings' (2008) para 196-197 <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416\(08\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0416(08)&from=EN)> accessed 20 May 2019. However, it also discusses that the geographical location for calculation of turnover may be different for certain sectors, such as technology based products and services.

<sup>157</sup> Mergers: Guidance on CMA's Jurisdiction and Procedure, B.11.



## **CHAPTER 4: ANTI-COMPETITIVE AGREEMENTS AND ATTENDANT SECTIONS**

### **1. BACKGROUND**

- 1.1. Section 3 deals with anti-competitive agreements which cause or are likely to cause an appreciable adverse effect on competition (“AAEC”) in India. The Committee noted that the CCI has made a definite mark in prohibiting anti-competitive agreements through its decisional practice and advocacy efforts. Through its review, the Committee has tried to further improve upon the existing framework governing anti-competitive agreements and their allied provisions that can identify and punish pernicious cartels and restrictive agreements that are likely to cause harm to competition.
- 1.2. The Committee has analysed the scope of Section 3 of the Act by discussing issues like the liability of third parties that facilitate cartels, treatment of agreements not falling strictly within the purview of horizontal or vertical arrangements as defined in Section 3, etc. The Committee has also taken note of decisional practice of the CCI regarding the scope of factors that help in determination of AAEC in the market, determination of relevant product and geographic markets, etc. Based on its study, the Committee has recommended clarifications wherever necessary.
- 1.3. The Committee has also looked at the existing use and implementation of the provisions on anti-competitive agreements and has sought to identify possible enforcement gaps. One of the key aims of this exercise has been to suitably amend the Act to accommodate for its future application to more developed markets, specifically to account for more inter-connected and new age markets. Simultaneously, in certain cases the Committee has sought to clarify the existing position by way of suggesting amendments for the purposes of certainty. This Chapter discusses amendments that seek to better identify the contours of competition and thereby address anti-competitive agreements more effectively.

### **2. INTRODUCING RELEVANT MARKET IN SECTION 3 AND SECTION 19**

- 2.1. Section 3 of the Competition Act prohibits any anti-competitive agreement which causes or is likely to cause an AAEC within India. Currently, Section 3 recognises two types of anti-competitive agreements. Horizontal

agreements<sup>158</sup>, including cartels, are prohibited under Section 3(3) of the Act and are presumed to be anti-competitive unless the presumption is rebutted. Vertical agreements<sup>159</sup> are prohibited under Section 3(4) and are assessed on the basis of a 'rule of reason' analysis. Currently, Section 3 does not expressly require a determination of the relevant market, both in a Section 3(3) horizontal arrangement as well as in a Section 3(4) vertical arrangement. Further, there is also no express requirement to define the relevant market in Section 19(3) of the Competition Act, which sets out the factors for determination of AAEC caused by such arrangements.

- 2.2. The Committee looked into whether there is a need to expressly define the relevant market, in Section 3(3), Section 3(4) and Section 19(3) of the Competition Act, to better understand the contours of AAEC that may be caused in the market.
- 2.3. The Committee noted that, by way of a clarification order, the Supreme Court speaking through a Division Bench in the *Coordination Committee* case<sup>160</sup> held that the delineation of relevant market is not a mandatory pre-requisite for determination of violation under Section 3(3) of the Competition Act. The Supreme Court clarified that:

*“As mentioned above, the submission of the applicant is that though paragraph 8 of the judgment rightly records that anti-competition agreements listed under Section 3(3) are per se treated as adversely affecting the competition to an appreciable extent, the aforesaid reading of the issue in respect of 'relevant market' may give an impression that there is also a necessity to delineate relevant market in all such cases. We clarify that such delineation is not mandatory in terms of the statutory scheme of the Act, particularly having regard to the statutory presumption contained in Section 3 of the Act itself.” (emphasis supplied)*

- 2.4. Similarly, the CCI in its decisional practice has also held that there is no requirement under Section 3(3), as also under Section 19(3), of the Act to

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<sup>158</sup> Under Section 3(3) of the Competition Act horizontal agreements are agreements between enterprises engaged in identical or similar trade of goods or provisions which directly or indirectly determine prices, limits or controls production, supply, markets, technical development, investment or provision of services, etc.

<sup>159</sup> Under Section 3(4) of the Competition Act vertical agreements are agreements between enterprises at different levels of production chain in different markets in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services.

<sup>160</sup> Supreme Court order dated 07.05.2018 in Miscellaneous Application No. 490/2017 in Civil Appeal No. 6691/2014.

determine and construct a relevant market.<sup>161</sup> In this regard, the Committee's attention was drawn to the recommendations of the Raghavan Committee, to which the genesis of modern competition law can be attributed. The Raghavan Committee Report had cautioned that even while examining horizontal agreements, "*the relevant market should be clearly identified*", to understand the contours of competition.<sup>162</sup>

- 2.5. The Committee thereafter discussed the position in other jurisdictions. In the EU, cartels are prohibited under Article 101(1) of the Treaty on the Functioning of the European Union ("**TFEU**"), which prohibits agreements, decisions and concerted practices that are restrictive of competition. Article 101 does not differentiate on the basis of horizontal and vertical agreements. Instead, the EU follows an 'objects and effects' approach. Hard-core cartels such as those involving price-fixing and bid rigging are restricted by 'object', i.e., they are perceived to be anti-competitive by their very nature, and hence, their 'effects' on competition are not analysed. Thus, for such cartels and anti-competitive agreements, a relevant market need not be defined. Such agreements caught by Article 101(1) are treated as void and unenforceable although they may be justified if they satisfy certain criteria set out in Article 101(3) of the TFEU.<sup>163</sup> It may also be noted that the EC has ruled that it is not obliged to engage in market definition in cartel cases.<sup>164</sup> However, agreements, whether horizontal or vertical, when considered restrictive by effects, may need to be assessed in the context of their relevant market.
- 2.6. In the US, while the parent statute, i.e., the Section 1 of the Sherman Anti-trust Act, 1890 ("**Sherman Act**"), does not differentiate between horizontal and vertical agreements, anti-competitive agreements are generally treated as either *per se* illegal or are analysed under the 'rule of reason'. Cartels, on account of their known pernicious effects, are generally treated as *per se* illegal and there is no requirement to define a relevant market. For agreements that are assessed under the 'rule of reason', the effects of such agreements may be analysed on the relevant market.

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<sup>161</sup> *Ficci Multiplex Association of India v. United Producers/Distributors Forum*. CCI order dated 25.05.2011 in Case No. 01 of 2009. *Builders Association of India v. Cement Manufacturers' Association & Ors*. CCI order dated 31.08.2016 in Case No. 29 of 2010.

<sup>162</sup> Raghavan Committee Report, 2000, Paras 4.3.4 and 4.4.2, <[https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)> accessed 28 May 2019.

<sup>163</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 115.

<sup>164</sup> *Candle Waxes*, Commission decision dated 1.10.2008 in Case COMP/39181, para 279; *Ziegler SA v. European Commission* [2011] ECR II-000 paras 41-45.

- 2.7. Against this background, the Committee deliberated if the CCI should be mandated to determine the relevant market for assessing a Section 3(3) contravention under the Competition Act. The Committee felt that such a mandate will make a Section 3(3) analysis too rigorous since the CCI will have to delineate the relevant market for dealing with all alleged contraventions in this provision. It was noted that this may consequently bring in an element of subjectivity which will be in contrast with the presumption of AAEC that is attributed to cartels in the Act. The Committee also agreed that even though the Raghavan Committee Report suggested defining the relevant market, a decade's worth of experience from the CCI's decisional practice and also decisions of the Supreme Court reflect the settled position of law on assessment of contraventions under Section 3(3) of the Act. Accordingly, the Committee agreed that the term 'relevant market' should not be introduced in Section 3(3) of the Act.
- 2.8. The Committee thereafter considered whether Section 3(4) should be amended to mandate the CCI to delineate relevant market for dealing with anti-competitive concerns arising out of vertical agreements. It was brought to the notice of the Committee that while the relevant primary legislations in the US,<sup>165</sup> the EU<sup>166</sup> and the UK<sup>167</sup> do not mandate determination of relevant market for assessing vertical restraints, competition authorities generally undertake the exercise of determining the relevant market in assessing the effects of vertical restraints based on guidelines or case law. Importance is also given to the assessment of the market power of the entity, in the applicable relevant market.<sup>168</sup>

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<sup>165</sup> Such analysis of relevant market has developed through case law. See *PSKS Inc. v. Leegin Creative Leather Products Inc.* 615 F3d 412, 418-19 (Fifth Circuit 2010).

<sup>166</sup> The need to assess competitive concerns on the relevant market is identified in the EC 'Guidelines on Vertical Restraints', (2010/C 130/01). <[http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf)> accessed 20 May 2019 and the Commission Regulation (EU) No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2010:102:0001:0007:EN:PDF>> accessed 20 May 2019.

<sup>167</sup> UK 'Guidelines on Vertical Agreements'. 'OFT419'. <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284430/oft419.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf)> accessed 20 May 2019 (The OFT is now replaced by the CMA).

<sup>168</sup> The emphasis on market power is reflected through mostly through various 'block exemptions' that are prescribed, especially in the EU, on the basis of which, certain forms of vertical agreements below a specified market share are exempted from a competition investigation. Article 1(1)(a) of Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices. As per *Whish and Bailey* (pg. 631), first the

2.9. Given that the assessment of vertical restraints is typically carried out by considering the market power of the enterprises in different markets, the Committee discussed if Section 3(4) of the Competition Act should be amended to expressly refer to 'relevant market'. The Committee thereafter discussed the decisional practice of the CCI in assessing vertical restraints under Section 3(4) of the Competition Act. In its decisional practice, the CCI refers to market share or market power of an entity, in comparison to its competitors, to assess whether any AAEC is caused by a Section 3(4) practice or agreement.<sup>169</sup> **The Committee noted that the concept of relevant market is implicit in the assessment of vertical agreements. Accordingly, the Committee observed that the Act need not be amended to expressly refer to 'relevant market' in Section 3(4) of the Competition Act.**

2.10. The Committee also considered whether the term 'relevant market' may be expressly referred to in Section 19(3) of the Act which sets out the factors for determining AAEC. The Committee noted that a reference to relevant market in this provision may prompt parties to define the relevant market while rebutting the presumption of AAEC under Section 3(3). It was brought to the notice of the Committee that a Division Bench of the Supreme Court in the case of *CCI v. Bharti Airtel*<sup>170</sup> observed that 'market' in Section 19(3) has reference to a 'relevant market'. Notably, the Supreme Court in this case did not refer to the clarification order issued in the *Coordination Committee* case, as discussed above. **The Committee felt that in the absence of evidence of any enforcement gap and in light of the aforesaid recommendations regarding non-inclusion of the term 'relevant market' in Section 3, Section 19 may not be amended to refer to 'relevant market.'**

### 3. EXPRESSLY INCLUDING HUB AND SPOKE CARTELS IN SECTION 3(3)

3.1. As noted above, Section 3(3) of the Competition Act provides that horizontal agreements, including cartels, are presumed to have an AAEC, unless otherwise rebutted. The Committee noted that there exist certain unique forms of agreements in which a third party, i.e. a 'hub' organizes or facilitates

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relevant market is defined in order to determine the supplier's and buyer's market share; secondly, where the market share of each of the parties is below 30 per cent, the block exemption will usually be applicable.

<sup>169</sup> CCI order dated 04.10.2018 in Case No. 15 of 2018: The CCI in this case took into account the declining market share of the Opposite Party and the high presence of its inter-brand competition in the relevant market to ultimately dismissed allegations of resale price maintenance. In CCI order dated 05.02.2014 in Case No. 39 of 2012, the CCI observed that while the relevant market does not have to be defined for Section 3, however, it is required to assess if any agreement creates AAEC in any market, and this may be the market of the product/service of any party entering into the agreement.

<sup>170</sup> (2019) 2 SCC 521.

collusion between two or more competitors, i.e. the 'spokes'. In such cartels, the hub communicates with one or more spokes and causes the sharing of information between the spokes. It was pointed out to the Committee that while the spokes may be captured in the prohibition against cartels, there is some conjecture that the hub may escape liability under the contours of a Section 3(3) analysis of anti-competitive agreements.

- 3.2. To address this, the Committee considered the need for further clarifying the scope of Section 3(3) to expressly cover such hubs in a hub and spoke arrangement. Allegations of a hub and spoke cartel have in fact been expressly raised before the CCI in the *Hyundai Motors Case*,<sup>171</sup> and later in the *Uber Case*.<sup>172</sup> While in the *Hyundai Motors Case*, the CCI did not comment on the existence of any such arrangement,<sup>173</sup> in the *Uber Case*, the CCI elaborated on the traditional circumstances for a hub and spoke cartel to exist. These are, (i) the spokes must use a third party platform (or, the 'hub') to exchange sensitive information, including information on prices which can facilitate price fixing; and (ii) there needs to be a conspiracy to fix prices, which requires the existence of collusion. However, in this instance the CCI did not find a reason to make a finding of a hub and spoke cartel.
- 3.3. The Committee considered whether an express provision to account for such hubs may be inserted, in order to clarify the scope and extent of Section 3(3) of the Competition Act. Internationally, the jurisprudence on hub and spoke cartels has primarily developed in the US and the UK and only on a case-by-case basis. This is probably owing to the fact that unlike the Competition Act in India, the legal framework on anti-competitive agreements in these jurisdictions is quite broadly worded and the need for an express clarification to cover 'hubs' in the law itself may have not been felt. However, it was also noted that the case law on hub and spoke cartels has developed a bit differently in the US as compared to the UK. In the US, cartels are prohibited under Section 1 of the Sherman Act, which broadly prohibits anti-competitive agreements in restraint of trade and commerce. The courts in the US have identified and

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<sup>171</sup> CCI order dated 14.06.2017 in Case Nos. 36 and 82 of 2014.

<sup>172</sup> CCI order dated 06.11.2018 in Case No. 37 of 2018.

<sup>173</sup> Though the CCI did make a finding of infringement against Hyundai Motors for indulging in resale price maintenance, this was overturned by the NCLAT (decision dated 19.09.2018 in Competition Appeal (AT) No. 06 of 2017 and the penalty imposed was also stayed by the Supreme Court (SC order dated 16.11.2018 in Civil Appeal No. 10979 of 2018 <[https://www.sci.gov.in/supremecourt/2018/42623/42623\\_2018\\_Order\\_16-Nov-2018.pdf](https://www.sci.gov.in/supremecourt/2018/42623/42623_2018_Order_16-Nov-2018.pdf)> accessed 01 June 2019).

subjected hub and spoke cartels to a *per se* analysis and accordingly penalised them for unlawful conduct.<sup>174</sup> In the UK, Section 2(1) of the UK Competition Act is widely worded to prohibit anti-competitive practices that may affect trade, and courts in the UK have penalized both hubs and spokes. However, the case law has graduated to lay greater emphasis on the element of intention in the formation of a hub and spoke collusion.<sup>175</sup> Rather than a strict *per se* analysis of unlawful conduct in cartel formation, the UK courts look at whether entities intentionally engaged in collusive conduct that they could reasonably foresee would cause restraint of trade and commerce.

- 3.4. Having noted the broad position of law, the Committee considered that if hub and spoke cartels are in fact expressly recognised to be covered within the ambit of Section 3(3), should the element of knowledge or intention be taken into account when penalizing such hubs and spokes. The Committee finally felt that owing to the overall deleterious effects of cartels, the requirement of knowledge or intent should not be imposed, but such hubs may be presumed to cause AAEC in terms of Section 3(3) of the Competition Act.
- 3.5. **In light of the aforesaid deliberations and with a view to providing clarity on the liability of hubs while assessing violation of Section 3(3) of the Competition Act by a hub and spoke cartel, the Committee recommended addition of an explanation to Section 3(3) of the Competition Act to expressly cover ‘hubs’ and impute liability to such hubs based on the existing rebuttable presumption rule as envisaged under Section 3(3) and without any element of ‘knowledge’ or ‘intention’.**

#### 4. WIDENING THE AMBIT OF SECTION 3

- 4.1. At present, anti-competitive agreements are described as falling within the category of either horizontal agreements under Section 3(3) or vertical

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<sup>174</sup> *United States v. Apple Inc.* 952 F. Supp. 2d 638, 694-695 (S.D. N.Y. 2013). The finding of *per se* liability of Apple Inc. by the district court was upheld by the Second Circuit Court, which rejected Apple’s defense that the *per se* rule should not apply to it, as it engaged in vertical conduct, which should be subject to a ‘rule of reason’ analysis.

<sup>175</sup> In the *Replica Kit decision*, Case No. CA98/06/2003 decided on 01.08.2003 by the UK Office of Fair Trading, now replaced by the CMA, fined all involved parties for entering into price fixing arrangements through a common contractor. On appeal, though the Competition Appellate Tribunal (‘CAT’) upheld this decision, it added the element of ‘reasonable foresight’ that the information provided would be passed on to a competitor. On further appeal, the UK Court of Appeal came up with a further nuanced test which emphasized on pricing intentions, as well as reasonable foresight and knowledge of circumstances pertaining to the information that is disclosed. The importance of intention has also been recognised in the *Dairy Cartel decision* CA98/03/2011 (Case CE/3094-03) decided on 26.07.2011 and the *Toys ‘R’ Us decision* CA 98/18/2002.

agreements under Section 3(4) of the Act. The Committee noted that there may be instances where one may argue that certain kinds of conduct or agreements do not squarely fall within the strict categorization of a horizontal or vertical arrangement as envisaged under Section 3(3) and Section 3(4) of the Competition Act. For instance, in the *Hiranandani Case*<sup>176</sup> parties had argued that a hospital and a stem cell bank are neither horizontally nor vertically related, and hence the referral agreement between them cannot be examined under Section 3.<sup>177</sup>

- 4.2. Therefore, with a view to comprehensively covering all forms of anti-competitive conduct and arrangements under Section 3 of the Competition Act, the Committee considered whether the current wording of Section 3(4) should be amended to include “any other agreement” to expressly cover agreements which may not fit within the strict categorization of either a horizontal or a vertical agreement. This is particularly relevant in the context of digital markets wherein there may be unanticipated linkages and arrangements that may not fall strictly in the existing classification of agreements envisaged under Section 3 of the Competition Act.
- 4.3. The Committee took note of the primary competition laws in the US, the UK, the EU, Singapore and Brazil. The Committee observed that in most of these jurisdictions, the parent statutes are broadly worded and there is no express classification of horizontal and vertical agreements in the manner envisaged under the Competition Act. Instead, what is generally followed is an ‘objects versus effects’ approach, where certain agreements, the object of which is very likely to lead to negative effects (such as cartels) are considered as *per se* anti-competitive and certain other agreements are assessed on the effects they may have on competition, on the basis of a rule of reason analysis.
- 4.4. For instance, in the US, Section 1 of the Sherman Act declares every agreement in restraint of trade or commerce to be illegal. Similarly, in the EU, Article 101 of the TFEU prohibits agreements between undertakings “which may affect trade between Member States, and which have as their *object or effect* the prevention, restriction or distortion of competition within the internal market”. The UK also adopts an approach quite similar to the EU.<sup>178</sup> Further, in the UK,

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<sup>176</sup> CCI order dated 05.02.2014 in Case No. 39 of 2012.

<sup>177</sup> The CCI however went ahead and examined the anti-competitive conduct in terms of Section 3(1) of the Act. The decision was appealed before the COMPAT and is now pending before the Supreme Court.

<sup>178</sup> UK Competition Act, S. 2(1).



the guidance issued on agreements and concerted practices,<sup>179</sup> states that its list is non-exhaustive and does not limit the investigation and enforcement activities of the Office of Fair Trading (“OFT”) (which is now replaced by the CMA).

- 4.5. A similar approach is also seen in Brazil<sup>180</sup> and Singapore.<sup>181</sup> Further, in Singapore the CCCS Guidelines on Section 34 convey the intention that the law should be made applicable in a manner that is comprehensive enough to include all agreements by which competition in a market may be restricted.<sup>182</sup> Therefore, unlike the Competition Act in India, the parent competition statute / laws in the jurisdictions discussed above do not specifically focus on the nature of relationship between the contracting parties (either in a horizontal or vertical relationship), thereby broadening the ambit of the relevant provisions.
- 4.6. **The Committee agreed that it may be prudent to insert an express provision in Section 3 of the Competition Act to comprehensively cover all kinds of anti-competitive agreements that may not strictly fall within the categorisation of either a horizontal or a vertical arrangement. This will clarify that all anti-competitive agreements are subject to the scrutiny of the CCI under Section 3. This will also be in line with the approach of other matured jurisdictions discussed above. Therefore, the Committee recommended that Section 3(4) of the Competition Act be amended to include ‘other agreements’ (over and above the vertical agreements as currently provided) that may cause AAEC and subject such agreements to a rule of reason analysis under Section 3(4).**

## **5. CLARIFYING THE SCOPE OF THE EXPLANATIONS TO SECTION 3(4)**

*Explanation (a) to Section 3(4): tie-in arrangements*

- 5.1. Explanation (a) to Section 3(4) of the Competition Act defines tie-in arrangements to include any agreement requiring a purchaser of a product (‘tying product’) to purchase another product (‘tied product’) as a condition of

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<sup>179</sup> UK Guidance on ‘Agreements and Concerted Practices’ (OFT401) (01 December 2004) <<https://www.gov.uk/government/publications/agreements-and-concerted-practices-understanding-competition-law>> accessed 26 May 2019.

<sup>180</sup> Law No. 12,529/11, Article 36.

<sup>181</sup> Competition Act, 2004, Chapter 50B, Section 34.

<sup>182</sup> The CCCS Guidelines state, “Competition in a market can be restricted in less direct ways than by fixing of prices or the sharing of market... for example, a scheme under which a consumer obtains better terms the more business he places with all the parties to the scheme. The circumstances of each case will be considered.”

purchase. Typically, anti-competitive concerns are related to tie-in arrangements where the products involved are distinct or separate from each other. It may be noted that though no enforcement gap has been observed in the interpretation and enforcement of the current explanation, the Committee assessed the need to define 'tie-in arrangements' more comprehensively and in line with decisional practise of the CCI.

- 5.2. In its decisional practice, the CCI has analysed a variety of tie-in arrangements, for instance, allegations regarding tying in connections from specific network operators with mobile handsets<sup>183</sup> and the sale of cars with specific goods and services such as CNG kits, lubricant oils and insurance policies<sup>184</sup>, etc. While looking into such allegations of tie-in arrangements, the CCI has considered various factors, including *inter alia* if there are two separate goods and services present which are capable of being tied.
- 5.3. The Committee noted that in the EU, the EC Notice providing guidelines on vertical restraints ("**EC Guidelines on Vertical Restraints**") expressly refers to the requirement to purchase distinct products when defining 'tying'.<sup>185</sup> As per these guidelines, two products are distinct if, in the absence of the tying, a substantial number of customers would purchase or would have purchased the tying product without also buying the tied product from the same supplier, thereby allowing stand-alone production for both the tying and the tied product.<sup>186</sup> Case law in both the EU<sup>187</sup> and the US<sup>188</sup> has also focused on assessing the distinctness of two products, on the basis of the test discussed above.

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<sup>183</sup> CCI order dated 19.03.2013 in Case No. 24 of 2011.

<sup>184</sup> CCI order dated 14.06.2017 in Case Nos. 36 and 82 of 2014.

<sup>185</sup> EC 'Guidelines on Vertical Restraints', para 214, (2010/C 130/01). <[http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf)>accessed 25 May 2019.

<sup>186</sup> *Ibid*, para 215.

<sup>187</sup> In the case of *Microsoft v. Commission*, T-201/04, [2007] ECR II-3601, paras 917, 921 and 922, the court explained that two products are distinct where, in the absence of the tying, a substantial number of customers would purchase the tying product without also buying the tied product from the same supplier, thereby allowing for stand-alone production for both the tying and the tied product.

<sup>188</sup> The leading approach towards tying in was defined by the US Supreme Court in 1984 in the case of *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, where it focused on the distinctness of two products that could be tied together, on the basis of whether customers want to purchase the products separately or not. If not, the Supreme Court opined there is little risk that the tying could foreclose any separate sales of the products.

- 5.4. **Therefore, the Committee, in the interests of comprehensiveness and with a view to clarifying the existing understanding and practice in relation to assessing tie-in arrangements, recommended that the definition of ‘tie-in’ in the Explanation to Section 3(4) of the Competition Act should be amended to expressly state that the tied and tying products in a tie-in arrangement are distinct or separate goods and services.**

*Explanation (b) to Section 3(4): exclusive supply agreement*

- 5.5. Currently, the definition of exclusive supply agreement in the explanation to Section 3(4) of the Competition Act focuses on exclusivity imposed on a buyer by a seller. However, it does not expressly cover the scenario of a buyer imposing exclusivity on a seller. While the CCI in its decisional practise has not pointed out any enforcement gap in the assessment of exclusivity, the Committee noted that such exclusionary tactics by buyers are well provided for in most international jurisdictions.
- 5.6. In the EU, the EC Guidelines on Vertical Restraints expressly provide for a scenario where the supplier is obliged to sell the contracted products to only one buyer.<sup>189</sup> The OFT’s Guidelines on vertical agreements (“**UK Guidelines on Vertical Restraints**”) also brings within its ambit exclusive distribution from manufacturer to only one retailer.<sup>190</sup> In the US, while ‘exclusive supply agreements’ are interpreted as a restriction on the seller that is imposed by the buyer, ‘exclusive purchase agreements’ are restrictions imposed by a seller (manufacturer) on buyers (dealers) to exclusively buy and deal in its products, which in turn restricts the downstream consumers’ access to the products of different manufacturers.<sup>191</sup>
- 5.7. **Therefore, in order to expressly recognise the imposition of exclusivity both from the sellers’ as well as from the buyers’ side, the Committee recommended amendment to the definition of ‘exclusive supply agreement’ in the explanation to Section 3(4) of the Competition Act. Flowing from this**

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<sup>189</sup> EC Guidelines on Vertical Restraints, para 192, (2010/C 130/01). <[http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf)> accessed 25 May 2019.

<sup>190</sup> UK Guidelines on Vertical Agreements, ‘OFT 419’, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284430/oft419.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf)> accessed 25 May 2019.

<sup>191</sup> US FTC, Competition Guidance, ‘Exclusive Supply or Purchase Agreements’ <<https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/exclusive-supply-or>> accessed 26 May 2019.

**proposed amendment, it was further agreed that the term ‘exclusive supply agreement’ should be substituted with the term ‘exclusive dealing’.**

*Explanation (e) to Section 3(4): resale price maintenance*

- 5.8. Under Explanation (e) to Section 3(4) of the Competition Act, resale price maintenance is defined to include any agreement where the prices charged on resale are the prices stipulated by the seller. There is no express indication as to whether the current explanation covers a direct as well as indirect restriction of prices that may be charged. Though no enforcement gap has been observed by the CCI in this regard, the Committee considered amending the explanation to make it more comprehensive so as to expressly include reference to indirect means of resale price maintenance, such as the use of threats, imposition of sanctions or penalties or even through benefits such as promotional offers, when the resale price is in fact maintained by the seller.
- 5.9. The CCI in its most prominent decision on resale price maintenance in the *Hyundai Motors Case*, has in fact recognised both direct and indirect mechanisms of such resale price maintenance and imposed a penalty on Hyundai for imposing mechanisms to control discounts given by distributors, directly as well as indirectly under threat of penalty.<sup>192</sup>
- 5.10. **While the Committee noted that the current definition of ‘resale price maintenance’ does not in any way inhibit the ability of the CCI to penalise both direct and indirect means of imposition of resale price maintenance (as evident from the case discussed above), it agreed that in the interest of clarity, it may be prudent to expressly refer to both direct and indirect means by amending the definition of ‘resale price maintenance’ in the explanation to Section 3(4) of the Competition Act.**

*Adding Services to the Explanation Clauses to Section 3(4)*

- 5.11. The Committee noted that while currently, Section 3(4) explicitly applies to goods and services, the explanation clauses to Section 3(4) does not use the word ‘services’ and refer only to goods. The Committee observed that it may have been an oversight and **accordingly, the Committee recommended**

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<sup>192</sup> It may be noted that the decision of the CCI was overruled by the NCLAT in Competition Appeal(AT) No. 06 of 2017, decided on 19.09.2018. The NCLAT overruled the decision of the CCI for the primary reason that there was no independent determination by the CCI of the findings of the DG’s report. However, the NCLAT did not comment on the CCI’s taking into account of direct and indirect mechanisms for imposition of resale price maintenance.

**addition the word ‘services’ to the five explanation clauses of Section 3(4) in order to cover both goods and services.**

**6. EXPAND THE SCOPE OF AAEC FACTORS UNDER SECTION 19(3)**

*Section 19(3) to be Made Inclusive*

6.1. Presently, Section 19(3) of the Competition Act lays down an exhaustive list of factors to assess AAEC. The Committee considered making this list inclusive, especially in light of new market entrants and new business models in digital markets. Notably, the Committee also deliberated if making Section 19(3) exhaustive could result in non-competition or non-economic factors (such as labour policy, taxation rates, etc.) being included by the CCI and the parties and thereby bring uncertainty to businesses. However, the Committee agreed that such concerns do not arise as the rule of *ejusdem generis* will be applicable.<sup>193</sup> Further, with a view to ensuring that there is certainty for businesses and the provision is not left open-ended, it was agreed that such new factors will be specified by the CCI in the regulations.

**6.2. For reasons discussed above, the Committee recommended amendment to Section 19(3) of the Act to make it inclusive with a view to allowing newer considerations and factors for assessing AAEC through regulations.**

*Revising Section 19(3)(c)*

6.3. Presently, Section 19(3)(c) of the Competition Act lists “foreclosure of competition by hindering entry into market” as a factor in the assessment of AAEC. The Committee noted that though this factor covers hindrance of the entry of new market players, it is needlessly restrictive in its wording and does not account for scenarios where there could be marginalisation of existing competition or the lessening of competition.

6.4. For this reason, the Committee considered that Section 19(3)(c) should be revised to provide for only ‘foreclosure of competition’, which term will be broad enough to cover scenarios other than just hindrance of the entry into the market.

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<sup>193</sup> The rule of *ejusdem generis* is a rule of construction as per which where a general word follows similar and specific words, the general word takes its meaning from such specific words, and is held restricted to the same genus as those more limited, unless there is something to show that a wider sense is intended to be borne by the general word.

- 6.5. While the decisional practice of the CCI does not point out any gap in the wording of Section 19(3)(c) till date, the Committee noted that international jurisdictions generally take into account the broader factor of ‘foreclosure of competition’. For instance, the EU treats the phrase ‘foreclosure of competition’ broadly enough to cover hindering entry into the market, as well as hindering expansion of rivals or encouraging their exit.<sup>194</sup> The EC Guidelines on Vertical Restraints also discuss foreclosure in broad terms, limiting it not just to entry barriers, but also to countervailing power, level of trade and market position of competing buyers.<sup>195</sup> Similarly, the UK also assesses foreclosure of competition in terms of both barriers to entry as well as barriers to expansion once in the market.<sup>196</sup>
- 6.6. **Therefore, the Committee recommended amendment to Section 19(3)(c) to broadly address ‘foreclosure of competition’ so that it takes into account situations such as lessening of existing competition, barriers to expansion in the market, and so on. Accordingly, it recommended that the words “by hindering entry into the market” may be deleted from Section 19(3)(c).**

*Inclusion of Consumer Harm*

- 6.7. Presently, though one of the objects of the Competition Act is to ‘protect the interests of consumers’, Section 19(3) does not specifically refer to ‘consumer harm’. Competition authorities generally protect consumers from anti-competitive practices, including cartels, abuse of market power, uncontrolled mergers and bid rigging in public procurement.<sup>197</sup> However, the extent and manner in which consumer issues are addressed by competition law authorities in various regimes differ. For instance, Canada<sup>198</sup> and South

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<sup>194</sup> European Commission Discussion Paper on the application of Article 82 of the Treaty to Exclusionary Abuses, 2005 <<http://ec.europa.eu/competition/antitrust/art82/discpaper2005.pdf>> accessed 20 May 2019.

<sup>195</sup> EC ‘Guidelines on Vertical Restraints’, paras 134-138, (2010/C 130/01). <[http://ec.europa.eu/competition/antitrust/legislation/guidelines\\_vertical\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/guidelines_vertical_en.pdf)> accessed 25 May 2019.

<sup>196</sup> UK Guidelines on Vertical Restraints, Para 7.10. ‘OFT 419’, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284430/oft419.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284430/oft419.pdf)> accessed 25 May 2019.

<sup>197</sup> UNCTAD, The Benefit of Competition Policy for Consumers, TD/B/C.I/CLP/27, 29 April 2014, <[https://unctad.org/meetings/en/SessionalDocuments/ciclpd27\\_en.pdf](https://unctad.org/meetings/en/SessionalDocuments/ciclpd27_en.pdf)> accessed 22 May 2019.

<sup>198</sup> Canada, Competition Act, 2010, Part I ‘Purpose of act’. <<https://laws-lois.justice.gc.ca/eng/acts/c-34/page-1.html#h-87829>> accessed 22 May 2019.

Africa<sup>199</sup> define the purpose of their competition acts as the promotion and maintenance of competition in order to, *inter alia*, “provide consumers with competitive prices and product choices”. Some competition authorities play a more proactive role in preventing consumer harm. For instance, the EC states that in applying Article 82 of the Treaty establishing the European Community to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct most harmful to consumers.<sup>200</sup> In the US, the FTC “promotes competition in industries where consumer impact is high, such as health care, real estate, oil and gas, technology and consumer goods”.<sup>201</sup>

- 6.8. Section 19(3), which sets out the factors for assessing AAEC, refers to ‘accrual of benefits’ to consumer as a factor for determining AAEC. **The Committee considered that in line with its objective to protect interests of the consumer, the Competition Act should be amended to take into account consumer harm while assessing AAEC.**

**7. EXPAND THE FACTORS FOR RELEVANT GEOGRAPHIC MARKET UNDER SECTION 19(6)**

- 7.1. Currently, Section 19(6) lists an exhaustive set of factors for determining relevant geographic market. As the criteria for determining relevant market may differ from case to case, the Committee deliberated on the need to make the provision inclusive. The Committee also noted that there is a need to expand the scope of market delineation to cover developments in the digital economy. For instance, unlike traditional markets, the distribution of digital services and content is often geographically unrestricted. The Committee accordingly also considered the addition of specific factors to make the provision for identification of relevant geographic market more comprehensive and better tailored for the digital age.

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<sup>199</sup> South Africa, Competition Act, 2000, Section 2 ‘Purpose of act’ <<http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf>> accessed 22 May 2019. It may be noted that the South African Competition Act, 2000 has been significantly amended by the Competition Amendment Bill which was signed into law by the President on 13 February 2019. The Amendment Act introduces extensive changes to the South African Competition Law landscape. As its text has not been published/notified in the public domain, the present footnote is limited in its observation to the un-amended provisions of the South African Competition Act, 2000.

<sup>200</sup> EC, Article 102 Guidance (2009).

<sup>201</sup> UNCTAD, ‘The Effects of Anti-Competitive Business Practices on Developing Countries and Their Development Prospects’ (New York and Geneva, United Nations publication, 2008).



- 7.2. One such specific factor considered for inclusion is the ‘characteristics of goods and services’. The Committee noted that certain characteristics of goods and services may also impact the determination of the relevant geographic market. For instance, geographic markets may be defined more narrowly for perishable goods (such as dairy, vegetables, etc.) as opposed to durable goods which can travel larger distances.
- 7.3. The Committee also considered the express inclusion of ‘switching costs’ incurred by purchasers in procuring supplies or by sellers in providing goods or services outside a specific geographic area.
- 7.4. **Based on the need to make the factors for determination of relevant geographic market more inclusive and comprehensive, and also to accommodate for factors that may apply to new age, digital markets, the Committee recommended amendment to Section 19(6) of the Competition Act to make it more inclusive by allowing the incorporation of any other factors as may be specified in the regulations. The Committee also recommended incorporation of “characteristics of goods and services” and “costs associated with switching supply / demand to other areas” as factors for determination of relevant geographic market in Section 19(6).**

#### **8. EXPAND THE FACTORS FOR RELEVANT PRODUCT MARKET UNDER SECTION 19(7)**

- 8.1. The Competition Act provides an exhaustive list of factors for the determination of the relevant product market under Section 19(7) of the Act. Accordingly, the Committee considered that this list should also be made inclusive in order to accommodate for differing criteria and also to accommodate future factors and evidence that is specific to digital markets and may be useful in defining a relevant product market.
- 8.2. The Committee considered the need to expressly incorporate switching costs for the relevant product market so that the costs incurred by purchasers in procuring supplies from other sellers, or by sellers in manufacturing other/similar goods/services may also be taken into account in defining the relevant product market. There can also be prohibitive switching costs where certain products require significant capital investments in the production process, investments in training and human resources.<sup>202</sup> The CCI, in its decisional practise, does consider such switching costs<sup>203</sup> in order to assess

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<sup>202</sup> World Intellectual Property Organisation, ‘Guidelines on the definition of Relevant Market’. <<https://www.wipo.int/edocs/lexdocs/laws/en/tr/tr131en.pdf>> accessed 16 May 2019.

<sup>203</sup> *Bayer | Monsanto*, CCI order dated 14.06.2018 in Combination Registration No. C-2017/08/523.



whether the combination would bind consumers through switching costs that inhibit their ability to adopt options available from other players in the market.

- 8.3. The Committee also considered adding an express reference to categories of customers such as institutional / large scale / small scale customers that avail themselves of the same product or service, in order to better identify a relevant product market. For instance, where there are diverse customer groups, the borders of the product market may be reduced. A different group of customers for the relevant product may also form a smaller and separate market in case there is price discrimination to its disadvantage. In this sense, there is value in recognising the different types of consumers to better identify and define the contours of a relevant product market.
- 8.4. **Having considered the above, the Committee recommended amendment to Section 19(7) of the Competition Act to make the factors for determination of relevant product market more inclusive and comprehensive, and to be wide enough to accommodate for factors that may apply to new age, digital markets. The Committee recommended that Section 19(7) of the Competition Act may be made inclusive by allowing the incorporation of any other factors as may be specified in the regulations. It also recommended specifically recognising 'switching costs' and 'categories of customers' as relevant factors when determining the relevant product market in Section 19(7).**

## CHAPTER 5: INQUIRY PROCEDURE AND PENALTY

### 1. BACKGROUND

- 1.1. The success of any enactment is very closely linked to its procedural efficacy. The procedure prescribed by Section 26 of the Competition Act has been followed by the CCI for a decade and has established a sense of predictability and ease amongst its stakeholders. The Committee has sought to address the enforcement gaps that were observed in practice, and has made explicit, the powers of parties and the CCI that were earlier absent or merely implicit. The changes in Section 26 as proposed by this Chapter serve to make the procedure more robust on the counts of natural justice, transparency and predictability.
- 1.2. This Chapter will also address the provisions on penalty, which the Committee has sought to bring in line with the stated position of law brought about through decisional practice. Further, the scope and ambit of powers of penalty imposition are sought to be made clear through the issuance of a guidance.
- 1.3. The Committee has also sought to fine tune and bring procedural consistency into various allied provisions, such as on interim relief and the DG's investigative powers.

### 2. INQUIRY PROCEDURE

#### *Reviewing the Inquiry Procedure under Section 26*

- 2.1 Section 26 of the Competition Act sets out the procedure of inquiring into an alleged contravention of Section 3 and Section 4 of the Act. Briefly, the process of inquiry as envisaged under Section 26 is set out below:
  - (i) On receipt of information regarding an alleged contravention, if the CCI is of the opinion that a *prima facie* case exists, it directs investigation by the DG. However, if there is no *prima facie* case, the CCI passes an order closing the matter.
  - (ii) In case of an order for investigation, the DG conducts the investigation and submits a report on her findings to the CCI.
  - (iii) A copy of the report may be forwarded to the parties concerned.
  - (iv) If the DG report recommends that there is no contravention of the relevant provisions of the Act, the CCI invites objections/suggestions on the report

from *inter-alia* the parties concerned. Pursuant to the consideration of such objections / suggestions, if the CCI agrees with the recommendations of the DG, it closes the matter. Alternatively, the CCI may also direct further investigation in the matter by DG or cause further inquiry to be made or proceed with further inquiry under the Competition Act.

- (v) If the DG report recommends that there is contravention and the CCI is of the opinion that further inquiry is called for, the CCI may inquire into such contraventions.

2.2 It was brought to the attention of the Committee that based on the experience of more than a decade of enforcement of Section 26, there are certain issues that need to be deliberated.

- (i) First, a bare reading of Section 26(8) of the Competition Act indicates that if the DG report finds a contravention, the only recourse for the CCI is further inquiry. It does not expressly empower the CCI to pass an order to close the case if the CCI disagrees with the findings of the DG report. Similarly, when the DG report finds no contravention and post consideration of objections or suggestions of parties, the CCI is of the opinion that further investigation is required, it may direct further investigation or cause further inquiry under Section 26(7) of the Competition Act. However, a bare reading of this provision indicates that Section 26(7) of the Act does not empower the CCI to pass a final order post such investigation or inquiry.
- (ii) Second, the Committee deliberated on the power of the CCI to pass orders for closure of a case where the information or reference that is raised under Section 19 is on the same facts/issues which has already been decided by CCI and in respect of which a final order has been passed.
- (iii) Third, the Committee discussed the scope and ability of the CCI to club cases for the DG to investigate, where an infringement occurs not just from an isolated act, but owing to a series of acts or from continuous conduct, which has the same objective of distorting competition in the market. This is typically seen to occur in complex cartel arrangements.
- (iv) Fourth, it was pointed out that presently there is no mandatory requirement for providing an opportunity of hearing to the opposite

parties, before the CCI passes an order under Section 26(7) or Section 26(8) of the Competition Act.

- (v) Fifth, it was pointed out to the Committee that even before the CCI forwards the DG report to the relevant parties under Section 26(4), the CCI in practice sometimes directs the DG for supplementary investigation where it finds that the report may be deficient in certain aspects. At present, there is no express enabling provision in the Competition Act that empowers the CCI to order such supplementary investigation by the DG at this stage. The only exception to this is Section 26(7), where the CCI may direct further investigation by the DG post consideration of objections or suggestions of parties to the report of the DG.

- 2.3 The Committee noted that Section 26 is critical to the enforcement of Section 3 and Section 4. With more than a decade since the coming into force of Section 26, jurisprudence and processes in relation to Section 26 have evolved and accordingly, the Committee felt that at this juncture it may not be appropriate to rewrite the scheme of Section 26. However, the Committee agreed that to the extent any enforcement gap has been noted, the same should be addressed. In this regard, the Committee deliberated on the specific issues discussed above.
- 2.4 The Committee discussed if the Competition Act should be amended to expressly empower the CCI to pass orders for closure of certain cases, the facts and issues of which have been finally decided by the CCI and in respect of which a final order has been passed. It was felt that such a provision may be necessary in the interests of expedience and also to avoid repetition of effort in the conduct of inquiry and investigation by the DG and CCI. **The Committee recommended that the procedure under Section 26 of the Act should be amended to expressly enable the CCI to pass orders for closure of cases where the information or reference that is received pertains to the same or substantially the same facts/issues as have already been decided by CCI and in respect of which a final order has been passed by the CCI.**
- 2.5 The Committee then discussed the ability of the CCI to pass orders to club cases involving infringements resulting not just from an isolated act, but also from a series of acts or continuous conduct, typically in complex cartel arrangements that together distort competition in the market. It was pointed out to the Committee that currently as per the proviso to Section 26(1), the CCI (at the stage of forming a *prima facie* opinion), can club any new information along with any previously received information, where in the opinion of the CCI, the subject matter of information received is substantially the same, or has been

covered by any previously received information.<sup>204</sup> Thus, it was noted that the CCI can club several cases at the stage of forming a *prima facie* opinion and direct the DG to investigate continued conduct or even single, isolated actions that may together point to anti-competitive conduct.

- 2.6 The Committee also discussed the enforcement gap with respect to Section 26(7) and Section 26(8) of the Competition Act. It was brought to the attention of the Committee that a plain reading of Section 26(8), which does not empower the CCI to pass any order in cases where the DG report recommends a contravention of the Competition Act, may create an impression that the CCI cannot disagree with the recommendations of the DG, which is not correct. The CCI must independently apply its judicial mind to the report before passing any order under the Competition Act and the CCI is not bound by the findings of the investigation authority i.e. the DG. Similarly, a bare reading suggests that Section 26(7) does not explicitly empower the CCI to pass appropriate final orders post investigation. **Therefore, with a view to clarifying the existing position of law, the Committee agreed that Section 26(7) and Section 26(8) should be amended to clarify that the CCI is empowered to pass appropriate orders.**
- 2.7 A corresponding issue which was brought up is that currently the CCI is not expressly mandated to provide an opportunity of hearing to parties before passing orders under Section 26(7) and Section 26(8) of the Competition Act. While the Committee noted that in the discharge of its functions, the CCI must be guided by principles of natural justice as per the provisions of the Competition Act, it may be prudent to clarify this in Section 26(7) and Section 26(8).<sup>205</sup> The Supreme Court has also recognised that parties must be provided an opportunity of hearing before orders are passed under Section 26(7) and Section 26(8) of the Competition Act.<sup>206</sup> **Therefore, the Committee agreed that Section 26(7) and Section 26(8) of the Competition Act may be amended to expressly clarify that prior to issuance of any orders parties must be provided**

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<sup>204</sup> For instance, in *India Glycols Ltd. & Ors. V. India Sugar Mills Association & Ors.* (CCI order dated 18.09.2018 in Case nos. 21, 29, 36, 47, 48 & 49 of 2013), the CCI clubbed as many as six cases against several parties that were involved in similar issues and allegations of bid rigging.

<sup>205</sup> Competition Act, Section 26.

<sup>206</sup> *CCI v Steel Authority of India Ltd.* (2010) 10 SCC 744. The Hon'ble Court observed that: "*when the Commission receives the report from the Director General and if it has not already taken a decision to close the case under Section 26(2), the Commission is not only expected to forward the copy of the report, issue notice, invite objections or suggestions from the informant, Central Government, State Government, Statutory Authorities or the parties concerned, but also to provide an opportunity of hearing to the parties before arriving at any final conclusion under Section 26(7) or 26(8) of the Act, as the case may be.*"

**with an opportunity of hearing subject to strict timelines for conclusion of such hearing.**

- 2.8 The Committee also deliberated if orders passed under Section 26(7) and Section 26(8) should be made appealable. Currently, under Section 53A, only orders passed under Section 26(2) and Section 26(6) are appealable. Given that closure orders under Section 26(2) and Section 26(6) are made appealable, there appears to be no rationale why final orders under Section 26(7) and Section 26(8) should not be made appealable under Section 53A. **Accordingly, the Committee recommended that Section 53A of the Competition Act should be amended to expressly refer to Section 26(7) and Section 26(8) of the Act, so that the orders passed therein are made appealable.**
- 2.9 While Section 26(7) of the Competition Act empowers the CCI to direct supplementary investigation after consideration of objections or suggestions of the concerned parties on the DG report, Section 26 is silent on the power of the CCI to direct supplementary investigation prior to forwarding of the DG report to parties concerned. **Accordingly, in the interest of providing clarity, the Committee recommended that if upon receipt of the DG report under Section 26(3), the CCI is of the opinion that further investigation is necessary, Section 26 may be amended to specifically empower the CCI to direct DG to conduct supplementary investigation at this stage as well.**

*Issuance of show cause notice*

- 2.10 At present, once the DG has conducted investigation upon the CCI's finding of a *prima facie* case, it submits the report to the CCI, which may be then forwarded to the parties concerned in terms of Section 26(4) of the Competition Act. The Committee considered if a show-cause notice ("SCN") should be issued to parties in addition to the DG report. The Committee noted that in India, most other regulators such as the SEBI<sup>207</sup> and the IBBI<sup>208</sup> provide parties with an SCN prior to initiating adjudication proceedings. In other jurisdictions such as in the UK<sup>209</sup> and in Singapore,<sup>210</sup> parties are provided with an opportunity of hearing, through notice, before arriving at a decision regarding contravention.

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<sup>207</sup> SEBI (Procedure for Holding Enquiry by Enquiry Officer and Imposing Penalty) Regulations, 2002. Regulation 13(2).

<sup>208</sup> IBC, Section 219.

<sup>209</sup> UK Competition Act, Section 31(2).

<sup>210</sup> Competition Act, 2006, Section 68(1).

- 2.11 **Against this background and with a view to further ensuring transparency and predictability in the inquiry procedure under Section 26 of the Competition Act, the Committee recommended that after the objections of parties to the DG's report are received, as maybe applicable, a statement of charges shall be framed and provided in an SCN that will be issued to the concerned parties.**

### **3. IMPOSITION OF PENALTY**

#### *Relevant Turnover*

- 3.1. Pursuant to an inquiry under Section 26 of the Competition Act, upon finding a contravention of Section 3 or Section 4 of the Act, the CCI is empowered to pass appropriate orders under Section 27 of the Act including orders imposing penalty. The CCI may impose a penalty of up to 10% of the average turnover for the preceding three financial years on every person or enterprise which is a party to an anti-competitive agreement or abuse. In case of cartels under Section 3(3), the CCI may impose upon each producer, seller, distributor, trader or service provider included in the cartel, a penalty of up to three times of its profits for each year of the continuance of such agreement or 10% of its turnover for each year of the continuance of such agreement, whichever is higher.<sup>211</sup> Turnover has been defined under the Act to include value of sale of goods and services.<sup>212</sup>
- 3.2. In *Excel Crop Care Ltd. v. CCI & Ors.*,<sup>213</sup> a question arose before the Supreme Court as to whether penalty under Section 27(b) of the Competition Act has to be on 'total turnover' of the company covering all its products or if it is relatable to the 'relevant turnover' i.e. relating to the product in question in respect of which the provision of the Act was contravened. The Court held that adopting the criteria of 'relevant turnover' for the purpose of imposition of penalty will be more in tune with the ethos of the Act. The Court noted that when the agreement leading to contravention of Section 3 of the Competition Act involves one product, there appears to be no justification for including other products of an enterprise for the purpose of imposing penalty. The Court also held that such an interpretation is in line with the doctrine of proportionality.

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<sup>211</sup> Competition Act, Section 27(b).

<sup>212</sup> Competition Act, Section 2(y).

<sup>213</sup> (2017) 8 SCC 47.

- 3.3. Notably, while arriving at the aforesaid decision, the Supreme Court took note of the guidelines issued by the EC<sup>214</sup> and the guidance issued by the OFT<sup>215</sup> on the computation of penalty and case laws in other jurisdictions.<sup>216</sup> In his concurring judgment, Hon'ble Justice N.V. Ramana after perusing international guidance and case law observed that interpretation of Section 27(b) of the Competition Act requires a fresh indigenous consideration rather than reliance on foreign jurisprudence. Accordingly, he set out a two-step method of calculation for imposing penalty under Section 27(b): (a) determination of relevant turnover i.e. the entity's turnover pertaining to products and services that have been affected by such contravention; and (b) determination of appropriate percentage of penalty based on aggravating and mitigating circumstances.
- 3.4. The Committee took note of the aforesaid judgment of the Supreme Court and deliberated if the term 'turnover' in Section 27(b) of the Competition Act should be substituted with the term 'relevant turnover'. The Committee's attention was drawn to certain issues which needs to be considered prior to making such an amendment. For instance, reference to only 'relevant turnover' in Section 27(b) may result in no penalties being imposed on 'hubs' in case of a hub and spoke cartel, where the hub is not engaged in the same line of business as the spokes. Accordingly, in such a case, the hub may not have any direct income / turnover from the product which is the subject matter of the cartel allegation. Similarly, it was also discussed that such an amendment may result in no penalties being imposed on potential competitors and fail to cover bidders not engaged in the same line of business. In this regard, the Committee's attention was drawn to the recent decision of the CCI in *Nagrik Chetna Manch*<sup>217</sup> which pertained to infringement of Section 3(3)(d) of the Competition Act (collusive bidding). In this case, certain opposite parties were not engaged in the business

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<sup>214</sup> EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29>> accessed 09 May 2019.

<sup>215</sup> OFT, Guidance as to the appropriate amount of a penalty, 'OFT423' (September 2012) <<https://assets.publishing.service.gov.uk/media/555de4cded915d7ae2000171/oft423.pdf>> accessed 09 May 2019. Please note that currently the CMA regulates the competition law regime in the UK and this guidance has been replaced by the CMA, CMA's guidance as to the appropriate amount of a penalty (18 April 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/700576/final\\_guidance\\_penalties.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf)> accessed 09 May 2019.

<sup>216</sup> Judgment of the Competition Appeal Court of South Africa in *Southern Pipeline Contractors v. Competition Commission* 2011 SCCOnline ZACAC 5.

<sup>217</sup> *Nagrik Chetna Manch v Fortified Security Solutions & Ors*. CCI Order dated 1.05.2015 in Case no. 50 of 2015.



/ trade which was the subject matter of contravention. However, they had falsely represented themselves to be manufacturers in that line of business and indulged in bid rigging by putting a false bid to assist another enterprise. Citing the decision of the Supreme Court in *Excel Crop* case, these parties argued that no penalty should be imposed on them as they do not have any 'relevant turnover'. However, the CCI rejected the contention, distinguished the case from *Excel Crop* and held that imposition of penalty on the basis of relevant turnover in this case would imply that no penalty would be leviable on several opposite parties who have contravened the provisions of the Competition Act, thereby defeating the objective of the Act.

- 3.5. The Committee took note of these concerns and discussed if making an express amendment in the Competition Act to substitute the word 'turnover' with 'relevant turnover' will reduce the deterrent effect of Section 27 and may be misused by parties to defeat the objective of the Act. In this regard, the Committee discussed the position in other jurisdictions. In the EU, the EC regulation has empowered EC to impose fines on undertaking for procedural and substantive infringements.<sup>218</sup> For substantive infringements, EC may impose fines on the total turnover or worldwide turnover of the undertaking, as the case maybe.<sup>219</sup> While the EC enjoys a wide margin of appreciation when determining the level of fine, guidelines have been issued on the method of setting fines.<sup>220</sup> These guidelines propose a two step-methodology when setting fines - determination of basic amount of the fine and the adjustments to the basic amount.<sup>221</sup> Notably, the basic amount is computed with reference to the value of the sales of the goods or services to which the infringement directly or indirectly relates, subject to the cap as set out in the regulations.<sup>222</sup> In the UK, the UK Competition Act provides that penalties for contraventions may not

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<sup>218</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 23; David Whish and Richard Bailey, *Competition Law* (9th edn., Oxford University Press, 2018), p. 285.

<sup>219</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 23(2).

<sup>220</sup> EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29>> accessed 10 July 2019.

<sup>221</sup> David Whish and Richard Bailey, *Competition Law* (9th edn., Oxford University Press, 2018), p. 286-287.

<sup>222</sup> EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29>> accessed 10 July 2019, paras 12-16.

exceed 10% of an undertaking's turnover.<sup>223</sup> As per the penalty guidance issued by CMA ("CMA Penalty Guidance"),<sup>224</sup> the starting point for determining the level of penalty to be imposed on an undertaking should have regard to the relevant turnover of the undertaking. In Singapore, the Singapore Competition Act refers to turnover of the undertaking (as opposed to relevant turnover) for the purpose of determination of penalty.<sup>225</sup> In line with the EU and UK, the penalty guidelines issued by the CCCS<sup>226</sup> clarifies that the calculation of the base penalty is linked to the turnover of the business of the undertaking in Singapore for the relevant product and relevant geographic markets affected by the infringement in the undertaking's last business year. A similar approach is also seen in Germany where the parent statute<sup>227</sup> does not refer to relevant turnover, but it is recognised in the penalty guidelines.<sup>228</sup>

- 3.6. The Committee noted that the parent statutes / legal framework in the jurisdictions discussed above do not cap penalty at the relevant turnover of the undertaking / enterprise concerned. Rather, the concept of relevant turnover has been introduced through penalty guidance/guidelines and is typically used as a starting point for computation of penalty, with total turnover being used as a basis for capping the penalty. **Therefore, the Committee recommended that while the concept of 'relevant turnover' should be given due regard to while computing the quantum of penalty under Section 27 of the Competition Act, in light of the precedents discussed above and the concerns as discussed in paragraph 3.4 above, Section 27 need not be amended to expressly substitute the word 'turnover' with 'relevant turnover'. Rather, the Committee agreed that the CCI should issue penalty guidance which brings in the concept of 'relevant turnover' that should be considered by CCI as a starting point for computation of the penalty. The Committee further stressed that in line with the judgment of the Supreme Court in *Excel***

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<sup>223</sup> UK Competition Act, Section 36(8).

<sup>224</sup> CMA, 'CMA's guidance as to the appropriate amount of a penalty' (18 April 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/700576/final\\_guidance\\_penalties.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/700576/final_guidance_penalties.pdf)> accessed 09 May 2019.

<sup>225</sup> Singapore Competition Act, Section 69(4).

<sup>226</sup> CCCS, 'CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016' (2016), <<https://www.ccs.gov.sg/legislation/competition-act>> accessed 10 July 2019.

<sup>227</sup> Act against Restraints of Competition, Section 81.

<sup>228</sup> Bundeskartellamt, 'Guidelines for the setting of fines in cartel administrative offence proceedings', (25 June 2013), <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?\\_\\_blob=publicationFile&v=3](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitlinien/Guidelines%20for%20the%20setting%20of%20fines.pdf?__blob=publicationFile&v=3)>, accessed 10 July 2019.

***Crop* case, the CCI should follow the doctrine of proportionality while determining the quantum of penalty. The Committee agreed that such an approach will maintain the deterrent effect of Section 27 and not expose it to being abused by parties and at the same time will ensure that there are sufficient checks on the CCI's power to impose penalties.**

#### *Penalty Guidance*

- 3.7. Globally, it is common for competition law regulators to issue guidance notes on the interpretation of certain aspects of the competition law. Notably, the Raghavan Committee Report also stressed on the importance of guidance and recommended that:<sup>229</sup>

*“Parties subject to Competition Law, should be helped to comply with it and to plan their activities accordingly. Much of this assistance could come through the publication of enforcement guidelines articulating how the CCI will interpret and apply the law.”*

- 3.8. The Committee noted that the CCI has so far issued only one guidance note on non-compete restrictions.<sup>230</sup> The Committee deliberated that such guidance assumes much significance in the context of imposition of penalties, as was also noted by the Supreme Court in the *Excel Crop* case. In the instant case, the Supreme Court noted that other jurisdictions (like the EU or the UK) have issued penalty guidelines/guidances which ensure that the penalty imposed does not become disproportionate. Contrary to this, the Court noted that there are no similar guidelines in India, and in absence thereof, imposition of penalty on total turnover may bring disastrous results.
- 3.9. The Committee took note of the position in other jurisdictions with respect to issuance of penalty guidance. In the UK, the CMA is mandated to prepare and publish guidance as to the appropriate amount of a penalty.<sup>231</sup> Further, the CMA is under a statutory obligation to have regard to the guidance when setting the amount of penalty to be imposed.<sup>232</sup> Pursuant to this, the CMA has

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<sup>229</sup> Raghavan Committee Report, (2000) <[https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)> accessed 09 May 2019.

<sup>230</sup> CCI, 'Guidance on Non-Compete Restrictions' <[https://www.cci.gov.in/sites/default/files/Non-Compete/Guidance\\_Note.pdf](https://www.cci.gov.in/sites/default/files/Non-Compete/Guidance_Note.pdf)> accessed 09 May 2019.

<sup>231</sup> UK Competition Act, S. 38(1)

<sup>232</sup> UK Competition Act, S. 38(8)

issued the CMA Penalty Guidance that *inter-alia* sets out the basis on which the CMA will calculate penalties for infringements of the UK Competition Act. The CMA Penalty Guidance sets out a six-step approach for computation of penalties.

3.10. Notably, the competition law of Singapore and South Africa expressly empower the respective competition regulators to issue guidelines.<sup>233</sup> Accordingly, the EC,<sup>234</sup> CCCS<sup>235</sup> and Competition Commission of South Africa<sup>236</sup> have issued guidelines for determining penalties imposed under their respective laws.

3.11. The Committee deliberated on the issuance of penalty guidance by the CCI. While the primary objective of penalties as envisaged under the Competition Act is deterrence, the Committee recognised that it is important to ensure that penalties imposed on enterprises are proportionate and not excessive. It was noted that the rate of realisation of penalties imposed by the CCI is quite low.<sup>237</sup> The Committee observed that the CCI has attributed the low rate of recovery *inter alia* to the fact that several of its orders are appealed before the NCLAT and the Supreme Court, or challenged in writ proceedings before High Courts.<sup>238</sup> The Committee discussed that one of the causes for protracted litigation on penalties is imposition of penalties that seem disproportionate in the absence of clear guidance on computation of penalties. Accordingly, the Committee felt that there is a need for a framework that will guide the

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<sup>233</sup> Singapore Competition Act, S. 61 and South Africa Competition Act, S. 79

<sup>234</sup> European Commission, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) <<https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52006XC0901%2801%29>> accessed 09 May 2019

<sup>235</sup> CCCS, 'CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016' <<https://www.cccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-appropriate-amount-of-penalty-in-competition-cases-2016.pdf?la=en&hash=8D88F4ACEB53FBE3E65FCF6CC2A09D29C8AE1F58>> accessed 09 May 2019

<sup>236</sup> Competition Commission of South Africa, 'Guidelines for the Determination of Administrative Penalties for Prohibited Practices' (1 May 2015) <<http://www.compcom.co.za/wp-content/uploads/2015/01/Final-Guidelines-for-Determination-of-Admin-Penalties-MAY-2015.pdf>> accessed 09 May 2019

<sup>237</sup> In terms of the CCI Annual Report 2016-17 at pg. 18, out of Rs. 13,087.23 Crore penalty imposition, net penalty realization was only Rs. 43.07 Crore. See <[https://www.cci.gov.in/sites/default/files/annual%20reports/CCI\\_AR-2016-17\\_English.pdf](https://www.cci.gov.in/sites/default/files/annual%20reports/CCI_AR-2016-17_English.pdf)> accessed 22 July 2019. Similarly, in terms of the CCI Annual Report 2017-18 at pg. 21, out of Rs. 13,523.88 Crore penalty imposition, net penalty realisation was only Rs. 54.46 Crores. See <<https://www.cci.gov.in/sites/default/files/annual%20reports/AnnualReportEnglish2017-18.pdf>> accessed 22 July 2019.

<sup>238</sup> *Ibid.*

computation of penalties under the Competition Act. This will be an effective way to reduce discretion and increase certainty for stakeholders.

- 3.12. **In light of this, the Committee recommended that the CCI should be mandated to issue guidance on imposition and computation of penalties under the Competition Act. Further, the law should specify that the CCI shall consider such guidance while passing any order imposing penalty and the CCI should provide reasonable grounds for any derogation from such guidance.**

*Include Reference to 'income' in Section 27*

- 3.13. Currently, Section 27 of the Competition Act only refers to 'turnover' for the purposes of computation of penalty. It was brought to the attention of the Committee that the term 'enterprise' as defined under the Act also includes proprietorships and individuals, who do not have any turnover, but only income. Given that such proprietorships and individuals may also be found to be in contravention of the Act under Section 27, there is a need to add the word 'income' to indicate that in such cases, the penalty will be based on the income. **In this regard, it was agreed that Section 27 of the Competition Act should be amended to specifically refer to 'income' along with the word 'turnover'.**

*Separate Penalty Hearing*

- 3.14. Currently, the Competition Act does not mandate the CCI to provide a separate penalty hearing and the CCI hears the parties on merits and penalties together. In this regard, a concern that was flagged before the Committee was that parties may not get adequate opportunity to be heard on penalties, including on mitigating and aggravating factors. Accordingly, the Committee considered whether a separate hearing should be provided to the parties before the CCI passes its orders on penalties.
- 3.15. Notably, the Delhi High Court in *Mahindra & Mahindra Ltd. v. Competition Commission of India*<sup>239</sup> dealt with a similar issue where the petitioner alleged that Section 27(b) of the Competition Act is unconstitutional *inter-alia* on the ground that no separate penalty hearing is provided under the provision. After reviewing the procedure for conducting investigation, inquiry and passing of final orders under the Competition Act, the High Court held that the absence of a second specific hearing before imposition of a penalty under Section 27(b)

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<sup>239</sup> Decision dated 10 April 2019 in W.P. (C) 6610/2014.

does not expose the provision to the vice of arbitrariness and unconstitutionality. The Court observed that:

*“197. If these considerations are kept in mind, the fact that certain types of penalties (which are pre-determined quantum for specific violations of the Act) elicit show cause notice as prelude to penalty on the one hand, and absence of any compulsion to issue a separate show cause notice preceding a penalty under Section 27(b) (although a show cause notice and full hearing is provided with opportunity to submit against the report of DG) does not in the opinion of this Court, render that provision arbitrary.*

*198. The court is cognizant of the fact that there are several adjudications - quasi judicial and by judicial tribunals, which envision a “rolled up” hearing which visualizes only one show cause notice - that can culminate in both an adverse finding and a consequential penalty.”*

3.16. In the instant case, the Delhi High Court analysed the procedure adopted by the CCI and held that this procedure gives sufficient safeguard to parties likely to be affected adversely, both as regards findings and sanctions. The Court observed that:

*“However, a deeper analysis of the nature of the proceeding before the CCI would reveal that the procedure it adopts- and is required to adopt gives sufficient safeguard to parties likely to be affected adversely, both as regards findings and the sanctions. The first step, of course, is to decide whether to issue notice. Excel Crop Care (supra) and the later decisions have now held conclusively that this step is administrative and does not contemplate any prior notice or hearing to the opposite parties. The next stage is investigation by the DG. At this stage, the parties – whenever needed – receive notice and opportunity; if it is denied, they can seek directions to the DG from the CCI. This stage includes evidence gathering and wherever necessary, cross-examination on behalf of one or more individuals, before the DG- and later, before the CCI, if the complaint is that cross-examination is not granted. The next stage is the report of the DG, which is shared by the parties, who then make their comments, and are granted full opportunity of hearing. This step is very significant, because when the parties do address the CCI and submit their contentions, they have foreknowledge of all the materials, including adverse materials and comments made in the DG’s report. This stage is a “full blown” hearing, when the parties know and have a fair awareness of the range of options available with the CCI in terms of both findings and the sanctions (such as orders enjoining some activity, or requiring positive steps*

*to be taken). This forewarning, as it were, and the statutory cap (of not more than 10 percent) is a broad guideline within which both CCI and the parties before it, operate."*

- 3.17. Against this background, the Committee deliberated on the need to have a separate hearing over and above the hearing as is contemplated under the Competition Act. While the Committee noted that such a separate notice / hearing is provided for in the EU and the UK, it felt that the procedure as envisaged under the Competition Act currently provides a fair opportunity of hearing to parties against whom an order of penalty is passed. This has also been confirmed by the Delhi High Court in the *Mahindra* case, as discussed above. Further, the Committee felt that its recommendation regarding mandatory requirement for the CCI to issue penalty guidance along with reasons in case of deviation from the guidance will add another layer of safeguard to the already existing process that has been upheld by the Delhi High Court to be constitutionally valid. **On the basis of this and in light of the observations of the Delhi High Court as discussed above, the Committee felt that a separate penalty hearing may not be recommended.**

#### *Quantum of Penalty for individuals*

- 3.18. Currently, the Competition Act does not provide any mechanism or quantum of penalty that may be imposed on individuals. In the absence of any guidance, it was pointed out to the Committee that the CCI has been using the same standard as used for enterprises under Section 27 for the purpose of imposing penalties on individuals i.e. imposition of penalty up to 10% of the average income for the past three years of the individual.
- 3.19. **The Committee deliberated on these issues and recommended that unless otherwise stated in the Competition Act, a provision should be introduced to reflect the quantum of penalty that may be imposed on individuals for the purposes of the contraventions of the Competition Act. The Committee recommended that unless otherwise stated in the Competition Act, such a provision should specify that in case of a contravention of the provisions of the Competition Act, in terms of Section 48, the concerned individual will be liable to a penalty of up to 10% of the average income for the last three preceding financial years. However, for any contravention relating to cartels, the amount of penalty that may be imposed should be up to 10% of the income of each year of the continuance of the cartel.**

#### **4. REVIEWING THE STANDARD OF EXTRA-TERRITORIAL JURISDICTION**

- 4.1. Section 32 of the Competition Act confers extra-territorial jurisdiction on the CCI. As per this provision, the CCI has the power to inquire into any anticompetitive agreement, abuse of dominance or combination, regardless of whether the conduct has taken place outside India or the party is outside India. The necessary standard for exercising this extra-territorial jurisdiction is that the conduct causes or is likely to cause an AAEC in the relevant market in India.
- 4.2. It was brought to the notice of the Committee that the provision does not expressly clarify whether a *prima facie* view is enough for the CCI to initiate an inquiry in cases referred to in Section 32 or whether the CCI must make a final determination of AAEC, the latter being a higher threshold for the CCI to commence an inquiry. Accordingly, the Committee deliberated if Section 32 should be amended to clarify that the CCI should be able to initiate an inquiry in respect of issues referred to in Section 32 if the CCI is satisfied that there is a *prima facie* case.
- 4.3. **Based on a literal interpretation of Section 32, the Committee agreed that it only confers extra-territorial jurisdiction on the CCI and the inquiry procedure will still be governed by the procedure as set out in Section 26 and Section 29 of Competition Act (which refers to a *prima facie* view of the CCI). In light of this and in the absence of any enforcement gap experienced by the CCI, the Committee agreed that Section 32 may not be amended.**

## 5. INTERIM ORDERS

- 5.1. Section 33 of the Competition Act empowers the CCI to pass interim orders during an inquiry. Such an order may be passed by the CCI when it is 'satisfied' that an act in contravention of Section 3(1), Section 4(1) or Section 6 of the Competition Act has been committed and continues to be committed or that such act is about to be committed. Pursuant to such orders, the CCI may temporarily restrain any concerned party from carrying on such act until the conclusion of the inquiry.
- 5.2. The Supreme Court in the *SAIL* case while reviewing the power to grant interim relief by the CCI observed that:

*"This power has to be exercised by the Commission sparingly and under compelling and exceptional circumstances. The Commission, while recording a reasoned order, inter alia, should: (a) record its satisfaction (which has to be of much higher degree than formation of a prima facie view under Section 26(1) of the Act) in clear terms that an act in contravention of the stated*



*provisions has been committed and continues to be committed or is about to be committed; (b) it is necessary to issue order of restraint and (c) from the record before the Commission, there is every likelihood that the party to the lis would suffer irreparable and irretrievable damage, or there is definite apprehension that it would have adverse effect on competition in the market.”*  
(emphasis supplied)

- 5.3. It was brought to the notice of the Committee that currently interim orders under Section 33 are passed by the CCI *inter-alia* when the CCI is ‘satisfied’ that conduct contravening the provisions of the Competition Act has been committed. The Committee considered if there is a need to revise the standard by using a ‘*prima facie*’ standard as opposed to the ‘satisfaction’ standard currently provided under Section 33 of the Competition Act.
- 5.4. The Committee noted that the principles of granting orders for interim relief have been settled by way of judicial precedents. While such cases do not particularly deal with the power to grant interim relief under the Competition Act, principles enunciated by courts of law may be relevant to the discussion here. While the Courts have noted that *prima facie* case is a factor for granting interim relief or interlocutory injunction, it is not the only factor. Other factors like balance of convenience, prevention of irreparable injury, etc. must also be considered.<sup>240</sup> In fact, the Committee noted that in certain cases, the court has cautioned stating that *prima facie* case is not the deciding factor for granting interim orders.<sup>241</sup>
- 5.5. **In light of the aforesaid discussion, the Committee recommended that Section 33 should not be amended to dilute the existing ‘satisfaction’ threshold to a ‘*prima facie*’ threshold since there are several factors that the CCI should consider before passing an interim order. The Committee also recommended that, in passing such interim orders, the CCI should consider the principles of granting interim relief as evolved by judicial precedents (to the extent applicable to the CCI). It was further recommended that the time period for which the interim order will be in operation should also be specified in the order.**

## **6. REINTRODUCING THE POWER OF REVIEW**

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<sup>240</sup> *Gujarat Bottling Co. Ltd. & Ors. v. Coca Cola Company & Ors.* (1995) 5 SCC 5 45; *Dorab Cawasji Warden v. Coomi Sorab Warden & Ors.* (1990) 2 SCC 117; *Morgan Stanley Mutual Fund & Ors. V. Kartick Das & Ors.* (1994) 4 SCC 225.

<sup>241</sup> *Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Ltd. & Ors.* (1985) 1 SCC 260.

- 6.1. Prior to the Competition (Amendment) Act, 2007 ("**2007 Amendment Act**"), Section 37 of the Competition Act conferred the power of review to the CCI. The CCI could exercise such power in respect of orders from which an appeal was allowed, but no appeal was preferred. Notably, Section 37 was omitted by the 2007 Amendment Act. However, under Section 38 of the Competition Act, the CCI has been empowered to pass rectification orders to amend its orders to rectify any mistake apparent from the record.
- 6.2. In 2015, a Single Bench of the Delhi High Court held that the CCI has the power to review or recall its order passed under Section 26(1) of the Competition Act subject to certain parameters discussed in the judgment.<sup>242</sup> However, in 2018, a Division Bench of the Delhi High Court expressed 'misgivings' about the earlier judgment for the reason that the substantive review power which vested with the CCI earlier, was repealed. The Court observed that a "*cardinal rule of interpretation is that the power of review is expressly granted.*"
- 6.3. It was brought to the notice of the Committee that in absence of a review power being conferred on the CCI, parties often have to resort to writ jurisdiction of the High Court to correct certain procedure adopted by the CCI, such as relying on allegedly forged documents in the DG Report. Given that the power of review has to be expressly conferred by a statute, the Committee deliberated if Section 37 of the Competition Act should be reinstated. It was noted that the NCLAT also does not have any statutorily conferred power of review. However, the powers of other regulators like the SEBI, National Consumer Disputes Redressal Commission ("**NCDRC**"), CERC, Airports Economic & Regulatory Authority of India, IBBI, IRDAI and PFRDA were also assessed in this regard. The Committee noted that power of review as originally envisaged under Section 37 of the Competition Act has not been conferred on such regulators. While certain regulators like the CERC<sup>243</sup> and the NCDRC<sup>244</sup> have been conferred with what is referred to in their respective enactments as the power to 'review', in effect this power is limited to correction of any mistake

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<sup>242</sup> LPA No.733/2014, Delhi High Court, Order dated 27 April 2015.

<sup>243</sup> Electricity Act, 2003. Section 94(1)(f).

<sup>244</sup> Consumer Protection Act Section 22. In terms of Section 22 of the Consumer Protection Act, only the NCDRC has the power to "review" any order made by it, when there is an error apparent on the face of record and also to set aside and review ex-parte orders by consumers' forums at any and all levels. The NCDRC can do so without any requirement of an oral hearing, in terms of Regulation 15(1) of the Consumer Protection Regulations, 2005.

apparent on the face of the record and cannot extend to assessing any new evidence, or addressing any misconception.<sup>245</sup> In this sense, it is closer to the power of rectification of orders which is currently enjoyed by the CCI under Section 38 of the Competition Act.

- 6.4. **Against this background and in view of the express legislative intent to withdraw such power of review from the CCI, the Committee felt that it will not be prudent to confer such power of review on the CCI again. Further, the absence of such power does not render parties remediless. Accordingly, the Committee recommended that power of review should not be conferred on the CCI.**

## **7. ALLOWING THE APPEARANCE OF EXPERTS**

- 7.1. Section 35 of the Competition Act permits a person or an enterprise or the DG to either appear in person or authorise a chartered accountant, company secretary, cost accountant or legal practitioner or any of her or its officers to present her or its case before the CCI.
- 7.2. The Committee noted that currently Section 35 does not permit other experts from the fields of economics, commerce, international trade or from any other discipline, not being officers of the enterprise to appear before the CCI. **Given that the presence of such domain expertise may be integral to undertake assessment under the Competition Act, especially in the context of AAEC analysis, the Committee recommended that Section 35 be amended to expressly allow a person, enterprise or the DG to call upon experts from the fields of economics, commerce, and international trade or from any other discipline.**

## **8. CLARIFYING THE POWERS OF THE DG UNDER SECTION 41**

- 8.1. The CCI is empowered to direct the DG to investigate into any contravention of the Competition Act or rules and regulations issued thereunder. In conducting such investigations, Section 41 of the Competition Act confers all powers of a civil court on the DG.<sup>246</sup> Further, the DG also has the same powers as available to an inspector under Section 240 and Section 240A of the Companies Act, 1956 ("CA 1956") (now, Section 217 and Section 220 of the Companies Act, 2013 ("CA 2013")).

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<sup>245</sup> The CERC, in Review Pet. No. 24/RP/2018 decided on 03.12.2018 has pointed out that the statutory power of review is limited to the correction of a mistake apparent on the face of the record and cannot be used to substitute the prior view of the Commission.

<sup>246</sup> The Competition Act, Section 41(2) read with Section 36(2).

- 8.2. The Competition Act currently does not contain a self-contained code setting out the powers of the DG during investigation, including powers of search and seizure and instead refers to provisions of the CA 1956. This is in contrast to the legal framework governing regulators like Registrar of Companies<sup>247</sup>, the IBBI<sup>248</sup> and the SEBI<sup>249</sup> where the power of the investigating authority is set out in the parent statute. Similarly, in the UK,<sup>250</sup> Singapore<sup>251</sup> and South Africa,<sup>252</sup> the powers of the investigating authority for enforcement of competition law are set out in the parent statute.
- 8.3. It was brought to the notice of the Committee that the reference to CA 1956 will now have to be read as reference to CA 2013 and its corresponding provisions. Under Section 240A of CA 1956, as currently referred to in Section 41 of the Competition Act, the inspector is required to obtain an authorisation from the Magistrate to seize documents. However, Section 220 of CA 2013 which corresponds to Section 240A of CA 1956 does not expressly refer to the requirement of such an authorisation. The Committee noted that with a view to providing procedural safeguards, the law should expressly mandate such authorisation from the Magistrate.
- 8.4. **The Committee believed that there is a need to ensure clarity of rules and processes and clear articulation of rights and obligations of business and officials in enforcement procedure. Accordingly, in line with best practices as discussed above and with a view to making the process transparent and certain, the Committee recommended that the powers of investigation of the DG, more particularly power of search and seizure should be codified in Section 41. Therefore, instead of referring to provisions of CA 1956 (or CA 2013), the provisions of Section 240 and Section 240A of CA 1956 (as reflected in Section 217 and Section 220 of CA 2013) should be codified in Section 41. Further, the Committee recommended that Section 41 should retain the requirement to obtain authorisation from the Chief Metropolitan Magistrate for conducting search and seizure.**

## 9. CONTRAVENTION OF ORDERS OF THE CCI

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<sup>247</sup> CA 2013, Section 209.

<sup>248</sup> IBC, Section 218.

<sup>249</sup> SEBI Act, Section 11C.

<sup>250</sup> UK Competition Act, Chapter III.

<sup>251</sup> Singapore Competition Act, 2004, Division 5.

<sup>252</sup> South Africa Competition Act, 1998, Part B.

- 9.1. Section 42(2) of the Competition Act empowers the CCI to impose penalty for non-compliance with its orders or directions issued under Section 27 (*Orders by Commission after inquiry into agreements or abuse of dominant position*), Section 28 (*Division of enterprise enjoying dominant position*), Section 31 (Orders of Commission on certain combinations), Section 32 (*Acts taking place outside India but having an effect on competition in India*), Section 33 (*Power to issue interim orders*), Section 42A (*Compensation in case of contravention of orders of Commission*) and Section 43A (*Power to impose penalty for non-furnishing of information on combinations*) of the Competition Act. Section 42(3) sets out criminal sanctions for non-compliance with the orders or directions or failure to pay the fine under Section 42(2) discussed above. Such a violation is punishable with imprisonment for a period which may extend to three years or with fine which may extend to INR 25,00,00,000, or with both, as the Chief Metropolitan Magistrate may deem fit.
- 9.2. The Committee noted that Section 42(2) does not refer to non-compliance with orders / directions passed under Section 43 (*Penalty for failure to comply with directions of Commission and Director-General*), Section 44 (*Penalty for making false statement or omission to furnish material information*) and Section 45 (*Penalty for offences in relation to furnishing of information*) of the Competition Act. Further, while criminal sanctions have been envisaged for non-compliance with payment of fine under Section 42(2), there is no provision for breach of orders passed by the CCI under Section 43, Section 44 and Section 45 of the Competition Act.
- 9.3. **In light of this and in the interest of furthering the deterrent effect of the provisions discussed above, the Committee recommended that Section 42(2) of the Competition Act should be amended to refer to Section 43, Section 44 and Section 45.**

## 10. AMENDMENTS TO FRAMEWORK FOR LESSER PENALTY

### *Leniency Plus*

- 10.1. Leniency programmes play an instrumental role in assisting competition authorities in detecting, investigating and prosecuting hard-core cartels.<sup>253</sup> In India, applications for leniency treatment or lesser penalty (as is known under

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<sup>253</sup> OECD, Policy Roundtables, 'Leniency for Subsequent Applicants', 2012 <<http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf>> accessed 20 May 2019.

the Competition Act) are governed by Section 46 of the Act read with the CCI (Lesser Penalty) Regulations, 2009 (“**Lesser Penalty Regulations**”). Under the existing framework, the CCI may impose a lesser penalty on a person involved in a cartel alleged to have violated Section 3 if such person has made a full and true disclosure in respect of alleged violations and such disclosure is vital.

10.2. Cartels are recognised as the most egregious violation of competition law<sup>254</sup> and accordingly, it has been the focus of competition enforcement.<sup>255</sup> It is undisputable that competition authorities face significant obstacles in detecting and prosecuting cartels since they operate under a cloak of secrecy. With a view to dealing with such challenges, most jurisdictions have developed leniency programmes.<sup>256</sup> While the Competition Act provides a framework for the CCI to deal with leniency / lesser penalty applications, it does not recognise leniency plus. Leniency Plus is a proactive antitrust enforcement strategy aimed at attracting leniency applications by encouraging companies already under investigation for one cartel to report other cartels unknown to the competition regulator.<sup>257</sup> Such disclosure will involve reduction of penalty in the first cartel to the person disclosing the information. Currently, leniency plus is recognised in jurisdictions like the UK,<sup>258</sup> the US,<sup>259</sup> Singapore<sup>260</sup> and Brazil.<sup>261</sup>

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<sup>254</sup>OECD, Policy Roundtables, ‘Leniency for Subsequent Applicants’, 2012. <<http://www.oecd.org/competition/Leniencyforsubsequentapplicants2012.pdf>>accessed 20 May 2019.

<sup>255</sup> OECD, ‘Recommendation of the OECD Council concerning Effective Action against Hard Core Cartels. 1998. <<http://www.oecd.org/daf/competition/2350130.pdf>> accessed 20 May 2019.

<sup>256</sup> OECD, Directorate for Financial and Enterprise Affairs Competition Committee, Working Party No. 03 on Co-operation and Enforcement. ‘Use of Markets in Leniency Programs’ 16 December 2014 DAF/COMP/WP3(2014)9<[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2014\)9&doclanguage=en](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2014)9&doclanguage=en)> accessed 20 May 2019.

<sup>257</sup> ICN, ‘Anti-Cartel Enforcement Manual’ April 2014. <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG\\_ACEMLeniency.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/CWG_ACEMLeniency.pdf)> accessed 20 May 2019.

<sup>258</sup> OFT, Applications for Leniency and No Action in Cartel Cases July 2013 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)> accessed 20 May 2019.

<sup>259</sup> US DoJ, ‘Frequently Asked Questions about the Antitrust Division’s Leniency Program and Model Leniency Letters’ (19 November 2008). <<https://www.justice.gov/atr/page/file/926521/download>> accessed 20 May 2019> accessed 19 May 2019.

<sup>260</sup> CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016.

<sup>261</sup>CADE, CADE’s Antitrust Leniency Program, Guidelines <<http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-leniency-program-final.pdf>> accessed 20 May 2019.

10.3. **The Committee deliberated on the introduction of a leniency plus regime in the Competition Act. It was discussed that such a framework may incentivise applicants to come forward with disclosures regarding multiple cartels, thereby enabling the CCI to save time and resources on cartels investigation. The Committee felt that the leniency plus regime will further facilitate the successful prosecution of cartel cases by providing the CCI with evidence of infringements of the Competition Act by cartels and will also be in line with international best practices. The Committee recommended that with a view to incentivising an applicant for disclosing other cartels, a penalty reduction should be given to a leniency plus applicant in the first cartel. This reduction will be over and above any other penalty reductions that such applicant may receive under the normal lesser penalty application framework.**

*Withdrawal of leniency applications*

10.4. Under the existing lesser penalty framework in the Competition Act, there is no provision enabling withdrawal of lesser penalty application. It was pointed out to the Committee that certain enterprises apply for a lesser penalty application at the beginning of discovery of internal documents. However, pursuant to a detailed investigation, the enterprise may learn that there has been no contravention of Section 3(3) of the Competition Act. It was further highlighted that at times purely commercial disputes may be raised in an application for lesser penalty. Accordingly, there was a need to consider if the Competition Act should have an enabling provision permitting withdrawal of lesser penalty applications. Notably, withdrawal of application for leniency is also permissible in jurisdictions such as the UK<sup>262</sup> and Brazil.<sup>263</sup>

10.5. In the context of withdrawal of application for lesser penalty, an issue that arose was whether information/evidence submitted by leniency applicant should be allowed to be relied on by the CCI for the purposes of prosecution under the Competition Act.

10.6. **The Committee recommended that Section 46 should be amended to enable an applicant of leniency to withdraw the application for leniency and the time period for allowing such withdrawal should be set out in the Lesser Penalty Regulations. On the issue of reliance on evidence / information**

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<sup>262</sup> OFT, Applications for Leniency and No Action in Cartel Cases July 2013 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/284417/OFT1495.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/284417/OFT1495.pdf)> accessed 20 May 2019.

<sup>263</sup> CADE, CADE's Antitrust Leniency Program, Guidelines <<http://en.cade.gov.br/topics/publications/guidelines/guidelines-cades-antitrust-lenieny-program-final.pdf>> accessed 20 May 2019.

submitted by such an applicant that withdraws its applications later, the Committee recommended that the CCI should be allowed to rely on the information submitted by the applicant in accordance with applicable laws.

## **11. REVIEWING THE COMPENSATION PROCESS**

11.1. Section 53N of the Competition Act deals with the power of the Appellate Tribunal (i.e. NCLAT) to adjudicate on claims of compensation. An application to adjudicate on claims for compensation that may arise from the findings of the CCI or orders of the Appellate Tribunal in an appeal against any finding of the CCI or Section 42A or under Section 53Q(2) of the Competition Act.

11.2. **The Committee noted that Section 53N currently does not allow application for compensation claims to be filed post determination of appeal by the Supreme Court. This may cause prejudice to the parties as they will be deprived from claiming any compensation, especially in cases where the CCI and the Appellate Tribunal do not find a contravention, but the Supreme Court finds a contravention. Therefore, the Committee recommended that Section 53N of the Competition Act should be amended to allow applications for compensation to be filed post determination of an appeal by the Supreme Court.**

## **12. GRANT OF CONFIDENTIALITY**

12.1. Section 57 of the Competition Act restricts disclosure of information relating to any information which has been obtained by or on behalf of the CCI or the Appellate Tribunal for the purposes of the Act without previous permission of the enterprise. Such information may be disclosed in compliance with or for the purposes of the Competition Act or any other law for the time being in force. The regulatory framework for parties making a request for granting confidentiality to the CCI or the DG in respect of a document(s) is set out in Regulation 35 of the General Regulations.

12.2. Pursuant to Regulation 35, on receipt of a request for grant of confidentiality, the CCI or the DG (as the case may be), if satisfied, direct that the document or part(s) of it should be kept confidential for a specific time period. The regulation also sets out the factors that the CCI or the DG may consider while arriving at a decision regarding confidentiality.<sup>264</sup> Notably, the CCI or the DG may reject

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<sup>264</sup> CCI General Regulations, Regulation 35(9).



the request and, in such cases, parties will be informed about the intention of CCI or DG.<sup>265</sup>

12.3. Confidentiality of commercially sensitive information of parties is critical to businesses. Keeping this in mind, Section 57 of the Competition Act read with Regulation 35 envisages a framework for protection of confidential information. Currently, the Competition Act does not expressly require the CCI to pass an order granting or rejecting applications for confidentiality and providing parties an opportunity of hearing before rejecting such application. Accordingly, it was deliberated if Section 57 of the Competition Act may be amended to require the CCI to pass an order granting or rejecting an order of confidentiality.

12.4. **The Committee discussed if Section 57 of the Competition Act should be amended to include a framework for passing orders for granting or rejecting requests for confidentiality. Based on a review of the General Regulations, the Committee noted that Regulation 35 of the General Regulations already sets out a detailed framework governing the confidentiality regime. Accordingly, the Committee observed that Section 57 of the Competition Act need not be amended at this stage.**

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<sup>265</sup> CCI General Regulations, Regulation 35(11).

## CHAPTER 6: UNILATERAL CONDUCT

### 1. BACKGROUND

- 1.1. Competition laws in various jurisdictions penalise anticompetitive unilateral conduct by entities which are dominant in a market or have substantial market power.<sup>266</sup> As per an ICN report on objectives of unilateral conduct laws, most member States have agreed that the key aim of unilateral conduct rules is to ensure an effective competitive process for players in the market.<sup>267</sup> Some other aims cited include enhancing efficiencies in the market, ensuring a level playing field for medium and small enterprises, promoting consumer welfare, safeguarding economic freedom, etc.
- 1.2. The law penalising unilateral conduct in India is laid down in Section 4 of the Competition Act and aims to punish certain conduct of dominant entities, and not dominance itself. Section 4 penalises abusive behaviour by a dominant enterprise or group. A three-step test has been devised to establish that an enterprise or group has undertaken prohibited conduct under this provision which includes analysing the relevant market, dominance, and abuse.<sup>268</sup> First, the relevant market in which the enterprise or group operates has to be determined. This includes an assessment of both the relevant product market and the relevant geographic market in which the entity conducts its operations. Second, it needs to be established that the enterprise or group is in a dominant position in the relevant market. In order to assess dominance, factors given in Section 19(4) of the Act are to be enquired into.
- 1.3. Once it is proven that the enterprise or group is in a dominant position in the relevant market, the third step is to be undertaken wherein it is analysed whether conduct of the enterprise or group amounts to 'abuse'. Section 4(2) of the Competition Act iterates an exhaustive list of various actions which shall amount to abuse if undertaken by a dominant enterprise or group. Based on this analysis, an enterprise or a group shall be liable under Section 4 only if the

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<sup>266</sup> ICN, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State-Created Monopolies' (May 2007) p.6 <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG\\_SR\\_Objectives.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_Objectives.pdf)> accessed 19 May 2019.

<sup>267</sup> *Ibid*, p. 8.

<sup>268</sup> *M/s Counfreedise through its Partner Mr. Sidharth M v. Timex Group India Limited*, CCI Order dated 14 August 2018 in Case No. 55 of 2017, para 12.2-12.6.

answers to the second and third steps are in affirmative, i.e. if it is in a dominant position in the relevant market *and* if it has abused this position.<sup>269</sup>

- 1.4. This Chapter discusses the issues related to abuse of dominance that were deliberated on by the Committee, and its recommendations in respect of such issues.

## 2. SCOPE OF SECTION 4

### *Collective dominance*

- 2.1. The concept of collective dominance is essentially aimed at situations of conscious parallelism, *i.e.*, when independent firms behave in a similar fashion due to the structure of the market.<sup>270</sup> It generally comes into play in oligopolistic markets where a few firms collectively possess market power, and two or more such firms act as a collective entity due to existence of structural or economic links.<sup>271</sup>
- 2.2. Section 4 of the Competition Act presently does not recognise the concept of 'collective dominance' by enterprises that are unrelated to each other by structural or control-based links arising from common corporate ownership. In a number of decisions, the CCI has observed that Section 4 of the Competition Act clearly requires, as a jurisdictional requirement, a dominant position by only one enterprise or one group. For instance, in the *Fast Track Case*,<sup>272</sup> the CCI held that the Competition Act does not allow for more than one dominant player under Section 4.
- 2.3. The Committee noted that some other jurisdictions have recognised collective dominance within their competition legislations. In the EU, Article 102 of the TFEU specifically prohibits the abuse of a dominant position "*by one or more*

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<sup>269</sup> Cyril Shroff and Avaantika Kakkar, 'India: Abuse of Dominance', *The Asia Pacific Antitrust Review* 2019, (19 March 2019) <<https://globalcompetitionreview.com/insight/the-asia-pacific-antitrust-review-2019/1188990/india-abuse-of-dominance>> accessed 19 May 2019.

<sup>270</sup> Jason Gudofsky, Evangelia Litsa Kriaris and Lucian Vital, 'Abuse of Joint Dominance: Is the Cure Worse than the Disease?' (Canadian Bar Association- 2010 Annual Competition Law Conference, 2010) p.1 <<https://pdfs.semanticscholar.org/2f77/f10bf98fbc1766eaabc9e1b475d373330213.pdf>> accessed 19 May 2019.

<sup>271</sup> Albertina Albors-Llorens, 'Collective Dominance: A Mechanism for the Control of Oligopolistic Markets?' (2000) *The Cambridge Law Journal* 59, no. 2, p. 253-57 <<http://www.jstor.org/stable/4508667>> accessed 19 May 2019.

<sup>272</sup> *Fast Track Call Cab Pvt. Ltd. v. ANI Technologies Pvt. Ltd.*, CCI order dated 19.07.2017 in Case No. 6 and 74 of 2015.

*undertakings*”, which includes jointly exercising such dominance.<sup>273</sup> Similarly, in the UK, the concept of collective dominance has been recognised in the law.<sup>274</sup>

- 2.4. However, it is notable that nearly all cases brought under collective dominance in the EU<sup>275</sup> and the UK<sup>276</sup> so far, have involved some form of anticompetitive agreement. Collective dominance has, therefore, primarily been utilised in instances that are already covered by rules prohibiting anticompetitive agreements (Article 101 of the TFEU<sup>277</sup> and Chapter 1 of the UK Competition Act<sup>278</sup>). For example, in the case involving *Almelo*<sup>279</sup> in the EU, undertakings that were alleged to have abused their collective dominance were also members of a trading association with legally binding agreements containing, *inter alia*, exclusive purchasing obligations. This overlap has also been noted in a recent OECD paper, which states:

*“Regardless of the legal definition of collective dominance in the EU, Hawk and Motta (2008) suggest that, in practice, collective dominance has been pursued under Article 102 only in limited circumstances where there were clear links between the firms involved, for example through contracts, exchanges of products, cross-shareholdings, common membership in a trade association or shipping conference, etc. Further, collective dominance is not*

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<sup>273</sup> EC, Communication from the Commission, ‘Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings’, (2009), para 4 <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:NOT)> accessed 19 May 2019.

<sup>274</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 594-596.

<sup>275</sup> OECD, ‘Competition Enforcement in Oligopolistic Markets- Issues paper by the Secretariat’ (June 2015), para 37 <[https://one.oecd.org/document/DAF/COMP\(2015\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)2/en/pdf)> accessed 19 May 2019.

<sup>276</sup> David R Little and Alexander Waksman, ‘Dominance, United Kingdom’, Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, August 2018), question 7 <<https://gettingthedealthrough.com/area/10/jurisdiction/22/dominance-united-kingdom/>> accessed 19 May 2019.

<sup>277</sup> OECD, ‘Competition Enforcement in Oligopolistic Markets- Issues paper by the Secretariat’ (June 2015), para 37 <[https://one.oecd.org/document/DAF/COMP\(2015\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)2/en/pdf)> accessed 19 May 2019.

<sup>278</sup> David R Little and Alexander Waksman, ‘Dominance, United Kingdom’, Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, August 2018), question 7 <<https://gettingthedealthrough.com/area/10/jurisdiction/22/dominance-united-kingdom/>> accessed 19 May 2019.

<sup>279</sup> *Gemeente Almelo and Others v Energiebedrijf IJsselmij*, C-393/92, EU:C:1994:171.

*addressed in the European Commission's guidance on enforcement priorities relating to abuse of dominance."*<sup>280</sup> (emphasis supplied)

- 2.5. Based on the above, the Committee discussed that the conduct captured by collective dominance cases may already be covered by Section 3 of the Competition Act. It was noted that the existence of two strong players in the market may be indicative of competition between them, unless they have agreed not to compete. It was also stressed that successful utilisation of collective dominance has been rare. For example, in the UK there have not been any cases yet that have found the existence of collective dominance.<sup>281</sup> Even in Singapore, though the concept of collective dominance is recognised under the law<sup>282</sup>, there have been no enforcement actions regarding it.<sup>283</sup> Further, in some other developed jurisdictions like the US<sup>284</sup> and Australia<sup>285</sup>, the concept of collective dominance has not been recognised in their respective legislations. In light of this, the Committee agreed not to introduce the concept of collective dominance in the Competition Act at this stage.

*Attempt to monopolise*

- 2.6. As noted above, establishing dominance of an enterprise or a group is a prerequisite to imposing any penalty for violation of Section 4 of the

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<sup>280</sup> OECD, 'Competition Enforcement in Oligopolistic Markets- Issues paper by the Secretariat' (June 2015), para 37 <[https://one.oecd.org/document/DAF/COMP\(2015\)2/en/pdf](https://one.oecd.org/document/DAF/COMP(2015)2/en/pdf)> accessed 19 May 2019.

<sup>281</sup> David R Little and Alexander Waksman, 'Dominance, United Kingdom', Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, August 2018), question 7 <<https://gettingthedealthrough.com/area/10/jurisdiction/22/dominance-united-kingdom/>> accessed 19 May 2019.

<sup>282</sup> CCCS, 'CCCS Guidelines on Section 47 Prohibition 2016', para 3.16-3.21 <<https://www.ccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs-guidelines/cccs-guidelines-on-the-section-47-prohibitions-2016.pdf?la=en&hash=7A9612B3CFCD096645D014141E5F3F10E506BF3A>> accessed 19 May 2019.

<sup>283</sup> Lim Chong Kin and Corinne Chew, 'Dominance, Singapore', Drew & Napier LLC, (Getting the Deal Through, April 2019) question 7 <<https://gettingthedealthrough.com/area/10/jurisdiction/58/dominance-singapore/>> accessed 19 May 2019.

<sup>284</sup> Kenneth S Reinker and Lisa Danzig, 'Dominance, United States', Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, April 2019) <<https://gettingthedealthrough.com/area/10/jurisdiction/23/dominance-2018-united-states/>> accessed 19 May 2019.

<sup>285</sup> Elizabeth Avery and Liana Witt, 'Dominance, Australia', Gilbert + Tobin, (Getting the Deal Through, April 2019) <<https://gettingthedealthrough.com/area/10/jurisdiction/5/dominance-australia/>> accessed 19 May 2019.

Competition Act. The scheme of the Act does not account for those businesses that *attempt* to dominate the market but are yet to attain dominance.

- 2.7. In most jurisdictions, unilateral anticompetitive conduct is only prohibited if the relevant firm holds a dominant position (or substantial market power) in a market.<sup>286</sup> The underlying rationale for this threshold requirement of dominance, is that dominant firms may be the most likely to create substantial anticompetitive effects on a unilateral basis. Therefore, in the interests of efficient regulation and legal certainty, unilateral conduct rules are usually restricted in their application to dominant firms.<sup>287</sup> The requirement of dominance, therefore, acts as a legal ‘screen’ or ‘filter’.
- 2.8. However, some economists have recently pointed out that non-dominant firms can also create significant anticompetitive effects and that, in some cases, they may be more likely than dominant firms to create such effects.<sup>288</sup> These economists have cautioned that new business strategies reveal that firms are engaging in predatory conduct even before they possess substantial market power. This has been noted especially in relation to digital markets. In light of this, jurisdictions such as the US<sup>289</sup>, Germany<sup>290</sup>, and Japan<sup>291</sup> have included provisions in their competition law to impose penalties for certain unilateral conduct by firms that are not dominant yet.
- 2.9. The Committee recognised that regulating platform-driven digital businesses is still a new territory in competition policy worldwide. The central dilemma here is essentially that platform competition usually results**

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<sup>286</sup> ICN, ‘Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, & State-Created Monopolies’ (May 2007) pp. 2-3 <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG\\_SR\\_Objectives.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_SR_Objectives.pdf)> accessed 19 May 2019.

<sup>287</sup> Katharine Kemp, *Misuse of Market Power: Rationale and Reform* (Cambridge University Press) p. 139.

<sup>288</sup> See e.g., Richard S Markovits, *Economics and the Interpretation and Application of US and EU Antitrust Law: Volume I* (Springer, 2014) p. 528-30.

<sup>289</sup> Kenneth S Reinker and Lisa Danzig, ‘Dominance, United States’, Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, April 2019) question 1 <<https://gettingthedealthrough.com/area/10/jurisdiction/23/dominance-2018-united-states/>> accessed 19 May 2019.

<sup>290</sup> Katharina Apel and Tobias Rump, ‘Dominance, Germany’, Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, April 2019) question 34 <<https://gettingthedealthrough.com/area/10/jurisdiction/11/dominance-2018-germany/>> accessed 19 May 2019.

<sup>291</sup> Atsushi Yamada and Yoshiharu Usuki, Anderson Mōri & Tomotsune, ‘Dominance, Japan’ (Getting the Deal Through, April 2019) <<https://gettingthedealthrough.com/area/10/jurisdiction/36/dominance-japan/>> accessed 19 May 2019.

in dominance by one or a few enterprises, while also providing tremendous gains to consumers. Though non-intervention may result in the former, any premature intervention may thwart the latter. Therefore, a balanced approach is essential in this context. It was noted that a number of countries are conducting studies for greater insights into regulation of digital markets. The Committee noted that any proposed change to the law would have wide implications and requires deeper analysis. Therefore, the Committee felt that a study of Indian digital markets may be undertaken to understand if there is presently any enforcement gap, and if provisions prohibiting unilateral conduct by enterprises attempting to monopolise will resolve this gap.

### 3. MANNER OF ASSESSING DOMINANCE

- 3.1. As noted above, proving that an entity is dominant is essential to punishing any abusive practices that it might have undertaken. There are multiple approaches for assessing dominance that are followed by various jurisdictions. For example, while some jurisdictions assess dominance based on the amount of market share the enterprise has gathered, other jurisdictions also analyse additional factors related to the nature of market and business.
- 3.2. The Raghavan Committee Report, while discussing the test for dominance in Section 4, noted that a firm must be in a position where it enjoys such economic strength that it can behave (to a considerable extent) independently of its competitors and consumers.<sup>292</sup> It also discusses that the aim was to design the law in such a way that its provisions in this aspect only take effect if dominance is clearly established.<sup>293</sup> As per Explanation (a) to Section 4 of the Competition Act, an enterprise or group is in a dominant position if it can operate independently of market forces, or affect its competitors or consumers in its favour, in its relevant market. To undertake an enquiry in this regard, factors provided in Section 19(4) are to be considered by the CCI. This includes factors such as market share, size and resources of enterprise, size and importance of competitors, dependence of consumers on the enterprise, etc.
- 3.3. The Committee noted that some jurisdictions have adopted a 'bright line test' for determination of dominance. This means that dominance is assessed based on the market share of the enterprise or group, and if its market share is below a certain threshold then it is not considered dominant. For example, in the EU,

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<sup>292</sup> Raghavan Committee Report (2000) Para 4.4.8. [https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf) accessed 19 May 2019.

<sup>293</sup> *Ibid* para 4.4.6.



the Guidance on the Commission's Enforcement Priorities (“**Article 102 Guidance**”) on Article 102 of the TFEU, discusses that dominance is not likely when the undertaking has a market share below 40%. The European Court of Justice (“**ECJ**”) has also held that for undertakings with a market share above 50%, there may be a rebuttable presumption that the undertaking is dominant.<sup>294</sup> Even in the UK, courts have held that a market share below 50% is generally not enough to support the inference of monopoly power.<sup>295</sup>

- 3.4. In OECD’s recent *Roundtable on Safe Harbours and Legal Presumptions in Competition Law – Note by India*, it was noted that such a bright line test based on market shares has not been adopted under Indian competition law.<sup>296</sup> For instance, in *MCX Stock Exchange v. National Stock Exchange of India Limited*<sup>297</sup>, the key issue before the CCI was whether the National Stock Exchange (“**NSE**”) by merely occupying a position of strength in the other markets, could be considered a dominant player in the currency derivative market wherein it occupied only 33.17% of the market share. The CCI held that NSE was in a dominant position, and discussed:

*“Unlike in some international jurisdictions, the evaluation of this “strength” is to be done not merely on the basis of the market share of the enterprise but on the basis of a host of stipulated factors such as size and importance of competitors, economic power of the enterprise, entry barriers etc. as mentioned in Section 19 (4) of the Act. This wide spectrum of factors provided in the section indicates that the Commission is required to take a very holistic and pragmatic approach while inquiring whether an enterprise enjoys a dominant position before arriving at a conclusion based upon such inquiry.”*<sup>298</sup> (emphasis supplied)

- 3.5. **The Committee discussed that though a bright line test will provide objectivity and certainty in the law, it will also reduce flexibility to assess various factors which impact the position an enterprise occupies in the**

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<sup>294</sup> Case C-62/86 AKZO Chemie [1991] ECRI-3359.

<sup>295</sup> David R Little and Alexander Waksman, ‘Dominance, United Kingdom’, Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, August 2018), question 2 <<https://gettingthedealthrough.com/area/10/jurisdiction/22/dominance-united-kingdom/>> accessed 19 May 2019.

<sup>296</sup> OECD, ‘Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by India’ (December 2017) para 40 and 41 <[https://one.oecd.org/document/DAF/COMP/WD\(2017\)58/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2017)58/en/pdf)> accessed 19 May 2019.

<sup>297</sup> CCI Order dated 23 June 2011 in Case No. 13 of 2009.

<sup>298</sup> *Ibid*, para 10.28.



market. It was discussed that the Raghavan Committee Report had also considered this issue and concluded that specifying a threshold or an arithmetical figure for defining dominance may either allow real offenders to escape or result in unnecessary litigation.<sup>299</sup> Further, even in some jurisdictions which have a bright line test, like the EU and the UK, authorities retain the flexibility to look into cases where market shares may be lower than the respective thresholds.<sup>300</sup> Therefore, the Committee agreed that introducing a bright line test for assessing dominance may not be desirable.

#### 4. RULE OF REASON IN FINDING OF ABUSE

- 4.1. A list of actions which amount to abuse of dominance have been provided in Section 4(2) of the Act. The text of Section 4(2) does not refer to the *effect* of actions committed by dominant enterprises or groups and seems to imply that the actions listed always amount to abuse. For example, while Section 3 prohibits agreements which have an AAEC, Section 4 does not refer to any effects test for establishing abuse. Therefore, it may be argued that a bare reading of Section 4 establishes a *per se* approach to abuse, instead of being based on the rule of reason.
- 4.2. The Committee discussed if an effects-based analysis should be undertaken by the CCI to establish abuse in Section 4. In order to understand the aim of the provision, the discussion on abuse in the Raghavan Committee Report was perused. The Committee took note that this report indicates that an effects-based approach was contemplated to establish abuse of dominance under Section 4.<sup>301</sup>
- 4.3. The Committee then discussed jurisprudence established in India in this regard. In its decisional practice, the CCI and appellate authorities have adopted distinct approaches in different scenarios. For instance, in a case

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<sup>299</sup> Raghavan Committee Report (2000) Para 4.4.5 <[https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)> accessed 19 May 2019.

<sup>300</sup> EC, Communication from the Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', (2009), para 14 <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:NOT)> accessed 19 May 2019.

<sup>301</sup> Raghavan Committee Report (2000) Para 4.5 <[https://theindiancompetitionlaw.files.wordpress.com/2013/02/report\\_of\\_high\\_level\\_committee\\_on\\_competition\\_policy\\_law\\_svs\\_raghavan\\_committee.pdf](https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf)> accessed 19 May 2019.

involving NSE<sup>302</sup>, the CCI noted that NSE was dominant in the relevant market. It ordered NSE to modify its zero-price policy and to cease and desist from its unfair pricing, exclusionary conduct and from unfairly using its dominant position in the other market(s) to protect its own market. In coming to this conclusion, CCI followed a *per se* approach and did not enquire into the effect of the NSE's conduct.<sup>303</sup> On appeal, CCI's decision was upheld by COMPAT.<sup>304</sup>

- 4.4. However, the CCI has also relied on an effects-based approach to analyse abuse in many of its orders. In *Dhanraj Pillay v. Hockey India*<sup>305</sup>, the CCI held that the Act was not violated where allegedly abusive contractual restrictions were not disproportionate to a sporting organisation's legitimate regulatory goals.<sup>306</sup> It looked into the effects of the restrictive conditions imposed and noted that the conditions did not amount to abuse of dominance as they were intrinsic and proportionate to the objectives of the organisation.<sup>307</sup> In the *Schott Glass case*<sup>308</sup>, the COMPAT found that unlawful price discrimination required a showing of both "(i) dissimilar treatment to equivalent transactions; and (ii) harm to competition or likely harm to competition in the sense that the buyers suffer a competitive disadvantage against each other leading to competitive injury in the downstream market."<sup>309</sup> The COMPAT found the CCI had wrongly ignored the second limb and that the evidence showed there was no effect on the downstream market and the ultimate consumer did not suffer as a result of the alleged conduct.<sup>310</sup> In this case, not only was an effects based analysis undertaken but the objective justifications raised by the parties to justify their conduct were also considered.
- 4.5. It was also brought to the Committee's attention that, based on a plain reading of the statute, appellate authorities have interpreted the clauses in Section 4(2)

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<sup>302</sup> *MCX Stock Exchange v. NSE of India Ltd.*, CCI Order dated 23.06.2011 in Case No. 13/2009.

<sup>303</sup> *Ibid*, pp. 115-139; 144-146.

<sup>304</sup> *National Stock Exchange of India Ltd. v. Competition Commission of India*, COMPAT Order dated 5 August 2014 in Appeal No. 15/2011 with IA Numbers 25/2011, 26/2011.

<sup>305</sup> CCI Order dated 31 May 2013 in Case no. 73/2011.

<sup>306</sup> Shweta Shroff Chopra, Harman Singh Sandhu and Rohan Arora, 'Dominance, India', Shardul Amarchand Mangaldas & Co, (Getting the Deal Through, April 2019) question 10 <<https://gettingthedealthrough.com/area/10/jurisdiction/13/dominance-india/>> accessed 25 May 2019.

<sup>307</sup> CCI Order dated 31.05.2013 in Case no. 73/2011, para 10.12.1- 10.12.9.

<sup>308</sup> *Schott Glass India Pvt. Ltd. v. Competition Commission of India*, COMPAT Order dated 2.04.2014 in Appeal No. 91/2012 with IA Nos.253, 254, 255, 256.

<sup>309</sup> *Ibid*, para 45-45.1.

<sup>310</sup> *Ibid*, para 55-57.

broadly in certain cases. For instance, in a recent judgment, the Supreme Court held that Section 4(2)(c) is worded broadly enough to account for restraining entry of enterprises from the market even when they're not competitors.<sup>311</sup> However, the Committee noted that though the scope of abuse in Section 4(2)(c) was interpreted to be wide in this case, the Supreme Court also held that a penalty need not be imposed as the accused party had provided legitimate justifications.<sup>312</sup>

- 4.6. After analysing the decisional practice on abuse of dominance in India, the Committee concluded that the CCI does in fact adopt an effects-based approach in many cases depending on the kind of abuse in question. It was noted that this approach is in line with the approach adopted by the EU competition authorities in this regard. Article 102 of the TFEU, which deals with abuse of dominance, does not define abuse but provides a list of activities which may comprise abuse. Unlike Section 4(2) of the Act in India, Article 102 does not provide an exhaustive list of abusive practices.
- 4.7. Historically, there was a tendency on the part of both EU Courts and the EC to apply *per se* rules to at least some kind of abuses.<sup>313</sup> The Economic Advisory Group on Competition Policy, in 2005, criticised the *per se* approach taken by the EC until then to penalise abuse of dominance.<sup>314</sup> In line with this, recent case laws and guidance issued by the EC have pointed out that an effects-based analysis should be undertaken to establish abuse of dominant position for certain kinds of abuses.<sup>315</sup>
- 4.8. In 2009, the EC issued its Article 102 Guidance to clarify the position of law in relation to abuse of dominance. Within this, it was noted that for exclusionary abuses in Article 102, the EC will intervene if there is any likelihood of anti-competitive foreclosure.<sup>316</sup> Even in its recent case laws, the EC has adopted an

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<sup>311</sup> *CCI v. M/s Fast Way Transmission Pvt. Ltd.*, (2018) 4 SCC 316, para 9.

<sup>312</sup> *Ibid*, para 12-13.

<sup>313</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 205.

<sup>314</sup> Economic Advisory Group on Competition Policy, 'An Economic Approach to Article 82' (July 2005) <[http://ec.europa.eu/dgs/competition/economist/eagcp\\_july\\_21\\_05.pdf](http://ec.europa.eu/dgs/competition/economist/eagcp_july_21_05.pdf)> accessed 25 May 2019.

<sup>315</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 205.

<sup>316</sup> European Commission, Communication from the Commission, 'Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings', (2009), para 19 and 22 <[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224\(01\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52009XC0224(01):EN:NOT)> accessed 19 May 2019.

effects-based approach while analysing exclusionary abuse.<sup>317</sup> However, such an effects-based approach is not mandated for exploitative abuses under Article 102. In *Intel v. Commission*<sup>318</sup>, it was noted that there were two types of abuses in Article 102 of the TFEU- ‘by nature abuses’ (usually exploitative abuses, such as exclusivity rebates, excessive pricing, etc.) and ‘other abuses’ (usually exclusionary abuses, such as tying, product design, refusal to supply, etc.). It was held that ‘by nature abuses’ remain presumptively unlawful, but if a dominant firm submits evidence that its conduct is not capable of restricting competition, then an assessment of all the circumstances must be undertaken to decide whether the conduct is abusive. For ‘other abuses’ (usually exclusionary abuses), it was noted that a proper effects analysis must be undertaken irrespective of whether such a claim is raised by the dominant firm. Therefore, an effects-based approach has been established for exclusionary abuses in the EU. Further, an effects-based analysis may be undertaken even for exploitative abuses if it is raised by the dominant firm.

- 4.9. Singapore has also adopted a similar approach to analyse abuse by dominant enterprises.<sup>319</sup> In its guideline, the Singapore competition authority, i.e., CCCS has noted as below:

*“In conducting an assessment of an alleged abuse of dominance, CCCS will undertake an economic effects-based assessment in order to determine whether the conduct has, or is likely to have, an adverse effect on the process of competition. The process of competition may be adversely impacted, for instance, by conduct which would be likely to foreclose, or has foreclosed, competitors in the market. CCCS considers that factors which would generally be relevant to its assessment include: the position of the allegedly dominant party and its competitors; the structure of, and actual competitive conditions on, the relevant market; and the position of customers and/or input suppliers.”*<sup>320</sup> (emphasis supplied)

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<sup>317</sup> Patrick Bock, David R Little and Henry Mostyn, ‘Dominance, European Union’, Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, April 2019) question 10 <<https://gettingthedealthrough.com/area/10/jurisdiction/10/dominance-2018-european-union/>> accessed 25 May 2019.

<sup>318</sup> *Intel Corporation Inc. v. European Commission*, Case T-286/09.

<sup>319</sup> Lim Chong Kin and Corinne Chew, ‘Dominance, Singapore’, Drew & Napier LLC, (Getting the Deal Through, April 2019) question 10 <<https://gettingthedealthrough.com/area/10/jurisdiction/58/dominance-singapore/#link-9>> accessed 25 May 2019.

<sup>320</sup> CCCS, CCCS Guidelines On the Section 47 Prohibition 2016 (December 2016) para 4.4 <<https://www.ccs.gov.sg/-/media/custom/ccs/files/legislation/legislation-at-a-glance/cccs->

- 4.10. Even in the US, having a monopoly is not *per se* unlawful and is always judged under the rule of reason.<sup>321</sup> For establishing an allegation of monopolizing or attempting to monopolize, competition authorities are usually required to analyse if the defendant's conduct has or is likely to harm competition and consumers.<sup>322</sup> Other jurisdictions like Australia<sup>323</sup>, Brazil<sup>324</sup> and Canada<sup>325</sup> have also adopted the rule of reason to analyse the effect of activities while adjudging them to be an abuse of dominant position.
- 4.11. **Based on the above, the Committee discussed that the CCI has interpreted Section 4(2) keeping in mind that one of the key aims of the Act is to prevent practices which adversely affect competition in India.<sup>326</sup> It has therefore, wherever appropriate, analysed the effects of alleged abusive conduct by dominant entities before passing orders regarding such conduct. The CCI has relied on the effects built into some of the clauses of Section 4(2) to support its approach, e.g. "denial of market access in any manner" in Section 4(2)(c).**
- 4.12. The Committee did not find any significant issues with the decisional practice of CCI discussed above, and found it to be in line with global practices. After conducting an analysis of the CCI's orders, the Committee came to the conclusion that the current text of Section 4(2) has not proven to be a hindrance to the CCI's ability to assess effects in abuse of dominance disputes. It was agreed that since it may not be necessary to undertake an effects analysis in all kinds of abuse, e.g. exploitative abuse, it may not be appropriate to mandate an effects analysis in Section 4(2). Therefore, it was concluded that no legislative amendment is required in this regard.

## 5. EXCESSIVE PRICING AS ABUSE

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[guidelines/cccs-guidelines-on-the-section-47-prohibitions-2016.pdf?la=en&hash=7A9612B3CFCD096645D014141E5F3F10E506BF3A](https://www.cci.gov.in/guidelines/cccs-guidelines-on-the-section-47-prohibitions-2016.pdf?la=en&hash=7A9612B3CFCD096645D014141E5F3F10E506BF3A)> accessed 25 May 2019.

<sup>321</sup> Kenneth S Reinker and Lisa Danzig, 'Dominance, United States', Cleary Gottlieb Steen & Hamilton LLP, (Getting the Deal Through, April 2019) question 10 <<https://gettingthedealthrough.com/area/10/jurisdiction/23/dominance-united-states/>> accessed 25 May 2019.

<sup>322</sup> *Ibid*; *US v. Microsoft*, 253 F. 3d 34 (D.C. Cir 2001).

<sup>323</sup> Competition and Consumer Act 2010, Section 46. In Australia, the law was recently amended to introduce a competitive-effects while analysing abuse of dominance.

<sup>324</sup> Mattos Filho, Veiga Filho, Marrey Jr e Quiroga Advogados, 'Dominance, Brazil' question 10 <<https://www.lexology.com/gtdt/tool/workareas/report/dominance/chapter/brazil>> accessed 25 May 2019.

<sup>325</sup> Competition Act, 1985, Subsection 79(1).

<sup>326</sup> Competition Act, Preamble.

- 5.1. Section 4(2)(a) of the Competition Act deals with pricing abuses by dominant enterprises. Pricing abuses may be exclusionary, i.e. pricing strategies adopted to foreclose competitors, or may be exploitative, i.e. pricing strategies which exploit consumers by being excessive.<sup>327</sup> Though not explicitly mentioned in the text of Section 4, the CCI has maintained that excessive price forms a subset of ‘unfair price’ under the Competition Act.<sup>328</sup>
- 5.2. Given the challenges associated with the determination of a benchmark ‘fair price’, the CCI has rarely intervened in cases involving excessive pricing as the primary allegation. Even in cases where the CCI has intervened, the CCI has been averse to devising any pricing remedies. In *Manjit Singh Sachdeva*<sup>329</sup>, the CCI dealt with the issue of arbitrary high airfares being charged by various airlines and noted that “*The Commission can neither go into the issue of MRP i.e. what should be the MRP for any product or service and fix the MRP, nor the Commission can give direction to the Government of India that it should fix MRP of a service being provided by private entrepreneur. In fact that will be contrary to the spirit of competition law.*”<sup>330</sup> In another case involving *Super Cassettes*,<sup>331</sup> the CCI noted that determining whether a price charged is excessive is an uncertain and difficult task. It added that in the absence of data detailing costs in the market, it would be difficult to term prices charged by a dominant firm as ‘unfair’ or ‘excessive’ solely on the basis that it is higher than the prices charged by its competitors. Another reason for the reluctance of CCI to interfere in determination of fair price may also be to avoid any jurisdictional overlap as prices in certain sectors in India are regulated by their respective sectoral regulators (such as, electricity, telecommunication, pharmaceuticals, petroleum and natural gas, etc.).
- 5.3. The Committee deliberated if there is a need to amend the law to clarify that excessive pricing falls within the scope of Section 4 of the Act. It was discussed that, as is the case in India, excessive pricing has been interpreted to fall within ‘unfair pricing’ in the EU.<sup>332</sup> It was noted that as is the case with Section 4 of the

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<sup>327</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 732.

<sup>328</sup> OECD, ‘Policy roundtables on Excessive Prices’ (2011) <<http://www.oecd.org/daf/competition/abuse/49604207.pdf>> accessed 19 May 2019.

<sup>329</sup> *Manjit Singh Sachdeva v. Director General, DGCA*, CCI Order dated 6 March 2013 in Case No. 68 of 2012.

<sup>330</sup> *Ibid*, para 3.

<sup>331</sup> *M/s HT Media Limited v. M/s Super Cassettes Industries Limited*, CCI Order dated 1 October 2014 in Case No. 40 of 2011.

<sup>332</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 735



Competition Act, Article 102 of the TFEU also does not explicitly mention excessive pricing as an abuse of dominant position by a firm. However, the EU competition regulator as well as courts have held that excessive pricing by a dominant enterprise is in contravention of Article 102 of the TFEU.<sup>333</sup> Further, Competition authorities in the EU generally do not challenge prices.<sup>334</sup> Although the position of excessive pricing has been recognized in the EU, it has been noted that there is reluctance to adjudicate upon issues pertaining to excessive pricing.<sup>335</sup> Even in the UK, there have only been three occasions until 2018, where the competition authority has found excessive pricing to be abusive.<sup>336</sup>

- 5.4. The Committee also noticed that there are some jurisdictions which do not penalise excessive pricing as an abuse for dominant firms. For instance, in the US, excessive pricing by itself is not illegal under their monopoly laws.<sup>337</sup> The US Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis Trinko*<sup>338</sup>, has held that “mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”<sup>339</sup> As per this approach, penalising a firm for excessive pricing may remove incentives to reduce cost and innovate. In this regard, the US Supreme Court has also noted that “the opportunity to charge monopoly prices - at least for a short period - is what attracts “business acumen” in the first place; it induces risk taking that produces innovation and economic growth.”<sup>340</sup>
- 5.5. **Based on the above, the Committee noted that excessive pricing has not been categorised as an ‘abuse’ in some jurisdictions. Even in leading jurisdictions which have recognised it as an abuse, competition regulators rarely interfere in such cases. However, it was agreed that, though rare, there may be some instances of pricing abuse which warrant intervention by CCI. It was concluded that the current text of the law is broad enough to include excessive pricing within its scope. Therefore, it was felt that there may not be any need to amend the law in this regard.**

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<sup>333</sup> *Ibid.*

<sup>334</sup> EC, Panel on ‘Fairness in Unilateral Practice Cases’ (2018) <[http://ec.europa.eu/competition/speeches/text/sp2018\\_02\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2018_02_en.pdf)> accessed 19 May 2019.

<sup>335</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 739.

<sup>336</sup> *Ibid.*, p. 743.

<sup>337</sup> *Ibid.*, p. 735.

<sup>338</sup> 540 U.S. 398 (2004).

<sup>339</sup> *Ibid.*, p. 407.

<sup>340</sup> *Ibid.*

## 6. LEVERAGING IN 'ASSOCIATED' RELEVANT MARKETS

- 6.1. Leveraging is an abuse in which an enterprise or group, which is dominant in a market, utilises this dominance to enter another market. Unlike other kinds of abuses, leveraging involves two separate markets and the abuse in question is not in the market in which the accused party is dominant.
- 6.2. The Competition Act provides leveraging as an abuse in Section 4(2)(e). Some members of the Committee suggested that this provision may be amended to clarify that leveraging involves utilising the dominant position in a relevant market to enter into another 'associated' relevant market. This suggestion was made to bring the language in Section 4(2)(e) in line with the decisional practice on leveraging. In this regard, the Committee noted that jurisprudence in the EU has established that there should be 'associated links' between the two markets involved in abusive leveraging.<sup>341</sup> It was discussed that in practice, CCI also analyses the linkages of the relevant markets involved in cases of leveraging.<sup>342</sup> However, the CCI has held that presence of such associated links is not necessary for a finding of leveraging.<sup>343</sup> In this regard, the CCI has noted that:

*"...it is pertinent to observe that there is a subtle difference in the concept of "leveraging" as applied in some international jurisdictions (particularly the European Commission) and the wordings of the related provision in the Indian Competition Act, viz. section 4(2)(e). In the Indian context, Competition regime is a very new tool for regulating market forces. Due to historical developments, several enterprises have been incumbent and entrenched in trade and commerce in India without any regulations to keep their anticompetitive conducts in check. This position is in sharp contrast with that in some mature jurisdictions like the US or EU where competition laws have been in force for a century.*

*10.80 The Indian Competition Act recognizes leveraging as an act by an enterprise or group that "uses by its dominant position in one relevant market to enter into, or protect, other relevant market." Nowhere does the Act indicate that there has to be a high degree of associational link between the two markets being considered for this sub section. This is so because competition concerns are much higher in India than in more mature*

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<sup>341</sup> See for instance, *Tetra Pak International SA v Commission of the European Communities*, Case T-83/91, ECLI:EU:T:1994:246, para 106.

<sup>342</sup> See for instance, *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd.*, CCI Order dated 23.06.2011 in Case no. 13/2009, para 10.90 and 10.91.

<sup>343</sup> *Ibid*, para 10.80.



*jurisdictions because of the historical lack of competition laws.*"<sup>344</sup> (emphasis supplied)

6.3. It was pointed out that some commentators have criticized the insistence by EU authorities for presence of 'associated links' to establish leveraging. As per this criticism, analysing linkages between the markets may actually not be the central point of enquiry in many scenarios. For instance, leveraging may involve cases where the alleged abuse in a non-dominant market is undertaken to maintain or strengthen the firm's position in the market in which it is dominant. Some commentators have argued that the central point of enquiry here would be if the conduct of the firm could be said to strengthen its position in the relevant market in which it is already dominant, and not whether there were associated links between the two markets.<sup>345</sup> Further, it has also been argued that finding such associated links in all cases may make finding of leveraging rare.<sup>346</sup>

6.4. **The Committee took note of the above and discussed that mandating finding of associated links between the markets in leveraging may end up restricting the CCI. After analysing cases on leveraging, the Committee felt that the current language of Section 4(2)(e) may help in ensuring that there is no enforcement gap in the finding of leveraging. In this regard, it was noted that generally associated linkages between the relevant markets should exist in cases alleging leveraging. However, it was discussed that it may be prudent to allow some flexibility to CCI while determining the scope of leveraging in the Act, especially considering the unique nature of markets involved in the digital sector. Therefore, it was concluded that the language of Section 4(2)(e) does not need to be amended.**

## 7. INTERFACE WITH INTELLECTUAL PROPERTY RIGHTS ("IPR")

7.1. Rights over intellectual property operate like any other property right, i.e. they allow creators, or owners, of patents, trademarks or copyrighted works to benefit from their own work or investment in a creation.<sup>347</sup> This usually grants a temporary right in favour of the IPR holder to exclude others from using that

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<sup>344</sup> *Ibid*, para 10.79 and 10.80.

<sup>345</sup> Robert O'Donoghue and Jorge Padilla, '*The Law and Economics of Article 102 TFEU*' (2014, 2<sup>nd</sup> edition).

<sup>346</sup> *Ibid*.

<sup>347</sup> World Intellectual Property Organisation, 'What is Intellectual Property?' p.3 <[https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo\\_pub\\_450.pdf](https://www.wipo.int/edocs/pubdocs/en/intproperty/450/wipo_pub_450.pdf)> accessed 20 May 2019.

IPR. Thus, IPRs, by their very nature, often create a form of monopoly or a degree of economic exclusivity.<sup>348</sup> The creation of such legitimate exclusivity, however, may not necessarily establish the ability to exercise market power. Even in cases where it does confer market power, such dominant position in the market may not always cause foreclosure in the market and therefore, may not by itself constitute an infringement of competition law.<sup>349</sup> In this regard, the ECJ has noted that it is imperative that, when deciding if an IPR holder has abused its dominant position, a balance be struck between maintaining free competition and rights of the IPR holder.<sup>350</sup> Therefore, rights exercised in relation to intellectual property may sometimes result in abuse of dominant position by firms, but not in all cases.

7.2. The Competition Act currently does not provide for a defence in relation to reasonable exercise of IPR in cases of abuse of dominance. Unlike Section 3 of the Competition Act which carves out an exception for reasonable exercise of IPR in relation to anticompetitive agreements<sup>351</sup>, Section 4 does not have any such provision. This has been acknowledged in a note sent to OECD by India, where it has been noted that *“the exemption under Section 3(5)(i) of the Act is limited to the anticompetitive agreement falling under Section 3 of the Act and as such, do not explicitly apply to abuse of dominant position under Section 4 of the Act.”*<sup>352</sup> Based on this, it was brought to the Committee’s attention that in cases involving only abuse of dominance (and not anticompetitive agreements), the defence provided in Section 3(5) does not apply.

7.3. Many jurisdictions consider the rights that a party may have in relation to reasonable exercise of IPR when dealing with abuse of dominance. For instance, in *Parke, Davis & Co*, the ECJ noted that the ownership of a patent is not an abuse in itself although utilisation of the patent could degenerate into an improper exploitation of the protection.<sup>353</sup> Therefore, it was opined that the ownership of

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<sup>348</sup> Pham and Alice, ‘Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control’ (CUTS International, 2008) p.17 <[http://www.cuts-international.org/pdf/CompetitionLaw\\_IPR.pdf](http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf)> accessed 20 May 2019.

<sup>349</sup> *Ibid.*

<sup>350</sup> *Huawei Technologies Co. Ltd. v. ZTE Corp*, Case C-170/13 EU:C:2015:477, para 42.

<sup>351</sup> Competition Act, Section 3(5).

<sup>352</sup> OECD, ‘Licensing of IP rights and competition law – Note by India’ (6 June 2019) <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD\(2019\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WD(2019)4&docLanguage=En)> accessed 20 May 2019.

<sup>353</sup> *Parke, Davis & Co. v. Probel*, Case 24/67 EU:C:1968:11.

an intellectual property should be considered as a factor while assessing whether a firm has abused its dominant position.<sup>354</sup>

- 7.4. However, notably jurisprudence in the EU suggests that exercise of rights in relation to intellectual property may be held to be abusive only in exceptional cases. In *Magill*<sup>355</sup>, a case that concerned copyright over television listings, the EC found that in the exceptional circumstances of the case, the copyright-holder had abused its dominant position by refusing to grant a licence. This was confirmed by the ECJ. Noting that the appellants were the only sources of the basic information required to compile a weekly television guide, the ECJ held that the refusal to license amounted to abuse when: (a) the refusal prevented the appearance of a new product for which there was potential consumer demand; (b) there was no justification for such a refusal; and (c) the appellant's conduct excluded all competition on the market since they denied access to basic information that was indispensable for the creation of the new product.<sup>356</sup> Similarly, in the decision on *IMS Health*<sup>357</sup>, it was reiterated that the exercise of an exclusive right related to intellectual property may, in exceptional circumstances, give rise to abusive conduct.
- 7.5. A similar approach, as in the EU, has been followed in the UK in relation to interaction of IPR with abuse of dominance.<sup>358</sup> Such justifications of IPR are also considered in the US. For instance, in *Data General Corporation v. Grumman Systems Support Corporation*<sup>359</sup> refusal to license for protecting a copyright was held to be a valid business justification against an allegation of monopolisation or abuse of dominance.
- 7.6. **Based on the above, the Committee recommended that in cases of abuse of dominance, a defence allowing reasonable conditions and restrictions for protecting IPR may be provided. It was mentioned that reasonable exercise of IPR may be an obvious defence and may not need to be stated expressly. However, the Committee discussed that since the Act explicitly mentions this defence in Section 3(5)(i), a specific defence should also be provided in relation to Section 4 to avoid any uncertainty. This may be similar to the defence given in Section 3(5)(i). It was also added that this defence should be**

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<sup>354</sup> *Ibid.*

<sup>355</sup> *Radio Telefis Eireann (RTE) and Independent Television Publications Ltd (ITP) v Commission of the European Communities*, C-241/91 P and C-242/91 P, ECLI:EU:C:1995:98.

<sup>356</sup> *Ibid.*, para 54-57.

<sup>357</sup> *IMS Health GmbH & Co. OHG v NDC Health GmbH & Co. KG*, C-418/01, ECLI:EU:C:2004:257.

<sup>358</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 828

<sup>359</sup> 761 F. Supp. 185 (D. Mass. 1991).

narrowly construed, in line with international jurisprudence discussed above.

- 7.7. The Committee also discussed that IPR defences, in relation to both Sections 3 and 4, should include within their scope, any laws in force related to IPR. Therefore, for both Sections 3 and 4, the provision providing IPR defences should be wide and, in addition to the existing IPR laws, should also include 'any other law in force relating to protection of IPR rights'.

## CHAPTER 7: COMBINATIONS

### 1. BACKGROUND

- 1.1. Competition laws chiefly deal with ex-post regulation, i.e. “*the control of entities and their market behaviour during the regulatory period and intervening in situations when regulated entities abuse the market position or rules that have been imposed in a regulated market.*”<sup>360</sup> This essentially means intervention by a competition authority after abuse has already taken place. However, competition authorities in many jurisdictions also lay down ex-ante regulation to prevent abuse through merger control. The aim of this ex-ante regulation is to object to mergers which may cause foreclosure of competition in, or are otherwise harmful to, domestic markets.<sup>361</sup> In this regard, the term ‘merger’ is not just restricted to mergers of companies but encompasses various forms of corporate restructuring like mergers, amalgamations, etc.<sup>362</sup>
- 1.2. Sections 5 and 6 of the Competition Act are the key provisions regulating such mergers (referred to as ‘combinations’ in India). As per the broad scheme of these sections, enterprises that propose to enter into combinations falling within the thresholds in Section 5 have to notify CCI prior to entering into such combinations.<sup>363</sup> The CCI then analyses if the proposed combination causes or is likely to cause AAEC in the relevant market within 210 days of notification of the combination.<sup>364</sup> During this period, standstill obligations apply and parties are not permitted to consummate the proposed combination. This means that until approved by CCI, parties cannot give effect to the proposed combination.
- 1.3. CCI will approve the combination if, after its assessment, it concludes that no AAEC is caused or is likely to be caused by such combination.<sup>365</sup> In the event that CCI concludes that the proposed combination does cause or is likely to

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<sup>360</sup> Rafał Nagaj and Brigita Žuromskaitė, ‘Ex post regulation as method of the public policy in the regulated sectors’ (2017) 16(4) Public Policy and Administration, p. 543 <<https://www.mruni.eu/upload/iblock/6ea/2.pdf>> accessed 18 May 2019.

<sup>361</sup> Abir Roy, Jayant Kumar, *Competition Law in India* (2<sup>nd</sup> edn., Eastern Law House, 2018).

<sup>362</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 830.

<sup>363</sup> Competition Act, Section 6(1).

<sup>364</sup> Competition Act, Section 6(2A).

<sup>365</sup> Competition Act, Section 31(1).

cause AAEC, it may either direct that the combination shall not take place,<sup>366</sup> or approve the combination with modifications agreed to by parties.<sup>367</sup>

- 1.4. The present Chapter captures the issues related to the regulation of combinations that have been deliberated upon by the Committee, keeping in mind issues that have arisen over the last few years and potential issues that may arise in the future.

## 2. DEFINITION OF CONTROL

### *Introducing the standard of Material Influence*

- 2.1. The scope of the term 'control' assumes significance while determining notifiability as well as for substantive analysis of combinations under the Competition Act. Section 5 of the Competition Act looks at acquisition of 'control', shares, voting rights or assets while determining if a transaction is to be notified to the CCI. Explanation (b) to section 5 which defines 'group' also relies on ability to *control* the management or affairs of the other enterprise as one of the relevant factors to determine existence of a group.

- 2.2. The term 'control' is presently defined in Explanation (a) to section 5 as follows:

*“(a) “control” includes controlling the affairs or management by –  
(i) one or more enterprises, either jointly or singly, over another enterprise or group;  
(ii) one or more groups, either jointly or singly, over another group or enterprise;”.*

From the above definition, it is evident that there is no indication of what rights may amount to control. As a fallout of this, the CCI has used the yardstick of ability to exercise 'decisive influence'<sup>368</sup> over an enterprise in some cases and ability to exercise 'material influence'<sup>369</sup> over an enterprise in others while determining presence of control. Notably, the standard of material influence is

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<sup>366</sup> Competition Act, Section 31(2).

<sup>367</sup> Competition Act, Section 31(3).

<sup>368</sup> CCI Order dated 28.05.2012 in Combination Registration No. C-2012/03/47, para 15 <<https://www.cci.gov.in/sites/default/files/faq/C-2012-03-47.pdf>> accessed 08 May 2019.

<sup>369</sup> CCI Order dated 12.03.2018 in Combination Registration No. C-2015/02/246 paras 12.10, 12.12-12.13, 12.17 <[https://www.cci.gov.in/sites/default/files/246\\_44\\_PublicV.pdf](https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf)> accessed 08 May 2019.

lower than the standard of decisive influence to determine existence of control.<sup>370</sup>

- 2.3. It was brought to the attention of the Committee that internationally certain countries including the EU<sup>371</sup>, Czech Republic<sup>372</sup>, etc. rely on the decisive influence standard to determine existence of control. On the other hand, certain countries, including the UK,<sup>373</sup> South Africa<sup>374</sup> and Canada<sup>375</sup> cast a wider net by relying on the material influence standard to determine control. The Committee discussed that adopting the decisive influence standard for control may restrict notifiability in certain cases which may have the potential to impact competition. For example, acquisition of joint control or negative control, acquiring informational rights, acquisitions not in the ordinary course of business, etc. may not be captured by the decisive influence standard. The Committee was mindful of the fact that even the EU has in the recent past conducted a stakeholder consultation with a view to introducing notification requirements for combinations that involve acquisition of non-controlling

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<sup>370</sup> CMA 'Mergers: Guidance on the CMA's jurisdiction and procedure' (January 2014), footnote 34 on page 20, <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384055/CMA2\\_Mergers\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf)> accessed 23 April 2019.

<sup>371</sup> EUMR, Article 3(2) <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en>> accessed 23 April 2019.

<sup>372</sup> The Czech Republic Competition Act, Article 12(4).

<sup>373</sup> Section 26 of the UK Enterprise Act, 2003, distinguishes three levels of interest that constitute control (in ascending order) – (i) material influence, (ii) de facto control, and (iii) a controlling interest (also known as 'de jure', or 'legal' control). Section 26(3) of the Act provides that the CMA may treat material influence (and 'de facto' control) as equivalent to 'control', for the purposes of establishing whether enterprises have been 'brought under common ownership or control'. In the context of its Phase 1 decision, the CMA's policy is to treat material influence as control whenever it considers that the test for reference would be met in the case in question. The ability to exercise material influence is the lowest level of control that may give rise to a relevant merger situation in the UK. See, paras 4.12-14, CMA 'Mergers: Guidance on the CMA's jurisdiction and procedure', January 2014 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384055/CMA2\\_Mergers\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf)> accessed 23 April 2019.

<sup>374</sup> South Africa Competition Act, Section 12(2)(g). Also see Robert Legh and Tamara Dini, 'Merger Control', Bowmans, (Getting the Deal Through, August 2018) <<https://gettingthedealthrough.com/area/20/jurisdiction/2/merger-control-south-africa/>> accessed 23 April 2019.

<sup>375</sup> Canada Merger Enforcement Guidelines (2011), para 1.5 <[https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/\\$FILE/cb-meg-2011-e.pdf](https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf)> accessed 23 April 2019.

interest.<sup>376</sup> This move has been attributed to the enforcement gap perceived by the EC on account of the high standard of 'decisive influence' for determining acquisition of control under the Council Regulation (EC) No 139/2004 ("EUMR").<sup>377</sup> The policy brief accompanying the EC White Paper for the stakeholder consultation noted as follows<sup>378</sup>:

*"In certain scenarios, where the legal definition of control and "decisive influence" under the EU Merger Regulation are not met, the holder of a non-controlling minority shareholding may still be able to exert material influence over the target company. This is influence relevant for competitive behaviour but short of control over the target firm. Potentially, this can have significant anti- competitive effects." (emphasis supplied)*

2.4. **Keeping the above in mind and noting that the recommended definition of control would not only impact the notifiability analysis but also the substantive competition assessment<sup>379</sup>, the Committee was of the view that introduction of a material influence standard for determination of control would be suitable. Introduction of this criteria would serve the twin benefit of bringing certainty to the meaning of control under Section 5 of the Act whilst retaining the CCI's powers to assess a wide range of combinations that may have AAEC. It was agreed that a balance needs to be struck to ensure that the merger control regulation empowers CCI to scrutinize transactions that may cause AAEC whilst ensuring that the legal framework is investment friendly in the larger interest of the economy.**

2.5. The Committee also briefly examined the possibility of harmonising the interpretation of control under the Competition Act with other statutes such as

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<sup>376</sup> EC Policy Brief <[http://ec.europa.eu/competition/publications/cpb/2014/015\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/015_en.pdf)> accessed 23 April 2019

<sup>377</sup> EC Policy Brief, page 2 <[http://ec.europa.eu/competition/publications/cpb/2014/015\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/015_en.pdf)> accessed 23 April 2019

<sup>378</sup> EC Policy Brief, page 3 <[http://ec.europa.eu/competition/publications/cpb/2014/015\\_en.pdf](http://ec.europa.eu/competition/publications/cpb/2014/015_en.pdf)> accessed 23 April 2019

<sup>379</sup> Para 12.15, CCI Order dated 12.03.2018 in Combination Registration No. C-2015/02/246 <[https://www.cci.gov.in/sites/default/files/246\\_44\\_PublicV.pdf](https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf)> accessed 08 May 2019.



the SEBI Takeover Code<sup>380</sup>, CA 2013<sup>381</sup>, IBC<sup>382</sup>, etc. However, the Committee noted that while harmonisation may be desirable, the definition of control is mandate specific in different laws. This view has also been reiterated by the SEBI in a discussion paper.<sup>383</sup> For example, the Supreme Court recently held that ‘control’ under the IBC denotes only positive control. However, under the Competition Act in case of notifiability as well as substantive assessment of combinations, acquisition of negative control may be vital. Even internationally, the ability to block special resolutions (i.e. negative control) has been expressly held to confer material influence and hence ‘control’ for the purposes of competition law.<sup>384</sup> Accordingly, such harmonisation of the definition of control was not considered to be viable.

#### *Guidance on material influence*

- 2.6. **It was noted that the details of what may constitute ‘material influence’ may be provided in subordinate legislation. It was also discussed that subordinate legislation may list certain minority rights, the acquisition of which would not be considered to confer material influence and hence control.** Some indicative factors for determining existence of material influence that have been laid down by the CCI in its orders are shareholding, special rights, status and expertise of an enterprise or person, board representation, structural/financial arrangements, etc.<sup>385</sup>

### **3. DEFINITION OF GROUP**

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<sup>380</sup> SEBI (Substantial Acquisition of Shares and Takeover) Regulations, 2011, Section 2(e) - “control” includes the right to appoint majority of the directors or to control the management or policy decisions exercisable by a person or persons acting individually or in concert, directly or indirectly, including by virtue of their shareholding or management rights or shareholders agreements or voting agreements or in any other manner”.

<sup>381</sup> CA 2013, Section 2(27) defines ‘control’ exactly the same as the SEBI Takeover Regulations.

<sup>382</sup> *Arcelor Mittal India Private Limited v. Satish Kumar Gupta*, 2018 SCC OnLine SC 1733.

<sup>383</sup> SEBI Discussion Paper on ‘Brightline Tests for Acquisition of ‘Control’ under SEBI Takeover Regulations’, para 16 <[https://www.sebi.gov.in/reports/reports/mar-2016/discussion-paper-on-brightline-tests-for-acquisition-of-control-under-sebi-takeover-regulations\\_31883.html](https://www.sebi.gov.in/reports/reports/mar-2016/discussion-paper-on-brightline-tests-for-acquisition-of-control-under-sebi-takeover-regulations_31883.html)> accessed 23 April 2019.

<sup>384</sup> *British Sky Broadcasting Group Plc v. The Competition Commission*, [2010] EWCA Civ 2. Also see OECD Policy Roundtable - Definition of Transaction for the Purpose of Merger Control Review, Box 3 <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>> accessed 23 April 2019.

<sup>385</sup> Combination Registration No. C-2015/02/246, Para 12.10 <[https://www.cci.gov.in/sites/default/files/246\\_44\\_PublicV.pdf](https://www.cci.gov.in/sites/default/files/246_44_PublicV.pdf)> accessed 8 May 2019.

- 3.1. Explanation (b) to Section 5 of the Competition Act defines group to be two or more enterprises which are in a position to *inter alia* exercise 26% voting rights in the other enterprise. In 2016, the Central Government altered this voting threshold to 50% through a notification issued by utilising the power to provide exemptions in public interest under Section 54(a) of the Act.<sup>386</sup>
- 3.2. The Committee discussed that for definitions where certain quantifiable thresholds are provided, it may be prudent to have some flexibility to be able to modify such thresholds if required. This may aid in updating the law in line with the evolution in, and state of, the market. **Therefore, it was recommended that this definition may be altered to provide that the threshold given in Clause (i) of Explanation (b) to Section 5 shall be “26% or such other threshold as notified by the Central Government.”** It was noted that a similar provision to prescribe alternative thresholds is also provided in other statutes, e.g. Section 90(1) of the CA 2013.
- 3.3. It was also discussed that it may be possible to interpret the current definition of group to refer to a relationship between “two or more enterprises” on one hand and any other enterprise, on the other hand. This interpretation implies that a ‘group’ could only comprise of three or more enterprises. A corollary to this interpretation may also imply that a holding and a subsidiary company, would not be group companies of each other. It was noted that this is an anomaly in the definition. **Therefore, in order to remove this anomaly, the Committee recommended that the current definition of group should be amended. In this regard, it was discussed that the language in Explanation (b) to Section 5 may be tweaked to cover scenarios where one enterprise controls the other in the manner provided in the explanation, instead of where “two or more enterprises” exercise control over another enterprise.**

#### 4. GREEN CHANNEL FOR COMBINATIONS

- 4.1. In recent times, there has been growing international consensus that mergers are a means for companies to compete and to realise welfare-enhancing efficiencies.<sup>387</sup> Therefore, delaying merger implementation, imposes costs not

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<sup>386</sup> MCA, Notification (04 March 2016) <<https://www.cci.gov.in/sites/default/files/notification/SO%20673%28E%29-674%28E%29-675%28E%29.pdf>> accessed 18 May 2019.

<sup>387</sup> Background Note by OECD Secretariat, Suspensory Effects of Merger Notifications and Gun Jumping, 20 February 2019, para 2.3(23) <[https://one.oecd.org/document/DAF/COMP\(2018\)11/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf)> accessed 17 May 2019. In this regard the Raghavan Committee Report also highlighted that: “Mergers are a legitimate means by

only on merging parties, but on society more generally.<sup>388</sup> In fact, certain market participants have argued against the benefits of having a merger control regime at all in a developing economy like India.<sup>389</sup>

- 4.2. In this backdrop, the Committee traced the origins of the present merger control provisions in the Act. It was noted that originally the MRTP Act mandated approval of the Central Government for any merger, amalgamation, takeover, etc. above a certain threshold.<sup>390</sup> Thereafter, in the liberalisation era of 1991, the pre-entry restriction under the MRTP Act was omitted by the MRTP Amendment Act, 1991. It was felt that the pre-entry restriction on investment decisions of the corporate sector had outlived its utility and had become a hindrance to the speedy implementation of industrial projects.<sup>391</sup> However, in the year 2000, the Raghavan Committee, keeping international practice of the time in mind, recommended revival of the provision for seeking approval for combinations above a certain threshold.<sup>392</sup> Even so, the Raghavan Committee was cognisant of the fact that as a general principle, mergers should be challenged only if they reduce or harm competition and adversely affect welfare.<sup>393</sup> Accordingly, to avoid delays and unjustified interventions, the Competition Act, in its original form provided for *voluntary* notification of mergers.<sup>394</sup> However, before the merger control regime was notified, the 2007 Amendment Act introduced a *mandatory* notification requirement by amending Section 6(2) of the Competition Act. The Standing Committee recommended a mandatory notification regime as it feared that otherwise the CCI may miss out

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which firms can grow and are generally as much part of the natural process of industrial evolution and restructuring as new entry, growth and exit.”, para 4.6.1.

<sup>388</sup> Background Note by OECD Secretariat, *Suspensory Effects of Merger Notifications and Gun Jumping*, 20 February 2019, para 2.3(23) <[https://one.oecd.org/document/DAF/COMP\(2018\)11/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf)> accessed 17 May 2019.

<sup>389</sup> Bharat Vasani, "International Merger Control Regimes – It's Time to Re-examine the Merger Control Regimes of India and other Emerging Economies", 6 February 2013 <<https://www.xbma.org/indian-update-international-merger-control-regimes-its-time-to-re-examine-the-merger-control-regimes-of-india-and-other-emerging-economies/>> accessed 17 May 2019.

<sup>390</sup> MRTP Act, Sections 20 and 23.

<sup>391</sup> S.M. Dugar, *Guide to Competition Act, 2002* (7<sup>th</sup> edn., Lexis Nexis, 2019), p. 652.

<sup>392</sup> Raghavan Committee Report, Para 4.7.5.

<sup>393</sup> Raghavan Committee Report, para 4.6.3.

<sup>394</sup> T. Ramappa, *Competition Law in India - Policies, Issues and Developments*, 3rd edn, (2014), Oxford University Press, page 213.

on certain important developments, which may ultimately hamper its functioning as a regulatory body.<sup>395</sup>

- 4.3. The Committee discussed that the merger control framework under the Competition Act has now been in force for almost a decade and the time is opportune to take stock of its impact and recalibrate its working based on the experience of the CCI so far. The first step of this exercise was to determine the purpose served by the merger notification process. In this regard, a recent OECD Note states that the intent behind having a merger notification requirement is to “*identify those transactions that are “suitable” for merger review, i.e., transactions that ... have a reasonable likelihood of outcomes that conflict with the policy goals of a competition law regime*”<sup>396</sup> (emphasis supplied).
- 4.4. Contrary to the above, the Committee was apprised that from 2011 up to 31 March 2018, modifications have been ordered by the CCI in less than 2.6% of notified<sup>397</sup> combinations and no rejection orders have been passed till date.<sup>398</sup> The Committee contemplated as to whether these figures indicate the need to review existing notification criteria and thresholds for combinations.
- 4.5. The Committee discussed that one of its mandates is to ensure that “Legislation is in sync with the needs of strong economic fundamentals” and to recommend amendments to the competition law framework in view of the changing business environment.<sup>399</sup> Two issues that bore weight on the Committee in this regard were (i) data from the Annual Reports of the CCI demonstrating that a majority of notified combinations were approved by the CCI without any modifications; and (ii) the widely reported sentiment of the global business

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<sup>395</sup> 44th Report of the Standing Committee on Finance, December 2006, page 44, <[https://www.prsindia.org/sites/default/files/bill\\_files/bill73\\_2007050873\\_Competition\\_Bill\\_2006\\_standing\\_committee.pdf](https://www.prsindia.org/sites/default/files/bill_files/bill73_2007050873_Competition_Bill_2006_standing_committee.pdf)> accessed on 16 May 2019.

<sup>396</sup> Background Note by OECD Secretariat, Suspensory Effects of Merger Notifications and Gun Jumping, 20 February 2019, para 2.1(8) <[https://one.oecd.org/document/DAF/COMP\(2018\)11/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf)> accessed 17 May 2019.

<sup>397</sup> Including notification received by CCI and matters taken up by CCI *suo-motu*.

<sup>398</sup> Annual Report of the CCI for 2017-2018, page 32 <<https://www.cci.gov.in/sites/default/files/annual%20reports/AnnualReportEnglish2017-18.pdf>> accessed 16 May 2019.

<sup>399</sup> Press release by the Ministry of Corporate Affairs, Government of India, September 30, 2019 <<http://pib.nic.in/newsite/PrintRelease.aspx?relid=183835>> accessed 16 May 2019.

community<sup>400</sup> – i.e. merger control increases transaction costs and potentially delays transactions. To address these issues the Committee contemplated possible ways to ensure that a balance is struck between adequate regulatory oversight and the ease of doing business.

- 4.6. One of the options in this regard that emerged was to provide a 'Green Channel' for combinations that are unlikely to result in any AAEC. The parties to the combination may self-assess, based on specified criteria and pre-filing consultation with the CCI, whether they qualify for the Green Channel. If they qualify, they will have the option to notify the CCI of the proposed combination under the Green Channel and then consummate it based on an automatic approval. Under this route, parties need not wait for the statutory 210-day standstill period to expire.
- 4.7. The success of the above approach hinges on a robust pre-filing consultation between the parties and the CCI. Such consultations may aid in giving parties certainty on the eligibility of the proposed combination to pass through the Green Channel. However, the pre-filing consultation would continue to be an informal and non-binding discussion.
- 4.8. The Committee also underscored the importance of a well-designed Form for notifying potential Green Channel combinations. For example, the Form should provide standard declarations with binary options for responses and objective disclosures wherever possible. It was specifically noted that the Form should not be so complicated or burdensome that it disincentivises parties to apply through the Green Channel. It was also discussed that the Form can have clearly spelt out caveats to the effect that any material misinformation or wrong information provided as well as material omission of information by parties would render the Form and subsequent approval void *ab initio*. Similarly wrongly availing the Green Channel for transactions not eligible under this route may also render the approval void *ab initio* and entail a penalty. Another caveat discussed was the power of CCI to review notifiable combinations in certain cases up to one year as discussed below.
- 4.9. With regard to maintenance of regulatory oversight by CCI in Green Channel cases, the following was observed-

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<sup>400</sup> ICC Recommendations on Pre-Merger Notification Regimes, page 1, <<https://iccwbo.org/publication/icc-recommendations-pre-merger-notification-regimes/>> accessed 16 May 2019.

- (i) In appropriate cases, CCI must be allowed to impose commensurate penalty in case of filing of wrong information/incomplete information, filing under incorrect route or omission to file information. Towards this end, the CCI's power to impose penalty under Section 44 of the Act may be enhanced.
- (ii) CCI may use its powers under Section 20(1) of the Act to assess whether any combination has caused or is likely to cause an AAEC up to one year from the date on which the combination takes effect in case of filing of wrong information/incomplete information, filing under incorrect route or omission to file relevant information. This may be stated in the form for the Green Channel filing and also communicated to parties during the pre-filing consultation.

4.10. The Committee was apprised that even internationally some jurisdictions that require mandatory pre-merger notification do not impose standstill obligations.<sup>401</sup> Italy<sup>402</sup>, Mexico<sup>403</sup> and Latvia<sup>404</sup> are some examples that were highlighted. In Italy, pre-merger notification obligations do not trigger a suspension of the merger, which can be implemented prior to clearance. When second phase proceedings are opened, the Italian Competition Agency may issue a standstill order, if the transaction raises serious competition concerns. Mexican competition law also does not prohibit the implementation of a merger unless the competition authority, i.e. the Federal Economic Competition Commission ("COFECE"), issues a non-execution order within ten days of the merger notification. In such cases the merger has to be on hold until COFECE issues its resolution. In these countries, parties self-assess risks involved in case of review of the merger post implementation and decide internally as to whether they want to consummate prior to clearance or not.

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<sup>401</sup> Background Note by OECD Secretariat, Suspensory Effects of Merger Notifications and Gun Jumping, 20 February 2019, para 2.2(20) <[https://one.oecd.org/document/DAF/COMP\(2018\)11/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf)> accessed 17 May 2019.

<sup>402</sup> Gian Luca Zampa, 'Merger Control in Italy', Freshfields Bruckhaus Deringer, (Getting the Deal Through, August 2018) <<https://gettingthedealthrough.com/area/20/jurisdiction/15/merger-control-2018-italy/>> accessed on 17 May 2019.

<sup>403</sup> Background Note by OECD Secretariat, Suspensory Effects of Merger Notifications and Gun Jumping, 20 February 2019, para 2.2(20) <[https://one.oecd.org/document/DAF/COMP\(2018\)11/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf)> accessed 17 May 2019.

<sup>404</sup> Latvian contribution to OECD Working Party No. 3 on Co-operation and Enforcement, 25 February 2014, <[DAF/COMP/WP3/WD\(2014\)22](https://one.oecd.org/document/DAF/COMP/WP3/WD(2014)22)> accessed 17 May 2019.

- 4.11. The Committee discussed that a potential downside of exempting Green Channel cases from the standstill obligation was the difficulty involved in untangling of assets and business relationships if the need arises. In this regard, the Committee discussed that (i) empirical evidence discussed above supports the finding that over 95% cases are cleared in phase 1 by the CCI without any modifications, therefore the probability of a Green Channel case requiring intervention was extremely low and (ii) the pre-filing consultation would minimize the risk of ineligible transactions passing through the Green Channel.
- 4.12. Based on the current trend of CCI's decisional practice regarding combinations, the intention of the Committee is that a majority of notifiable combinations must be able to pass through the Green Channel. This would save businesses time and costs associated with a suspensory regime and allow the CCI to focus its limited resources on cases that actually pose competition concerns. The Committee discussed that the threat of a deal being undone by the CCI after it is closed, desire for certainty by shareholders and significant penalty costs associated with violation of merger notification requirements are likely to be sufficient incentives for bona-fide self-assessment and disclosure by parties.
- 4.13. The Committee discussed that criteria for determining eligibility under the proposed Green Channel may be prescribed by the Government in consultation with the CCI. Factors such as extent of overlap, either horizontal or vertical may be considered while formulating such criteria. The Act may provide broad principles such as 'public interest' that may be considered while formulating such subordinate legislation. It was noted by the Committee that the Green Channel will only apply to notifiable combinations that are not already exempt.
- 4.14. Some of the key advantages of the Green Channel approach discussed by the Committee are as below:
- (i) Introduction of an automatic route for approval of combinations which will significantly reduce time and costs of transactions that are notifiable to the CCI.
  - (ii) Allowing the CCI to continue its role in monitoring notifiable combinations which may have genuine competition concerns.
  - (iii) Ensuring that businesses in India are able to consolidate with minimal regulatory compliance, gain from economies of scale and compete at a global scale.



- (iv) In the long term, for combinations that are notified other than by way of the proposed Green Channel, the CCI will benefit from the 'signalling' connotation associated with such notification.
- (v) Recalibrating transaction costs for businesses, enforcement costs for the CCI vis-à-vis development goals of the country and benefit accrued to all industry participants including consumers through the merger control regime.

**4.15. Finally, the Committee discussed that the proposed Green Channel must become the preferred route for merger notification and approval for majority of the cases. It was agreed that detailed criteria for eligibility under the Green Channel may be formulated by the Government based on consultation with CCI. Appropriate forms for notification under this route may also be designed keeping the aforementioned principles in mind.**

4.16. While discussing the criteria for eligible combinations for Green Channel, the Committee considered if combinations arising out of IBC should be permitted to pass through this Green Channel. The IBC involves an insolvency resolution process wherein a company going through insolvency may be taken over by another enterprise whose plan is approved by a committee of creditors of the insolvent company.<sup>405</sup> This gives rise to possible combinations and the applicants proposing such a plan (i.e. resolution applicants) are required to notify their proposed combinations to the CCI, if the requirements of Section 5 of the Act are met. The Committee discussed that the insolvency resolution process is a time bound process and combinations arising out of this may require quick approval.<sup>406</sup> It was noted that the IBC was enacted with the aim of minimising the volume of non-performing assets in India. One of the objectives of the IBC is to create a market for distressed assets to maximise the value that creditors of distressed firms will receive.<sup>407</sup> It was highlighted that since a key policy objective here is to boost the distressed asset market, it may be beneficial to ease the regulatory burden on resolution applicants. **It was thus concluded that combinations arising out of resolution plans under the IBC may be permitted to be notified through the Green Channel.**

**4.17. Additionally, in furtherance of its objective of creating an efficient and time bound framework for assessment of combinations, the Committee**

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<sup>405</sup> IBC, Part II.

<sup>406</sup> IBC, Section 12.

<sup>407</sup> IBC, Preamble.



**recommended that the mandatory 30-day timeline for completion of the phase 1 review procedure provided in Regulation 19(1) of the Combination Regulations must be included in the Act itself. This timeline would continue to govern combinations that are not eligible for the proposed Green Channel.**

## **5. DEAL VALUE THRESHOLD FOR COMBINATIONS**

- 5.1. During its discussions on combinations, the Committee observed that in the last decade the five largest technology companies have made over 400 acquisitions globally.<sup>408</sup> As noted by a recent report, some of these acquisitions have been exceptionally high value, peaking with Microsoft paying \$26.2 billion for LinkedIn.<sup>409</sup>
- 5.2. The Committee was apprised by the CCI that industry leaders have recognised the imperative need for ex-ante assessment of acquisitions in the digital space during a stakeholder consultation on ‘digital markets and competition issues’ organized by CCI on 24 July 2018. The CCI further informed the Committee that the CCI has set up a Think Tank comprising of technologists, economists and lawyers to deliberate on the issues that arise in new-age markets. In a meeting held in November 2018, all members of the think-tank appreciated the need for looking at acquisitions in the digital space more carefully.
- 5.3. The Committee discussed that most of these acquisitions in digital markets derive value from data or some business innovation held by the target. In such acquisitions, the target may not have a huge asset base and may be offering products/services that are either free or generate insignificant turnover. This may be because the business model of companies in digital markets is often such that they do not generate any significant revenue for a number of years, focusing initially on user growth.<sup>410</sup> In such instances, the value of the target’s sales is a rather poor indicator of the transaction’s significance for competition. Against this background, the Committee discussed the adequacy of the existing asset and turnover based thresholds for notification of combinations provided in Section 5 of the Act.

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<sup>408</sup> Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ (March 2019), page 12 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 02 June 2019.

<sup>409</sup> *Ibid*, para 3.44.

<sup>410</sup> Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ (March 2019), page 94 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 06 June 2019.

- 5.4. The Committee noted that unlike many other jurisdictions, in India unless the notification thresholds are met, the CCI has no power to assess transactions, even if their potential competitive harm is evident. This is owing to the fact that the Competition Act does not grant the CCI any residuary power to assess *non-notifiable* transactions.
- 5.5. The Committee noted that certain competition regulators such as the EC which do not have residuary power, can rely on other mechanisms to evaluate non-notifiable mergers. For example, the Facebook/WhatsApp merger did not meet turnover thresholds of the EC and was thus initially not eligible for notification to the EC. However, ultimately the EC was able to review the merger under its case referral system since the proposed transaction met the notification thresholds in three European member States. The Committee noted that no such options were available to CCI to review non-notifiable mergers that may have an anti-competitive effect.
- 5.6. In this regard, the Committee discussed whether Section 20(1) of the Act may be relied upon by the CCI to review transactions that do not meet the asset and turnover thresholds. It was noted that the wording of Section 20(1) was such that it only enabled the CCI to assess transactions that qualified under Section 5, i.e. transactions that meet the asset and turnover thresholds in Section 5. Thus, it was concluded that presently the CCI had no residuary jurisdiction to assess *non-notifiable* transactions. On the other hand, in certain other countries, competition regulators have in the past used such residuary power to review transactions where thresholds were not met. For example, such powers have been exercised in Ireland and in Brazil.<sup>411</sup> Even in the US, where the merger notification threshold is based on the size of transaction test<sup>412</sup> the competition authority has jurisdiction to review transactions that fall below such threshold.
- 5.7. Certain other countries have decided not to rely on residuary powers and have addressed the lacuna more directly by introduction of a deal-value threshold for merger notification. Such a threshold has specifically been incorporated in the competition legislations in Germany and Austria as an additional,

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<sup>411</sup> Global Trends in Merger Control Enforcement, Allen & Overy LLP, (2018), <<http://www.allenoverly.com/SiteCollectionDocuments/Global%20trends%20in%20merger%20control.pdf>> accessed 22 December 2018.

<sup>412</sup> The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (Codified as amended at 15 U.S.C § 18a.) amongst other tests prescribes a size of transaction test / deal value threshold (which is currently \$ 84.4 million) for pre-merger notifications, unless the transaction is otherwise exempt under one of the many transaction types and asset class exemptions.

subsidiary threshold for notification.<sup>413</sup> The German Act against Restraints of Competition was amended post a detailed consultation with relevant stakeholders, to include Section 35(1a).<sup>414</sup> This provision prescribes a deal value threshold requirement of EUR 400 million for merger notification. Subject to certain turnover-based threshold requirements,<sup>415</sup> if an acquisition is valued more than EUR 400 million and the target undertaking has “*substantial operations*” in Germany, such transaction is subject to the merger control review of the German competition regulator.

5.8. Similarly, Section 9(4) of the Austrian Federal Cartel Act, 2005<sup>416</sup> prescribes a deal value threshold of EUR 200 million for merger notification. Subject to certain turnover-based threshold requirements,<sup>417</sup> if a transaction is valued to be in excess of EUR 200 million and the undertaking to be acquired “*is active to a large extent in the domestic market*”, it is subject to the merger notification requirement.

5.9. The Committee discussed how Germany and Austria have ironed out certain operational challenges that arise due to the introduction of a deal value threshold by the issuance of a guidance<sup>418</sup> that amongst other things, deals with the computation of deal value. However, the guidance itself notes that in the

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<sup>413</sup> Germany & Austria, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), (2018) , <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden\\_Transaktionschwelle.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionschwelle.pdf?__blob=publicationFile&v=2)> accessed 26 November 2018.

<sup>414</sup> German Act against Restraints of Competition <[http://www.gesetze-im-internet.de/englisch\\_gwb/](http://www.gesetze-im-internet.de/englisch_gwb/)> accessed 26 November 2018.

<sup>415</sup> These turnover requirements are: (1) the combined aggregate worldwide turnover of all the undertakings concerned was more than EUR 500 million in the last business year preceding the concentration; (2) in the last business year preceding the concentration the domestic turnover of one undertaking concerned was more than EUR 25 million; and neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than EUR 5 million.

<sup>416</sup> Austrian Federal Cartel Act, 2005 <[https://www.bwb.gv.at/fileadmin/user\\_upload/PDFs/PDFs3/2-Federal\\_Cartel\\_Act\\_final.pdf](https://www.bwb.gv.at/fileadmin/user_upload/PDFs/PDFs3/2-Federal_Cartel_Act_final.pdf)> accessed 26 November 2018.

<sup>417</sup> These turnover requirements are: (1) the undertakings concerned achieved an aggregate worldwide turnover of more than EUR 300 million in the last business year preceding the transaction and (2) the undertakings concerned achieved an aggregate domestic turnover of more than EUR 15 million in the last business year preceding the transaction.

<sup>418</sup> Germany & Austria, Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG), (2018) <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden\\_Transaktionschwelle.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionschwelle.pdf?__blob=publicationFile&v=2)> accessed 26 November 2018.

absence of sufficient case practice, it is not possible to contemplate all application related issues and it should be regarded as preliminary.

5.10. Efforts of other jurisdictions such the EU, UK, US and Italy in conducting wide-ranging consultations for analysing issues with merger control in digital markets and in particular introduction of a deal value threshold for data driven transactions were also noted by the Committee. For example, the Report of the Digital Competition Expert Panel constituted by the Government of UK ("**UK Expert Panel Report**")<sup>419</sup> examined in detail the reasons for the lack of detailed scrutiny by CMA of mergers in digital markets. One of the potential reasons for this evaluated by the Panel was whether the CMA is, "constrained by its reach, which includes meeting either of the following two jurisdictional threshold tests: the turnover test and the share of supply test."<sup>420</sup> Eventually, based on CMA's submissions that the "share of supply" test provided it enough flexibility to review mergers in digital markets, the Panel decided that a strong case for legislative change to CMA's jurisdiction could not be made out.<sup>421</sup> However, the UK Expert Panel Report noted as follows for countries that do not have a similar share of supply test:

*"The business model of digital companies often means that they fail to generate any significant revenue for a number of years, focusing initially on user growth. For countries relying solely on turnover thresholds to apply jurisdiction, this is a significant issue that must be addressed."*<sup>422</sup> (emphasis supplied)

The Report also contemplates that if needed in the future "it may be appropriate for government to introduce a transaction value threshold alongside the existing turnover and share of supply thresholds for jurisdiction." (emphasis supplied)<sup>423</sup>. The Report has in fact recommended that,

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<sup>419</sup> Digital Competition Expert Panel (UK), 'Unlocking digital competition' (March 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 06 June 2019.

<sup>420</sup> *Ibid.*, page 94.

<sup>421</sup> *Ibid.* However, the Panel also recommended that, "Merger assessment in digital markets needs a reset. The CMA should take more frequent and firmer action to challenge mergers that could be detrimental to consumer welfare through reducing future levels of innovation and competition, supported by changes to legislation where necessary." (page 138).

<sup>422</sup> *Ibid.*, page 94.

<sup>423</sup> *Ibid.*, pages 94 and 95.

digital companies that have been designated with a strategic market status should be required to make the CMA aware of all intended acquisitions.<sup>424</sup>

5.11. In light of the above, the Committee deliberated the need to amend the thresholds for CCI to review transactions under the Competition Act. There were concerns that any amendment to the law must not be premature. In this regard, it was pointed out that merger control, in terms of its intent and form, is an anticipatory regulation. To demand empirical validation on the basis of (a) the number of transactions that escaped scrutiny of the CCI owing to asset/turnover falling below the thresholds and (b) their anti-competitive effects on markets, would mean to wait until a large number of such transactions take place and their anti-competitive effects play out in the market and only thereafter plug the legislative gap which is already evident. It was highlighted that digital markets in India have witnessed a number of transactions, which have been used as a strategy to consolidate market positions, eliminate potential threats or to expand into new lines of businesses. Example include, acquisition of Myntra by Flipkart, TaxiforSure by Ola, Whatsapp by Facebook, and Freecharge by Snapdeal. The Committee noted that this view corresponds to the findings in the UK Expert Panel Report with respect to under-enforcement in digital markets.<sup>425</sup> The Committee discussed that it is necessary to adopt a pragmatic and forward-looking approach in this regard.<sup>426</sup>

5.12. Based on the above, the Committee was of the considered view that there is an enforcement gap regarding the ability of the CCI to review transactions in digital markets to test their anti-competitiveness under the present merger control regime. The CCI did not have any residuary power of review like Brazil or the US, referral mechanism like the EU, share of supply test like the UK or a deal value threshold like Germany and Austria. The Committee discussed that one of the key objectives of undertaking the current review of the Competition Act was to brace the legislation to meet the challenges that lie ahead. Given that the increasing importance of digital markets in the economy could not be

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<sup>424</sup> *Ibid.* page 95.

<sup>425</sup> *Ibid.* pages 91- 93.

<sup>426</sup> In this regard the UK Expert Panel Report states that no enforcement can be perfect, given all of the uncertainties inherent with forward-looking merger assessments, and some balancing of these types of errors is necessary -Digital Competition Expert Panel (UK), 'Unlocking digital competition' (March 2019), para 3.42  
<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 06 June 2019.

denied, the Committee felt that it was vital to ensure competitiveness of this market. While there was broad consensus that a deal value threshold may be introduced, it was discussed that there may be other suitable thresholds which may emerge as CCI and competition regulators worldwide better understand how new age markets function.

5.13. The Committee was cognisant of the fact that introducing new thresholds such as the deal-value threshold will certainly require ironing out the accompanying practical and operational challenges. For example, the following may need to be considered while formulating a deal-value threshold:

- (i) determining how to account for fluctuations in the value of shares if they form part of the transaction;
- (ii) computation of a deal value threshold in complicated cases such as in case of earn outs and deferred consideration provisions which are dependent on performance during such time period that may be years after closing;
- (iii) variation in the deal value based on the date of calculation of the value;
- (iv) introduction of a local nexus test in line with international standards,<sup>427</sup> to avoid catching cases that may not actually impact competition in India.

5.14. **Keeping the above in mind, the Committee recommended that while the Act is being comprehensively reviewed, an enabling provision empowering the Government to introduce necessary thresholds including a deal-value threshold for merger notification may be introduced in the Act. Any new threshold must account for clear and objectively quantifiable standards for computing the necessary figure as well as local nexus criteria. This will ensure that only those transactions that have a significant economic link to India are caught by the threshold and neither the CCI nor the parties are burdened with unnecessary notifications.**

## 6. EXEMPTIONS

### *Need for exemptions*

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<sup>427</sup> International Competition Network, Recommended Practices For Merger Notification And Review Procedures, (2017) <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf)> accessed 27 November 2018; Organisation for Economic Co-operation and Development, Recommendation of the OECD Council On Merger Review, (2005) <<http://www.oecd.org/daf/competition/mergers/40537528.pdf>> accessed 02 December 2018.



- 6.1. Presently, Section 5 of the Competition Act requires notification of *any direct or indirect acquisition of shares, voting rights, assets or control* if the asset/turnover thresholds are met. There is no limit on the number of shares, nature of voting rights or assets or quality of control. The Committee discussed that acquisitions that do not involve change in control (i.e. purely financial, non-strategic investments) are unlikely to have an impact on competitiveness of market. Therefore, subjecting such investments to mandatory notification unnecessarily stretches timelines, increases costs and is against the ease of doing business principle. Based on this understanding, several jurisdictions such as the EU,<sup>428</sup> South Africa<sup>429</sup> and the UK<sup>430</sup> hinge their mandatory notification requirement on acquisitions involving ‘change in control’.
- 6.2. The Committee briefly deliberated on the merits of introducing a change in control test for notification of combinations instead of the present catch-all approach in Section 5 discussed above. However, it was noted that certain cases such as investments in competitors may warrant scrutiny in spite of not involving a change in control. Additional tests would have to be recommended to capture such transactions if a purely control based test was introduced. While there was consensus on the underlying rationale for moving to a change in control test with additional criteria to capture investments in competitors, it was discussed that revamping the entire framework of Section 5 may have wide ramifications and lead to uncertainty among businesses. **Finally, the Committee agreed that an alternative approach that may provide similar benefits without revamping the entire Section 5 framework is to streamline the exemptions to Section 5. One of the aims of streamlining the exemptions to Section 5 is to ensure that minority non-controlling acquisitions are expressly exempted from notification obligations.**

*Exemption for acquisition of minority interest*

- 6.3. With respect to the exemption for minority non-controlling acquisitions, the Committee discussed that the present Item 1 exemption in Schedule 1 of the

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<sup>428</sup> EUMR, Article 3, Definition of concentration – “A concentration shall be deemed to arise where a change of control on a lasting basis results from: (a) the merger of two or more previously independent undertakings or parts of undertakings, or....”.

<sup>429</sup> UK Competition Act, Section 12(1)(a) – “For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm.” <<http://www.compcom.co.za/wp-content/uploads/2014/09/pocket-act-august-20141.pdf>> accessed 10 July 2019.

<sup>430</sup> Enterprise Act, Section 26, Enterprises ceasing to be distinct enterprises – “(1) For the purposes of this Part any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control...”.

Combination Regulations may be used with certain modifications. The indicative formulation proposed by the Committee sought to exempt the following: (A) acquisition of shares or voting rights up to 25% if there is no change of control and there are no vertical or horizontal overlaps between the business of the target and the acquirer group; and (B) a minority non-controlling acquisition of up to 10% shareholding of the target in case the acquirer group has horizontal or vertical overlaps with the target's business, provided that the acquisition does not give the acquirer group (i) the right to nominate a director on the target's board and the acquirer does not intend to participate in the affairs or the management of the enterprise whose shares or voting rights are being acquired, or (ii) any special right not enjoyed by an ordinary shareholder of the target.

- 6.4. The Committee discussed that the above formulation also addresses the ambiguity in the present Item 1 exemption as to whether the exemptions are applicable in case of horizontal or vertical overlaps in the business of the target and acquirer group.
- 6.5. While desirous of bringing in more clarity, at the same time, the Committee was wary of exempting all minority acquisitions as experience suggests that material influence can be exerted even by someone holding a minority interest in certain cases. In the past CCI has held that to qualify for 'exemption' under Item 1 of Schedule I to the Combination Regulations, the minority acquisition must not have been made with an intention of participating in the formulation, determination or direction of the basic business decisions of the target.<sup>431</sup> In a case where the acquirer held 16.43% shares in the target, the CCI considered surrounding circumstances that demonstrated strategic intent behind the acquisition and held that the minority acquisition was notifiable.<sup>432</sup>
- 6.6. The Committee was also apprised of the growing international consensus among competition regulators worldwide that certain acquisitions of minority interest may have competition concerns including dampening of competition.<sup>433</sup> For example,

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<sup>431</sup> *Zuari Fertilizers and Chemicals Ltd (ZFCL)*, Combination Registration No. C-2014/06/181.

<sup>432</sup> *Zuari Fertilizers and Chemicals Ltd (ZFCL)*, Combination Registration No. C-2014/06/181.

<sup>433</sup> OECD Policy Roundtable - Definition of Transaction for the Purpose of Merger Control Review, Page 215-223 <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>> accessed 23 April 2019.



- (i) The EC which presently cannot review acquisition of non-controlling minority shareholding has been reflecting on a review of its merger regulation with a view to covering the acquisition of non-controlling minority shareholdings so as to give the EC the possibility to intervene.<sup>434</sup>
- (ii) Even in South Africa, where statutorily notification is only required in case of direct or indirect acquisition of control<sup>435</sup>, a case to case analysis is carried out to determine notifiability in case of acquisition of minority interest. The Committee noted that it has been reported that the Competition Commission of South Africa in a recent merger held that a 7.6% shareholding confers control after an in-depth evaluation of the available information. It studied the information pertaining to various agreements, the voting pool arrangements, board minutes, and strategic documents detailing how decisions are taken.<sup>436</sup>
- (iii) In the UK, the Guidance on CMA's Jurisdiction and Procedure<sup>437</sup> clarifies as follows:

*"Although there is no presumption of material influence below 25%, the CMA may examine any shareholding of 15% or more in order to see whether the holder might be able materially to influence the company's policy. Exceptionally, a shareholding of less than 15% might attract scrutiny where other factors indicating the ability to exercise material influence over policy are present."*

The Guidance states that the purpose of the UK merger control is to enable the CMA to consider the commercial realities and results of transactions and that the focus should be on substance and not legal form. The Guidance

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<sup>434</sup> OECD Policy Roundtable - Definition of Transaction for the Purpose of Merger Control Review, Page 85 <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>> accessed 14 May 2019.

<sup>435</sup> UK Competition Act, Section 12.

<sup>436</sup> OECD Policy Roundtable - Definition of Transaction for the Purpose of Merger Control Review, page 162-163 <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>> accessed 14 May 2019.

<sup>437</sup> Guidance on CMA's Jurisdiction and Procedure, January 2014, paras. 4.14-4.29 <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/384055/CMA2\\_Mergers\\_Guidance.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/384055/CMA2_Mergers_Guidance.pdf)> accessed 14 May 2019.

also provides factors based on which acquisition of minority or other shareholding may be assessed by the CMA.<sup>438</sup>

- (iv) In the US, even though the Hart Scott Rodino Antitrust Improvements Act, 1976 (“**HSR Act**”) and the Rules thereunder exempt acquisitions that result in holding of 10% or less of a target’s voting share if made solely for the purpose of investment,<sup>439</sup> the ‘investment only’ exemption as defined and applied by competition agencies has been touted to be interpreted narrowly, subjecting many acquisitions of 10% or less of a target’s voting share to premerger reporting.<sup>440</sup>

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<sup>438</sup> The factors laid down are as follows:

- the distribution and holders of the remaining shares, for example whether the acquiring entity’s shareholding makes it the largest shareholder
- patterns of attendance and voting at recent shareholders’ meetings based on recent shareholder returns, and, in particular, whether voter attendance is such that a shareholder holding 25% of the voting rights or less would be able in practice to block special resolutions. In making this determination, the CMA may have regard to the votes of other shareholders that it considers may be expected to be voted with the acquirer against a special resolution
- the existence of any special voting or veto rights attached to the shareholding under consideration, and any other special provisions in the company’s constitution conferring an ability materially to influence its policy.
- the status and expertise of the acquirer, and its corresponding influence with other shareholders which may allow it to exert material influence even on acquisition of minority interest. CMA may also consider whether, given the identity and corporate policy of the target company, the acquirer may be able materially to influence policy formulation at an earlier stage through, for example, meetings with other shareholders.
- the scenario where a company’s appetite for pursuing certain strategies would be reduced because of a perception that these strategies would be likely to cause conflict with the acquirer.
- right to board representation and allied factors such as experience of board member, etc.
- agreements such as exclusive supply agreements, consultancy service agreements, loan agreements that make the target highly dependent on the creditor.

<sup>439</sup> 15 U.S.C. §18a(c)(9) and 16 CFR §802.9. The HSR Rules provide that “[v]oting securities are held or acquired ‘solely for the purpose of investment’ if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.” OECD Policy Roundtable - Definition of Transaction for the Purpose of Merger Control Review, page 198 <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>> accessed 30 May 2019.

<sup>440</sup> OECD Policy Roundtable - Definition of Transaction for the Purpose of Merger Control Review, Page 198 <<http://www.oecd.org/daf/competition/Merger-control-review-2013.pdf>> accessed 23 April 2019.

- 6.7. **Keeping in mind the emerging international practice, the Committee was of the view that while formulating subordinate legislation on exemptions for acquisition of minority interest, care must be taken to ensure that notifiability of combinations is assessed based on substance over form. One of the ways of achieving this may be to list down indicative factors similar to the Guidance in UK based on which the ‘non-controlling’ nature of the acquisition may be determined.**

*Target Based Exemption*

- 6.8. The Committee noted that there is general consensus among competition agencies worldwide that local nexus criteria is vital to a well-functioning merger control system.<sup>441</sup> Proper application of local nexus criteria can eliminate unnecessary costs for businesses and competition regulators, while increasing the efficiency, effectiveness and coherence of global merger control.<sup>442</sup> A recent OECD Report that reviewed merger control regimes in approximately 50 countries (including OECD and non-OECD countries) notes that most merger control thresholds across jurisdictions require some form of local nexus.<sup>443</sup>
- 6.9. In recognition of this desirability to establish local nexus for notifiability of combinations to the CCI, the Central Government introduced the target exemption in 2011 for a period of 5 years which was subsequently revised in 2016 and 2017.<sup>444</sup> According to the target-based exemption, a transaction where the value of assets or turnover in India of the target enterprise (including a division or business) being acquired, taken control of, merged or amalgamated is not more than a certain specified threshold, it does not need to be notified to the CCI. In other words, these transactions are exempt from the mandatory notification requirement as they are understood to be lacking sufficient local nexus with Indian markets. Notably, India’s compliance with international best

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<sup>441</sup> OECD Roundtable – Jurisdictional Nexus in Merger Control Regimes, page 2 <[https://one.oecd.org/document/DAF/COMP/WP3/M\(2016\)1/ANN3/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2016)1/ANN3/FINAL/en/pdf)> accessed 13 May 2019.

<sup>442</sup> OECD – Local Nexus and Jurisdictional Thresholds in Merger Control (2016), page 23 <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En)> accessed 12 May 2019.

<sup>443</sup> OECD – Local Nexus and Jurisdictional Thresholds in Merger Control (2016), page 18 <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En)> accessed 12 May 2019.

<sup>444</sup> Please refer to <<https://www.cci.gov.in/notification/111>> accessed 12 May 2019.

practice by introduction of the local nexus requirement has been duly noted in the international sphere.<sup>445</sup>

- 6.10. Several stakeholders highlighted that the target exemption presently operates by way of ad hoc notifications issued by the Central Government from time to time. It was suggested that given that the target exemption captures an essential element of the merger regulation framework i.e. local nexus for notifiability, it must be codified within the Act. **The Committee agreed that integrating the target-based exemption into the Competition Act would provide much needed certainty to all stakeholders.**

*Exemption for Financial Institutions*

- 6.11. Sections 6(4) and (5) of the Act provide the manner of notification of combinations involving certain financial institutions, which is distinct from the requirements for notification of other combinations provided in Section 5 and 6. Any proposed acquisition, falling within the scope of Sections 6(4) and (5), is not mandated to be notified to the CCI prior to actualising such acquisition. Parties to such acquisition are instead required to notify the CCI within seven days post such acquisition. Thus, Sections 6(4) and (5) effectively provide a carve out for financial institutions falling within their scope. This carve out has been created keeping in mind the public interest involved in the acquisitions made by these financial institutions.<sup>446</sup>

- 6.12. **The Committee discussed that presently there is no penalty for non-filing under Sections 6(4) and (5) of the Act. Further, it was noted that the CCI currently does not receive any substantial filings from financial institutions under these provisions. Therefore, the Committee concluded that this framework currently operates as an exemption in effect. It was agreed that acquisitions falling within the scope of Section 6(4) and (5) be made an exemption instead of the current *post facto* filing requirement as in practice it operates like an exemption even presently.**

- 6.13. **It was also pointed out that the language used in Sections 6(4) and (5) requires to be updated due to changes in other statutes. In this regard, it was decided that:**

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<sup>445</sup> OECD – Local Nexus and Jurisdictional Thresholds in Merger Control (2016), page 21 <[http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2016)4&docLanguage=En)> accessed 12 May 2019.

<sup>446</sup> S.M. Dugar, *Guide to Competition Act, 2002* (7<sup>th</sup> edn., Lexis Nexis, 2019), p. 712.

- (i) the term 'foreign institutional investor' should be substituted with 'foreign portfolio investor'<sup>447</sup>;
- (ii) the term 'venture capital fund' should be substituted with 'alternative investment fund falling within Category I of the Securities and Exchange Board of India (Alternate Investment Funds) Regulations 2012'.<sup>448</sup>

The Committee further discussed if non-banking financial companies that are not owned by corporate houses should also be exempted, along with other financial institutions mentioned in Section 6(4). However, the Committee observed that the power of the Central Government to exempt categories of combinations discussed in the paragraph 6.14 below may be utilised, if deemed appropriate, instead of providing this separately in the Act.

#### *Power to Exempt*

- 6.14. Regulation 4 of the Combination Regulations provides certain categories of combinations which are usually exempt from the obligation of notifying CCI and seeking approval of such a combination. It states that they are ordinarily not likely to cause AAEC and need not normally notify CCI. It was noted that the text of the Combination Regulations may be interpreted to imply that these are not absolute exemptions. **The Committee discussed the in order to provide clarity on the mandate of notification of combinations to CCI, a list of exempted combinations should be provided.** It was noted that the Central Government has been provided the power to exempt certain class of enterprises and certain practices and agreements from application of provisions of the Competition Act. In line with this, the Committee recommended that the Competition Act be amended to empower the Central Government to prescribe through rules categories of combinations which are exempt from the mandate of getting CCI's approval for the combination. Similar to Section 54 of the Act, grounds based on which such exemption is to be granted by the Central Government should also be outlined in the Act. Using this power, the Central Government may formulate subordinate legislation for exempting relevant acquisitions of non-controlling minority

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<sup>447</sup> SEBI (Foreign Portfolio Investor) Regulations, 2014, Regulation 47 repealed the SEBI (Foreign Institution Investor) Regulations, 1995.

<sup>448</sup> SEBI (Alternate Investment Funds) Regulations, 2012, Regulation 39 repealed the SEBI (Venture Capital Funds) Regulations, 1996.

**interest, devising appropriate thresholds for the target-based exemption and so on.**

## **7. APPLYING STANDSTILL OBLIGATIONS**

### *Public Bids and Hostile Takeovers*

- 7.1. Presently, the Competition Act does not permit parties to acquire any shares (or pay any consideration) in a proposed combination pending approval from the CCI. This includes combinations involving open market acquisition of shares listed on the stock exchange, including potential hostile acquisitions. The Committee noted that the execution and completion of share acquisition in public bids is usually instantaneous. Thus, mandating a standstill on acquisition of shares pending the approval of the combination may hamper the viability of acquisitions via public bids.
- 7.2. In this regard, it was further noted that internationally merger control regulations often account for the special characteristics of on-market share purchases in takeover situations and allow for special dispensations, in the context of standstill obligations. For instance, as per Article 7(2) of the EUMR, standstill obligations do not prevent the implementation of a public bid or a series of transactions in securities in a market such as a stock exchange, by which control is acquired from various sellers. During the pendency of the approval of the merger, the acquirer does not exercise any ownership or voting rights attached to the securities involved.<sup>449</sup> A similar position has also been adopted in Brazil.<sup>450</sup>
- 7.3. **Therefore, the Committee discussed that a dilution of standstill obligations in case of public bids and hostile takeovers may facilitate such takeovers and promote the ease of doing business in India. It was suggested that parties to such transactions should be allowed to purchase securities, provided they surrender all beneficial rights (of dividend and voting) attached to such securities until CCI approves the proposed combination. Further, such securities should also be placed in an escrow account pending CCI's approval.**

### *Power to Allow Derogations*

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<sup>449</sup> EUMR, Article 7.

<sup>450</sup> Internal Regulation of the CADE, Article 109-A.

7.4. Derogation from standstill obligations in combination regulation is essentially an exemption from the mandate to not consummate the combination pending its approval by competition authorities.<sup>451</sup> This does not mean that the entity is exempt from notification of the combination, but only means that parties are free to operationalise the combination while they are awaiting the approval of the combination. Derogations are usually seen as a way to reconcile, in exceptional cases, the burdens that *ex ante* merger control puts on merging firms with the overall pro-competitive effect that mergers will generally have.<sup>452</sup> As per an OECD Paper,

*“When insolvency of the target is pending or vital assets threaten to deteriorate if the prospective acquirer would not insert cash or enter into obligations of the target, the whole merger might not be feasible after the waiting period set for the standstill obligation. For such cases, many jurisdictions provide the possibility for a derogation from the standstill obligations, to allow merging parties to implement parts of the transaction before the expiration of the waiting period or the clearance.”*<sup>453</sup> (emphasis supplied)

7.5. The Committee noted that the Competition Act currently does not provide CCI a power to allow such derogations from standstill obligations. Internationally, many jurisdictions enable competition authorities to allow derogation from standstill obligations during merger control in certain cases. However, this power is usually meant to be exercised sparingly based on the facts and circumstances involved.<sup>454</sup>

7.6. Article 7(3) of the EUMR enables the EC to do away with standstill obligations in appropriate cases if required. While providing derogations, the EC may also impose conditions and restrictions on the derogation. In this context, the EUMR notes that the below factors may be taken into account while granting derogations:

*“(i) the nature and gravity of damage to the undertakings concerned or to third parties;*

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<sup>451</sup> David Whish and Richard Bailey, *Competition Law* (9<sup>th</sup> edn., Oxford University Press, 2018), p. 879.

<sup>452</sup> OECD, ‘Directorate for Financial and Enterprise Affairs Competition Committee’ (2018) p. 23 <[https://one.oecd.org/document/DAF/COMP\(2018\)11/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf)> accessed 18 May 2019.

<sup>453</sup> *Ibid.*

<sup>454</sup> *Ibid.*

- (ii) effects of the suspension on one or more parties to the transaction or on a third party; and
- (iii) the threat to competition posed by the concentration.”<sup>455</sup>

7.7. However, in the EU derogations are rarely granted and were only considerably utilised during the global economic downturn in 2008 and 2009.<sup>456</sup> Similar provisions on derogations exist in the merger laws of many European countries (like France, Germany, Romania) and in some jurisdictions outside Europe (like Brazil, Switzerland, and Norway).<sup>457</sup>

7.8. **In light of the above, the Committee recommended that CCI should have the power to allow derogation of standstill obligations in certain cases. It was also agreed that this should include the power to provide modifications and conditions along with the derogation. However, it was stressed that this power should be utilised by the CCI only in exceptional circumstances. Further, CCI should undertake an analysis of various relevant factors like the effect of standstill obligations on the enterprises or on relevant third parties, the extent and nature of damage caused to parties, nature of the relevant market of the enterprises involved, likely effect of proposed combination on competition, etc.**

## 8. REMEDIES

### *Process of Negotiating Remedies*

8.1. The Committee discussed that assessment of the potential AAEC of a combination is not a binary exercise. Remedies or modifications to notified combinations, either proposed by CCI or parties themselves, may facilitate a mutually workable solution in cases where combination as notified by parties may have an AAEC.

8.2. Broadly, remedies may be classified into two categories: (a) structural remedies, which involve a direct change to the competitive market structure (such as commitments to divest assets), and (b) non-structural remedies, which involve

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<sup>455</sup> EUMR, Paragraph 34.

<sup>456</sup> John Davies, Rafique Bachour, Angeline Woods and Silvia Modet, ‘Merger Control, European Union’, Freshfields Bruckhaus Deringer, (Getting the Deal Through, August 2018), question 11 <<https://gettingthedealthrough.com/area/20/jurisdiction/10/merger-control-european-union/>> accessed 18 May 2019.

<sup>457</sup> OECD, ‘Directorate for Financial and Enterprise Affairs Competition Committee’ (2018) p. 24 <[https://one.oecd.org/document/DAF/COMP\(2018\)11/en/pdf](https://one.oecd.org/document/DAF/COMP(2018)11/en/pdf)>, accessed 18 May 2019.



modifications or constraints on the future conduct of the merged entity (such as commitments with respect to certain contractual clauses).<sup>458</sup> A remedy package may consist of either or both of these components.

- 8.3. The Committee discussed that currently the process of negotiating remedies under the Competition Act is fairly rigid. *Firstly*, the existing framework under Section 31 of the Act, does not provide flexibility to parties to either propose modifications in the first instance or negotiate freely with CCI once CCI has proposed modifications. The process commences with CCI proposing modifications which parties may either accept or propose amendments to. In case, amendments proposed by parties are not acceptable to CCI, parties only have 30 days to accept CCI's original modification(s) or they risk the combination being disapproved. *Secondly*, the Act only allows proposal of modifications *after* CCI has formed its opinion under Section 31(2) that a combination has or is likely to cause AAEC.
- 8.4. Recognising the advantage of allowing parties to propose modifications at different stages of the merger notification process, instead of artificially constricting it to one stage of the merger assessment process, the CCI has by way of the Combination Regulations permitted parties to propose modifications even prior to CCI forming its opinion under Section 31(2). Accordingly, Regulation 19(2) of the Combination Regulations allows parties to propose modifications prior to CCI forming its prima facie view under Section 29(1).<sup>459</sup> Similarly, Regulation 25(1A) allows parties to propose modifications along with their reply to the notice issued by CCI under Section 29(1). The Committee noted that the gap addressed by the Combination Regulations may require to be suitably incorporated into the Act in order to provide a comprehensive framework for remedies under Sections 29 and 31 and to avoid potential challenges to vires of the regulations given that they may be construed to be in excess of the framework conceived under the Act.

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<sup>458</sup> ICN 'Recommended Practices For Merger Notification And Review Procedures', page 38 <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf)> accessed on 22 May 2019.

<sup>459</sup> This is the absolute initial stage in the merger review process and occurs prior to CCI forming its prima facie opinion under Section 31(2) of the Act.

- 8.5. The Committee was also apprised that this approach would be consistent with the process followed in other jurisdictions, including the EU<sup>460</sup> and US<sup>461</sup>. Moreover, international best practice suggests that “early and ongoing dialogue between the investigating competition authority and the merging parties throughout the investigation, related to both the potential competitive harm arising from the merger as well as the design and choice of remedies, can facilitate a timely resolution to an otherwise anti-competitive merger”.<sup>462</sup>
- 8.6. **Based on the above, the Committee concluded that both CCI as well as notifying parties must be given equal opportunities for proposing remedies at various stages of the merger assessment process, with the ultimate decision to reject all proposals remaining with the CCI. Towards this end, Sections 29 and 31 may require to be amended to empower parties to a combination as well as CCI to propose and negotiate remedies throughout the review process. The Committee observed that this will allow the CCI to complete its review of combinations much faster, which will also be beneficial to businesses.**

#### *Market Testing of Remedies*

- 8.7. The ICN recommends that “Market testing, involving either a formal or informal process by which a competition agency obtains views and comments from third-party customers, suppliers, and/or competitors, should be encouraged when it helps to determine if the proposed remedy will adequately address competitive concerns.”<sup>463</sup>

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<sup>460</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, Paras 18, 19, 77 and 78, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF>> accessed 22 May 2019; DG Competition, Best Practices on the conduct of EC merger control proceedings, paras 33, 40 <<http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>> accessed 22 May 2019.

<sup>461</sup> In the US, parties are not restricted to only submit one remedy proposal, and are permitted to negotiate and submit multiple amendments/proposals. See Statement of the FTC’s Bureau of Competition on Negotiating Merger Remedies (2012) <<https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf>> accessed May 22 May 2019.

<sup>462</sup> ICN Merger Remedies Guide (2016), para 2.4 <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG\\_RemediesGuide.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf)> accessed 22 May 2019.

<sup>463</sup> ICN Recommended Practices For Merger Notification And Review Procedures, page 39 <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf)> accessed 22 May 2019.

- 8.8. The Committee discussed that in order to make sure that the remedies negotiated between parties to a combination and CCI are adequate to address any potential AAEC concerns, market testing of remedies prior to their acceptance may be conducted in appropriate cases. However, while doing so, CCI must be mindful of confidentiality concerns of the merging parties and be aware of biases of third parties that may have a commercial interest in a particular outcome.<sup>464</sup>
- 8.9. Market testing of remedies is part of the merger control regime in the EU.<sup>465</sup> In the US, even though a formal market testing of remedies is not conducted, comments from third parties including major customers and knowledgeable third parties are part of the process for finalising a merger remedy.<sup>466</sup> **Underscoring the potential benefits of market testing of remedies, the Committee recommended that CCI must endeavour to make this process robust and undertake market testing of remedies wherever required.**

#### *Monitoring of remedies*

- 8.10. Regulation 27 of the Combination Regulations empowers the CCI to appoint independent agencies to oversee implementation of accepted modifications in cases where such supervision is required. **The Committee discussed that in line with its focus on encouraging self-compliance by companies through disclosure, it may be beneficial if Annual Reports of companies contain disclosure regarding compliance with remedies. Such disclosure can be signed and endorsed by the relevant key management personnel of the company.**

## 9. CODIFYING EXCLUSIONS

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<sup>464</sup> ICN Merger Remedies Guide, para 3.6 <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG\\_RemediesGuide.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf)> accessed on 22 May 2019.

<sup>465</sup> Commission notice on remedies acceptable under Council Regulation (EC) No 139/2004 and under Commission Regulation (EC) No 802/2004, Paras 79 and 91 <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:267:0001:0027:EN:PDF>> accessed on 22 May 2019.

DG Competition, Best Practices on the conduct of EC merger control proceedings, para 16 and 33 <<http://ec.europa.eu/competition/mergers/legislation/proceedings.pdf>> accessed on 22 May 2019; Recital 30 of the EUMR <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004R0139&from=en>> accessed 30 May 2019.

<sup>466</sup> Ronan P Harty and Mary K Marks, 'Merger Control, United States', Davis Polk & Wardwell LLP, (Getting the Deal Through, August 2018) question 29 <<https://gettingthedealthrough.com/area/20/jurisdiction/23/merger-control-2019-united-states/>> accessed 30 May 2019.

- 9.1. The Committee discussed that timely assessment of combination notifications was vital to establishing an efficient competition law framework. This would also be in line with the focus of the Government on facilitating the ease of doing business in India.
- 9.2. The Committee was apprised that through amendments to the Combinations Regulations and general practice, the CCI has introduced certain ‘time exclusions’ which are not specifically envisaged under the Competition Act. The Committee noted that these additional exclusions (which go beyond the exclusions specifically permitted under the Competition Act) may also be challenged as *ultra vires* the Competition Act. **Accordingly, the Committee recommended that all permissible time exclusions be codified within the Competition Act itself, which will provide more certainty/transparency in the process. Further, an endeavour must be made to limit the exclusions to the bare essentials required.**
- 9.3. The Committee discussed that the following principles must be kept in mind while formulating exclusions from the 210-day timeline under Sections 6(2A) and 31(11) of the Act. *Firstly*, the 210-day timeline is sacrosanct and exclusions from this timeline must be minimized. *Secondly*, the 210-day timeline must commence once parties have provided CCI with full information. *Thirdly*, any time, up to a certain upper limit, spent on litigation relating to the notification may be excluded. *Fourthly*, no other exclusions may be permitted. For example, the time taken by CCI to evaluate proposals is part of the merger assessment process and need not be excluded from the 210-day timeline. Further, an over-all time limit of 270 days inclusive of exclusions and time spent on litigation must be provided in the Act itself.

## 10. EXPANDING THE SCOPE OF PENALTIES

- 10.1. The Committee noted that penalties for certain violations of the merger control framework in the Competition Act are currently not explicitly provided. For instance, penalty for filings made after the inquiry under Section 20(1) is undertaken by CCI has not been mentioned in the Act. CCI currently utilises its powers under Section 43A of the Act to impose such penalties.<sup>467</sup> Similarly,

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<sup>467</sup> For example, in *Bharti Airtel* order dated 11 May 2018, the CCI utilised Section 43A to hold that the combination was liable for penalty due to failure to file notice pursuant to an inquiry under Section 20(1). See CCI, ‘Notice given by *Bharti Airtel Limited and Bharti Hexacom Limited* pursuant to an inquiry under Section 20(1) of the Competition Act, 2002’ (11 May 2018) <[https://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/Order%20under%20Section%2043A\\_3.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20under%20Section%2043A_3.pdf)> accessed 18 May 2019.

there is currently no penalty for gun-jumping, i.e. consummating a proposed combination prior to approval of the CCI, in the Competition Act even though it violates Section 6(2A). Even in this case, CCI currently utilises its powers under Section 43A of the Act to impose such penalties.<sup>468</sup> **In order to remedy this anomaly, the Committee recommended that Section 43A of the Act be amended to include penalties for violation of Section 6(2A) and for filings made pursuant to an inquiry under Section 20(1). Further, in light of the recommendation in Chapter 7, paragraph 4 to introduce a Green Channel for automatic approval of certain combinations based on self-assessment and disclosure by parties, CCI's power to impose penalty under Section 44 (*Penalty for making false statement or omission to furnish material information*) of the Act may be enhanced.**

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<sup>468</sup> For example, in order dated 11 December 2017 in relation to *ITC Limited*, CCI imposed a penalty under Section 43A for violation of Section 6(2A). See CCI, '*Notice given by ITC Limited, pursuant to directions issued under Section 20 (1) of the Competition Act, 2002*' (11 December 2017) <[https://www.cci.gov.in/sites/default/files/Notice\\_order\\_document/Order%20under%20Section%2043A.pdf](https://www.cci.gov.in/sites/default/files/Notice_order_document/Order%20under%20Section%2043A.pdf)> accessed 18 May 2019.

## CHAPTER 8: TECHNOLOGY AND NEW AGE MARKETS

### 1. BACKGROUND

- 1.1. Digital technology has permeated all aspects of our lives. The wave of digitisation presents an opportunity for countries to leverage its potential and increase efficiencies, promote consumer welfare and create a favourable ecosystem for businesses. Perhaps this is the reason why most jurisdictions are currently exploring possible strategies to seize opportunities presented by the digital economy and address concerns that it may pose. A critical area in any deliberation on the digital economy is its interface with competition law. Recognizing this, the Committee agreed that this is an opportune moment to assess if the Competition Act is ready to address the pressing issues of the ever-growing digital markets. The underpinnings of the Committee's approach are its shared goal to further the objects of the Competition Act, including protecting and promoting consumer welfare, facilitating entry and growth of new players in markets and encouraging existing companies to innovate.
- 1.2. Characterised by strong economies of scale and scope, network effects and multisided markets, digital markets present unique opportunities as well as challenges to policymakers. These characteristics are relevant to assess the competitive dynamics in such markets.
- 1.3. Digital markets show strong 'returns to scale,' meaning that the cost of production is lesser in proportion to the number of customers served.<sup>469</sup> As the customer base of a digital platform increases, the average cost incurred by such companies in providing services will reduce significantly. While this characteristic may also be witnessed in certain traditional markets, digital markets have a tendency to maximise it, thereby creating competitive advantages for incumbents.
- 1.4. Another distinctive feature of such markets is that the economies of scale of consumption or network externalities<sup>470</sup> as witnessed in such markets imply that the efficiency and user benefits increase with the size of the user base. It is often argued that markets with strong network effects tend to produce markets

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<sup>469</sup> Jacques Cremer, Yves-Alexandre de Montjoye & Heike Schweitzer, 'Competition Policy for the digital era', (2019) <<http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed 02 June 2019.

<sup>470</sup> Richard A. Posner, 'Antitrust in the New Economy' (John M. Olin Program in Law and Economics Working Paper No. 106, 2000).



with a small number of ‘clear leaders’, making it difficult for small firms to survive unless they deliver highly innovative products and services.<sup>471</sup> Such network effects do not necessarily lead to concentration in such markets, provided consumers in the market have the possibility to either switch between services or use multiple services simultaneously. In this regard, the Committee underscored the importance of ensuring *interoperability* between various platforms and service providers in digital markets. The Committee noted that personal data mobility and systems with open standards have been identified key tools to increase interoperability and thereby increase competition and consumer choice by experts.<sup>472</sup> Illustratively, the Committee discussed benefits accrued to consumers from interoperability in services such as banking, mobile telephony and email. However, the Committee noted that the pros and cons of adopting the tools discussed above would require wider consultation with various stakeholders such as the Ministry of Finance, Ministry of Electronics and Information Technology, Department of Telecommunication, NITI Aayog, etc.

- 1.5. While certain characteristics of new age markets can increase competition, certain features may also create risks of undesirable concentration. In this regard, the Committee took note of the recent UK Expert Panel Report:<sup>473</sup>

*“Digital markets have features that can increase competition relative to traditional markets. These include the ability for consumers to use multiple platforms simultaneously, the removal of some barriers to switching, and the ability to use digital tools to compare prices and features. Digital markets also have features that heighten concentration, including economies of scale and scope, a data advantage for incumbents, network effects, limitations to switching and multi-homing including behavioural factors, and access to finance and intangible capital.*

*The relative importance of these factors varies from market to market but in many digital markets, the forces for concentration appear to have a strong cumulative effect and thus predominate. Many of these factors, however, are*

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<sup>471</sup> David S. Evans, Richard Schmalensee, ‘Some Economic Aspects of Antitrust Analysis in Digitally Competitive Industries’ (January 2002) <<https://www.nber.org/chapters/c10784.pdf>> accessed 02 June 2019.

<sup>472</sup> Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ (March 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 02 June 2019.

<sup>473</sup> Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ (March 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 02 June 2019.

*not inherent in the market and with different technological choices greater competition would be possible.”*

- 1.6. Any discussion on the antitrust implications of the new age economy is incomplete without assessing the accumulation and use of data by data-rich incumbents in digital markets. The ability to amass and process huge volume of data and use it to develop new and innovative services is a parameter critical to the discussion on the role of competition in new age markets.
- 1.7. Keeping in mind these distinct features of digital markets and with a view to harnessing the potential of innovative technologies, promote consumer interest and innovation, the Committee deliberated on the interplay of the Competition Act with the developments in the digital market. A pertinent question in this regard which the Committee considered is whether digital markets necessitate a new antitrust dispensation or the existing framework under the Competition Act has the flexibility to deal with these issues.
- 1.8. While the Committee undertook an analysis of global developments and provisions in the current Competition Act in relation to new age digital markets, it was also cognisant of the fact that nuances of the issues involved in this area will become clearer in the near future. It was noted that global jurisprudence in this regard is still evolving, and various countries are conducting studies in their markets to predict the implications that growth of technology would have on competition and consumers in the market. The Committee noted that the Think Tank constituted by the CCI, discussed above, may periodically review the trends in the market and the policy implications of digital markets in relation to the Competition Act.

## **2. RECOMMENDATIONS OF THE COMMITTEE**

### *Definition of Price*

- 2.1. Under Section 19(7) of the Competition Act, one of the relevant factors to determine the ‘relevant product market’ is the ‘price of goods or service’. Two-sided or multi-sided markets typically treat one side of the market as a profit centre. Consequently, the users on the other side of the market, do not pay any monetary consideration for availing the services of a platform. While a user may not pay ‘money’ for using the services of the platform, it may nonetheless ‘pay’ for the service in the form of personal data and revealed preferences.<sup>474</sup>

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<sup>474</sup> Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ (March 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data)



This data can be regarded as consideration. Platforms monetize the collected user data in the form of targeted advertisements.<sup>475</sup>

- 2.2. In light of the fact that such markets do not involve payment of monetary consideration, the Committee deliberated if there is a need to widen the definition of 'price' under Section 2(o) of the Competition Act to expressly include data. In this regard, the Committee noted that in Germany, the competition law has been amended to clarify that the assumption of a market is not to be invalidated by the fact that a good or service is provided free of charge.<sup>476</sup> **Therefore, the Committee examined if the definition of 'price' as set out under the Competition Act is wide enough to include non-monetary consideration in the form of 'data'. The Committee noted that the: (a) the definition of price is an inclusive definition; (b) it refers to every valuable consideration, whether direct or indirect; and (c) it also includes any consideration which in effect relates to the performance of any services although ostensibly relating to any other matter or thing. Therefore, the Committee concluded that the existing definition of 'price' as set out in Section 2(o) of the Competition Act is broad enough to capture non-monetary considerations like data.**

#### *Algorithmic Collusion*

- 2.3. The rise of data-driven business models have witnessed an increased reliance on algorithms. One key features of such algorithms is that rather than following static instructions, they operate in a manner where they build a system from inputs received and use this to make predictions or decisions.<sup>477</sup> There is a growing debate<sup>478</sup> whether algorithms enable collusive behaviour /

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[/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](#)> accessed 02 June 2019 and Autorite de la concurrence & Bundeskartellamt, 'Competition Law and Data'. (10 May 2016) <<http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>> accessed 02 June 2019.

<sup>475</sup> Bundeskartellamt, 'Market Power of Platforms and Network', (June 2016) <[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Berichte/Think-Tank-Bericht-Langfassung.pdf?__blob=publicationFile&v=2)> accessed 02 June 2019.

<sup>476</sup> Section 18(2a), Acts against Restraints of Competition.

<sup>477</sup> Ariel Ezrachi and Maurice E. Stucke, Artificial Intelligence & Collusion: When Computers Inhibit Competition (April 8, 2015). University of Illinois Law Review, Vol. 2017, 2017.

<sup>478</sup> OECD, 'Algorithms and Collusion: Competition policy in the digital policy', (2017) <<http://www.oecd.org/daf/competition/Algorithms-and-collusion-competition-policy-in-the-digital-age.pdf>> accessed 02 June 2019.

arrangements in novel ways that may or may not require any human intervention.

- 2.4. It has been pointed out that by providing companies with powerful automated mechanisms *“to monitor prices, implement common policies, send market signals or optimise joint profits with deep learning techniques, algorithms might enable firms to achieve the same outcomes of traditional hard core cartels through tacit collusion”*<sup>479</sup> Similarly, concerns have also been raised that with the ever evolving machine learning technology, pricing algorithms may autonomously learn to collude, without any human interaction.<sup>480</sup>
- 2.5. Against this background, the Committee discussed the antitrust concerns of algorithmic collusion as have been pointed out by commentators in existing studies. In this regard, the Committee’s attention was also drawn to studies undertaken by other jurisdictions (UK and Germany)<sup>481</sup> on algorithmic collusion and its treatment under competition law. In a recent working paper, the CMA<sup>482</sup> concluded *“in our tentative view, it seems less likely than not that the increasing use of data and algorithms would be so impactful that they could enable sustained collusion in markets that are currently highly competitive, or those with very differentiated products, many competitors, and low barriers to entry and expansion.”* The more recent UK Expert Panel Report found that the existing competition tools are likely to be sufficient to deal with explicit cases of algorithmic collusion. Insofar as tacit coordination such as autonomous collusion is concerned, the panel noted that there is no clear evidence in this regard

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<sup>479</sup>*Ibid.*

<sup>480</sup> Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ (March 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 02 June 2019 and Ariel Ezrachi and Maurice E. Stucke, ‘Sustainable and Unchallenged Algorithmic Tacit Collusion’ (November 10, 2018), Oxford Legal Studies Research Paper No. 16/2019 <<https://ssrn.com/abstract=3282235>> accessed 30 May 2019.

<sup>481</sup> Digital Competition Expert Panel (UK), ‘Unlocking digital competition’ (March 2019) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/785547/unlocking\\_digital\\_competition\\_furman\\_review\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf)> accessed 02 June 2019; CMA, ‘Pricing algorithms’, (8 October 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/746353/Algorithms\\_econ\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf)> accessed 02 June 2019; Monopolkommission, ‘Algorithms and collusion’, <[https://www.monopolkommission.de/images/HG22/Main\\_Report\\_XXII\\_Algorithms\\_and\\_Collusion.pdf](https://www.monopolkommission.de/images/HG22/Main_Report_XXII_Algorithms_and_Collusion.pdf)> accessed 02 June 2019.

<sup>482</sup> CMA, ‘Pricing algorithms’, (8 October 2018) <[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/746353/Algorithms\\_econ\\_report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/746353/Algorithms_econ_report.pdf)> accessed 02 June 2019.

necessitating any legislative intervention. Having said that, the panel recommended that the CMA and Government should continue to monitor the use of machine learning and artificial intelligence to ensure that it does not lead to anti-competitive activity.

- 2.6. In its paper on anti-competitive concerns of pricing algorithms, the OECD concludes that *“despite the clear risks that algorithms may pose on competition, this is still an area of high complexity and uncertainty, where lack of intervention and over regulation could both pose serious costs on society, especially given the potential benefits from algorithms. Whatever actions are taken in the future, they should be subject to deep assessment and a cautious approach.”*
- 2.7. Keeping this in mind, the Committee examined the extant regulatory framework for anti-competitive agreements in India. **The Committee concluded that the existing framework under Section 3 is sufficient to cover scenarios of ‘algorithmic collusion’. The Committee further agreed that the proposed amendments to clarify the inclusion of ‘hub and spoke’ cartels in Section 3(3)<sup>483</sup> by way of adding an explanation to Section 3(3) and to make Section 3(4)<sup>484</sup> inclusive will further strengthen the framework for regulating anti-competitive arrangements by expanding the scope of Section 3. The Committee also took note that no enforcement gap in relation to dealing with cases of algorithmic collusion or digital hub and spoke arrangements has been felt so far. The Committee agreed that the existing agreement-based framework in Section 3 is sufficient to deal with cases of collusion in digital markets. This is also in line with the approach of matured jurisdictions like UK and US. Insofar as autonomous algorithmic collusion is concerned, the Committee felt that the absence of credible evidence demonstrating the anti-competitive concerns associated with such collusion and in line with the approach taken by other jurisdictions, it may be premature to warrant a legislative intervention.**

#### *Online Vertical Restraints*

- 2.8. Vertical restraints imposed by online platforms on suppliers may raise competition concerns. In this regard, the Committee discussed “most favoured nation” (“MFN”) clauses or “across platforms parity” agreements. Pursuant to an MFN clause between a seller and a digital platform, the seller undertakes

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<sup>483</sup> Please see Chapter 4 (Paragraph 3) for discussion and recommendation on ‘Hub and Spoke’ Cartels.

<sup>484</sup> Please see Chapter 4 (Paragraph 4) for discussion and recommendation on Widening the Ambit of Section 4.

not to charge on that platform a price that is higher than the price that she charges on other platforms.<sup>485</sup> There are concerns that such clauses may soften competition and reduce incentives for online retailers to lower their commission rates since they get no benefit in competition terms.<sup>486</sup> Where several online retailers have an MFN clause with the same supplier, it may be argued that they are fixing prices. Competition regulators in different jurisdictions have investigated into such clauses to assess their anti-competitive implications.<sup>487</sup>

2.9. In this regard, the Committee deliberated if Section 3(4) of the Competition Act is wide enough to capture online vertical restraints in the form of MFN clauses. Incorporated in agreements between enterprises at different stages of production and/or distribution chain, MFN clauses are typically classified as vertical restraints.<sup>488</sup> **The Committee noted that MFN clauses can potentially give rise to both pro-competitive benefits and anti-competitive effects on the market. The extent of the effect depends on various factors such as the market structure, the form of the MFN clause used, and the characteristics of the sellers and buyers in the market.**<sup>489</sup> In light of this Committee agreed that such agreements should be analysed under the 'rule of reason' or 'effects' test under Section 3(4) of the Competition Act. Having said that, the Committee noted that in cases where such clauses seek to facilitate a cartel, fix price or supply terms, it will be hit by the provisions of Section 3(3) of the Competition Act.

2.10. Based on a review of Section 3(4) of the Competition Act, the Committee noted that such MFN clauses in case of vertical restraints will typically be hit by Section 3(4)(e) which deals with 'resale price maintenance'. To the limited extent where such clauses are used in the form of 'agency' agreements, Section 3(4)(c) which deals with refusal to deal arrangements is wide enough

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<sup>485</sup> OECD, 'Vertical Restraints for On-line Sales' (2013) <<http://www.oecd.org/competition/VerticalRestraintsForOnlineSales2013.pdf>> accessed 02 June 2019.

<sup>486</sup> *Ibid.*

<sup>487</sup> Sim, Justina and Tan, Hi Lin, 'Anything wrong with asking for the best price?', Occasional Paper CCCS (17 August 2015).

<sup>488</sup> Luis Omar Guerrero-Rodríguez and Martín Michaus-Fernández, 'Most-Favored Nation Clauses: A Business Need But Unresolved Topic in Mexico', (March 2016) <<https://www.competitionpolicyinternational.com/wp-content/uploads/2016/03/Most-Favored-Nation-Clauses.pdf>> accessed 02 June 2019; Sim, Justina and Tan, Hi Lin, 'Anything wrong with asking for the best price?', Occasional Paper CCCS (17 August 2015).

<sup>489</sup> Sim, Justina and Tan, Hi Lin, 'Anything wrong with asking for the best price?', Occasional Paper CCCS (17 August 2015).

**to include any restrictions in terms of sale or purchase. In any event, the Committee noted that under the proposed amendments to Section 3(4), an inclusive list of agreements is sought to be included which is broad enough to include MFN agreements.**

*Widening the ambit of Section 3*

2.11. The rapid pace of technological innovations in digital markets constantly challenges traditional means of conducting business. While the existing framework under Section 3 of the Competition Act makes an explicit distinction between horizontal and vertical agreements, there may be instances in new age markets which may not squarely fit into the traditional definition of horizontal or vertical relationship currently envisaged under Section 3 of the Competition Act.

2.12. The Committee agreed that new forms of business relations that are emerging due to the evolution of digital markets, give rise to unanticipated forms of linkages and agreements. Therefore, the Committee agreed that the existing framework governing anti-competitive agreements should be robust enough to deal with the challenges of such markets. **In light of this, the Committee recommended that the scope of Section 3(4) of the Competition Act should be broadened to include 'other agreements' that cause or are likely to cause AAEC in India and which do not strictly get covered under the horizontal and vertical arrangements currently envisaged under Section 3.** Please see Chapter 4 for detailed discussions and the recommendation of the Committee in this regard.

*Control over data and assessment of market power*

2.13. Section 4 of the Competition Act deals with abuse of dominance. A dominant position is defined under the provision to mean a position of strength enjoyed by an enterprise in the relevant market in India which enables such an enterprise: (a) to operate independently of competitive forces prevailing in the relevant market; or (b) affect its competitors or consumers or the relevant market in its favour. In assessing whether an enterprise enjoys a dominant position, Section 19(4) of the Act lists out certain factors.

2.14. Online businesses have been able to amass large amounts of data. Access to data enables such businesses to engage in data-driven innovations. This in turn helps them to better assess consumer demands, habits, needs and preferences.

Access to data can represent a form of competitive advantage.<sup>490</sup> A data-rich incumbent is able to strengthen its position in the market by improving its service and making it more targeted for users. On the basis of ‘feedback loops’, data provides incumbent businesses with a competitive advantage. A company with a large user base is able to collect more data to improve the quality of its service and thereby acquire new users – known as the ‘user feedback loop’. Additionally, companies are able to explore user data to improve targeted advertisement and monetise their services, obtaining additional funds to invest in the quality of the service and attracting again more users – known as the ‘monetisation feedback loop’.<sup>491</sup> Such feedback loops have the potential to turn access to data into a barrier to entry in digital markets.

2.15. In light of the critical role that data plays, the Committee deliberated if Section 19(4) of the Competition Act should be amended to specifically include ‘control over data’ or ‘specialised assets’ as a factor for determining dominant position. In this regard, the Committee’s attention was drawn to the German law which expressly provides that an undertaking’s ‘access to data relevant for competition’ will be a factor for assessing the market position of an undertaking in a multi-sided market. **The Committee examined the existing factors under Section 19(4) of the Competition Act and noted that unlike the German law, Section 19(4)(b) of the Competition Act expressly refers to ‘resources of the enterprise’ as a factor for determining dominant position. The Committee further noted that Section 19(4) of the Competition Act is also inclusive in nature<sup>492</sup> and read with Section 19(4)(b) is broad enough to include control over data as a factor for determining the dominant position of an enterprise under the Competition Act.**

2.16. **The Committee also discussed if Section 19(4) should be amended to include specific reference to ‘network effects’. The Committee agreed that such factors may be relevant in assessing the dominant position of an enterprise. However, on an examination of Section 19(4), the Committee agreed that Section 19(4) by way of being inclusive in nature provides CCI with enough flexibility to consider such factors while determining the dominant position**

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<sup>490</sup> EC Jacques Cremer, Yves-Alexandre de Montjoye & Heike Schweitzer, ‘Competition Policy for the digital era’, (2019) <<http://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>> accessed 02 June 2019.

<sup>491</sup> OECD, ‘Big Data: Bringing Competition Policy to the Digital Era’ (27 October 2016) <[https://one.oecd.org/document/DAF/COMP\(2016\)14/en/pdf#\\_ga=2.106957570.1680213474.1559388897-1619135612.1554836539](https://one.oecd.org/document/DAF/COMP(2016)14/en/pdf#_ga=2.106957570.1680213474.1559388897-1619135612.1554836539)> accessed 02 June 2019.

<sup>492</sup> Competition Act, Section 19(4)(m).

**of an enterprise. Accordingly, the Committee agreed that such an amendment may not be required.**

*Introduction of new thresholds for notification of combinations*

- 2.17. The existing merger control framework in India is based on an asset and turnover threshold. The business model in digital markets is such that they may fail to generate significant revenue for a number of years given that the focus of a business is typically on user growth in order to exploit network effects of such markets. Further, such industries are asset light. Therefore, jurisdictions that rely on such asset and turnover threshold for merger control may expose themselves to the risk of letting high value transactions in digital markets escape the radar of competition authorities despite such transaction posing an anti-competitive risk.
- 2.18. This may be particularly concerning if such regulatory gaps fail to account for acquisition of small innovative companies by large digital companies in spaces adjacent or overlapping with their main activity. It is often argued that such acquisitions which are frequent in new age digital markets can 'lessen future competition' even if they have no immediate impact. To explain this, economist Carl Shapiro notes that:<sup>493</sup>

*"To illustrate, suppose that the target firm has no explicit or immediate plans to challenge the incumbent firm on its home turf, but is one of the several firms that is best placed to do so in the next several years by developing innovative new products or by improving or modifying existing new products. Not even the target firm knows for sure how the product offering will evolve. Does it seem far-fetched that the dominant incumbent firm, whose market capitalisation will fall sharply if successful entry occurs would pay a premium to acquire the target firm in order to avoid the risk of facing this pesky rival firm in a few years' time? Not to me. Nor does it seem far-fetched that a dominant incumbent firm can reliably identify the firms that are genuine future threats before the antitrust agencies or the courts can do so with confidence."*

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<sup>493</sup> Carl Shapiro, 'Antitrust in a time of populism', International Journal of Industrial Organisation 61 (2018) 714-718.

2.19. Therefore, it is argued that the merger control framework should apply a stringent standard to mergers that may lessen competition in the future, even if they do not lessen competition right away.<sup>494</sup>

2.20. The Committee clarified that being conscious of such transactions does not automatically mean that policy makers should assume that acquisitions of small businesses by incumbent large businesses in the digital markets will necessarily give rise to anti-competitive concerns. **However, with a view to optimising the competition law framework to meet the challenges in the digital markets, the Committee agreed that there is merit in exploring the possibility of looking at other thresholds beyond existing asset and turnover thresholds for merger control in India. In this regard, the Committee recommended adoption of a forward-looking approach by enabling the Government to formulate new thresholds based on certain broad parameters which may be stated in the Act. Further, to address the present concerns regarding jurisdiction to review combinations in digital markets and drawing from international experience, the Committee recommended that a 'size of transaction' or 'deal value' threshold may be introduced in due course in the merger control framework in the Competition Act.** The Committee was apprised that a similar threshold has been specifically introduced in Germany and Austria keeping in mind digital markets. The size of transaction test is also used in US. The Committee also noted that the UK Export Panel Report also recently suggested that if CMA is experiencing difficulties in the existing thresholds, the Government may consider introducing a transaction value threshold alongside the turnover and share of supply thresholds for UK. Please see Chapter 7 for a detailed discussion and recommendations of the Committee.

*Other issues deliberated by the Committee*

2.21. The Committee also discussed the following issues in the context of digital markets which have been dealt with in previous chapters of the Report.

- (i) Expanding the scope of the factors for determining relevant geographic market under Section 19(6) and relevant product market under Section 19(7) of the Competition Act – Please see Chapter 4 for a detailed discussion and recommendations of the Committee.

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<sup>494</sup> *Ibid.*



- (ii) Expanding the scope of factors to assess AAEC by widening the scope of Section 19(3) – Please see Chapter 4 for a detailed discussion and recommendations of the Committee.
- (iii) Introducing a provision to cover attempt to monopolise as an abuse of dominance – Please see Chapter 6 for a detailed discussion and recommendations of the Committee.

## CHAPTER 9: ADVOCACY

### 1. BACKGROUND

- 1.1. The Committee's mandate in reviewing the competition law framework also extended towards performing a broad review of the advocacy and advisory functions of the CCI. The importance of these functions cannot be undermined as they spread awareness of the benefits of competitive conduct and boost competition compliance. The Committee discussed that in order to develop a more robust and effective competition law regime, the CCI must do more than simply enforce the law. The Committee looked at the measures that have so far been undertaken by the CCI and also called for an impact assessment study to better understand the effectiveness of the CCI's enforcement and advocacy of competition law in the Indian economy. Based on this, the Committee deliberated upon recommendations to strengthen the advocacy and advisory roles of the CCI.
- 1.2. The Committee noted that the CCI has already undertaken considerable initiative and has utilized various tools and events to spread information and awareness about competition law and policy. For instance, CCI has organised road shows, interactive discussions, video-exhibitions and disseminated information through speeches and advocacy booklets.
- 1.3. It was noted that the website of the CCI has been developed to increase transparency and allow access to important information. For example, the website allows easy access to various reports in relation to competition law and policy in India. Importantly, the CCI has also developed a 'Competition Assessment Toolkit' to help sensitize the market as well as policymakers, analysts, researchers and other competition stakeholders of good practices and policies regarding competitive conduct. This toolkit provides a detailed roadmap as per which various policies, legislations, rules and regulations can be assessed for their competitiveness.
- 1.4. The main provision of the Competition Act which confers the power and responsibility to conduct such competition policy advocacy and advisory functions is found in Section 49 of the Competition Act. The Committee mainly deliberated on certain clarifications to this provision. In doing so, the primary objective of the Committee was to emphasize and strengthen the ability of the CCI to implement such advocacy functions to facilitate competition compliance as well as to initiate a basic level of competition introspection amongst various stakeholders in the market.

- 1.5. While the Committee briefly touched upon the issue of a National Competition Policy, no specific recommendations were made on adoption of such a policy. The Committee noted that the Ministry of Corporate Affairs has issued a draft National Competition Policy<sup>495</sup>, which is in the public domain and consultations with other Government ministries and departments would be required for such a policy to be adopted formally. The draft National Competition Policy is an important policy document as it aims to facilitate practices and behavior that encourage overall competitive conduct. It also provides for the establishment of a National Competition Policy Council to exclusively oversee the mechanisms and policies that promote competitive behaviour.

## 2. RECOMMENDATIONS ON LEGISLATIVE CHANGES

### *Changes to Section 49(1) of the Act*

- 2.1. Section 49(1) of the Competition Act, as it is currently worded seems to suggest that Governments may make a reference to CCI only while framing a policy on competition. It does not emphasize that the reference can also be made for review of any law that can have an impact on competition, as this is only mentioned cursorily in brackets. Therefore, there is a need to stress on the requirement for ministries and departments of the Central and State Governments to review their legislation and policies so that they align with the principles of competition.
- 2.2. **Accordingly, it was agreed to recommend amendment to Section 49(1) to clarify the need for the Central and State Governments to review their laws from a competition law and policy standpoint and to make a reference to the CCI for its opinion on possible effects of such laws on competition.**

### *Changes to Section 49(3) of the Act*

- 2.3. Section 49(3) of the Competition Act, in its present form, allows the CCI to promote competition advocacy and to create awareness and impart training about competition issues. The Committee also stressed on the need to promote “competition culture” in the economy. The development of a robust competition culture is important as it encompasses the manner in which businesses, consumers and the public sector act in given market situations.

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<sup>495</sup> MCA, 'National Competition Policy, 2011'.  
<[http://www.mca.gov.in/Ministry/pdf/Revised\\_Draft\\_National\\_Competition\\_Policy\\_2011\\_17nov2011.pdf](http://www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf)> accessed 30 May 2019.

- 2.4. The Committee also initially considered the introduction of a new sub-section (4) that would explicitly allow the CCI to communicate its recommendations on measures to promote competition to the Central and State Governments. However, it was decided that Section 49(3) of the Act is broad enough to cover such action by the CCI.
- 2.5. **Accordingly, the Committee recommended introduction of a reference to competition culture along with the existing reference to competition advocacy, in Section 49(3) of the Act. The Committee also observed that Section 49(3) is broad enough to allow the CCI to communicate its recommendations on measures to promote competition to the Central and State Governments, and hence, agreed to not introduce a separate provision to this effect.**

### **3. RECOMMENDATIONS ON ADVOCACY**

- 3.1. The Committee also discussed advocacy initiatives of CCI and made broad recommendations to boost the advocacy functions of the CCI. These recommendations include suggestions on increasing the scope of advocacy initiatives already undertaken by CCI and on additional initiatives it may consider undertaking.
- 3.2. The Committee recommended the following to further augment the CCI's efforts:
- (i) Roadshows on competition advocacy should not just be limited to the cities of Mumbai and Delhi, but should be organized in Tier-II and Tier-III cities as well.
  - (ii) Advocacy videos of the CCI should not just be run in kiosks but should be played in roadshow sessions as well.
  - (iii) CCI's advocacy booklets should be translated in vernacular languages to cover a wider audience.
  - (iv) CCI should actively participate in the working groups formed by ICN, especially their working group on advocacy in competition law.
  - (v) CCI should consider undertaking advocacy initiatives at educational institutions, like universities, colleges and other such institutions, to promote awareness and quality research on competition. In this regard, it was suggested that CCI may consider funding research, including the setting up of research centres for promoting competition law and policy, in such institutions.

- (vi) CCI should frame schemes that allow for the competition assessment of laws and policies both at the Central and State level. For building expertise at the state level, the CCI may develop a system to embed some resources, such as two appropriately qualified and experienced persons at the state level.
- (vii) A ranking system may be developed, similar to the 'Ease of Doing Business' State rankings given by the Department for Promotion of Industry and Internal Trade. This may be utilised to assess and rank states on the basis of the competitiveness of their laws and policies. CCI highlighted that for this purpose reference may be made to the roadmap provided in the Competition Assessment Toolkit for conducting competition assessment of policies, legislations, rules and regulations in India. The Competition Assessment Toolkit is available on the website of the CCI.<sup>496</sup>

#### 4. CONDUCT OF AN IMPACT ASSESSMENT STUDY

- 4.1. As part of its review on competition policy, advocacy and advisory functions of the CCI, the Committee decided to direct an independent agency to conduct an impact assessment study, in order to:
  - (i) Assess the impact of functioning of the CCI and enforcement of Competition law on the economy, competition, consumers, enterprises and other stakeholders;
  - (ii) Assess the impact and effectiveness of advocacy and advisory roles undertaken by the CCI on creating awareness among stakeholders; improving competition compliance; sensitising law and policy makers and in reaching out to young professionals.
- 4.2. The Committee engaged the Indian Institute of Management, Ahmedabad to conduct the impact assessment study. An overview of the findings of the impact assessment report has been discussed below.

##### *Impact on Corporates and Enterprises*

- 4.3. The study acknowledged the efforts put in by the CCI in improving competition compliance amongst a broad base of corporates and business

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<sup>496</sup> Competition Assessment Toolkit  
 <[https://www.cci.gov.in/sites/default/files/whats\\_newdocument/COMPETITION%20ASSESSMENT%20TOOLKIT.pdf](https://www.cci.gov.in/sites/default/files/whats_newdocument/COMPETITION%20ASSESSMENT%20TOOLKIT.pdf)> accessed 18 June 2019.

enterprises. It also commends the CCI's track record in issuing timely approvals for notified transactions and notes that unlike some other regulators, the CCI is perceived as a business friendly regulator that encourages parties to seek informal guidance before formally instituting a case or filing a notice.

4.4. The study offered a few recommendations in areas where it noted there is scope for improvement:

- (i) There may be a need to increase staff and resources of the CCI. There is also a need to increase the accessibility of CCI for corporates and other stakeholders that are not based in Delhi. If not multiple benches, at least offices of the CCI may be opened in other cities, with such increased staff and resources, to advice and assist on competition related concerns and issues.
- (ii) Delay in appellate proceedings under the Competition Act has been observed ever since the functions of the COMPAT were subsumed within the NCLAT. Pursuant to the merger, the workload of the NCLAT has gone up, but adequate infrastructure and well trained personnel to handle this workload has not been supplanted. Due to this, most orders of CCI are pending at the appellate stage. As a fallout of this, the actual collection of penalty imposed by CCI has been very low compared to matured jurisdictions.
- (iii) The study suggests changes to facilitate a more structured conduct of proceedings, such as the publication of cause lists with case numbers, issuance of time period for fresh listing of fresh cases and/or applications, and quick listing of cases for temporary injunctions.

#### *On Economy and Consumers*

4.6. The study acknowledged that awareness has substantially improved regarding 'fair competition,' and the role of competition law in mergers and acquisitions and that, in the very near future, competition law will become a major guiding force on how businesses compete in the market place.

4.7. The main issue pointed out was with regard to the misuse of competition law provisions by a few players in the market, by filing frivolous cases to harass their fellow competitors, which puts great cost on burgeoning enterprises that fight cases under the threat of penalty and invest time, effort and money.

#### *Findings on Advocacy Programs.*

- 4.8. While acknowledging the advocacy efforts of the CCI, the study recommends the need for ‘generalist experts’ at the senior level so that their opinions can integrate with competition law opinions and provide a big picture view for the CCI’s advocacy efforts.
- 4.9. It was pointed out that the relationship that the CCI shares with the ICN and competition regulators in other jurisdictions is not sufficiently known to an average business. Further, international cooperation agreements entered into between India and other countries for competition regulation are not available on the website of the CCI (though CCI does share this information in its advocacy programs). The study suggests that these agreements, if not confidential, may be shared on the website of the CCI.
- 4.10. The study points out that while the CCI has engaged well with colleges and especially students of law, it will be desirable to also engage with future business leaders from management schools.
- 4.11. The study also flags that over and above advocacy programs, the decisional practice of the CCI is a major source of information for corporates as proceedings against competitors instill awareness that competition law must be complied with.

*Sensitising Law and Policy Makers*

- 4.12. The study acknowledges the usefulness of the Competition Law Toolkit, but points out that while assessment of competitiveness of law and policy may be happening, it is mostly after the law is passed. To this end, it suggests that the CCI may be allowed to intervene before any potentially anti-competitive law is passed.
- 4.13. As public sector undertakings (“PSUs”) are also covered within the scope of the Competition Act,<sup>497</sup> the study suggests that the CCI should conduct outreach programs for the departments of the Central and State Governments in charge of PSUs.
- 4.14. The study also makes some suggestions on utilizing the jurisprudence of the CCI. For instance, it suggests the development of a case law compendium by the CCI. The study also suggests the need for issuance of clear and comprehensive penalty and merger guidelines. Finally, the study also suggests that awareness be generated of the fact that broader representation can be made

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<sup>497</sup> See Competition Act, Section 2(h).

before CCI by not just lawyers, but economists, company executives, industry experts, etc. This view was also reiterated by some members of the Committee.

- 4.15. **The Committee appreciated the findings of the study and noted that the CCI has efficiently carried out its advocacy functions by undertaking various initiatives. It was suggested that the CCI may consider spreading its reach to non-metropolitan cities and creating awareness across the country. In this regard, various suggestions as discussed above were made by the Committee.**



## CHAPTER 10: ADDITIONAL CHANGES

### 1. DRAFTING AND OTHER MINOR CHANGES

1.1. The Committee also noted certain minor changes and drafting corrections in the text of the Act. These do not entail any substantial change to the law and have been listed below in brief:

- (i) The definition of ‘cartel’ in Section 2(c) may be amended to clearly state that cartelization involves limiting or controlling, and also the “attempt to limit”, goods or provision of services. The definition may also be cleaned up to comprehensively refer to the limiting or controlling of the “sale or price of goods or provision of services or trade”.
- (ii) The definition of ‘consumer’ in Section 2(f) of the Act currently refers to a consumer that buys any goods or services. The definition may be amended to also include a consumer that ‘hires or avails’ goods or services. Further, while the present definition of consumer has two sub-paragraphs numbered (i) and (ii) separately pertaining to goods and services respectively, as their scope and essence is the same, it is agreed that these two paragraphs should be combined to refer to both goods and services in the same paragraph.
- (iii) In Section 2(h), the reference to location of a unit or division or subsidiary (whether located at the same place as the enterprise or a different place from the enterprise) may be removed as it was agreed that this location is not material.
- (iv) Section 2(z) currently refers to the CA 1956. As the CA 1956 has been replaced by the CA 2013, Section 2(z) and other provisions of the Competition Act that refer to CA 1956 may be replaced with CA 2013.
- (v) In Section 19(3)(d), the words ‘accrual of’ in “accrual of benefits to consumers” may be deleted as a cleanup change, in lieu of the suggestion to add ‘consumer harm’ as a factor for assessing AAEC. Thus, Section 19(3)(d) may now read as “benefits or harm to consumers”.
- (vi) Certain clean up changes were discussed to Section 27(b) for better readability, such as by the addition of connectors or longer and specific references. Thus, the phrase “upon each of such person or enterprises which are parties to such agreements or abuse” may be cleaned up to read

as “upon each of such person or enterprise, which is a party to such agreement or has abused its dominant position”.

- (vii) Instead of imposition of a lesser penalty as the CCI “may deem fit”, a clean-up change may be made to state that such lesser penalty will be “as may be determined by regulations”.
- (viii) Instead of the words “such discriminatory conditions or prices” in the Explanation to Section 4(2)(a), the words “such conditions or prices” may be used since the defence applies to both unfair and discriminatory conditions or prices.
- (ix) The threshold values mentioned in Section 5 of the Act may be placed in subordinate legislation or in notifications instead of stating the figures in the Act, as these figures may be revised regularly.
- (x) The word ‘merger’ in Explanation (c) to Section 5 should be substituted with the word ‘combination’.
- (xi) The definition of ‘other document’ as given in the Combination Regulations should be inserted as an Explanation to Section 6(2).
- (xii) Definition of ‘assets’ as given in Explanation (c) to Section 5 should be referenced in Sections 2(a), 20(3) and 43A.
- (xiii) The 30-day deadline in Section 6(2) should be deleted in line with notification issued by the Ministry of Corporate Affairs dated 29 June 2017.<sup>498</sup>
- (xiv) In section 20(4)(c), the word ‘combination’ in “level of combination in the market”, should be replaced with the term ‘concentration’, so that the provision reads as “level of concentration in the market”.
- (xv) In Section 31(12), the reference to ‘ninety’ for extension of time sought by parties to the combination should be replaced with “two hundred and ten”.

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<sup>498</sup> Ministry of Corporate Affairs, Notification (29 June 2017) <<https://www.cci.gov.in/sites/default/files/notification/S.O.%202039%20%28E%29%20-%2029th%20June%202017.pdf>> accessed 21 May 2019.

- (xvi) The word 'calendar' is to be added to the word 'days' in respect of the references to timelines in the Act except where there is explicit reference to 'working days'.

## ANNEXURE I – SUMMARY OF RECOMMENDATIONS

S. No.	TOPIC/ PROVISION	SUMMARY OF RECOMMENDATIONS <sup>499</sup>
	<b>CHAPTER 1 – REGULATORY ARCHITECTURE</b>	
1.	Introducing a Governing Board	Introducing a governing board of a Chairperson, six WTMs (excluding the Chairperson) and six PTMs (which includes 2 <i>ex-officio</i> members and 4 ‘eminent persons’). The qualifications for members of the Commission as provided in Section 8(2) of the Act may be retained, with the inclusion of additional qualifications in relation to ‘administration’ and ‘technology’. The functions of the governing board shall be clearly delineated – for example it will perform quasi-legislative functions, drive policy decisions and perform a supervisory role but will not be involved in the discharge of the adjudicatory functions of the CCI.
2.	Delegation of functions	Enabling CCI to delegate certain functions and allocate responsibilities to its members and officers with the exception of quasi-judicial functions exercised by WTMs and quasi-legislative functions of the governing board.
3.	Merger of DG’s office with CCI	<p>The DG’s office should be formally folded into the CCI as an ‘Investigation Division’, and such merger should be accompanied by adherence to certain best practices such as:</p> <ol style="list-style-type: none"> <li>a. Functional autonomy for office of the DG, where the DG reports directly to the CCI Chairperson;</li> <li>b. Internal division of investigation and adjudication functions;</li> <li>c. Adequate right of representation to parties and the right to examine evidence;</li> <li>d. Strong appellate forum;</li> <li>e. Issuance of guidance on important issues like imposition of penalty to ensure certainty and reduce discretion.</li> </ol>
4.	Offices of the CCI	The CCI should have offices at multiple locations. These offices can facilitate advocacy and awareness activities, improve accessibility, increase efficiency of investigation, and boost interaction with

<sup>499</sup> Please note that except for the discussion on 'Technology and New Age Markets' (Chapter 8) and 'Advocacy' (Chapter 9), the Summary of Recommendations *only* sets out the recommendations for which legislative amendments have been proposed by the Committee. Further, minor drafting changes are also not mentioned in the Summary of Recommendations as these are set out in ‘Additional Changes’ (Chapter 10).

		sectoral regulators, State Governments and local-self Governments. Technology should also be leveraged to ease accessibility, for example through video conferencing and e-filing mechanisms.
5.	Performance review and metrics for performance assessment	CCI may submit a more structured annual report which must be placed before the governing board. The annual report must contain performance targets and other data as may be prescribed in subordinate legislation, in addition to financial disclosures. The annual report may be divided into two parts, one dealing with financial aspects and the other with non-financial aspects. Additionally, CCI must also submit quarterly progress reports to its governing board.
6.	Financial Independence	<p>CCI may be granted a one-time corpus fund and be empowered to charge an <i>ad valorem</i> fee for combination filings, with specification of slabs with upper limits. Due to the significant impact of such fee on businesses, the CCI must carry out a cost-benefit analysis while formulating details of the proposed fee. CCI may also be exempt from paying certain taxes in consonance with the treatment meted out to other regulatory bodies.</p> <p>Matters pertaining to human resources that are presently decided by the Government may be decided by the governing board, which will have an ex-officio member from the MCA. Such matters may be governed by way of relevant subordinate legislation.</p>
7.	Appellate Authority	To introduce a bench of the NCLAT dedicated to hearing appeals under the Competition Act.
<b>CHAPTER 2 – FUNCTIONING OF THE CCI</b>		
8.	Functioning of the Governing Board	Decisions pertaining to certain key functions not including adjudication and investigation may be taken by the governing board in its meetings. Such meetings should be called by giving adequate notice and the relevant agenda to all the members. The quorum of such meetings shall be two-third of the strength of the governing board. Decisions in these meetings should be taken by majority. Key provisions on procedure for meetings of the governing board should be provided in the Act and detailed procedure may be provided in subordinate legislation.
9.	Quasi-Legislative Functions	a. To adopt a formal framework for the issuance of regulations by the CCI, with provisions to publish draft regulations for public consultations prior to finalising regulations, and review of such subordinate legislation every few years. Exceptions from the framework may be carved out for certain scenarios.

		<p>b. To ensure uniform exercise of CCI's quasi-legislative powers, and in the interests of predictability and transparency, the CCI may issue only type of subordinate legislation, which is binding and has the force of law.</p> <p>c. The CCI may also provide non-binding guidance on certain issues to foster certainty in the interpretation of the Competition Act.</p>
10.	Quasi- Judicial Functions	<p>a. The Chairperson and the WTMs may sit in panels of three for meetings in relation to adjudication, and the composition of the panel may be determined by the Chairperson to ensure that the best equipped members are appointed to dispose of a matter.</p> <p>b. Decisions of the panel are to be taken by a majority and there will be no casting vote for decisions relating to adjudication of matters before the CCI.</p> <p>c. Preliminary conferences need not be disallowed. But they must be conducted in a time-bound manner.</p> <p>d. As a best practice, detailed timelines for various stages of the enforcement process should be prescribed through subordinate legislation. The CCI should make every attempt to adhere to such detailed timelines as may be prescribed.</p> <p>e. To amend Sections 21 and 21A to widen the scope of inter-regulatory consultation, such that the CCI and sectoral regulators may make a reference whenever an issue of competition law or other relevant matter is raised before each other, and not only in respect of a proceeding. Such a reference should be allowed even in the absence of any contradiction or conflict between the ambit of the CCI and the sectoral regulators.</p>
11.	Settlements and Commitments	<p>To expressly provide for a settlement mechanism applicable for contraventions related to anti-competitive agreements under Section 3(4) and abuse of dominance under Section 4 of the Competition Act. An application for settlement may be filed only after receipt of the DG Report and within such time before the passing of a final order by the CCI, as may be specified by subordinate legislation. The CCI may impose certain conditions which may include settlement amount and/or non-monetary terms. The order granting or rejecting a settlement application should not be appealable. The detailed procedure for the settlement mechanism should be set out in subordinate legislation.</p> <p>To amend the Competition Act to empower the CCI to accept commitments from parties alleged to have contravened the</p>

		provisions of Section 3(4) and Section 4. An application for commitment may only be submitted after an order under Section 26(1) of the Competition Act has been passed so that the parties are aware of the proceedings. Such application may be submitted within such period prior to the submission of the DG report as may be specified in subordinate legislation. CCI should have the discretion to accept or reject the application. The law should enable the CCI to review its decision to accept commitments in certain circumstances, including where the concerned party has acted contrary to the terms of commitment, when there is a material change in facts on the basis of which the commitment decision was passed or where the commitment decision was based on false, misleading or incomplete information provided by the concerned party.
<b>CHAPTER 3 – DEFINITIONS</b>		
12.	Section 2(c) Cartel	To insert the word ‘buyer’ in the definition of ‘cartel’ in Section 2(c) of the Competition Act in order to expressly recognise buyers’ cartels. Consequently, the term ‘buyer’ will also be required to be inserted into Section 27, dealing with the imposition of penalty on cartel participants, and in Section 46 of the Act, which deals with lesser penalty applications.
13.	Section 2(f) Consumer	To include ‘department or agency of the government’ in the definition of ‘consumer’ and to further amend the definition to refer to both direct and indirect users of goods and services.
14.	Section 2(h) Enterprise	The definition of ‘enterprise’ in Section 2(h) to be amended to expressly clarify that the legal form of an entity or the way it is financed are not relevant factors to determine if an entity is an enterprise. Further, in line with the observations of the Supreme Court in relevant case-law, the definition may refer specifically to engagement in any economic activity.
15.	Insertion of Section 2(k)(a) Party	New definition to be inserted as currently the term ‘party’ is not defined specific to its use in the provisions of the Competition Act.
16.	Section 2(t) Relevant product market	To insert the word ‘supply’ in Section 2(t) in order to incorporate express reference to supply side substitutability in the definition of ‘Relevant product market’.

17.	Section 2(v) Shares	To insert the words “on a fully diluted basis” in Section 2(v) in order to clarify that the shareholding percentage has to be calculated on a fully diluted basis.
18.	Turnover	To exclude intra-group sales, indirect taxes, trade discounts, and revenue generated outside India while calculating turnover. Such exclusions may be prescribed by way of rules, and to this end, the Act may be amended to enable the Central Government to prescribe rules for calculation of turnover.
<b>CHAPTER 4 – ANTI-COMPETITIVE AGREEMENTS AND ATTENDANT SECTIONS</b>		
19.	Insertion of Explanation to Section 3(3)  Horizontal Anti- competitive agreements	To insert a new Explanation to Section 3(3) of the Competition Act to cover hubs in ‘hub and spoke cartels’, in order to provide clarity on the liability of hubs while assessing violation of Section 3(3).
20.	Section 3(4)  Vertical anti- competitive agreements	To insert an express provision in Section 3 to comprehensively cover all kinds of anti-competitive agreements that may not strictly fall within the categorisation of either a horizontal or a vertical arrangement
21.	Explanation (a) Section 3(4)  Tie-in arrangements	To insert the word ‘distinct’ in the explanation of ‘tie-in arrangements’ to expressly clarify that the tied and tying products in a tie-in arrangement must be distinct or separate goods and services.
22.	Explanation (b) Section 3(4)  Exclusive supply agreement	To substitute ‘exclusive supply agreement’ with ‘exclusive dealing’ in order to expressly recognise the imposition of exclusivity both from the sellers’ as well as from the buyers’ side.
23.	Explanation (e) Section 3(4)  Resale price maintenance	To insert the words ‘direct and indirect’ in the explanation of ‘resale price maintenance’ to expressly clarify the ability of the CCI to penalise both direct and indirect means of imposition of resale price maintenance.
24.	Explanation clauses to Section 3(4)	To insert the word ‘services’ to the explanation clauses of Section 3(4) as it currently refers only to goods.
25.	Section 19 (3)(g)	To expand the scope of Section 19(3) of the Act to make the list of factors provided therein for determining AAEC inclusive.



	Inquiry into certain agreements and dominant position of enterprise	
26.	Section 19(3)(c)	Deleting the words “by hindering entry into the market” in Section 19(3)(c) so that it refers broadly to ‘foreclosure of competition’, which takes into account situations such as lessening of existing competition, barriers to expansion in the market, etc.
27.	Section 19(3)(d)	To include ‘consumer harm’ in Section 19(3)(d) as a factor for assessing AAEC.
28.	Section 19(6)  Relevant geographic market	To expand the scope of Section 19(6) for determination of ‘relevant geographic market’ by: <ul style="list-style-type: none"> <li>a. Inserting a new sub-clause (i) to include “characteristics of the goods/nature of services”;</li> <li>b. Inserting a new sub-clause (j) to include “costs associated with switching supply/demand to other areas”;</li> <li>c. Inserting a new sub-clause (k), allowing for the consideration of “any other factor as may be specified in regulations”.</li> </ul>
29.	Section 19(7)  Relevant product market	To expand the scope of Section 19(7) for determination of ‘relevant product market’ by: <ul style="list-style-type: none"> <li>a. Inserting a new sub-clause (g) to include “costs associated with switching demand/supply to other products”;</li> <li>b. Inserting a new sub-clause (h) to include “categories of customer”;</li> <li>c. Inserting a new sub-clause (i), allowing for the consideration of “any other factor as may be specified in regulations”.</li> </ul>
<b>CHAPTER 5 – INQUIRY PROCEDURE AND PENALTY</b>		
30.	Section 26  Procedure for inquiry under Section 19	The procedure for inquiry laid down under Section 26 has been reviewed in the following manner – <ul style="list-style-type: none"> <li>a. To amend Section 26 to enable the CCI to pass orders for closure of cases where the information or reference that is received pertains to the same or substantially the same facts/issues as have already been decided by CCI, and in respect of which a final order has been passed by CCI.</li> <li>b. To amend Section 26(7) and Section 26(8) to clarify that the CCI has the power to pass appropriate orders under the said sections, and that such orders are to be passed only</li> </ul>

		<p>after adequate opportunity for hearing is provided to the parties.</p> <p>c. To amend Section 53A (1)(a), which deals with the Appellate Tribunal's (i.e. NCLAT) powers to hear and dispose of appeals to expressly insert reference to Sections 26(7) and 26(8) of the Act so that orders passed under these provisions are made appealable.</p> <p>d. To amend Section 26, allowing the CCI to direct a further, supplementary investigation by the DG upon receipt of the DG report under Section 26(3).</p> <p>e. To amend Section 26, providing for the issuance of a show cause notice to the concerned parties, as may be applicable, after objections to the DG's report are received and considered.</p>
31.	Section 27 Orders by Commission after inquiry into agreements or abuse of dominant position	<p>The concept of 'relevant turnover' should be given due regard to while computing the quantum of penalty under Section 27 and the CCI should follow the doctrine of proportionality while determining the quantum of penalty. However, in light of practical difficulties that may arise if Section 27 is amended to state 'relevant turnover' instead of 'turnover' (for example in cases of hubs of cartels that may not have relevant turnover) no amendment may be made.</p> <p>CCI should mandatorily issue penalty guidance which brings in the concept of 'relevant turnover' that should be considered by CCI as a starting point for computation of the penalty. CCI should be bound to consider the guidance while passing any order of penalty, and in case it derogates from the guidance, it should provide reasonable grounds.</p> <p>Section 27 must also include the word 'income' to facilitate computation of penalty in relation to individuals and proprietorships.</p>
32.	Section 48 Contravention by companies and individuals	<p>To amend Section 48 of the Competition Act to reflect the quantum of penalty that may be imposed on individuals for the purposes of contraventions of the Competition Act. Unless otherwise stated in the Competition Act, such penalty may be up to 10% of the average income for the last three preceding financial years, and for any contravention relating to cartels, the amount of penalty may be up to 10% of the income for each year of the continuance of the cartel.</p>
33.	Section 35	<p>To amend Section 35 to enable a person, enterprise or the DG to call upon domain experts from the fields of economics, commerce and international trade or from any other discipline to appear before the CCI.</p>

	Appearance before Commission	
34.	Section 41 Director General to investigate contraventions	To amend Section 41 to state the DG's powers of investigation, more particularly, the powers of search and seizure in the Competition Act, instead of the current reference to provisions of CA 1956 (or CA 2013).  The requirement to obtain authorisation from the Chief Metropolitan Magistrate, Delhi, for conduct of such search and seizure may be retained in Section 41.
35.	Section 42 Contravention of orders of Commission	To amend section 42(2) which currently imposes a fine for non-compliance of orders/ directions of the CCI passed under Sections 27, 28, 31, 32, 33, 42A and 43A, to also refer to Sections 43, 44 and 45 of the Competition Act.
36.	Section 46 Power to impose lesser penalty	a. To amend Section 46 to provide for a 'leniency plus' regime, which incentivises applicants to come forward with disclosures regarding multiple cartels by providing a penalty reduction to a leniency applicant in the first cartel, which reduction will be over and above any other penalty reductions that such applicant may receive under the normal lesser penalty application framework.  b. To amend Section 46 to enable a leniency applicant to withdraw her application within a time-period as may be set out in the Lesser Penalty Regulations. Notwithstanding such withdrawal the CCI may use the information submitted by the leniency applicant in accordance with applicable laws.
37.	Section 53N Awarding compensation	To amend Section 53N to allow applications for compensation to be filed post determination of an appeal by the Supreme Court.
<b>CHAPTER 6 – UNILATERAL CONDUCT</b>		
38.	Insertion of Section 4A Interface with Intellectual Property Rights	To insert a new Section 4A that allows for the reasonable exercise of IPR as a defence against allegations of abuse of dominance. This provision must be similar to the defence provided in Section 3(5)(i), which lists the existing IPR laws. For both Sections 3 and 4, the provision providing IPR defences should also include 'any other law in force relating to protection of IPR rights'. However, CCI should narrowly construe the IPR defence under Section 4.
<b>CHAPTER 7 – COMBINATIONS</b>		

39.	Definition of Control	Introduction of a 'material influence' standard for determination of control, to bring certainty to the meaning of control under Section 5 of the Act, whilst retaining the CCI's powers to assess a wide range of combinations that may have AAEC. Details of what may constitute 'material influence' may be provided in subordinate legislation. Subordinate legislation may also list certain minority rights, the acquisition of which would not be considered to confer material influence and hence control. Need to strike a balance to ensure that the merger control regulation empowers CCI to scrutinize transactions that may cause AAEC whilst ensuring that the legal framework is investment friendly in the larger interest of the economy. Details of what constitutes 'material influence' may be provided in subordinate legislation, which may also list certain minority rights, the acquisition of which will not be considered to confer material influence, hence control.
40.	Definition of Group	To amend the definition to <ul style="list-style-type: none"> <li>a. provide that the threshold given in Clause (i) of Explanation (b) to Section 5 shall be <i>"26% or such other threshold as notified by the Central Government."</i></li> <li>b. clarify and cover scenarios where one enterprise controls the other, instead of where <i>"two or more enterprise"</i> exercise control over another enterprise.</li> </ul>
41.	Green Channel for Combinations	A 'Green Channel' route to be provided for automatic approval of certain combinations. Parties to the combination may self-assess, based on specified criteria and pre-filing consultation with the CCI, whether they qualify for notification under the Green Channel. CCI must be allowed to impose commensurate penalty in case of filing of wrong information/incomplete information, filing under incorrect route and omission to file information. Towards this end, CCI's power to impose penalty under Section 44 of the Act may be enhanced, if required.  The Green Channel route should become the <i>de facto</i> route for merger notification and approval for majority cases. Detailed criteria for eligibility under the Green Channel may be formulated by the Government based on consultation with the CCI. Appropriate forms for notification under this route shall be designed.
42.	Treatment of combinations arising out of IBC	Combinations arising out of the insolvency resolution process under the IBC should be eligible for the Green Channel recommended above.

43.	Timebound framework for assessment of combinations	The mandatory 30-day timeline for completion of the phase 1 review procedure provided in Regulation 19(1) of the Combination Regulations must be included in the Act itself. This timeline would continue to govern combinations that are not eligible for the proposed Green Channel.
44.	Deal Value Threshold for Combinations	An enabling provision empowering the Government to introduce necessary thresholds including a deal-value threshold for merger notification may be provided. Any new threshold must account for clear and objectively quantifiable standards for computing the necessary figure as well as local nexus criteria. This will ensure that only those transactions that have a significant economic link to India are caught by the threshold and neither the CCI nor the parties are burdened with unnecessary notifications.
45.	Exemptions	<ol style="list-style-type: none"> <li>a. To streamline the exemptions from notification under Section 5.</li> <li>b. While formulating subordinate legislation on exemptions for acquisition of minority interest, the notifiability of combinations is to be assessed based on substance over form and this may be done by listing down the indicative factors based on which the 'non-controlling' nature of the acquisition may be determined.</li> <li>c. To integrate the target-based exemption into the Competition Act.</li> <li>d. As there is no penalty for non-filing by financial institutions under Sections 6(4) and (5) of the Act, and as the CCI does not receive any substantial filings from such financial institutions, such acquisitions falling under Sections 6(4) and (5) to be made an exemption instead. Further, the language of these provisions should be updated such that the term 'foreign institutional investor' should be substituted with 'foreign portfolio investors' and the term 'venture capital fund' should be substituted with 'alternative investment fund falling within Category I of the Securities Exchange Board of India (Alternate Investment Funds) Regulations, 2012.</li> <li>e. To empower the Central Government to prescribe categories of combinations that are exempt from notification under Section 5. Similar to Section 54 of the Act, the grounds based on which such exemption is to be granted should be outlined in the Act. Using this power, the Central Government may formulate subordinate legislation for exempting relevant acquisitions of non-controlling minority interest (exemptions under Regulation 4 of the Combination Regulations shall be integrated under this provision), devising appropriate</li> </ol>

		thresholds for the target-based exemption, exempting certain NBFCs and so on.
46.	Applying Standstill Obligations	<p>a. To allow for dilution of standstill obligations in case of public bids and hostile takeovers. Parties to such transactions may be allowed to purchase securities, provided they surrender all beneficial rights (of dividend and voting) attached to such securities until CCI approves the proposed combination. Such securities should be placed in an escrow account pending CCI's approval.</p> <p>b. To provide CCI with the power to allow derogation of standstill obligations in certain cases, which power will also include the power to provide modifications and conditions along with the derogations. However, this power should be used by CCI in exceptional circumstances. CCI should undertake an analysis of various relevant factors like the effect of standstill obligations on the enterprises or on relevant third parties; the extent and nature of damage caused to parties; nature of the relevant market of the enterprises involved; likely effect of proposed combination on competition; etc.</p>
47.	Remedies	<p>a. To give both CCI and notifying parties equal opportunities for proposing remedies at various junctures of the merger assessment process, with the ultimate decision to reject all proposals remaining with the CCI.</p> <p>b. The CCI must make the process of market testing remedies robust and undertake market testing of remedies in appropriate cases.</p> <p>c. To encourage self-compliance by companies, it may be beneficial if Annual Reports of companies contain disclosure regarding compliance with remedies, which may be signed and endorsed by the relevant key management personnel of the company.</p>
48.	Codifying all exclusions	<p>All permissible time exclusions from the 210-day timeline for assessment of mergers to be codified within the Competition Act itself. This will provide more certainty and transparency in the process. Further, an endeavour must be made to limit the exclusions to the bare essentials required.</p> <p>The following principles must be kept in mind while formulating exclusions from the 210-day timeline under Sections 6(2A) and 31(11) of the Act. <i>Firstly</i>, the 210-day timeline is sacrosanct and exclusions from this timeline must be minimized. <i>Secondly</i>, the 210-day timeline must commence once parties have provided CCI with</p>

		full information. <i>Thirdly</i> , any time spent on litigation relating to the notification may be excluded. <i>Fourthly</i> , no other exclusions may be permitted. For example, the time taken by CCI to evaluate proposals is part of the merger assessment process and need not be excluded from the 210-day timeline. An over-all time-limit of 270 days inclusive of all exclusions and time spent on litigation should be provided.
49.	Expanding the scope of penalties	<p>To amend Section 43A of the Act to include penalties for violation of Section 6(2A) and for filings made pursuant to an inquiry under Section 20(1).</p> <p>In light of the recommendation to introduce a Green Channel for automatic approval of certain combinations based on self-assessment and disclosure by parties, CCI's power to impose penalty under Section 44 (<i>Penalty for making false statement or omission to furnish material information</i>) of the Act may also be enhanced.</p>
<b>CHAPTER 8 – TECHNOLOGY AND NEW AGE MARKETS</b>		
50.	Definition of Price Section 2(o)	The current definition of 'price' is wide enough to include non-monetary consideration such as 'data'. The current definition is inclusive in nature; it refers to every valuable consideration, whether direct or indirect and it also includes any consideration which in effect relates to the performance of any services although ostensibly relating to any other matter or thing.
51.	Algorithmic Collusion	The current provisions in the Act (specifically Section 3) are broad enough to address cases of 'algorithmic collusion'. Further, the proposed amendments to clarify the inclusion of 'hub and spoke' cartels in Section 3(3) and to make Section 3(4) inclusive will further strengthen the framework by expanding the scope of Section 3. As regards 'autonomous algorithmic collusion', in the absence of any credible evidence on the anti-competitive concerns, it may be premature to warrant any legislative intervention.
52.	Online Vertical Restraints	<p>MFN clauses should be analysed under the 'rule of reason' or 'effects' test under Section 3(4) of the Act. In cases where such a clause seeks to facilitate a cartel, fix price or supply terms, it will be hit by the provisions of Section 3(3) of the Competition Act.</p> <p>Further, such MFN clauses will typically be hit by Section 3(4)(e) dealing with 'resale price maintenance' and to the limited extent where such clauses are used in the form of 'agency' agreements, they will come within the ambit of Section 3(4)(c) which covers 'refusal to deal' arrangements. In any event, the list of vertical anti-competitive agreements in the proposed Section 3(4) is inclusive in nature, and is hence, broad enough to include MFN agreements.</p>

53.	Widening the ambit of Section 3	Agreements in new age markets which may not be classified strictly as either horizontal or vertical agreements, may be covered within the scope of 'other agreements' in the proposed Section 3(4).
54.	Control over data and assessment of market power	<p>Section 19(4) provides a list of factors that the CCI may consider while inquiring whether an enterprise enjoys a dominant position. This list is inclusive and broad enough to cover instances where control over data may pave the way for dominance and its abuse. Further, Section 19(4)(b) expressly refers to "resources of the enterprise" as a factor for determining dominant position. Such resources may include data. Therefore, Section 19(4) is also broad enough to include control over data as a factor for determining dominance and there is no need for an express reference to control over data or specialised assets as a factor.</p> <p>Further, there is no need to include express reference to the term "network effects" in Section 19(4) as it is already worded in an inclusive manner and provides CCI with enough flexibility to consider such factors while determining the dominant position of an enterprise.</p>
55.	New thresholds for notification of combinations	The Act must enable the Government to formulate new thresholds for notification of combinations based on certain broad parameters which may be stated in the Act. Further, to address the present concerns regarding jurisdiction to review combinations in digital markets, a 'size of transaction' or 'deal value' threshold may be introduced for notification of combinations under the Competition Act.
<b>CHAPTER 9 – ADVOCACY AND CHAPTER 10 ADDITIONAL CHANGES</b>		
56.	Recommendations on Advocacy	<ol style="list-style-type: none"> <li>Roadshows on competition advocacy should not just be limited to the cities of Mumbai and Delhi, but should be organized in Tier-II and Tier-III cities as well.</li> <li>Advocacy videos of the CCI should not just be run in kiosks but should be played in roadshow sessions as well.</li> <li>CCI's advocacy booklets should be translated in vernacular languages to cover a wider audience.</li> <li>CCI should actively participate in the working groups formed by ICN, especially their working group on advocacy in competition law.</li> <li>CCI should consider undertaking advocacy initiatives at educational institutions, like universities, colleges and other</li> </ol>



		<p>such institutions, to promote awareness and quality research on competition. In this regard, it was suggested that CCI may consider funding research, including the setting up of research centres for promoting competition law and policy, in such institutions.</p> <p>f. CCI should frame schemes that allow for the competition assessment of laws and policies both at the Central and State level. For building expertise at the state level, the CCI may develop a system to embed some resources, such as two appropriately qualified and experienced persons at the state level.</p> <p>g. A ranking system may also be developed, similar to the 'Ease of Doing Business' rankings given by the Department of Industrial Policy and Promotion. This may be utilised to assess and rank states on the basis of the competitiveness of their laws and policies. CCI highlighted that for this purpose reference may be made to the roadmap provided in the Competition Assessment Toolkit for conducting competition assessment of policies, legislations, rules and regulations in India.</p>
57.	Recommendation on Legislative Changes	<p>To amend Section 49(1) to emphasize and clarify the need for the Central and State Governments to review their laws from a competition law and policy standpoint and to make a reference to the CCI for its opinion on possible effects of such laws on competition.</p> <p>To amend Section 49(3) to introduce reference to competition culture along with the existing reference to competition advocacy, in Section 49(3).</p> <p>Section 49(3) is broad enough to allow the CCI to communicate its recommendations on measures to promote competition to the Central and State Governments.</p>
58.	Impact Assessment Study	For a summary of findings of the impact assessment study, please see Chapter 9, para 4.
59.	Additional changes	For certain drafting and other minor changes, please see Chapter 10.

## ANNEXURE II - NOTIFICATION CONSTITUTING THE COMMITTEE

No. 5/9/2017- CS  
Government of India  
Ministry of Corporate Affairs  
\*\*\*\*

5<sup>th</sup> Floor, 'A' Wing, Shastri Bhawan  
Dr. Rajendra Prasad Road  
New Delhi-110001  
The 18<sup>th</sup> October, 2018

### ORDER

**Subject: Constitution of Competition Law Review Committee to review the Competition Act, 2002- regd.**

A Competition Law Review Committee with the following composition is hereby constituted with the approval of the Competent Authority:-

- |        |   |                    |
|--------|---|--------------------|
| (i)    | Secretary, Ministry of Corporate Affairs  | - Chairperson      |
| (ii)   | Chairperson, Competition Commission of India (CCI)                              | - Member           |
| (iii)  | Chairperson, Insolvency and Bankruptcy Board of India                           | - Member           |
| (iv)   | Shri Haigreve Khaitan, M/S Khaitan & Co.  | - Member           |
| (v)    | Shri Harsha Vardhana Singh, IKDHVAJ Advisers LLP                                | - Member           |
| (vi)   | Ms. Pallavi Shardul Shroff, Advocate,<br>M/S Shardul Amarchand Mangaldas & Co.  | - Member           |
| (vii)  | Dr. S. Chakravarthy, IAS (Retd.), Hony. Visiting Prof. ASCII                    | - Member           |
| (viii) | Shri Aditya Bhattacharjea, Professor of Economics,<br>Delhi School of Economics | - Member           |
| (ix)   | Joint Secretary (Competition), MCA  | - Member Secretary |

**Invitees (not below the Rank of Joint Secretary) to be nominated by the following Institutions/ Departments:**

- (x) NITI Aayog
- (xi) Department of Commerce
- (xii) Department of Economic Affairs
- (xiii) Department of Consumer Affairs
- (xiv) Department of Industrial Policy and Promotion

2. The terms of reference of the Competition Law Amendment Committee are:-

- (i) To review the Competition Act/ Rules/ Regulations, in view of changing business environment and bring necessary changes, if required;
- (ii) To look into international best practices in the competition fields, especially anti-trust laws, merger guidelines and handling cross border competition issues;

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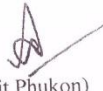
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(iii) To study other regulatory regimes/ institutional mechanisms/ government policies which overlap with the Competition Act;

(iv) Any other matters related to competition issue and considered necessary by the Committee.

3. The Committee shall complete its work and submit its report within three months of the date of its first meeting.

  
(Abhijit Phukon)  
Director

To,

1. Chairperson, Competition Commission of India (CCI)
2. Chairperson, Insolvency and Bankruptcy Board of India
3. Shri Haigreave Khaitan, M/S Khaitan & Co.
4. Shri Harsha Vardhana Singh, IKDHVAJ Advisers LLP
5. Ms. Pallavi Shardul Shroff, Advocate, M/S Shardul Amarchand Mangaldas & Co.
6. Dr. S. Chakravarthy, IAS (Retd.), Hony. Visiting Prof. ASCI
7. Shri Aditya Bhatrtacharjea, Professor of Economics, Delhi School of Economics, University of Delhi

Copy to (*with the request to nominate an officer not below the rank of Joint Secretary*)

8. CEO, NITI Aayog, NITI Bhawan, New Delhi
9. Secretary, Department of Commerce, Udyog Bhawan, New Delhi
10. Secretary, Department of Economic Affairs, North Block, New Delhi
11. Secretary, Department of Consumer Affairs, Krishi Bhawan, New Delhi
12. Secretary, Deptt. of Industrial Policy and Promotion, Udyog Bhawan, New Delhi

Copy also to:-

- a. PS to CAM
- b. PPS to Secretary, Corporate Affairs
- c. Joint Secretary (Competition), MCA
- d. Secretary, CCI (with the request to provide secretarial services to the Committee)

  
(Abhijit Phukon)  
Director

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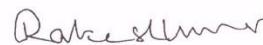
No. 5/9/2017- CS  
Government of India  
Ministry of Corporate Affairs  
\*\*\*\*

5<sup>th</sup> Floor, 'A' Wing, Shastri Bhawan  
Dr. Rajendra Prasad Road  
New Delhi-110001  
The 5<sup>th</sup> November, 2018

ORDER

**Subject: Constitution of Competition Law Review Committee**

In continuation to this Ministry's Order of even number dated 1<sup>st</sup> October, 2018, Shri Anand S. Pathak, Managing Partner, P&A Law Offices is hereby nominated as a Member of the said Committee.

  
(Rakesh Kumar)

Under Secretary to Government of India  
9c

To,

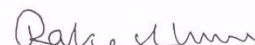
1. Chairperson, Competition Commission of India (CCI)
2. Chairperson, Insolvency and Bankruptcy Board of India
3. Shri Haigreve Khaitan, M/S Khaitan & Co.
4. Shri Harsha Vardhana Singh, IKDHVAJ Advisers LLP
5. Ms. Pallavi Shardul Shroff, Advocate, M/S Amarchand Mangaldas & Co.
6. Dr. S. Chakravarthy, IAS (Retd.), Homy. Visiting Professor, ASCI
7. Shri Aditya Bhattacharjee, Professor of Economics, Delhi School of Economics, University of Delhi
8. Anand S. Pathak, Managing Partner, P&A Law Offices

Copy to:

9. CEO, Niti Aayog, Niti Bhawan, New Delhi
10. Shri Dhammu Ravi, Joint Secretary, Department of Commerce, Udyog Bhawan, New Delhi
11. Dr. Shashank Saxena, Adviser (FSLR), Department of Economic Affairs, North Block, New Delhi
12. Shri. Amit Mehta, Joint Secretary, Department of Consumer Affairs, Krishi Bhawan, New Delhi
13. Shri. Ravinder, Joint Secretary, Deptt. of Industrial Policy and Promotion, Udyog Bhawan, New Delhi

Copy also to:-

- a. PS to CAM - 5-11-18
- b. PPS to Secretary, Corporate Affairs - 5/11/18
- c. Joint Secretary (Competition), MCA - 5/11/2018
- d. Secretary, CCI

  
(Rakesh Kumar)

Under Secretary to Government of India  
9c

### ANNEXURE III - COMPOSITION OF WORKING GROUPS

No. 5/9/2017- CS  
Government of India  
Ministry of Corporate Affairs  
\*\*\*\*

218  
5<sup>th</sup> Floor, 'A' Wing, Shastri Bhawan  
Dr. Rajendra Prasad Road  
New Delhi-110001  
The 13<sup>th</sup> November, 2018

#### ORDER

**Subject: Constitution of Working Groups of the Competition Law Review Committee- regd.**

In accordance with the deliberations of the 1<sup>st</sup> meeting of the Competition Law Review Committee held on 31<sup>st</sup> October, 2018, the following four Working Groups (WG) are constituted:-

- i. **WG on Regulatory Structure** (Dr. MS Sahoo- WG I/C)
- ii. **WG on Competition Law** (Dr. S Chakravarthy- WG I/C)
- iii. **WG on Competition Policy, Advocacy and Advisory Functions** (Prof. Aditya Bhattacharya- WG I/C), and
- iv. **WG on New Age Markets & Big Data** (Shri Harsha Vardhana Singh- WG I/C).

(The composition of the Working Groups is annexed as Annexure-I).

2. It is requested that the findings of the each Working Group may be presented to the Competition Law Review Committee within four Weeks from the date of issue of this order.

  
(Abhijit Phukon)  
Director

- To,
1. Chairperson, Competition Commission of India (CCI)
  2. Chairperson, Insolvency and Bankruptcy Board of India
  3. Shri Haigreave Khaitan, M/S Khaitan & Co.
  4. Shri Harsha Vardhana Singh, IKDHVAJ Advisers LLP
  5. Ms. Pallavi Shardul Shroff, Advocate, M/S Amarchand Mangaldas & Co.
  6. Dr. S. Chakravarthy, IAS (Retd.), Hony. Visiting Professor, ASCI
  7. Shri Aditya Bhattacharjee, Professor of Economics, DSE, University of Delhi
  8. Shri Anand S. Pathak, Managing Partner, P&A Law Offices

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## Copy to:-

9. CEO, Niti Aayog, Niti Bhawan, New Delhi (*with the request to nominate an officer not below the rank of Joint Secretary*)
10. Shri Dhammu Ravi, Joint Secretary, Department of Commerce, Udyog Bhawan, New Delhi
11. Dr. Shashank Saksena, Adviser (FSLR), Department of Economic Affairs, North Block, New Delhi
12. Shri Amit Mehta, Joint Secretary, Department of Consumer Affairs, Krishi Bhawan, New Delhi
13. Shri Ravinder, Joint Secretary, Deptt. of Industrial Policy and Promotion, Udyog Bhawan, New Delhi

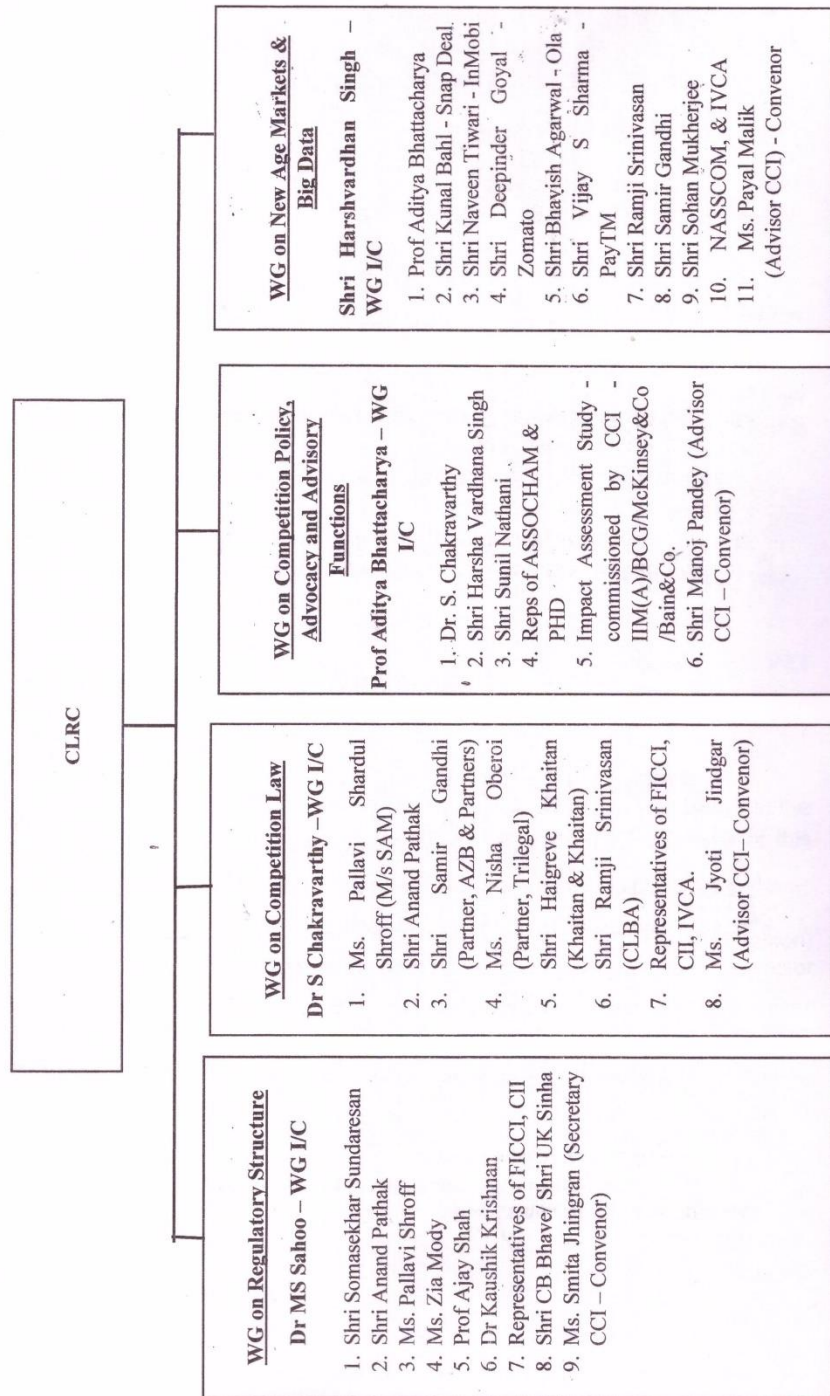
## Copy also to:-

- a. PS to CAM
- b. PPS to Secretary, Corporate Affairs
- c. Joint Secretary (Competition), MCA
- d. Secretary, CCI (*with the request to circulate this order to the Convenor of each Working Group for further necessary action*)

  
(Abhijit Phukon)  
Director



Composition of the Working Groups of the Competition Law Review Committee



#### ANNEXURE IVA – OBSERVATIONS OF DR. ADITYA BHATTACHARJEA

*Please note that these observations were based on a penultimate version of the Report.*

##### ***Abuse of Dominance/Unilateral Conduct (ch. 6 of Draft Report)***

Several commentators have opined that once dominance of the enterprise is established, s.4(2) as it stands treats the practices listed in subsections (a) to (e) as abusive per se. No doubt subsections (b), (c) and (e) focus attention on anti-competitive effects, but (a) and (d) do not (apart from the inclusion of predatory pricing in (a)), making the practices listed therein vulnerable to challenge. But these practices need not be abusive. Elementary economics tells us that price discrimination is not necessarily harmful, and can even be beneficial. Discriminatory conditions or supplementary obligations in a contract can also be objectively justified. Even if the CCI applies this logic and finds no contravention, a dissatisfied Informant can approach the Appellate Tribunal and Supreme Court, which may have a different view based on a plain reading of the section. The fact that the CCI has applied an effects-based analysis in some (but not all) cases might not be persuasive on appeal. It might not even bind the Commission itself in future, given its inconsistent record. (The Draft Report cites just two cases in which the CCI has used a per se approach, but there are several others, e.g. *BCCI, Faridabad Industries Association v Adani Gas, GHCL Ltd v Coal India.*)

Incorporation of an AAEC test into s.4 is therefore necessary. In order to provide some structure to this test, it can be applied with reference to the factors specified in s.19(3). The proposal to amend 19(3)(d) to read as “benefits or harm to consumers” (Draft Report, chapter 10, para 1.1.v) would now cover exploitative as well as exclusionary abuses. This test would enhance legal certainty and Ease of Doing Business. By bringing the section into line with international norms, it would provide a familiar template to foreign firms in assessing regulatory risks associated with setting up business in India.

The Explanation to s.4(2)(a), which explicitly allows for a ‘meeting competition’ defence even for predatory pricing, also needs a relook. Such a defence should be available only against an allegation of unfair/discriminatory conditions or prices, not for predatory pricing. This seems to have been an inadvertent error in the original Act, which copied the wording of s.4(2)(a)(ii) into the Explanation. As it stands, this wording immunizes a predator who uses its deep pockets to price below its cost so as to eliminate a more efficient rival. This cannot be the intention of any competition law. Finally, I have reservations about the inclusion of an IPR defence in cases of abuse of dominance. The general principle followed in the CLRC has been that no changes



should be recommended unless there is evidence of serious enforcement gaps. No evidence has been presented to establish that such a gap has hindered the CCI, or resulted in 'false positives', in cases involving IPRs and abuse of dominance. For example, in *Kapoor Glass v Schott Glass India Pvt Ltd*, both CCI and COMPAT agreed with the OP that its refusal to deal was justified in order to protect its trademark. Moreover, the Draft Report does not provide any evidence of an IPR defence for abuse of dominance being written into any antitrust statute.<sup>500</sup> It cites an outdated ECJ judgment (*Parke, Davis and Co. v. Probel*) of 1968. The relevance of this judgment is questionable: it only stated that to establish a violation of the Article, it must be proved that there is dominance and abuse, which is now obvious, and that commerce amongst the EC member states has been affected, which is not relevant for the Indian Competition Act.

More importantly, there are much more recent ECJ judgments (*Magill*, 1995; *IMS Health*, 2004; *Microsoft*, 2007) that spell out specific conditions where an IPR defence is not maintainable against an allegation of abuse. Encoding a blanket IPR defence into the Competition Act, even if it allows for only 'reasonable' conditions to protect IPRs, would unnecessarily strengthen the position of right holders. In particular, it might inhibit the CCI from taking action against anti-competitive practices such as those in the three ECJ cases cited above, or in the very recent *FTC v Qualcomm* decision in the U.S. Instead of a specific IPR exemption, incorporation of an AAEC test based on s.19(3) into s.4 would allow legitimate IPR defences, while taking into account effects on competition and consumers.

### ***Combinations (ch.7 of Draft Report)***

The case for a 'Green Channel' for combinations that are unlikely to raise competition does not seem to be compelling. As I mentioned in my earlier communication, the CCI has an excellent record of clearing Phase I combination cases in an average time of 18 days and a maximum of 30 days. This does not seem to be excessive relative to the months that the parties would have devoted to preparing their business integration plan. However, if at all such a facility is to be provided, it should be accompanied by some safeguards. I would suggest that the CLRC should recommend the following specific safeguards:

- i) The 'Green Channel' should not be available for combinations that require a Form II filing, and there should be deterrent penalties for wrongly filing Form I or the proposed new form in order to avail of the Green Channel.

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<sup>500</sup> Incidentally, Australia has recently repealed an IPR exemption in its competition law. This exemption applied to anti-competitive agreements—significantly, there was no such exemption for abuse of dominance.

Substantial monetary penalties, on par with those for ‘gun jumping’, should be written into the Act itself. Apart from these, submission of false information should result in reversal of the combination even if the parties have made substantial progress, or even consummated the deal.

- ii) Even if the information supplied is correct, the CCI may reverse or modify the combination under section 20(1), if it finds that it is likely to result in an AAEC. It should be clear that the parties will bear the risk of proceeding with the deal. This should be spelt out in the pre-notification consultative process as well as all Green Channel documents and forms.

The Draft Report also contains a proposal to allow the government to create categories of combinations that are exempt from review by the CCI. This is in the context of avoiding unnecessary delays in granting approval to resolution plans under the Insolvency and Bankruptcy Code (IBC), but the proposal is not confined to such combinations. The Record of Proceedings states only that “it was discussed that it may be provided that such combinations fall within the fast-track process (Green Channel)”. A blanket power to exempt goes far beyond this. I acknowledge that multiple resolution applications by different potential bidders, of which only one may be ultimately approved by the Committee of Creditors (CoC), does tax the resources of the bidders as well as the CCI. But this is unlikely to be a major reason for so many proposals exceeding the 270 day outer limit for resolution under the IBC. In any case, a blanket exemption from scrutiny is not advisable. Suppose a large airline or telecom company enters the IBC process, and the CoC finds that a bid from a close competitor offers the most favourable terms. Approval of such a proposal would clearly result in an appreciable adverse effect on competition, which the Competition Act is supposed to prevent. Such cases should be subject to Form II and Phase II (i.e., s.29) clearance, which the CCI could informally fast track. A carefully designed Green Channel would be available for non-problematic IBC cases. As for the problem of multiple notifications, the IBC may be amended to require that only the applicant who is approved by the CoC need file for CCI approval. All applicants would have to prepare a defence and possible modifications so as to clear this hurdle, but this would be only a small part of preparing their resolution plan.

*Other observations (keyed to chapter / para of the Draft Report)*

- 1/ 4.5 It is incorrect to classify the institutional framework in the U.S. as an “Integrated Agency Model”. Even the FTC is the final authority only in some merger cases. In all other cases (including anticompetitive agreements and monopolization), the FTC and Department of Justice must bring the case before

the federal courts. In this respect, the U.S. should be classified as following the “Bifurcated Judicial Model”.

- 1/ 4.6 More thought needs to be given to the proposal to introduce settlements and commitments. In particular, what would be the implications for (a) the existing leniency programme; (b) compensation that can be awarded under section 53N? Also, some guidelines (along the lines of the Lesser Penalty Regulations) should be prescribed so as to limit the discretion of the CCI in reducing the penalty. The level at which the settlement/commitment can be authorized (full Commission or individual bench?) should also be spelt out. The terms of a settlement/commitment should be made public and interested third parties should be allowed to approach the CCI to review it on certain grounds, as in Canada.
- 4/ 5.7 As pointed out in my earlier note, neither the existing definition of exclusive supply agreement, nor the proposal to call it exclusive dealing, is wide enough to cover restrictions imposed on sellers by platform intermediaries who are neither buyers nor dealers.
- 9/ 2.2 As Chairperson of the Working Group on Advocacy, I would belatedly like to add a recommendation here. The websites of most higher courts and regulatory agencies in India have excellent search facilities, whereby judgments and orders can be located by entering case number or party names. Even full-text search is possible in some cases. The CCI website does not have any of these facilities. Even its keyword search feature is almost useless. The CLRC may recommend a revamping of the CCI website to make it more user friendly. This would help lawyers, scholars, students, potential informants, and all those interested in competition jurisprudence.

## ANNEXURE IVB – OBSERVATIONS OF MRS. PALLAVI SHROFF

*Please note that these observations were based on a penultimate version of the Report.*

As a member of the Competition Law Review Committee (CLRC), I would like to thank the members of the CLRC as well as the Competition Commission of India (CCI) for their efforts in undertaking a review of the nearly decade old Competition Act, 2002 (*Competition Act*). However, I have some reservations/comments against a few recommendations made in the report, detailed below in IV parts.

### AMENDMENTS TO THE REGULATORY STRUCTURE

#### A. Corporate Governance

1. The report proposes a complete change in the structure and institutional framework of the CCI even though the existing structure has served well/effectively. Given the general approach followed by the CLRC – “*if it ain't broke don't fix it*” approach, I do not understand the need to recommend a complete change in the structure and framework of the CCI. The CLRC has proposed the introduction of a governing board to “supervise” the functions of the CCI.
2. I appreciate that the concept of a governing board has been borrowed from the structure of regulators like the Securities and Exchange Board of India (*SEBI*), but unlike SEBI, CCI is not what can be called a traditional regulator. Unlike a traditional regulator, the CCI:
  - a) does not issue licenses;
  - b) does not issue and revise at regular intervals, regulations that govern various stakeholders; and
  - c) does not monitor the compliance with stakeholder regulations; and
  - d) take action for non-compliance/breach.
3. In a free market economy, the enforcement role of the CCI is broadly to consider market concerns on account of (a) agreements between competitors or between enterprises or persons at different stages or levels of the production chain in different markets; and (b) unilateral conduct of dominant enterprises. The CCI also reviews combinations (including mergers, acquisitions, and amalgamations) from a competition law perspective and grants approvals to such combinations

with or without modifications. Given the role and functions of the CCI, which are quite different from other 'regulators', it is not advisable to copy the institutional framework of regulators like SEBI for the governance of CCI, specifically in absence of any gap/evidence on the need for a governing board.

4. As stated in the Supreme Court decision in *CCI v SAIL*<sup>501</sup>, the CCI performs *inter-alia* administrative, investigative and quasi-judicial functions. Therefore, given the role of the CCI, I believe that there is no need to overhaul the structure of the CCI, in terms of requirement of Part Time Members (*PTMs*) or even a corporate board structure. The present structure of the CCI is working very well. Introduction of a governing board hints at additional layer of institutional costs/issues which can very well be avoided.
5. It is important to note that the CCI performs quasi-judicial functions (as admitted by the CCI in various replies/affidavits filed before various courts in India) and is an independent body. The independence of the CCI, uninfluenced by the government is critical in CCI performing its role and duties in a fair, proper and just manner; uninfluenced by other factors. In fact, several safeguards have been inbuilt in the statute to ensure independence of the CCI. The Raghavan Committee while noting that "*CCI will have to be a quasi-judicial body with autonomy and administrative powers*" had also categorically stated that "*the CCI needs to be functionally autonomous and financially independent*".
6. Imposition of a board/body to supervise the functioning of a body performing a quasi-judicial functions is not advisable. Such a measure is bound to impinge on its independence. In any event, the statute/law provides for adequate safeguards by providing for a right to appeal to the appellate authority (section 53 B of the Act) and finally an appeal to the Supreme Court of India (section 53T of the Act). In addition, the writ jurisdiction of a High Court under Article 226 of the Constitution of India is also available to an aggrieved party. With existing powerful safeguards in place, there is absolutely no need for a board/body to oversee the functioning of the CCI.

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<sup>501</sup> (2010) 10 SCC 744, para 37.

7. The report notes that in light of the multifaceted role being performed by CCI, there may be *“the need to introduce a governing board with part-time members (PTMs) (including ex-officio members) in the CCI to bring in an external perspective, objectivity and more transparency in the functioning of CCI”*. However, it is not clear as to what end is the *“external perspective”* and *“objectivity”* being sought for. Clearly *“external”* perspective is not required and indeed cannot be brought into the adjudicatory function of the CCI. If it is sought to be done, it would violate the basic principles of law that external factors cannot be considered or influence a decision of a quasi-judicial body.
8. As to objectivity, the CCI has been objective in its functioning in the last decade and whenever parties have been aggrieved, appeals have been preferred.
9. Whilst bringing in transparency in the functioning of the CCI is welcome, there is no need for having an oversight board/body.
10. Further, the report recommends that functions related to adjudication (where the CCI exercises its quasi-judicial functions) are to be exercised by Whole Time Members (WTMs) (including Chairperson), and not by the governing board as these functions are an intrinsic part of the CCI’s powers, and involve adjudication of competition issues which may impact rights of persons, and should therefore not be delegated. While I agree with the proposition on delegation, the statement begs the question of the need for a governing board where most of the functions of the CCI (adjudicatory and executive) cannot be delegated to the board and any function which can be delegated is being delegated as of today as well.
11. It is, in my view, better to have more members in the CCI than it currently has. The CCI should have 7-9 members, coming from backgrounds of different expertise, who can add substantive value to the decision making by the CCI. The focus should be on creating greater transparency in the current set up rather than on having a supervisory/advisory governing board.
12. Further, while I also agree that the Chairperson and members may sit in panels of three for meetings in relation to adjudication, I am also of the view that every such panel must have a judicial member. This is

especially so, because at this stage, the CCI is exercising its quasi-judicial powers. Further, the recent judgement of the Hon'ble Delhi High Court in *Mahindra* case after providing a very detailed reasoning, has clarified that “... at all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary.”

13. In so far as quasi legislative functions of the CCI is concerned, I agree that the CCI should follow the principles set out in the report (page 28, paragraph 2.4). I hasten to add that these principles are being followed by the CCI in drafting regulations. As such, there is no need to amend the Act. However, if thought appropriate, principles to be followed can be spelt out in the Act. Having said that, I reiterate that there is no justification to step up a governing board for the purpose of contributing to the drafting and finalizing the regulations/rules.

#### B. Merging office of the Director General (DG) within CCI

14. It has been recommended that the investigative function must be merged with the CCI. I am not in agreement with this recommendation. I am of the view that to ensure fair and independent investigation and the possibility for the DG to come to a finding contrary to the prima facie order, (which can result in serious consequences for an enterprise), it is necessary that the DG is fully independent. If the DG is folded into the CCI (for example, if the DG is appointed by the CCI and its confidential appraisal reports are written by the CCI), the independence and fairness of investigation by the DG is likely to be significantly impacted. In fact, all required steps should be taken to preserve the independence of the investigative process and strengthen the office of the DG with economists, analysts, competition law experts etc.

### AMENDMENTS TO SECTION 3

#### C. Section 26 – Amending the inquiry procedure

15. Club cases pertaining to single and continuous infringement: The concept of a ‘single and continuous infringement’ *“under EU jurisprudence is recognised as an infringement of Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) that can result not only from an isolated act, but also from a series of acts or from continuous conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute an infringement of that*

*provision. Accordingly, if the different actions form part of an 'overall plan' because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole."*

16. Thus, complex cartel arrangements dealing with:
- a) the same product and the same participants involved in varying time periods;
  - b) the same product but different participants and different geographic territories; or
  - c) two separate but complementary products in the same time period (but with a common view to implement the cartelization of the primary product) have all been held to be a part of a single and continuous infringement.
17. Accordingly, I am of the view that an amendment should be made in Section 26 to enable the CCI to club different cases (including lesser penalty application cases) before the DG's report is submitted.

#### D. Introducing relevant market in Section 3

##### Horizontal agreements under Section 3(3)

18. The Supreme Court of India while interpreting the existing provision of Section 3 has held that a relevant market definition is not required in Section 3(3) cases.<sup>502</sup> However, the Raghavan Committee Report had cautioned that even while examining horizontal agreements, "*the relevant market should be clearly identified*", to understand the contours of competition. This is because critical factors such as market shares/power of parties involved and the effects on customers cannot be accurately examined without defining a relevant market.
19. In the EU, Article 101 of the TFEU classifies anti-competitive agreements into two categories – agreements restricted by '*object*' and agreements restricted by '*effect*'. Object restrictions (such as hard-core price fixing/ market sharing / bid-rigging/ customer allocation cartels) are perceived to be anti-competitive by their very nature and their effects are not

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<sup>502</sup> *Competition Commission of India v. Coordination Committee of Artist and Technicians of West Bengal Film and Television Industry*, Order dated 7 March 2017.



analysed. Thus, a relevant market need not be defined and it is only necessary to prove the fact that an agreement existed, although these may be justified under Article 101(3) of the TFEU.<sup>503</sup> However, relevant markets are required to be defined in agreements (whether horizontal or vertical) which are considered restrictive by their effects.

20. The US classifies anti-competitive agreements into two categories- ones which are declared *per se* illegal and others, which are analysed under the *rule of reason* analysis. Agreements which are considered *per se* illegal include hard-core cartels and it is only essential to prove that there was an anti-competitive agreement. Once the agreement is established, the parties cannot rebut the illegality attached to such agreements and the effects of such agreements are not analysed at all. Hence, a relevant market is not defined in *per se* cases. On the other hand, other horizontal agreements are analysed under the *rule of reason* doctrine and the effects of such agreements are analysed on the relevant market.
21. Therefore, regardless of how horizontal agreements are treated internationally, whenever any agreement's effects are analysed, these effects are tested on the *relevant market*.
22. In contrast, the Indian position is unique in its approach to horizontal agreements. Under Section 3(3) of the Competition Act, cartels are *presumed* to have an appreciable adverse effect on competition (AAEC) in India and the parties may rebut this presumption by analysing the factors under Section 19(3) of the Competition Act. Further, Section 19(3) refers to a "market". In this regard, the Supreme Court has also held that,

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<sup>503</sup> Article 101(3) of TFEU does not expressly mention the effects of an agreement. It states that Article 101 is *inapplicable* to the following agreements -

Which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and

Which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

“the word ‘market’ has reference to ‘relevant market.’”<sup>504</sup> Therefore, while the CCI need not define the relevant market in the first instance, I am of the view that there is a need for the parties to define a relevant market for the purpose of rebutting the presumption of AAEC under Section 3(3).

#### Vertical agreements under Section 3(4)

23. The need for defining relevant markets in vertical agreements is of the utmost importance, in order to correctly understand whether the parties involved are in fact in a vertical relationship.
24. Unlike Section 3(3), there is no presumption of AAEC under Section 3(4). Rather, AAEC must be proven by analysing the factors under Section 19(3), such as foreclosure of competition etc. In order to accurately analyse whether there is input and customer foreclosure, there is thus a need to define the relevant downstream and upstream markets respectively, in which the foreclosure will occur. The Raghavan Committee Report had also stated that “*..under the rule of reason, vertical agreements are generally treated more leniently than horizontal agreements. This is because vertical agreements can often perform pro-competitive functions. Such agreements are generally considered anti-competitive if one or more of the firms that are party to the agreement have market power...*”
25. Further, the CCI<sup>505</sup>, EU<sup>506</sup> and USA<sup>507</sup> define relevant markets while analysing the competition concerns arising out of vertical agreements. Therefore, I am of the view that an amendment be made to define relevant markets in agreements governed by Section 3(4).

#### E. Reintroducing the power of review under Section 37

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<sup>504</sup> Para 69 of *Competition Commission of India v. Bharti Airtel and others*,: 2018 SCC OnLine SC 2678.

<sup>505</sup> *Matrimony.com Ltd vs Google LLC & ors.*, Case Nos. 07 and 30 of 2012; *House of Diagnostics v Esaote SPA & ors*, Case no. 9 of 2016.

<sup>506</sup> *Atlantic Container Line AB and Others v Commission of the European Communities*, Case T-395/94, European Court Reports 2002 II-00875; EU Vertical Guidelines.

<sup>507</sup> *Tampa Electric Company v Nashville Coal Company*, 365 US 320 (1961).

26. As noted in the report, power to review (available earlier with the CCI) was omitted by the *Competition (Amendment) Act, 2007*.<sup>508</sup>
27. In various cases, the writ jurisdiction of the High Court is often invoked to correct certain procedure adopted by the CCI, such as making a third party an opposite party without prior notice and passing a Section 26(1) order against the same; relying on allegedly forged documents or misleading information in the DG Report; or passing a Section 26(1) order despite there being an error apparent on the face of record or the commission of a fraudulent act. Further, the *SAIL* decision stated that a Section 26(1) order is administrative in nature and not appealable. Hence parties are left with no other option but to resort to the writ jurisdiction of the High Courts and the Supreme Court, while challenging Section 26(1) orders.
28. This leads to delays in the overall investigation as well as adversely affects the time and resources of the parties and the CCI, as they are involved in numerous litigations. Therefore, it is important that the CCI have the power to review its orders, even if this review is required to be based on a limited set of objective criteria.
29. Moreover, the *Google*<sup>509</sup> case clearly spells out the reasoning for the need of such a power. However, the Delhi High Court was handicapped in providing any relief given the lack of statutory provisions granting the CCI the power to review its own orders. The right to review has been further read down in the recent *Cadila*<sup>510</sup> case where the Delhi High Court specifically noted that the “*cardinal rule of interpretation is that the power of review is expressly granted.*” Therefore, it is clear that the lack of a specific statutory power of review has led to great uncertainty. Thus, I am of the view that Section 37 of the Competition Act should be re-instated to grant the CCI the power to review its orders.

#### F. Revising the definition of relevant market in Section 2(r)

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<sup>508</sup> The report of the Standing Committee on Finance (2006-2007) does not provide any reason for the omission of the same. This report is available at [https://www.prindia.org/sites/default/files/bill\\_files/bill73\\_2007050873\\_Competition\\_Bill\\_2006\\_standing\\_committee.pdf](https://www.prindia.org/sites/default/files/bill_files/bill73_2007050873_Competition_Bill_2006_standing_committee.pdf)

<sup>509</sup> LPA No.733/2014, Delhi High Court, Order dated 27 April 2015

<sup>510</sup> LPA No.160/2018, Delhi High Court, Order dated 12 September 2018

30. The relevant market within which the competition issues are to be analysed should be with reference to both, relevant geographic and the relevant product markets. This is in line with the European Commission's *Notice on Relevant Market*.<sup>511</sup> The CCI has also recognised the same in its decisional practise.<sup>512</sup> However, Section 2(r) of the Competition Act states that a relevant market may be determined with reference to either the relevant geographic market or the relevant product market. Therefore, in order to harmonise the legislation with the current national and international jurisprudence, I am of the view that Section 2(r) should be revised to clarify that relevant market means both, the relevant geographic and relevant product market.

#### AMENDMENTS TO SECTION 4

G. Section 4 – Introducing an “Effects Doctrine” and “Objective Justification” to determine an abuse of a dominant position.

31. Majority of the members of Working Group II had agreed that an “effects based approach” should be included in the Competition Act and the language of the Competition Act should be amended to introduce the same. This is essential to ensure that conduct covered by Section 4(2)(a) – (e) does not remain a *per se* violation of the Competition Act, with no assessment of the conduct's actual effects.
32. Any restrictions on the ability of an enterprise to do business in India, must be supported by a robust assessment of how such conduct affects the process of competition. A failure to do so casts a chilling effect on dominant enterprises to compete on merits which is the antithesis of the current competition law regime in India which is not designed to penalize dominant companies for being dominant, but to only prohibit the abuse of such a position.

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<sup>511</sup> EC Notice at para 9:

[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=EN)

<sup>512</sup> *Matrimony* vs *Google* at <https://www.cci.gov.in/sites/default/files/07%20%2030%20of%202012.pdf> ; *House of Diagnostics* v *Esaote* at <https://www.cci.gov.in/sites/default/files/case%20no.%2009%20of%202016%20%28Majority%20Order%20P.%2001%20to%2033%29%20%2C%20Dissent%20Note%20by%20Chairperson%20%28P.34%20to%2039%29.pdf>

33. The CLRC's decision to review each abuse under Section 4(2)(a) – (d) to determine "*which approach for assessing the abuse of dominance is most suitable for Section 4*", does not adequately replace the benefits of an effects based test for Section 4. Amending the Competition Act to require the CCI to consider the effects of conduct on competition provides the safeguards required to ensure that only egregious conduct is caught and pro-consumer conduct is not chilled.

H. Section 4 – Specifying that leveraging in Section 4(2)(e) is in another "associated" relevant market.

34. Majority of the members of Working Group II had agreed that Section 4(2)(e) should be amended to include "another associated" relevant market.
35. Currently, the language under Section 4(2)(e) of the Competition Act relates to abuse of dominant position by an enterprise or group if the enterprise or group leverages its dominant position in one relevant market to enter or protect another relevant market. The term "another relevant market" can be interpreted to mean any market that is unrelated to the market in which the enterprise or group is found to be in a dominant position. This causes a problem in the theory of abuse as it is well established that there must be a causal link between the dominant position and abuse. In other words, the abuse must arise from the position of dominance, and the question to be asked is "but for" the dominant position, could an enterprise have engaged in the conduct said to be abusive. In leveraging cases, where the second relevant market is unrelated, this causal link becomes very remote and enterprises are at risk of being penalised for only having considerable resources in another market (and not for *using* their dominance in another market in an abusive manner).
36. In order to ensure that the stator provisions are not misused to penalise legitimate actions of an enterprise, the Competition Act needs to be amended to state that leveraging is only prohibited in cases where the two relevant markets are related. The CLRC's decision to reject this proposed amendment leaves the section open to misuse and reduces incentives of enterprises to use their resources in one market to (such as oil and gas) to enter into new markets (such as telecom).

## AMENDMENTS TO THE COMBINATIONS

### I. Introduction of “material influence” standard

37. The report recommends that the introduction of a ‘material influence’ standard for determination of control would be suitable as opposed to a ‘decisive influence’ standard, therefore substantially lowering the thresholds for determining control.
38. Over the past few years, the CCI has specifically identified certain categories of rights that may be construed to confer “control”. The CCI’s interpretation of control is already quite wide (partly owing to the lack of clarity in the Statue), and also captures certain standalone minority investor protection rights. Given that the CCI’s interpretation of decisive influence is anyway overtly wide, we do not need to further lower this standard. For example, veto/affirmative rights regarding amending of charter documents<sup>513</sup> and changing the dividend policy<sup>514</sup> (which have been held to amount to control by the CCI) typically do not confer control on their own, and are merely rights given to investors to ensure that they remain aware about the company’s operations and to protect their financial interest.<sup>515</sup>
39. Keeping this background in mind, few important aspects need to be kept in mind while considering introduction of this reduced/lower standard, as detailed below:
40. Firstly, the CCI has consistently used the standard of “decisive influence” in all its cases since the inception of merger control in India in 2011 and the material influence standard has been used only in one case (not in context of notifiability of a combination but on account of a non-disclosure in the filing). Therefore, the CCI itself has agreed with this standard over the years and there has been no enforcement gap.

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<sup>513</sup> Case No.C-2014/07/192, *Alpha TC Holdings/Tata Capital Growth*.

<sup>514</sup> Case No. C-2015/01/243, *Caladium Investment Pte. Ltd/Bandhan Financial Services Limited*.

<sup>515</sup> EU Jurisdictional Notice, para 66 states that veto over such rights would typically not confer control.

41. The CLRC now, instead of strengthening and improving the standard being followed over years (in a move which will lead to more notifications), is proposing to lower the standard which is likely to have a huge impact on the government's ease of doing business policy in India and transaction costs.

42. As an illustration, please see the case scenario below:

CCI has held that material influence, the lowest level of control, implies presence of factors which give an enterprise *ability to influence* affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements etc. Further, the CCI has held that even having one board seat on a board of a may *“lead to material influence over the affairs of a company”*.

43. Secondly, going by this reasoning, whenever an enterprise acquires just an *“ability to influence”* in another enterprise, the combination becomes notifiable to the CCI. Thus acquisition of just one board seat may lead to an acquirer having to take a CCI approval even though acquiring a board seat (in let's say a board of 5 or 8 members) may not give any control to the acquirer, to impose the strict burden of prior notification. Such an outcome goes against the sentiment of all the stakeholder comments received by the CLRC and ease of doing business in India. Statutorily defining a lower standard will result in substantial number of notifications/filings to the CCI. This coupled with the proposed ad-valorem fees will increase the cost of doing a transaction/deal in India and is contrary to the stated policy of increasing ease of doing business in India.

44. Thirdly, to keep things in perspective, approximately 800 private equity deals (aggregating to USD 26 billion) happened in India in 2018<sup>516</sup>. With the lowering of the standard for notifiability to “material influence”, all such deals will become notifiable to the CCI<sup>517</sup>. As the report suggests, the CCI has imposed remedies in less than 3% cases till date. Therefore, we may need to balance the requirement to file with the state policy objective of doing ease of business in India.

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<sup>516</sup> <https://www.bain.com/insights/india-private-equity-report-2019/>

<sup>517</sup> Subject to meeting of financial thresholds prescribed.

45. Fourthly, as noted in the report, the Supreme Court of India in the Arcelor Mittal decision when interpreting control under the IBC has clarified that control *“denotes only positive control”*, which means that the *“mere power to block special resolutions of a company cannot amount to control”*. *“Control”* here, as contrasted with *“management”*, means *“de facto control of actual management or policy decisions that can be or are in fact taken”*. Therefore, a decisive influence standard would be more appropriate.
46. Fifthly, it is also noted that *“adopting the decisive influence standard for control may restrict notifiability in certain cases”* in the report. However, we should not lose sight of the fact that the CCI has the power to suo moto initiate investigations under Section 20(1) of the Competition Act, if the parties fail to notify certain transactions because of the *“perceived”* diluted standard. It is in fact the parties who will be the ones taking a risk of getting penalized under the Competition Act.
47. Sixthly, we have to keep in mind that the need for an ex ante regulation on combinations stems from the need to ensure that combinations which may have, both, an *“appreciable”* as well as an *“adverse”* effect on competition are reviewed by the regulator. While the reports uses reference to guidance provided by the UK competition authority on use of a *“material influence”* standard, we have to keep in mind that the notification of combinations in UK is voluntary and not mandatory like India.
48. Seventhly, the report also takes note of the European Commission’s (EC) white paper on minority acquisitions and changes proposed to the EC regime. It is important to note that this was a white paper introduced in 2014 for stakeholder consultation and even five years after its introduction, no steps have been taken by the EC to introduce a lower standard in the EU. The standard today still remains as that of *“decisive influence”* in EC. Further, a white paper is a means for stakeholder consultation and not a decision of the EC. For that matter, even the white paper does not recommend adoption of *“material influence”* standard but proposes expanding the EC’s jurisdiction to include review of potential anti-competitive effects resulting from acquisitions of non-controlling minority shareholdings **using a targeted and non-intrusive**



transparency system, and making the EC case referral system more efficient and effective.

49. None of the countries where growth is similar/at par with the growth stage of Indian economy, have such a “low threshold” for notifiability of a combination. Even the mature jurisdictions like EC have not adopted such a standard. In any case, the Indian economy is not at par with these mature jurisdictions as India is currently in dire need of foreign direct investment which would be possible only if we have more certain and investor friendly antitrust laws and therefore, the standard of ‘decisive influence’ may be more suitable for certainty to the regime.
50. Eighthly, the information required to be furnished in the notification to the CCI (especially market related information) of companies is near impossible to obtain, where the investment does not result in any “control”. For illustration, if an investor is acquiring “material influence” and notifying a deal to the CCI, they will have to ask the target company to provide very detailed and confidential information including market shares, sales, production etc. Thus, the proposed amendment (as contemplated) would impose a tremendous compliance burden on investors, which is hugely onerous. It may be extremely burdensome for investors to comply with the condition of securing a CCI approval, (given the suspensory nature of the merger control regime in India) which will add significantly to the administrative costs of deals (including but not limited to costs of the CCI filing, legal and financing costs involved and time cost of obtaining CCI approvals) without any strong economic rationale or theory of harm being explained to the stakeholders.
51. While I fully agree that there needs to be certainty for the business segment in India, we need to be mindful of the impact of far-reaching changes we are proposing to the law. If the changes are being brought in for lowering the standard for notification to the CCI, we just need to be more mindful of equivalent protection being built in the subordinate legislation on investment friendly regulations.

J. Exemption of combination under the Insolvency and Bankruptcy Code

52. The CLRC has recommended that combinations arising out of resolution plans under the IBC may be exempted by the Central Government.

However, I believe that such an exemption carries a risk of sham transactions under the Competition Act and the following needs to be kept in mind:

- a) The potential resolution applicants in most Combinations arising under the Code are competitors who believe that the corporate debtor has valuable assets and thus may augment their/its economic power in the market.
- b) In the event an exemption is granted to such transactions, parties to an IBC Combination may structure their transactions in a manner which allows them to abuse such an exemption by circumventing the obligation to obtain a prior CCI approval. Further, given the low thresholds under the Code and the complexities of corporate governance in unscrambling consummated transactions, an exemption may not be appropriate.
- c) Additionally, certain IBC Combinations may give rise to serious competition concerns having AAEC on the relevant market in India. In such a case, an exemption shall be manifestly injurious to competition in the market and will be in conflict with the policy objectives of the Competition Act.
- d) For example, there exist CCI investigations for antitrust concerns in relation to steel and cement industries besides other industries. IBC Combinations (only who meet the relevant thresholds) have taken place in mostly these industries, necessitating proper scrutiny and thus an exemption may not be the best solution in such cases.
- e) For the reasons listed above, internationally, there are usually no *per se* exemptions to bankruptcy transactions. For example, the US Bankruptcy Code does not eliminate the filing obligation under the Clayton Act and the HSR Act (allows for fast track review where multiple bidders can approach). Even the CCI has been very quick to clear the IBC Combinations.

53. While I believe that the timelines under the IBC are mandatory and we need to balance out the policy with current law, we can achieve the end

of “reducing burden on resolution applicants” through various other means which may include a fast track process and/or introduction of a separate set of regulations governing the IBC Combinations under Section 64 of the Competition Act.

## ANNEXURE IVC – OBSERVATIONS OF DR. S. CHAKRAVARTHY

*Please note that these observations were based on a penultimate version of the Report.*

### Chairperson of WG II

I have keyed down my comments on the draft CLRC (Committee, for brief) report on some of its contents.

#### 1. Regulatory structure and Governance (Chapter 1, sections 1.1 to 2.6):

The recommendations of the Committee are based on the report of the Working Group WG 1. I would at the outset compliment WG 1 for a well worded report having a flavour of rich academia. The Committee, noting that “[I]n light of the multifaceted role being performed by CCI, the Committee deliberated on the need to introduce a governing board with part-time members (“PTMs”) (including ex-officio members) in the CCI to bring in an external perspective, objectivity and more transparency in the functioning of CCI”, concluded that “[S]ection 8 of the Competition Act should be amended to provide for a governing board consisting of six WTMs (excluding the Chairperson) and six PTMs, (which will also include *ex-officio* members). The concept of a governing board has been borrowed from the structure of regulators like the Securities and Exchange Board of India (SEBI) and more. SEBI and CCI are bodies with different objectives and inhere different roles and form. What may be suitable for SEBI will not suit CCI. Unlike SEBI, CCI is not a traditional regulator. SEBI, a traditional regulator in character issues licences, mandates regulations that govern various stakeholders and so on. Whereas, the CCI addresses market distortion, prejudice to competition, misconduct and misbehavior of the players in the Market and in essence, seeks to have a competition driven market in consumer and public interest. CCI has the big responsibility to review combinations (mergers, acquisitions, acquisitions of control and amalgamations) from a competition law perspective and accords green signal to them with or without modifications or flashes the red signal. A governing board may be warranted, if there is any gap or evidence in the functioning of the CCI in subserving its objectives described in the preamble to the Competition Act, 2002 (as amended in 2007). There appears to be no demonstrable enforcement gap arising out of the current composition.

Furthermore, the proposed board is supposed to bring in an external perspective, objectivity and more transparency in CCI’s functioning. “External” perspective should not influence the CCI in its quasi judicial work or adjudicatory functions. Objectivity cannot be thrust on the CCI. CCI is manned by eminent persons with credentials in education and experience. They do not require any external stimulus in the form of a governing board. Likewise, transparency need not be imparted by the proposed board. CCI can look after these vignettes in its functioning.

In the CCI v SAIL case, the Apex Court observed that CCI performs *inter-alia* administrative, investigative and quasi-judicial functions. Unless, CCI’s functioning

has run into a head wind, there does not appear to be any justification for a governing board. It will only add to additional institutional costs.

The Committee says, however, that the proposed “governing board will perform quasi-legislative functions, drive policy decisions and perform a supervisory role” and that “it should not be involved in the discharge of the adjudicatory functions of the CCI”. While I accept this principle, I wonder, why the CCI should not be left alone to perform quasi-legislative functions, drive policy decisions and perform a supervisory role. CCI can always enlist experts and Government representatives in undertaking quasi-legislative work. The need for a governing board cannot be anchored on the presumption that CCI will not perform such duties.

I draw support of the Raghavan Committee (of which I was a Member) which noted that “CCI will have to be a quasi-judicial body with autonomy and administrative powers” and that “the CCI needs to be functionally autonomous and financially independent”. The proposed governing board will, with respect to WG 1, dilute CCI’s autonomy and independence, or at the least, lend itself to an appearance of dampening of CCI’s functional independence..

## 2. Delegation of functions (Chapter 1, sections 3.1 and 3.2):

The Committee, the report says, agreed “that the CCI should be permitted to delegate certain functions to its Members and officers”. Delegation to Members is in order, but delegation to officers may not be. The report clarifies that quasi-judicial functions will not be permitted to be delegated. What can be delegated to officers, I understand, is being done even now. There appears no need for any amendments to the Act in this regard.

## 3. Offices of the CCI (Chapter 1, sections 5.1 to 5.3):

I agree with the Committee’s recommendation on setting up offices in multiple locations. I propose that circuit benches may be created, as may be needed, to bring the CCI closer to the public and consumers. The benches may not be permanent but constituted on the basis of needs, from among the members of the CCI.

Every Bench of the CCI must have a Judicial Member, as it discharges quasi-judicial powers. In line with the recent judgment of the Delhi High Court in Mahindra case, “at all times, when adjudicatory orders (especially final orders) are made by CCI, the presence and participation of the judicial member is necessary.” The risk associated with Constitutional challenges, should not be adjudicated upon by a bench without a Judicial Member. I suggest that this may be recommended in the report.

## 4. Metric for performance assessment (Chapter 1, section 6):

The Committee’s recommendation on the Annual Report being in two parts is welcome. I suggest that the non-financial aspects part of the report should provide for a review of an important dimension as to whether CCI had attained the objectives

listed in the preamble to the Competition Act. The overall review should be qualitative in addition to providing the quantitative achievement.

5. Appellate authority (Chapter 1, section 8):

Competition Law is a highly technical subject and domain expertise of the Chairperson and Members is important. The earlier body COMPAT was the appellate body against CCI's orders, till the Finance Act, 2017 gave the mandate to hear appeals to NCLAT. The Finance Act, 2017 has been challenged and is currently pending before the Supreme Court. For the competition law regime to remain relevant and business-friendly in today's rapidly evolving economic scenario, there is imminent need for quick disposals of appeals. Even though section 53(B)(5) of the Competition Act specifically provides that appeals filed before the Appellate Tribunal shall be dealt with as expeditiously as possible and an endeavour shall be made by it to dispose of appeals within six months from the date of receipt of the appeal, many appeals suffered time lag despite COMPAT having been the exclusive designated body to deal with appeals. Now NCLAT is the Appellate Body but it has to deal with Company Law related appeals in addition to dealing with matters relating to Insolvency and Bankruptcy Code, 2016. The report notes that Government had mounted an initiative to build capacity of the NCLAT and in furtherance of this initiative has recommended that it would be prudent to introduce a bench of the NCLAT that is dedicated to hear appeals under the Competition Act.

My take is that Competition related matters under the Competition Act being complex in nature require domain expertise and therefore COMPAT should be restored. Competition Act in section 8(2) specifies the credentials of the Chairperson and Members to include "special knowledge of and such professional experience of not less than fifteen years in.....competition matters including competition law and policy". These provisions in the Act need to be respected and warrant restoration of COMPAT.

6. Merger of DG's office with CCI (Chapter 1, sections 4.1 to 4.8):

The report suggests that "[t]he Committee recommended that the office of the DG should be formally folded into the CCI as an 'Investigation Division'. However, the Committee was mindful that integration of the office of the DG within CCI would need to be accompanied by certain best practices to ensure adherence to due process".

Independence of the investigating wing is a *sine qua non* for ensuring fairness to parties. If the DG is folded into the CCI, the independence and fairness of investigation by the DG is likely to be significantly compromised, as any suggestions by the Members or Chairperson of the CCI in a particular case of investigation, would carry weight and influence on the DG, having regard to the fact that if the DG is a part of CCI, is appointed by the CCI and his confidential appraisal reports are written by the CCI, he would be loathe to proceed against such suggestions. DG should be independent in his task, subject to the provisions of the Competition Act and steps should be taken to preserve the independence of the investigative process and strengthen the office of the DG with relevant professionals including competition law

experts. Furthermore, the proposed merger besides negatively affecting investigative independence, is likely to make decisions of the CCI susceptible to judicial challenge on grounds of procedural fairness.

7. Definitions (Chapter 3, sections 2 to 10):

Trade in section 2(x) needs to be defined as recommended by WG II for the reasons indicated therein. WG II has rightly recommended adding acquisition, investment etc.

8. Amendment to section 27(b) (Chapter 5, section 3.4)

In line with the Supreme Court's decision in Excel Crop Care Ltd., section 27(b) warrants an amendment to clarify that 'turnover' for the purpose of imposition of penalty should be 'relevant turnover'.

9. Amendment to Section 32 (Chapter 5, sections 4.3)

Section 32 amendment incorporating *prima facie* opinion will be in the right direction, as the section as it stands now gives the impression that the offence has been perpetrated. An amendment correcting the impression is required.

10. Reintroducing the power of review ( Chapter 5, section 6.4)

The power of review was withdrawn by the 2007 amendments to the Act and needs to be reinstated. The Delhi High Court in the Cadila case had noted that "the cardinal rule of interpretation is that a power of review is expressly granted". It is therefore needed that the review power as it existed in section 37 of the Act should be brought back. The following amendment is desirable.

*Any person aggrieved by an order of the Commission from under sub-section (1) of section 26 which an appeal is allowed by this Act but no appeal has been preferred or from which no appeal is allowed, may, within thirty days from the date of the order, apply to the Commission for review of its order and the Commission may after hearing the parties pass such order thereon as it thinks fit:*

*Provided that the Commission may entertain a review application after the expiry of the said period of thirty days, if it is satisfied that the applicant was prevented by sufficient cause from preferring the application in time.*

11. Unilateral Conduct (Chapter 6) :

In the fast developing New Age Markets, non-dominant firms can create significant anti-competitive effects. It must also borne in mind that as a part of business strategies, firms engage in predatory conduct even before they possess substantial market power. This is especially so in relation to digital markets. Jurisdiction such as US, Germany and Japan have provisions in their Competition Laws to impose penalty for certain unilateral conduct by firms that are not dominant yet.

I suggest that the expression 'network effects' may be incorporated in section 19 of the Act. Big Data being the new oil, the said incorporation will take care of the issue raised herein above.

## 12. Combinations (Chapter 7):

Control, in a manner of speaking, can be likened to interconnection, which was defined in the repealed MRTTP Act. Interconnection was conceived in the form of a triangle. One side was shareholding control, the second was control by the Board through common Directorships and the third was belonging to a group. WG II has in its proposed amendment has reckoned this concept in principle. Explanation (a) to section 5 and Explanation (b) to section 5 should be read together.

The former leaning on a ruling by the Apex Court in Arcelor Mittal case under IBC Code (not Competition Act) that control means *de facto* control of actual management or policy decisions, has sought to make an amendment to control as the ability to exercise decisive influence over the management decisions or affairs or strategic commercial decisions. The expression 'decisive influence' captures the focus or thrust of control. The report recommends that the introduction of a 'material influence' standard for determination of control would be suitable as opposed to a 'decisive influence' standard, therefore substantially lowering the thresholds for determining control. Over the past few years, the CCI has specifically identified certain categories of rights that may be construed to confer control. The CCI's interpretation of control is already quite wide and captures certain standalone minority investor protection rights. Given that the CCI's interpretation of decisive influence is overtly wide, we do not need to further lower this standard.

The latter defines a 'group' with one side of the triangle calling for exercise of 50% or more of voting rights, with the second side calling for exercise of control through 50% or more of the members of the Board and with the third side calling for exercise of control of management decisions.

These two amendments are desirable to be incorporated. But if there are 3 or more enterprises, would the proposed amendments suffice? In Explanation (b) to section 5, the first sub clause mentions "[other] enterprises" while the second and third sub clauses mention 'other enterprise'. Does this bring out the correct intent? Maybe, some legal touch up/editing may be required.



## LIST OF DEFINED TERMS

Administrative Council for Economic Defence	<b>CADE</b>
Administrative Procedures Act, 1946	<b>APA</b>
Appreciable Adverse Effect on Competition	<b>AAEC</b>
Central Electricity Regulatory Commission	<b>CERC</b>
Companies Act, 1956	<b>CA 1956</b>
Companies Act, 2013	<b>CA 2013</b>
Competition Act, 1998	<b>UK Competition Act</b>
Competition Act, 2002	<b>Competition Act/Act</b>
Competition (Amendment) Act, 2007	<b>2007 Amendment Act</b>
Competition and Consumer Commission of Singapore	<b>CCCS</b>
Competition Commission of India	<b>CCI</b>
Competition Commission of India (General Regulations), 2009	<b>General Regulations</b>
CCI (Procedure in Regard to the Transaction of Business Relating to Combination) Regulations, 2011	<b>Combination Regulations</b>
Competition Commission of India (DG) Recruitment Rules, 2009 and CCI (Number of Additional, Joint, Deputy or Assistant Director-General other officers and employees, their manner of appointment, qualification, salary, allowances and other terms and conditions of service) Rules, 2009	<b>DG Office Rules</b>
Competition Law Appellate Tribunal	<b>COMPAT</b>
Competition Law Review Committee	<b>Committee</b>
Competition and Markets Authority	<b>CMA</b>
Competition Market Authority Guidance as to the Appropriate Amount of a Penalty	<b>CMA Penalty Guidance</b>
Director General	<b>DG</b>
European Commission	<b>EC</b>

European Commission Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings	<b>Article 102 Guidance</b>
European Commission Notice on Guidelines on Vertical Restraints	<b>EC Guidelines on Vertical Restraints</b>
European Council Regulation (EC) No 139/2004	<b>EUMR</b>
European Court of Justice	<b>ECJ</b>
European Union	<b>EU</b>
Federal Trade Commission	<b>FTC</b>
Federal Economic Competition Commission	<b>COFECE</b>
Frequently Asked Questions	<b>FAQs</b>
High Level Committee on Competition Policy and Law	<b>Raghavan Committee</b>
Intellectual Property Rights	<b>IPR</b>
International Competition Network	<b>ICN</b>
Insolvency and Bankruptcy Code, 2016	<b>IBC</b>
Insolvency and Bankruptcy Board of India	<b>IBBI</b>
Insurance Regulatory and Development Authority of India	<b>IRDAI</b>
Ministry of Corporate Affairs	<b>MCA</b>
Monopolies and Restrictive Trade Practices Act, 1969	<b>MRTP Act</b>
Most Favoured Nation	<b>MFN</b>
National Company Law Appellate Tribunal	<b>NCLAT</b>
National Consumer Disputes Redressal Commission	<b>NCDRC</b>
National Stock Exchange	<b>NSE</b>
Organisation for Economic Co-operation and Development	<b>OECD</b>
Office of Fair Trading	<b>OFT</b>
Office of Fair Trading Guidelines on Vertical Restraints	<b>UK Guidelines on Vertical Restraints</b>

Part-time members	<b>PTMs</b>
Pension Fund Regulatory and Development Authority	<b>PFRDA</b>
Report of the High Level Committee on Competition Policy and Law	<b>Raghavan Committee Report</b>
Report of the Competition Law Review Committee	<b>Report</b>
Report of the Digital Competition Expert Panel constituted by the Government of UK	<b>UK Expert Panel Report</b>
Reserve Bank of India	<b>RBI</b>
Show-Cause Notice	<b>SCN</b>
Secretariat for Economic Monitoring of the Ministry of Finance	<b>SEAE</b>
Secretariat of Economic Law of the Ministry of Justice	<b>SDE</b>
Securities and Exchange Board of India	<b>SEBI</b>
SEBI Act, 1992	<b>SEBI Act</b>
Senior Responsible Officer	<b>SRO</b>
Sherman Anti-trust Act, 1890	<b>Sherman Act</b>
Singapore Competition Act, 2004	<b>Singapore Competition Act</b>
Telecom Regulatory Authority of India	<b>TRAI</b>
Treaty on the Functioning of the European Union	<b>TFEU</b>
United Kingdom	<b>UK</b>
United Nations Conference on Trade and Development	<b>UNCTAD</b>
United States	<b>US</b>
Whole-time members	<b>WTMs</b>