

## INTERLOCKING DIRECTORATES: AN INDIRECT THREAT TO COMPETITION IN INDIA

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### *Abstract*

*The paper seeks to highlight the issue of interlocked directors within companies in India. They are persons who are on the board of two or more companies or have represented the same investor in two or more competing firms. This practice provides a channel of information as well as decision making which, if coordinated by competing firms can be detrimental to competition and adversely affect consumers' interest. Currently under Indian law, there is no express bar on interlocked directorates, which limits the ability of competition authorities to tackle such issues head-on. Consequently, heavy reliance becomes extensions of other general principles on a case-to-case basis. In this paper, we look at other jurisdictions for inspiration to help arrive at a legal solution that is suitable to India. A comparison is drawn between the approach of India and the EU and the contrast of both of those approaches with the United States. A number of other developing economies (China, Japan*

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*& South Korea) which have already dealt with the subject are reviewed to understand the different institutional approaches. Contextualising the responses of competition authorities around the world, with the circumstances in India, a number of recommendations are made, including – the need for legislative intervention, the threshold of prohibition and the requirement of government-regulator collaborations. These steps are important to safeguard the competition environment and fulfil the objective aims of Indian competition law.*

## I. INTRODUCTION

With increasingly creative ways for companies to perform at the cost of the final consumer, it becomes important for a competition law regime to be equally robust and responsive. Indirect connections between companies by virtue of the connections of their directors or other key management personnel provide for a platform for companies to engage in anti-competitive behaviour. One such connection is an interlocked director. An interlocked director is one who sits on the board of two or more competing companies, thus linking these companies in an indirect manner. Although the Indian Competition Act, 2002 (“**Act**”) does not have any specific provision which opposes interlocking directorates, the concept is recognized tangentially by the Competition Commission of India (“**CCI**”) in its merger control cases.<sup>1</sup> This paper seeks to analyse how such

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<sup>1</sup>Arihant Agarwal and Aditya Mukherjee, ‘Interlocking Directorates and its Relevance to Competition in India’, (2020) The Indian Review of Corporate and Commercial Laws, 22 January, <<https://www.irccl.in/single->

interlocked directors could be a problem for competition law. Part I will deal with the concept of interlocks as well as the role that directors play in a company. Part II seeks to look into the manner in which the European Union (“EU”) deals with the anticompetitive effects of interlocking directorates. Part III will discuss the position of the United States on such directors. Part IV will examine the Indian position in light of Section 3 of the Act, as well as the Companies Act, 2013. The parallels and deviations between the positions across jurisdictions will be highlighted and finally, we seek to provide recommendations for the manner in which such interlocked directorates can be evaluated and reduction in consequent anti-competitive effects, effectuated.

## II. WHAT ARE INTERLOCKING DIRECTORATES AND THEIR EFFECTS

The concept of interlocking directorates is the ability of one director to sit and serve on the board of multiple corporations.<sup>2</sup> Interlocking directorates are not illegal *per se*, as the Companies Act allows a person to be a director and hold the office of a director in up to twenty companies at the same time with the restriction that only ten of them can be public companies.<sup>3</sup> The problem arises in the event where such interlocks occur in competing companies and they seek to gain from such links, to the detriment of the integrity of the market and the consumers. The concept of interlocks extends beyond the title of ‘director’ and could be the result of different offices like that of a

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post/2020/01/22/Interlocking-Directorate-and-its-Relevance-to-Competition-in-India> accessed 20 April 2020.

<sup>2</sup>Michael E. Jacobs, ‘Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies’, (2014) 37(3) Fordham Intl L.J. 643.

<sup>3</sup>The Companies Act 2013, Section 165.

CEO or an auditor, or when different people on each board represent the same person.<sup>4</sup> Interlocking directorates can thus provide access to sensitive information on prices, costs, future strategies and other key competitive decisions that can assist competitors to reach explicit or implicit agreements and to monitor their adherence to such agreements.<sup>5</sup> They can be direct (one person sitting on the board of two competing companies) or indirect (different persons linked by close family relation or sitting on the board of a third unrelated company).

Johannes Pennings enquires into whether interlocked directorates provide an unfair advantage to the corporations that have them?<sup>6</sup> Firms enter into such interlocked directorates to develop connections and manage their dependence on other organisations. It is seen mostly in the case of oligopolies, where companies must develop strategies to cope with the competition in an environment with some degree of interdependence. “*Interdependence on competitors requires firms to improve their information about market conditions so that they can neutralize the adverse effects of competitive interdependence*” says Pennings.<sup>7</sup>

The study conducted by Pennings seeks to understand whether the theoretical prediction of interlocking directorates that contribute to better organisational effectiveness, due to acquisition of better intelligence or anticipation of contingencies,<sup>8</sup> can be confirmed in

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<sup>4</sup>Vidir Petersen, ‘Interlocking Directorates in the European Union: An Argument for Their Restriction’, Eur. Bus. L. Rev. (forthcoming 2016).

<sup>5</sup>Directorate for Financial and Enterprise Affairs Competition Committee, ‘Roundtable on Antitrust Issues Involving Minority Shareholding and Interlocking Directorates’, (DAF/COMP(2008)30).

<sup>6</sup>J.M.Pennings, ‘Interlocking Directorates: Origins and Consequences of connections among organisations’ Board of Directors’ (Jossey-Bass 1980).

<sup>7</sup>ibid.

<sup>8</sup>Oliver E. Williamson, ‘Markets and hierarchies: analysis and antitrust implications: a study in the economics of internal organization’ (1975).

practice. The study having looked at a number of corporations from diverse fields concludes thus:

*“well-interlocked firms perform better than poorly interlocked firms. The effect of the from-financial interlocks appears to be strong, as does the effect of the to-financial interlocks. Quasi-competitive collusion, in the form of horizontal interlocks, does not enhance the effectiveness.”*<sup>9</sup>

The conclusion of this study provides the basis of the rationale for regulatory intervention in cases of interlocked directorates. Although information asymmetry will always benefit the better informed, it becomes the duty of a regulator to level the playing field within the market so as to reduce the negative effects of such asymmetry, as far as possible. The minimum disclosure requirements,<sup>10</sup> disclosures between related parties,<sup>11</sup> as well as strict penalties for trading or communicating unpublished price sensitive information,<sup>12</sup> are examples where the regulatory body seeks to reduce information asymmetry.

The management of the corporate entity is undertaken by a board of directors, who are appointed by the shareholders. These directors have the responsibility to carry on the operations of the company. There exists an agency relationship between the company and the director.<sup>13</sup> The directors also act as trustees of the money and properties of the company wherein, they must account for the money

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<sup>9</sup>J.M.Pennings, ‘Interlocking Directorates: Origins and Consequences of connections among organisations’ Board of Directors’ (Jossey-Bass 1980).

<sup>10</sup>Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 4.

<sup>11</sup>Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, Regulation 23 and Schedule V Para A.

<sup>12</sup>Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015, Regulation 3 and Regulation 4.

<sup>13</sup>*Ferguson v. Wilson* (1886) LR Ch App 77.

over which they exercise control.<sup>14</sup> In exercise of their duties, the directors are privy to sensitive information relating to the company or its business, the company's strategic goals and future prospects. Since there exists a fiduciary relationship between the company and its directors,<sup>15</sup> the company in theory, must wholly be able to trust the director and believe that the director would look after the company's interests.<sup>16</sup> When such director is appointed to the board of two competing companies, it opens an unofficial channel of information that is not publicly available, either giving both companies or the more powerful one leverage over the another and consequently an incentive to act in concert. In both cases, it becomes the duty of the regulatory body to take into account and monitor anticompetitive effects and actions.<sup>17</sup>

At this stage, it must be clarified that this paper does not seek to prove that interlocks *per se* should be prohibited. It seeks to show firstly, the negative effects on competition by turning a blind eye to interlocks, and secondly, that only those interlocks which cross a certain threshold should be prohibited.

The OECD 2008 Policy Roundtable also came to the conclusion that although there is no *per se* illegality of structural links between competitors, interlocking directors (and minority shareholdings) can have negative effects on competition by reducing the individual incentive to compete or by facilitating collusion.<sup>18</sup> A 2002 Study in

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<sup>14</sup>*Sharp, re* (1892) 1 Ch 154; *Great Luxembourg Railway Co. v. Sir William Magnay* (1858) 25 Beav 586.

<sup>15</sup>The Companies Act 2013, Section 166; *Sangramsinh P. Gaekwad & Ors., v. Shantadevi P. Gaekwad* AIR 2005 SC 809.

<sup>16</sup>*Turner Morrison & Co. Ltd. v. Shalimar Tar Products* (1980) 50 Comp Case 296 (Cal); *New Zealand Netherlands Society Inc v. Kuys* (1973) 1 WLR 1126 (PC); *Rajeev Saumitra v. Neetu Singh* 2016 SCC Online Del 512.

<sup>17</sup>The Competition Act 2002, s 18.

<sup>18</sup>Directorate for Financial and Enterprise Affairs Competition Committee, 'Roundtable on Antitrust Issues Involving Minority Shareholding and Interlocking Directorates', (DAF/COMP(2008)30).

the United States showed the presence of a tight network of directors sitting on the boards of major United States corporations<sup>19</sup>. The observations include – eleven of the 15 largest companies, including Pfizer and Citigroup, having at least two board members who sit together on another board; one-fifth of the 1,000 largest companies in the United States sharing at least one board member with another of the top 1,000.<sup>20</sup>

The competition issues around interlocks can also be derived from issues around common investors of companies.<sup>21</sup> In a study conducted on banking companies, it was concluded that, “*who owns the banks matters for how the banks compete*”.<sup>22</sup> The interest rates, depositing fees, and depositing thresholds have seen a price rise with increase in competition. Although the study doesn’t show the mode of coordination, the situation of having a common owner is similar to having interlocked directors – an indirect common link between companies. This empirical study, although limited in scope, highlights the effects on competition and therefore, is another example of how such indirect links could adversely affect the market.

Further, the above effects can be substantiated by the manner in which they have been dealt with, in a number of jurisdictions. The legal responses to interlocks around the world support the claim that interlocked directors have a serious adverse impact on competition which must be curbed. Although different jurisdictions recognize the problem to different degrees, there is widespread agreement and acknowledgement of the problem itself.

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<sup>19</sup>Matt Krantz, ‘Web of Board members ties together Corporate America’ *USA Today*, (USA 24 November 2002).

<sup>20</sup>*ibid.*

<sup>21</sup>Asaf Eckstein, ‘*The Virtue of Common Ownership in an Era of Corporate Compliance*’, 105 *Iowa L. Rev.* 507 (2020).

<sup>22</sup>Azar, José and Raina, Sahil and Schmalz, Martin C., *Ultimate Ownership and Bank Competition* (May 4 2019).

The Model Law on Competition,<sup>23</sup> which was revised by the Intergovernmental Group of Experts, raises competition concerns from an arrangement like that of interlocking directorship, while defining the same under Chapter VI. The possibility of sharing administrative control, which affects decisions regarding investment or production, consequently leads to the formation of common strategies on prices, or market allocations.<sup>24</sup> Even on a vertical level, the integration of activities between suppliers and customers can have significant anti-competitive effects. The Model Law prohibits transactions, “*including interlocking directorships*” of any nature (vertical or horizontal), when two conditions are met – the proposed transaction substantially increases the ability to exercise market power, *and* the resultant market share in the country or part of it will result in a dominant firm or in a significant reduction of competition in the market.<sup>25</sup> The conditions prescribed are a conjoint condition, which means that one has to prove both a positive effect on the business of the company in terms of market power as well as a negative effect on the resultant market share. This twin combination, in the opinion of the authors, raises the bar for the regulatory body to prove a causal link between interlocks and market power, especially since these indirect links affect the position of the firms indirectly. In addition to the subversive strategy and consequent effects, the evidence to prove such a causal link would be difficult to collect since it would be in the possession of the company under investigation.

Under the Japanese Anti-monopoly Act,<sup>26</sup> Chapter IV deals with inter alia shareholdings and ‘interlocking officers’. Article 13 provides for

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<sup>23</sup>United Nations Conference on Trade and Development, Intergovernmental Group of Experts on Competition Law and Policy, Seventeenth Session, ‘*Model Law on Competition (2018): Revised Chapter VI*’, (UNCTAD TD/B/C.I/CLP/L.10, 2018).

<sup>24</sup>Ibid.

<sup>25</sup>Elimination or control of restrictive business practices: Antimonopoly Law; UNCTAD, Model Law Competition, 2010, Chapter VI.

<sup>26</sup>Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, 1947.

the restriction of interlocked directors where such position “*substantially restrains competition in any particular field of trade*”.<sup>27</sup> There is a substantive assessment of the kind of effects on competition by virtue of such an interlock. In South Korea, the Monopoly Regulation and Fair-Trade Act<sup>28</sup> prevents the ‘business combination’ of interlocked directors, which substantially restricts competition in any given area of trade. The reporting obligations in South Korea are governed by their understanding of ‘control’. Prima facie, control is established when the share in the target exceeds 50 per cent, however, in cases where only a minority stake in the target is acquired, the control can be established by other surrounding factors like director interlocks or transactional relationships, which can together show that the acquirer exerts substantial influence on the target.<sup>29</sup>

In the case of Brazil, the legal scheme is wide enough to give power to the authorities to hold actions as violations of the law, as long as the objective or effect is anticompetitive ‘regardless of fault’ and ‘even if not achieved’.<sup>30</sup> The list of offences is wide enough to incorporate coordination due to interlocks.

Having established the theoretical and statistical issues prevalent due to interlocks and the legal responses across jurisdictions, it is clear that this problem must be tackled via legislation or regulatory rules. The current Indian formulation of ‘appreciable adverse effect on competition’ is not wide enough to include transfer of information via

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<sup>27</sup>Law Relating to Prohibition of Private Monopoly and Methods of Preserving Fair Trade, 1947 (Shitekidokusen no kinshioyobi kosei torihiki no kakuhonikansurnhritsu) (Law No. 54, 1947).

<sup>28</sup>Monopoly Regulation and Fair Trade Act, 1980.

<sup>29</sup>Directorate for Financial and Enterprise Affairs Competition Committee, ‘*Definition of Transactions for the purpose of merger control review*’, (DAF/COMP(2013)25).

<sup>30</sup>Brazilian System for Protection of Competition, Law N° 12.529 (November 30 2011).

interlocks and the same will be discussed in the latter part. From the variety of ways in which interlocks can influence competition, Indian competition law requires a substantive assessment of cases wherein interlocks exist. Factors like - potential competition, consumer effect, and coordinated effects, traditionally used to evaluate a merger, could be important for the regulator to make a decision on a permissible or impermissible interlock. The discussion of the likely/recommended substantive criterion of a valid or invalid interlock takes into account the position of the EU and the United States on the issue. Further, the possibility of regulatory collaboration could increase the resources available to the regulator, and help arrive at a more accurate determination in a quick and efficient manner.

### III. INTERLOCKING DIRECTORATES IN THE EU

The current EU Competition Law regime finds its source under Article 101 and Article 102 of the Treaty of the Functioning of the EU, which deals with agreements that restrict competition and abuse of dominance respectively.<sup>31</sup> The Council Regulation 139/2004 (“**2004 Regulation**”) provides the basis for the review of ‘concentrations’ with an ‘EU dimension’ of mergers and acquisitions within the EU.<sup>32</sup> The 2004 Regulation introduced the test of ‘significantly impeded effective competition’,<sup>33</sup> which provided for greater certainty and predictability as well as plugging the gap to

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<sup>31</sup>Consolidated versions of the Treaty of the Functioning of the European Union [2012] OJ C326/01; Competition (European Commission) <[https://ec.europa.eu/competition/antitrust/overview\\_en.html](https://ec.europa.eu/competition/antitrust/overview_en.html)> accessed on 29 April 2020.

<sup>32</sup>Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004.

<sup>33</sup>Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) 2004 Article 2(2) and Article 2(3); *Western Digital Irland/Viviti Technologies*, Case No. COMP/M.6203, Commission decision of 23 November 2011, recital 1038.

review anti-competitive effects resulting from a merger, where the merged entity would not become dominant.<sup>34</sup> In 2014, the European Commission came out with a White Paper which proposed to extend the 2004 Regulation to a situation where a minority stake was held in an undertaking.<sup>35</sup>

The acquisition of minority shareholding and the concept of interlocking directorates have similar effects and therefore, it is important to look into the ‘theories of harm’ due to minority acquisition. The White Paper discusses the harms wherein the minority shareholder uses their position to limit the competitive strategies available to the company, thereby weakening it as a competitive force. The degree of influence plays a key role in determining harm. In the case of *Siemens*,<sup>36</sup> the factum of voting rights helped determine factors like - influence and anticompetitive effect due to financial incentive. In this case, along with information rights being given to the parties involved, the power of the minority to effect significant changes in the capital structure or operation were material to the adjudication. In the case of *Ryanair*,<sup>37</sup> a minority stake was already held in Aer Lingus and later, they sought to merge. The merger was denied by the Commission on the basis of dominance. This goes to show that the regulator is aware of the intertwined nature of – common shareholding and interlocks, and their consequent effect

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<sup>34</sup>European Commission, ‘Towards more effective EU merger control’, (White Paper, COM(2014) 449 final); Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004, Recital 25; *UPS/TNT Express*, Case No. COMP/M.6570, Commission decision of 30 January 2013; *Universal Music Group/EMI Music* Case No. COMP/M.6458, Commission decision of 21 September 2012.

<sup>35</sup>ibid.

<sup>36</sup>*Siemens/VA Tech* Case No. COMP/M.3653, Commission decision of 13 July 2005.

<sup>37</sup>*Ryanair/Aer Lingus I* Case No. Case COMP/M.4439, Commission decision of 27 June 2007, confirmed by the General Court in Case T-342/07 *Ryanair v Commission* [2010] ECR II-3457; See also case *Ryanair/Aer Lingus III* Case No. COMP/M.6663.

on competition. We see the manner in which the minority stake, coupled with voting rights as well as appointment of directors to the board, allows for control to permeate through competitors. In the case of *Toshiba*,<sup>38</sup> the merger with Westinghouse was denied due to possible elimination of competition. Toshiba held a stake in the competitor of Westinghouse and had veto rights as a result of its shareholding. The possibility of the use of such influence to restrict that competitor from entering into newer fields of competition was the rationale of disallowing the transaction.

One of the first cases relating to minority shareholding was the *British American Tobacco Case*,<sup>39</sup> wherein the ECJ gave due weightage to the issue as to whether the shareholding was an “*instrument for influencing the commercial conduct*” of the company in an anti-competitive manner. In the case of *Enichem*,<sup>40</sup> a joint venture was exempted only when the associated companies or parents did not hold any participation in the competitors so as to affect the economic behaviour of the joint venture.<sup>41</sup> In another case,<sup>42</sup> the court relied on *coordination of business behaviour* and *information flows*. In this case, the court allowed the acquisition of a minority stake in the target, since the corporate structure made either of the two virtually

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<sup>38</sup>*Toshiba/Westinghouse* Case No. COMP/M.4153, Commission decision of 19 September 2006.

<sup>39</sup>Joint Cases 142, 156/84, *British American Tobacco Company Limited and R.J. Reynolds Industries Inc/Commission* ECR [1987] 4487.

<sup>40</sup>*Enichem/ICI* Commission Decision 88/87/EEC on 22 December 1987, [1988] OJ L 50/18, Case No. IV/31.846.

<sup>41</sup>Enzo Moavero Milanese & Alexander Winterstein, ‘*Minority shareholdings, interlocking directorships and the EC Competition Rules – Recent Commission practice*’, (European Commission, February, 2002) <[https://ec.europa.eu/competition/publications/cpn/2002\\_1\\_15.pdf](https://ec.europa.eu/competition/publications/cpn/2002_1_15.pdf)> accessed on 29 April 2020.

<sup>42</sup>*Olivetti-Digital* Commission Decision 94/771/EC on 11 November, 1994, OJ [1994] L 309/24, Case No. IV/34.410.

impossible. In the case of *Allianz/Dresdner*,<sup>43</sup> the European Commission was concerned about the reduction of competition since there was considerable cross-shareholding in competitor firms. Both groups reduced their joint holdings in other firms and refrained from exercising voting rights in excess of their reduced shareholding, thereby allowing them to merge. The Philip Morris Doctrine (*British American Tobacco*) was also applied to the case of *British Telecom*,<sup>44</sup> wherein the court looked into the possibility of the nominee directors of British Telecom in its competitor firm, to coordinate its business behaviour as well as access to confidential information. The Court finally questioned the ability of British Telecom to exert control or influence on the competitor.

From the perusal of the cases above, it becomes clear that emphasis is laid on coordination of businesses to the detriment of consumers and competition generally, as well as the negative effects of information sharing. This enquiry is more remarkable, since there are no specific provisions providing for a prohibition to the practice of interlocked directors. The regulatory body does give due weightage to the consequences of minority shareholdings in competitor companies and the rights granted therewith, including board seats and rights. The harms of both coordinated and non-coordinated acts due to information sharing or one-way information gathering, are apparent. An argument, on the basis of the previous cases, can be made for the introduction of a rebuttable presumption in the cases of interlocked directors and minority shareholding.

It is also pertinent to note the argument against any further law-making with regard to interlocks. It has been argued that the current

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<sup>43</sup>Commission clears acquisition of Dresdner Bank by Allianz AG', (*European Commission*, 19 July 2001) IP/01/1040, <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_01\\_1040](https://ec.europa.eu/commission/presscorner/detail/en/IP_01_1040)> accessed on 29 April 2020.

<sup>44</sup>*BT-MCI* Commission Decision 94/579/EC on 27 July, 1994, [1994] OJ L223/36, Case No. IV/34.857.

competition law regime is sufficient to deal with the anti-competitive effects of both minority shareholdings and interlocked directors.<sup>45</sup> Under the EU Merger Regulation, a concentration can be deemed to exist on the basis of change of control.<sup>46</sup> The test of ‘control’ focuses on the possibility of exercising influence in the target company.<sup>47</sup> Gabrielsen argues that the substantive test laid down in Article 101 TFEU, which has a broad scope to deal with restrictive agreements and/or concerted practice between undertakings, is enough legal basis for action, and deterrence against the anti-competitive effects of interlocked directors.<sup>48</sup>

However, as a policy consideration one must look into the efficiency of the law when it is applied *ex post* and when it is applied *ex ante*. In a scenario where only Article 101 is the legal basis of action against an anti-competitive interlock, the action taken only after the effects of the agreement or coordination is apparent. A simple notification requirement, that too in cases of a merger, is a very narrow *ex ante* prohibition/regulation. This can be remedied by having a clear prohibition with sound thresholds.

The EU dimension provides a number of insights which can be imported for the Indian competition law regime. First, that interlocks have to and must be continued in order to be taken seriously as a medium of anti-competitive effects. Second, even though there is no blanket prohibition there should be certain and determinative factors (coordination in business & information flow) which provides basis

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<sup>45</sup>Tommy Staahl Gabrielsen, ErlingHjelmeng and Lars Sorgard., ‘Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention’ (2011) 36 E. L. REV. 837.

<sup>46</sup> Council Regulation (EC) No. 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation), 2004, Article 3.

<sup>47</sup>Tommy StaahlGabrielsen, ErlingHjelmeng and Lars Sorgard., ‘Rethinking Minority Share Ownership and Interlocking Directorships: The Scope for Competition Law Intervention’ (2011) 36 E. L. REV. 837.

<sup>48</sup>ibid.

for the regulator to stop a transaction. Both regimes however, struggle with the gap in legislation on the topic, which forces them to rely on an object-based approach. A legislative initiative to alter the Merger Regulation as well as the Competition Act, to include a clear threshold for prohibition, would support economic efficiency and legal predictability.

#### IV. INTERLOCKING DIRECTORATES IN THE US

The United States legal jurisprudence specifically prohibits existence of interlocking directorates in competing firms. Section 8 of the Clayton Act, 1914 prohibits the appointment of a person as a director or an officer in corporations that are engaged in commerce and are in competition with each other by virtue of their type of business or location. If there is an agreement between them that eliminates competition, it would violate anti-trust laws.<sup>49</sup> This provision is subject to applicability of certain *de-minimus* thresholds and is a *per se* prohibition, i.e., it is a strict liability provision, not depending on actual harm caused to competition. It is violated if there exists a prohibited interlock even though there is no proof of any harm to competition or intention to coordinate prices, final product or any other such relevant and sensitive business decision. The purpose of this section is to “*nip in the bud incipient violations of the antitrust laws by removing the opportunity or temptation to such violations through interlocking directorates*”.<sup>50</sup>

The Federal Trade Commission (“FTC”) of United States has focused on the importance of the prohibition under this Section<sup>51</sup> on several occasions. In a recent news article published by the FTC, the Bureau

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<sup>49</sup>The Clayton Act 1914, s 8.

<sup>50</sup>*United States v Sears, Roebuck & Co.* 111.F. Supp.614, 616 (S.D.N.Y. 1953).

<sup>51</sup>The Clayton Act 1914, s 8.

of Competition reminded the market players to ensure avoidance of the *per se* prohibition on interlocking directorates.<sup>52</sup> It shed light on the importance of mindfulness required in the corporate world especially in situations of market developments, mergers and spin-offs, where the company and the directors could create unexpected interlocks.<sup>53</sup> In order to avoid litigation cases occurring due to Section 8 violations, the FTC takes stringent measures. For example, it monitors companies which share board members and takes the required action in advance – like passing an order which eliminates the interlock. For example, in 2009 Eric E. Schmidt, Chief Executive Officer of Google and board member of both Google and Apple, stepped down from the board of Apple after FTC raised a concern with the companies that this overlapping of directors between the competing firms would lead to anti-trust issues and violation of Section 8.<sup>54</sup> As Google and Apple increasingly competed, after continuous investigation from the FTC over the remaining interlocking directorates, Arthur D. Levinson who was a corporate board member of both Google and Apple at that time, stepped down from Google's board in 2009.<sup>55</sup> FTC's Bureau of Competition in

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<sup>52</sup>Michael E. Blaisdell, Bureau of Competition, 'Interlocking Mindfulness' (Federal Trade Commission, June 26 2019), <[https://www.ftc.gov/news-events/blogs/competition-matters/2019/06/interlocking-mindfulness?utm\\_source=govdelivery](https://www.ftc.gov/news-events/blogs/competition-matters/2019/06/interlocking-mindfulness?utm_source=govdelivery)> accessed 2 May 2020.

<sup>53</sup>ibid.

<sup>54</sup>Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board' (Federal Trade Commission, August 3 2009) <<https://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding>> accessed on 2 May 2020.

<sup>55</sup>Statement of FTC Chairman Jon Leibowitz Regarding the Announcement that Arthur D. Levinson Has Resigned from Google's Board' (Federal Trade Commission, October 12 2009) <<https://www.ftc.gov/news-events/press-releases/2009/10/statement-ftc-chairman-jon-leibowitz-regarding-announcement>> accessed on 2 May 2020.

alignment with the Bureau of Economics investigates alleged anti-competitive business practices and takes the required action.<sup>56</sup>

It is pertinent to point out that Section 8 also gives a one-year grace period to fix interlocks that arise subsequently as a result of change in the capital, surplus, or in the affairs of the company from whatever cause (like interlocks resulting from mergers and spin-off), thus, making him or her ineligible to serve on both the boards.<sup>57</sup> This grace period could be problematic as a director who is previously ineligible to sit on the board under the statute, continues to serve the board for another year after the date on which he became ineligible to serve the board.

Interlocks that are not in violation of Section 8, could still give rise to claims and doubts under the other competition laws in the United States. Section 1 of the Sherman Act that has no exceptions, limits collusive behaviour or unreasonable information sharing among competitors, including when such conduct occurs in the context of an exempt interlock. It is this provision that prohibits interlock directorates from practicing anti-competitive conduct during the one-year grace period under Section 8 of the Clayton Act. Interlock directorates have been challenged under Section 1 of the Sherman Act when there was a conspiracy and anti-competitive conduct through information exchange.<sup>58</sup> Further, Section 5 of the FTC Act may also reach interlocks that do not technically meet Section 8's interlock requirements but violate the policy against horizontal interlocks expressed in the latter. This provision prohibits unfair methods of competition. It could pose a threat to interlocks that are not there

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<sup>56</sup>Statement of Bureau of Competition Director Richard Feinstein Regarding the Announcement that Google CEO Eric Schmidt Has Resigned from Apple's Board' (*Federal Trade Commission*, August 3 2009) <<https://www.ftc.gov/news-events/press-releases/2009/08/statement-bureau-competition-director-richard-feinstein-regarding>> accessed on 2 May 2020.

<sup>57</sup>The Clayton Act 1914, s 8(2).

<sup>58</sup>*Perpetual Fed. Sav. & Loan Ass'n*. 90. F.T.C. 608.

between potential competitors. The FTC also sometimes alleges Sections 8 and 5 violations together.<sup>59</sup> For example, Section 5 can reach interlocks involving banks, which are exempt from Section 8, and competing non-bank corporations.<sup>60</sup>

The FTC has provided certain practices after reviewing interlocks, which would help companies to not violate Section 8, thus avoiding interlocks.<sup>61</sup> They are: 1. Monitor the company's assets and check it annually against the *de minimus* threshold as given under Section 8, which is announced every year in January and takes effect immediately. 2. Track new products or offerings for each interlocked company that is likely to create new areas of competitive sales. 3. Review documents that track market developments. 4. Be cautious when mergers and acquisitions take place as these two situations have high possibilities of creating interlocks. 5. Monitor board members and officers by seeking periodical report on their position outside the company.

Even though Section 8 may be ineffective sometimes, the United States dealings with management interlocks clarifies that 'real utility' can be gained when legislature courts and commentators thoroughly address corporate law and competition law in a unified manner.<sup>62</sup> Although the uniformity and predictability is laudable and it makes the regulator's job easier by not having to make a substantive assessment of facts and circumstances necessary after passing the *de minimis* threshold. It also ignores surrounding facts and any benefits

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<sup>59</sup>*In re Borg-Warner Corp.* 101 F.T.C. 863.

<sup>60</sup>*In re Perpetual Fed. Savings & Loan Ass'n* 90 F.T.C. 608, 657 (1977).

<sup>61</sup>Debbie Feinstein, Bureau of Competition, 'Have a plan to comply with the bar on horizontal interlocks', (*Federal Trade Commission*, 23 January 2017), <<https://www.ftc.gov/news-events/blogs/competition-matters/2017/01/have-plan-comply-bar-horizontal-interlocks>> accessed on 2 May 2020.

<sup>62</sup>Michael E. Jacobs, 'Combating Anticompetitive Interlocks: Section 8 of the Clayton Act as a Template for Small and Emerging Economies' (2014) 37(3) *Fordham Int'l L.J.* 643.

that may come from highly qualified individuals serving multiple companies. One must give weight to the deterrence effect of the US law on the topic; however, one should be sceptical of the effects on Indian companies if the law is lifted and added to the Indian Competition Act, 2002 as is.

## V. INDIAN POSITION AND ITS RELATIONSHIP WITH COMPANY LAW

The Companies Act, 2013 allows a person to be a director and hold office of a director in up to twenty companies at the same time with the restriction that, only ten of them can be public companies.<sup>63</sup> Multiple directorships are ideally not a threat when they are companies which are not in competition. However, they can pose a threat to the competition in India when a person is a director in two or more competing/interdependent organizations. Organizations do not operate in socio-economic vacuum, and one must give consideration to the probable actions and reactions of other organizations when they perform certain activities.<sup>64</sup> Studies previously cited have indicated the existence of web-like linkages within corporations. The confidential information shared with directors or other key managerial personnel for taking business decisions, then becomes available to those outside that corporate entity.

In the case of *Excel Crop Care Limited v. CCI*,<sup>65</sup> the court remarked that the purpose of curbing anti-competitive agreements is to ensure a “level playing field” for all market players, so as to help markets be competitive. Competition law enforcement deals with anti-

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<sup>63</sup>The Companies Act 2013, s 165.

<sup>64</sup>J.M.Pennings, ‘Interlocking Directorates: Origins and Consequences of connections among organisations’ *Board of Directors* (Jossey-Bass 1980).

<sup>65</sup>*Excel Crop Care Limited v. Competition Commission of India*, (2017) 8 SCC 47.

competitive practices arising from the acquisition or exercise of undue market power by firms that result in consumer harm in the forms of higher prices, lower quality, limited choices and lack of innovation.<sup>66</sup> In the case of *CCI v. SAIL*,<sup>67</sup> the court stated the threefold advantages of perfect competition *viz.* allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices.

The real possibility of coordination, and information exchange via interlocks, frustrate the underlying rationales of the competition law regime – level playing field, information symmetry, efficiency and consumer interest.

This Part will deal with — (i) Interplay between the Companies Act, 2013 and the Act;(ii) the new Amendment Bill to the Act; and (iii) policy recommendations.

(i) Indian Jurisprudence and the relationship between the Act vis-à-vis the Companies Act, 2013.

Section 3(1), read with Section 3(3) of the Act,<sup>68</sup> prohibit anti-competitive agreements which cause adverse appreciable effects on the competition within India, with respect to production, supply, distribution, storage, acquisition or control of goods or provision of services, and declares it void. As defined under the Act, an agreement here includes any kind of arrangement or understanding, or action done in concert, notwithstanding that the agreement is formal or written or if it intends to be legally enforceable.<sup>69</sup> This definition is

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<sup>66</sup>ibid.

<sup>67</sup>*Competition Commission of India v. Steel Authority of India* (2010) 10 SCC 744.

<sup>68</sup>The Competition Act, 2002, s 3.

<sup>69</sup>The Competition Act, 2002, s 2(b).

inclusive and not exhaustive.<sup>70</sup> Section 3(3) prohibits organisations from entering into agreements that directly or indirectly determine purchase or sale prices, limits or controls production, supply and market, shares market source of production, etc. and extends to any sort of information exchange or communication between the competitors. Section 3(3) is a *per se* violation. Though the Section presumes appreciable adverse effect on competition, the same is rebuttable and can be refuted with evidence by analysing the factors listed under Section 19(3) of the Act to determine a Section 3(3) prohibition on the facts of the case.<sup>71</sup> Thus, to establish such kind of an anti-competitive behaviour, the CCI observes whether the persons have entered into an “agreement” for information exchange that led to collusive action in the market.

The Act does not expressly prohibit or draw any restrictions on interlock directorates. Although the act has not addressed the problem, it can be argued that the preamble along with the broad theme of the Act prohibits activities undertaken by interlocked directors in competing companies. Here, a distinction is being made between the *fact* of having interlocks in competing firms and the *activities undertaken* by those interlocks once in office. A difference between – ‘that they exist’ and ‘what they do’. In this manner, an object-based approach, similar to an approach employed by the EU, is used to make such exchange actionable by the CCI.

One of the greatest effects of interlocked directors in competing firms is felt inside board meetings, where not only are they privy to confidential information and future strategic planning, but also have the ability to shape the final result due to voting (diversify the business of the company, to approve amalgamation, merger or

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<sup>70</sup>*Competition Commission of India v. Coordination Committee of artistes and technicians of West Bengal Film and Television and Ors.* (2017) 5 SCC 17.

<sup>71</sup>*Sunshine Pictures Private Ltd. v. Central Circuit Cine Association* Case No. 52/2010.

reconstruction, to takeover a company or acquire a controlling or substantial stake in another company etc.). It has been held that, such common platforms provide an umbrella for companies to act in a coordinated manner and arrive at a formal or informal arrangement about pricing and production strategies that contravenes the Competition Act.<sup>72</sup> Although the Companies Act, 2013 requires the directors to mandatorily hold board meetings as prescribed thereunder, where important discussions and decisions of the organizations take place including special resolutions,<sup>73</sup> the compliance is looked at by the Ministry of Corporate Affairs (“MCA”) through the lens of corporate governance. Thus, the regulatory body as well as the nature of enquiry is different from what would be under scrutiny of competition law.

Further, on the point of evidence, the directors are required to maintain books of minutes of the proceedings of every general meeting of any class of shareholders or creditors, every resolution passed by postal ballot and every meeting of its Board of Directors or of every committee of the Board.<sup>74</sup> The minutes should contain a fair and correct summary of the proceedings, all appointments made in the meeting, the names of the directors present at the meeting, in case a resolution is passed, the names of directors, if any, dissenting from or not concurring with the resolution, to name a few.<sup>75</sup> A different minutes book is required to be maintained for general meetings of members, board and its committee meetings, and the creditor’s meetings, which shall be initialled or signed on each page of every such book by the Chairman of that meeting.<sup>76</sup> The minutes book

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<sup>72</sup>*Builders Association of India v. Cement Manufacturers Association* Case No. 29/2010 (2016 CCI Order).

<sup>73</sup>The Companies Act, 2013, s 173 read with s 175, s 179 and The Companies (Meetings of Board and its Powers) Rules, 2014, Rule 8.

<sup>74</sup>The Companies Act, 2013, s 118.

<sup>75</sup>*ibid.*

<sup>76</sup>Companies (Management and Administration) Rules, 2014, Rule 25.

would provide for the communication that took place in the meetings and the associated inter-organizational decision-making between the key individuals of the respective company, who are privy to sensitive information of the company. Thus, it would prove to be a substantial piece of evidence to determine the intention of the interlocking directors. These evidences like the platform of meetings, the minutes of the meetings, etc. provide a strong piece of evidence and act as a 'smoking gun' to evaluate whether the interlock directorates have been acting in any coordinated behaviour and whether there exists an anti-competitive agreement.

The directors are required to disclose their concern, or interest in any company or companies or bodies corporate, firms, or other association of individuals and any changes made with respect to the same in the board meetings.<sup>77</sup> These disclosures shall also include shareholding interest.<sup>78</sup> Such disclosure requirements can be leveraged towards greater enforcement of the (possible) prohibition against interlocked directorates in competing companies.

The discussion around the problem of interlocks serves another purpose – it brings attention to the area of tension between corporate governance laws and competition law. The MCA along with the Securities and Exchange Board of India (“**SEBI**”) in the case of listed companies, regulate the disclosure, eligibility and other requirements for directors who are appointed to the Board. While SEBI and MCA have a periodic disclosure and form requirements, the CCI’s mandate is narrow and enquiries are conducted on case- to- case basis as a result of a motion, on its own accord or due to information received. A platform or channel of communication, with free flow of information between the regulators, is an important requirement for the efficient and smart regulation of corporate India. Rather than having the regulators wrestle for jurisdiction, hierarchy and/or

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<sup>77</sup>The Companies Act, 2013, s 184.

<sup>78</sup>Companies (Meetings of Board and its Powers) Rules, 2014, Rule 9.

oversight, with a common monitoring mechanism – the problem of interlocks and consequent information exchange could be more robustly tackled. The manner of regulatory collaboration could vary – specified information sharing or a separate review mechanism. From a policy perspective, the former would be preferred as it would reduce a regulatory hurdle rather than add one.

Despite legislative silence, in the past few years the CCI has adjudicated upon issues that arise out of common ownership/management *vis-à-vis* its impact on competition and has recognised the same. In the *Liner Shipping* case, three competitors were forming a joint venture by merging their liner shipping business; however, the other businesses were outside the scope of this joint venture.<sup>79</sup> The CCI objected that this joint venture could lead to spill-over of information of the non-integrated businesses. In lieu of this, the parties were required to offer information on spill-over protection remedies wherein, they agreed that the directors and executives of the joint venture so formed would not receive or exchange sensitive information from the other businesses that is not a part of the venture of the respective parties or exchange information to third parties. In a similar case,<sup>80</sup> the CCI had approved an acquisition of Fortis Healthcare Limited (FHL), a company operating in the multi-speciality, super-speciality and diagnostic centre in India by Northern TK Venture Limited (“**Acquirer**”), which is an investment company. A member of the acquirer’s group, IHH Healthcare Berhad, had an interest in a joint venture operating a competing hospital. The issue that this joint venture could be used as a platform for co-ordination by the competitors was addressed by a “*rule of information control*”. This ensured that the joint venture and the combined entity would operate as separate, independent and competitive businesses which

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<sup>79</sup>*Liner Shipping case* (Combination Registration No.C-2016/11/459, Order dated 29 September 2017).

<sup>80</sup>*Northern TK Venture Pte Limited and Fortis Healthcare Limited* (Combination Registration No. C-2018/09/601, dated 29 October 2019).

included not appointing common directors on the joint venture or the entity created post transaction and not sharing commercially sensitive information and any such commitment to prevent information sharing.

In a recent deal of acquisition of approximately 3% shareholding in Intas Pharmaceutical by Canary Investment and Link Investment, both being affiliates of ChrysCapital, the CCI while approving the same, again directed its attention towards the anti-competitive concerns of the deal.<sup>81</sup> Along with increasing ChrysCapital's shareholding to approximately 6% in Intas Pharmaceutical, the deal allows ChrysCapital and its affiliates the right to receive information with respect to Intas' day-to-day affairs, a right to appoint a director on the Board and a right to veto corporate actions like amendment to the charter documents, commencement of new business and change in capital structure. ChrysCapital had minority shareholdings in other competing companies like Mankind Pharma and Eris Lifescience (10%), GVK Biosciences and Curatio Healthcare (less than 20%) in the pharmaceutical market apart from in Intas. The combined market share of Intas and the shareholding of ChrysCapital in these entities was greater than 30% in more than 20 pharmaceutical products. Thus, the CCI was afraid that this common shareholding that ChrysCapital held in the same business might lead the deal to cause an anti-competitive effect. The CCI rejected ChrysCapital's contention that their acquisition being less than 10% had minority investment protection rights and was thus exempt. The CCI pointed that until the deal allows active participation of the acquirer in the day-to-day affairs, ability to materially influence those affairs or other corporate actions of the target, the deal cannot be said to be "*solely an investment*". The CCI, however, approved this acquisition deal as ChrysCapital agreed to remove their director on the board of Mankind

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<sup>81</sup>*Canary Investment Limited, Link Investment Trust II and Intas Pharmaceuticals Limited* (Combination Registration No. C-2020/04/741 dated 30 April 2020).

Pharma, to restrict using information that concern these companies. and not to exercise their veto rights in Mankind Pharma, except in some exemptions in order to protect their investment's value.

The CCI has taken also taken another approach while approving combinations through merger and acquisition in competing firms, based on the individual and combined market share that the parties hold in the relevant market and the presence of other significant players in the relevant market.<sup>82</sup> The CCI approved Tiger Midco's 100% shareholding acquisition in Tech Data Corporation which has a market of hardware and software products, distribution of cloud solutions, to name a few.<sup>83</sup> The investment funds affiliated to Apollo Management, which is known to be in the market of application services, provision of cloud solutions and professional sources, manage Tiger Midco. Even though, the markets of Apollo Management and Tech Data compete both horizontally and vertically, the CCI did not go into defining the relevant market due to the insignificant market share that the parties held in the market and also because there were other major players like Microsoft, Google, Ingram India, etc. in the market. Thus, the CCI was not apprehensive that this acquisition would have an anti-competitive effect. It also approved Nuvoco Vistas' acquisition of 100% shareholding in Emami Cement. The former manufactured clinkers for captive consumption while the latter sold clinkers to other cement manufacturers and both were involved in the manufacture and sale of grey cement, among

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<sup>82</sup>*Tiger Midco LLC and Tech Data Corporation* (Combination Registration No. C-2020/03/737 dated 30 April 2020); *Mylan N.V. and Upjohn Inc.* (Combination Registration No. C-2020/01/720 dated 23 March 2020); *JSW Energy Limited, GMR Energy Limited, GMR Kamalanga Energy Limited* (Combination Registration No. C-2020/03/731 dated 7 April 2020); *Nuvoco Vistas Corporation Limited and Emami Cement Limited* (Combination Registration No. C-2020/03/734 dated May 2020).

<sup>83</sup>*Tiger Midco LLC and Tech Data Corporation* (Combination Registration No. C-2020/03/737 dated 30 April 2020).

others.<sup>84</sup> The combined market share of both the parties was 15-20% based on their installed capacity and sales volume in the relevant market i.e manufacture and sale of grey cement which had other important competitors like Shree Cement, Holcim, Ultratech, Dalmia and the Herfindahl Hirschman Index. Thus, due to the low market share, other players in the relevant market, and the insignificant portion of revenue from sale of grey cement and clinkers to third parties by Emami Cement, the CCI disregarded the likelihood of appreciable adverse effect on competition.

The problem arising out of a common investor of two competing companies is at the heart of the interaction between company law and competition law. Whether such a scenario is anti-competitive would depend on the shareholding pattern and subsequently, the board rights, which have been obtained by the common investor.<sup>85</sup> If the investor has enough powers and shareholding pattern of above 25%, he may be able to practice activities, which might be anti-competitive and indirectly start colluding. In the case of *Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd.*,<sup>86</sup> Meru had alleged anti-competitive conduct against Uber and Ola where they had a common private equity investor, SoftBank. Meru alleged that Ola and Uber entered into anti-competitive agreements and were indulging in predatory pricing. It alleged that Ola and Uber enjoyed a dominant position as a group because of the shareholding position of Softbank in Ola and Uber. The CCI observed that anti-competitive practice can be seen in the form of price increase or quality reduction which might

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<sup>84</sup>*Nuvoco Vistas Corporation Limited and Emami Cement Limited* (Combination Registration No. C-2020/03/734 dated May 20 2020).

<sup>85</sup> Arihant Agarwal and Aditya Mukherjee, 'Interlocking Directorates and its Relevance to Competition in India', (*The Indian Review of Corporate and Commercial Laws*, 22 January 2020) <<https://www.ircl.in/single-post/2020/01/22/Interlocking-Directorate-and-its-Relevance-to-Competition-in-India>> accessed 20 April 2020.

<sup>86</sup>*Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd.* Case no. 81 of 2015.

be unprofitable for the firm but benefits the common investors, and may soften competition. However, the CCI had ruled that there is no collusion between the parties due to their common investor as there was lack of evidence to show that there was an appreciable adverse effect on competition or that it harms the stakeholders.

It is imperative to focus on the fact that it is difficult to prove information exchange with lack of proper evidence. Even though the CCI had intel that the persons were in an agreement to increase prices or control the production and supply, the CCI did not find it to be in contravention of the Act as there was lack of proof to substantiate the implementation of the price according to the agreement or the limitation of supply.<sup>87</sup> In the *Flashlights Case*,<sup>88</sup> despite having the proof of information exchange with respect to price and sales production, the CCI said that this exchange of data only indicates a possibility of collusion and can be considered as a “*plus factor*” as it has to be in conjunction with other evidences provided, to prove violation. The evidence in the case showed that even though there was proof of information exchange on the price among the parties, the same was not implemented and thus mere discussion of it does not amount to price fixing. However, it is observed that, the CCI has taken an opposed view regarding the availability of evidence for implementation of the agreement in a recent order.<sup>89</sup> In the *Bearing’s* case, the CCI noted a coordinated action amongst competing firms to uniformly increase prices in the automotive and industrial original equipment manufacturer customers and in the distribution segment of the market when the steel prices started to rise from the year 2009. The CCI had evidence of consensus amongst the suppliers for writing

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<sup>87</sup>*Nirmal Kumar Manhsani v. Ruchi Soya Industries Ltd & Ors* Case No. 76/2012; *In re: Alleged Cartelisation in Flashlights Market in India* (Suo Moto Case No. 1 of 2017).

<sup>88</sup>*In re: Alleged Cartelisation in Flashlights Market in India* (Suo Moto Case No. 1 of 2017).

<sup>89</sup>*In re: Cartelisation in Industrial and Automotive Bearings* (Suo Moto Case No. 05 of 2017).

price increase letters to the OEM customers including evidences of emails, telephonic conversations and meetings where commercially sensitive price related information was shared. Based on these evidences, the CCI concluded that there was information exchange and collusion among key competitors for pricing strategies. The CCI said that even though the price revisions quoted by the parties to the OEMs does not align with their agreement, the statutory presumption of appreciable adverse effect under Section 3(3) cannot be rebutted because the parties, met each other and decided the price revisions to be quoted to the OEMs, compromised their independence. Though, interestingly, the CCI held the agreement to violate Section 3(3), it did not impose any monetary penalty on the competitors and directed them to cease and desist from such cartel like activities in the future. Two questions arise from the contrary views taken by the CCI regarding the availability of evidence for implementation of the agreement i.e first, if the parties are required to show that they acted upon the agreement and second whether the CCI can assume that the parties implemented the agreement and hold parties in contravention of the Act solely based on the information exchange and the presumption approach?

The regulator, thus, is not blind to the problem since it has been a repetitive observation in the aforementioned orders, as well as orders dealing with acquisitions which are either made in the ordinary course of business or for solely investment purposes as they are not likely to cause appreciable adverse effect on the competition.<sup>90</sup>

#### *A. Changes and reform in Indian Competition law*

It is interesting to note that the preceding law, the Monopolistic and Restrictive Trade Practices Act<sup>91</sup> (“**MRTP Act**”), had a specific provision against one director being appointed as director in a

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<sup>90</sup>Indian Competition Act, 2002, Item 1, Schedule 1.

<sup>91</sup>Monopolistic and Restrictive Trade Practices Act, 1969, s 25.

competing firm; however, this provision is not included in the Act. The goal of the MRTP Act was along the lines of the Act – ensuring that the operation of the economic system does not result in the concentration of economic power in hands of few, control of monopolies, and prohibition of monopolistic and restrictive trade practices.<sup>92</sup> The then Chapter III of the MRTP Act specifically related to the concentration of economic power and had provisions dealing with interconnected undertakings. The basis for having such provisions was the findings of the Monopolies Inquiry Commission which was set up to inquire into the extent and effect of concentration of economic power.<sup>93</sup> One of the causes of such concentration was found to be cross-investments and interconnections between companies. Thus, it can be seen that such indirect influence and effects thereof are not novel problems faced by the Indian legal regime. Such findings of a decades-old commission only support the claim for having greater regulation of interlocks.

It is disheartening to see that though the issue of interlock directorates within companies, especially those that are in the same horizontal line, has been discussed on various occasions by the CCI, the regulators have still failed to provide legislative guidance on this front in the recent Draft Competition (Amendment) Bill, 2020, which was released in public domain on 20 February, 2020. This bill was released after a cumulative process of discussions that started in October 2018 by the Competition Law Review Committee set up by the MCA, to examine the Act and its rules and regulations in the “wake of changing business landscape” and a decade of enforcement by the CCI.<sup>94</sup> One of the relevant amendments prescribed in the draft

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<sup>92</sup>Monopolistic and Restrictive Trade Practices Act, 1969, Statement of Object and Reasons.

<sup>93</sup>V. D. Kulshreshtha, ‘Report of the Monopolies Inquiry Commission: An Evaluation’ (1966) 8(3) Journal of the Indian Law Institute 413.

<sup>94</sup>Karan Chadnhiok and Deeksha Manchanda ‘A look at the Draft (Competition Amendment Bill, 2020 - Clarity, transparency, robustness and bit more to be

bill is the amended definition of “*control*” under Section 5 of the Act to include “*material influence*” over the management or affairs or strategic commercial decisions of one or more enterprise/group by another. The Committee opined that this addition of material influence will serve as a double-edged benefit. It would bring more certainty to the meaning of control while retaining the power of the CCI to assess a wide range of combinations that may have an appreciable adverse effect on competition.

Referring to the *Ultratech-Jail*<sup>95</sup> case, the CCI discussed how having “*material influence*” over the management of affairs of the companies could be a deterrent towards the competition in market. In the case, the CCI defined material influence as the lowest level of control, which implies presence of factors like giving an enterprise the ability to influence affairs and management of the other enterprise including factors like, shareholding, special rights, status and expertise of an enterprise or person, Board representation, structural/financial arrangements, etc. Yet it is important to point out that, no guidelines have been given to define what constitutes “*material influence*” that would amount to “*control*” in the Act. There should be some quantifiable yard-stick that amounts to material influence, as the same cannot be assessed based on the quantum of shareholding, availability of special/veto rights but further requires deeper analysis of the market realities and in exceptional cases, lifting of the corporate veil as well.

### B. *Policy Recommendation*

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desired’ 01 March 2020, Bar and Bench  
<<https://www.barandbench.com/columns/a-look-at-the-draft-competition-amendment-bill-2020-clarity-transparency-robustness-and-bit-more-to-be-desired>>  
accessed 13 May 2020.

<sup>95</sup>*Ultratech-JAL* (Combination registration number C-2015/02/246, Order dated 12 March 2018).

Though the present competition law regime in India does not expressly prohibit the practice of interlock directorates in India, the practices indulged in by these directors or the subsequent actions are subject to the checks mentioned in the Act, especially in cases of mergers and acquisitions and combinations. For effective mechanism and in the interest of the economy as a whole, it is suggested that a specific provision prohibiting interlock directorates with *de-minimus* thresholds should be introduced in the Act. This means that the practice of interlocking directorates would be prohibited with a clear set of threshold exceptions carved out.

It is important to question the construction of the exceptions both, from the lens of efficiency as well as discrimination. Any policy that is enacted, must be capable of being implemented without unreasonable burden on the regulators. An approach similar to that adopted by the EU, which monitors and detects anticompetitive behaviour, has higher costs and relies on a robust institutional structure making it unsuitable for India. A prohibition with clear exceptions is more suited, and capable of implementation. The second and more important question is – what will the threshold be that makes the same act legal for some and illegal for others? And why not a complete prohibition for every actor?

A complete prohibition is itself anti-competitive in the sense that it impedes competition between mid-sized firms. Interlocks serve a number of pro-competitive effects like exchange of technical know-how and efficiency. Medium and small enterprises with low market share, could greatly improve their knowledge of technology, practices of inventory management and distribution strategies. A complete prohibition would deny these firms the ability to take advantage of highly skilled personnel. Having a *de-minimus* threshold thus allows positive effects of interlocks, but prevents them from becoming coordinated large-scale anticompetitive effects. The rationale for such a distinction flows from the basis of our competition law – to protect

the interests of the consumer. It is in consumer interest that small and medium enterprises exchange information to compete relentlessly in order to reduce prices of commodities and increase innovation. Similar exchange of information at the scale of large conglomerates only serves to exploit the consumer.

On the point of the substance of the threshold, it is proposed that 'market share' be used as the determinative factor in determining the threshold. The percentage of combined market share of competing firms must determine the interlock as valid or invalid. The reason 'annual turnover' or 'net profit' are rejected by the authors as metrics to determine validity of interlocks, is due to the fact that firms having large combined market shares may not necessarily have very high turnovers or profits. Further, the censure of this prohibition is not against highly profitable firms, but against highly dominant ones. The percentage of combined market share over which interlocks are prohibited can only be determined via an empirical study and is not the objective of this paper. The criticism however of this approach is clear. Any two firms with a large combined market share would be hit by the prohibition regardless of their actual effect on the market. Regardless of the reduction in price, increased innovation and efficiency, an offence would be made out. A blanket ban would then be counter-productive in those selective cases.

There is however a way where this criticism is constructively utilised by including a further qualification and room to the regulator to exercise discretion in limited cases. The following is a broad structure of the potential provision, by way of an example:

1. *Complete prohibition on interlocks between competing firms/companies subject to point 2 and 3.*
2. *The prohibition on interlocks must not apply to competing firms with a combined market share of less than 30%.*

3. *The prohibition on interlocks must not apply to competing firms with a combined market share of more than 30%, if the competing firms can show no adverse effect on competition.*

A provision with such a structure seeks to:

- a. Allow without undue scrutiny the practice of interlocks up to a certain threshold.
- b. Disallow those interlocks which *prima facie* show anti-competitive effects on the basis of combined market domination.
- c. Allow interlocks in those few firms with combined market share greater than the threshold, if the firms can show that they pose no harm or risk to competition. Further limits to discretion may be inserted as determined by the legislature to limit the scope of this leeway.

This paper, in addition to providing evidence to support the need for legislative intervention in the grey area of interlocks, tries to provide a concrete metric to deal with the issue of interlocks in India. Further, in addition to the modifications in substantive law, there is a requirement for regulatory collaboration between the SEBI, MCA and CCI where information and case particulars can be shared and acted upon. To increase oversight while not increasing regulatory hurdles for corporates, a joint approval mechanism can be set up where submission of documents is done once, and relevant approvals are sought together. Such administrative steps have the ability to combine efficiency and greater checks and balances on underhand collusion in the market.

## VI. CONCLUSION

Though the concept of interlocked directors is one that is not explored enough in India, it can be seen that there are numerous negative effects on competition law and the economy. The paper first seeks to demonstrate the actual effects of having interlocked directors. Citing studies conducted with a large sample of companies, it is seen that interlocks contribute to economic efficiency as it takes advantage of interconnections to be able to oppose adverse market forces.

It also becomes important to contextualise the Indian position in light of the global trends and how other developing economies are dealing with the problem. Brazil, China and Japan have a substantive assessment criterion, specifically for interlocks. The EU, while it lacks a specific provision prohibiting or regulating the practice, has evolved certain criteria by virtue of the cases before the ECJ. It also requires a minimum threshold to be met. Although semantically different, the threshold is that of significantly effecting competition. In sharp contrast, the United States has a *per se* prohibition once the *de-minimus* thresholds are met. It is submitted that a middle path can be taken which provides enough room for the regulator to assess the situation rather than a simple addition of regulations to the detriment of corporates in India and the economy as a whole.

In light of the evidence and legal positions, the paper makes three recommendations. First, that the concept of interlocks must be seen as a credible threat to competition, and there must be legislative intervention to avoid any vague or unpredictable actions by the regulator. Second, that the provision so made should have certain thresholds which can be borrowed from Section 19 of the Act, which would allow for substantive assessment of facts and circumstances, and only after crossing the threshold would the interlocks be prohibited. Third, that the current disclosure requirements of directors as well as the filing requirements of minutes, etc., should be used by

the MCA and SEBI in tandem with the analysis by the CCI. More mutual coordination and collaboration of different corporate regulators is important for dealing with the issue in a comprehensive manner.

With greater cohesion of the Indian market with global players and increase in foreign involvement in the economy, greater controls must also be applied so as to allow for businesses to flourish. The law must not permit the concentration of economic power in the hands of a few and having a specific provision would be a step towards this objective of the Indian competition law regime.