THE COMPETITION (AMENDMENT) ACT, 2023 AND ITS INFLUENCE ON DEAL-MAKING

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ABSTRACT

*The Competition (Amendment) Act, 2023 has introduced significant amendments which have the potential to reshape the dynamics of mergers, acquisitions, and business collaborations. This research paper aims to delve into the notable implications of the Competition (Amendment) Act, 2023 ("**Amendment Act**") on deal-making within the Indian corporate landscape. By scrutinizing the key changes introduced by the Amendment Act such as the revised deal value threshold; modifications to the definition of 'control'; alterations in procedural timelines; the introduction of settlement and commitment frameworks; decriminalization of certain offences, and more, this paper seeks to provide an in-depth analysis of how these changes are likely to impact the deal-making process by significantly influencing deal structures, timelines, and market dynamics. One of the*

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pivotal amendments is the introduction of a deal value threshold, requiring mandatory notification to the Competition Commission of India. Another significant amendment involves revising the definition of 'control,' which plays a crucial role in determining transactions that need regulatory approval to prevent anti-competitive consolidations. A significant step has also been taken towards potentially expediting deal-making process by addressing procedural timelines with the merger and acquisition assessment period being reduced from 210 to 150 days. The introduction of settlement and commitment frameworks offers efficient dispute resolution mechanism, reducing the burden on companies implicated in inquiries relating to abuse of dominance and anti-competitive agreements. The shift in enforcement, brought about by the decriminalization of certain offenses, includes changes in compliance requirements and penalties for not adhering to the directives of the Competition Commission of India and the Director General concerning anti-competitive agreements. Overall, this research paper provides a comprehensive analysis of how the Amendment Act transforms the deal-making landscape in India by shedding light on the intricate interplay between these amendments and their implications for the corporate world.

Keywords: *The Competition (Amendment) Act, 2023, Deal Value Threshold, Control,*

Procedural Timelines, Settlement and Commitment Framework, Global Turnover and Penalties

I. INTRODUCTION

The Parliament of India passed the Competition (Amendment) Act, 2023[1] which was introduced as a Bill in August of 2022, during the Monsoon Session of the Parliament. Spanning a period of nearly half a decade, the trajectory leading to this juncture has been a meticulously crafted endeavour of the Competition Law Review Committee ("**CLRC**") and the Parliamentary Standing Committee on Finance ("**Standing Committee**"), along with valuable insights from concerned parties.[2]

While certain provisions have been set in motion as of May 18, 2023 upon the official notification by the Ministry of Corporate Affairs ("**MCA**"),[3] Section 12 of the Amendment Act, which contains provisions for the appointment of the Director General of the Competition Commission of India ("**CCI**"), was made effective by a notification by the MCA on July 18, 2023.[4] It is pertinent to note that a few amendments hinge upon the Competition (Combinations) Regulations, 2023,[5] a draft of which has been recently proposed by the

[1]The Competition Amendment Act, 2023 (9 of 2023).
[2]Parliamentary Standing Committee on Finance, 'Fifty Second Report on the Competition Amendment Bill, 2023' (December 2022) <https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf>.
[3]Ministry of Corporate Affairs, 'Gazette Notification S.O. 2228(E)' (18 May 2023) <https://www.cci.gov.in/legal-framwork/notifications/details/151/0> accessed 31 August 2023.
[4]Ministry of Corporate Affairs, 'Gazette Notification S.O. 3199(E)' (18 July 2023) <https://egazette.nic.in/WriteReadData/2023/482363.pdf> accessed 29 October 2023.
[5]The Competition Commission of India (Combinations) Regulations, 2023 <https://cci.gov.in/images/stakeholderstopicsconsultations/en/draft-combinations-regulations1693891636.pdf>.

CCI. Consequently, the practical implementation of such provisions is anticipated to occur simultaneously with the notification of these provisions and the publication of regulatory directives by the CCI.

II. BRIEF BACKGROUND OF THE COMPETITION LAW IN INDIA

The salient features of the Amendment Act are in consonance with the development of competition law in India. The Competition Act of 2002[6] ("**Act of 2002**"), in general, endeavours to address the problems of unfair practices that harm healthy competition, on similar lines as its predecessor, the Monopolies and Restrictive Trade Practices Act, 1969[7] ("**MRTP Act**"). The genesis of the MRTP Act can itself be traced down to Articles 39(b) and (c) of the Constitution of India.[8] These provisions, found under the Directive Principles of State Policy, ensure that the government makes policies in a way that resources and wealth are distributed relatively to benefit everyone, rather than ending up in the hands of a few individuals.[9]

The advancement of economic conditions in the country necessitated a change in the legal regime of competition policies of India. To address the changing economic landscapes, the *Raghavan Committee* was formed in 1999, which highlighted the need for a modern competition law framework in India.[10] The observations of the Raghavan Committee formed the groundwork for the Act of 2002.

[6]The Competition Act, 2002 (12 of 2003).
[7]The Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969).
[8]The Constitution of India, 1950 arts 39(b) and 39(c).
[9]Ministry of Corporate Affairs, 'Fiftieth Annual Report' (2006) ch 4 <https://www.mca.gov.in/Ministry/pdf/50AR_English.pdf>.
[10]Chairman SVS Raghavan, 'Report of the High Level Committee on Competition Policy and Law' (2000).

After the enactment of the Act of 2002, the disputes that arose among the concerned parties were resolved by the CCI.[11] However, there was a lack of an appropriate and available forum for the stakeholders to contest the orders of the CCI.[12] Consequently, appeals were directly brought before the Supreme Court of India ("**SC**").[13] This situation prompted an amendment to the Act of 2002 resulting in the enactment of the Competition (Amendment) Act of 2007,[14] which, *inter alia*, led to the creation of the Competition Appellate Tribunal ("**COMPAT**").

Over time, in many instances, COMPAT began assuming the role and authority of the CCI within its jurisdiction. This shift also drew unfavourable commentary towards COMPAT. This circumstance was notably evident in *Gujarat Industries Power Company Limited v. CCI*.[15] Here, COMPAT overturned the decision of the CCI, contending that the CCI should not be excessively diligent while issuing a preliminary order.[16] In light of various such instances of escalating power tussle between COMPAT and the CCI, the Finance Act of 2017[17] was passed. Furthermore, over time, a need was felt to streamline the tribunal-structure in India and bring about an increase in efficiency through the consolidation of separate tribunals operating individually.[18] This culminated in the replacement of COMPAT by the

[11]Vijay Kumar Singh, 'Competition Law and Policy in India: The Journey in a Decade' (2011) 4 NUJS Law Review 523 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2971805>.
[12]ibid.
[13]*Brahm Dutt v Union of India* AIR 2005 SC 730.
[14]The Competition Amendment Act, 2007 (39 of 2007).
[15]*Gujarat Industries Power Company Limited v Competition Commission of India* (2017) COMPLR COMPAT 74.
[16]CAM Competition Team, 'COMPAT v. CCI: A Power Tussle' (*Cyril Amarchand Mangaldas Blogs*, 10 May 2017) <https://competition.cyrilamarchandblogs.com/2017/05/compat-v-cci-power-tussle/> accessed 26 August 2023.
[17]The Finance Act, 2017 (7 of 2017).
[18]Abhimanyu Singh Yadav and Anubha Singhal, 'Rationalisation of Competition Appeals: A Way Forward?' (*IndiaCorpLaw*, 11 March 2018) <https://indiacorplaw.in/2018/03/rationalisation-competition-appeals-way-forward.html> accessed 29 October 2023.

National Company Law Appellate Tribunal ("**NCLAT**") for the purpose of adjudicating appeals originating from the decisions of the CCI.

In continuation of the ever-evolving competition landscape of the country, 2018 witnessed the formation of CLRC to thoroughly assess and suggest amendments to the existing Act of 2002 due to the remarkable growth of Indian markets and a significant shift in business practices.[19] In 2019, the CLRC presented its comprehensive recommendations to the government.[20] The overarching objective was to establish a heightened level of regulatory framework that provided certainty and fostered a business environment based on trust, while ensuring expedited market corrections.[21]

Building upon this transformative momentum, in August 2022, the legal landscape in India witnessed the introduction of the Competition (Amendment) Bill, 2022 ("**Bill**").[22] The Bill aimed at strengthening the Indian framework of competition, sparking a series of deliberations and evaluations. Carefully scrutinized by the Standing Committee, which submitted its report with various recommendations in December 2022,[23] the Bill garnered resounding support from both the Houses of the Parliament in March 2023 and obtained the assent of the Hon'ble President in April 2023.

[19]The Competition Act, 2002 (12 of 2003).
[20]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.
[21]Competition Commission of India, 'Competition (Amendment) Act, 2023 Salient Features' < https://www.cci.gov.in/images/publications_booklet/en/competition-amendment-act-2023-salient-features1684831868.pdf>.
[22]The Competition Amendment Bill, 2022 (185 of 2022).
[23]Parliamentary Standing Committee on Finance, 'Fifty Second Report on the Competition Amendment Bill, 2023' (December 2022) <https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf>.

III. KEY HIGHLIGHTS OF THE AMENDMENT ACT

The Amendment Act has proposed various changes to the Act of 2002. The proposed amendments intend to rationalise and streamline the competition law framework of India in order to make it nimble and robust. The changes brought about through the Amendment Act encompass various aspects of competition law and enforcement, which would further help in providing certainty to businesses and facilitate ease of doing business.

Firstly, there is a reduction in the merger and acquisition assessment period from 210 days to 150 days.[24] This change is expected to expedite the regulatory process for such transactions, potentially facilitating deal making timelines, business operations and reducing uncertainties. Secondly, the scope of anti-competitive agreements is set to broaden with the inclusion of all agreements having a 'significant adverse effect on competition' in the definition of anti-competitive agreements.[25] This expansion aims to create a more encompassing regulatory framework, subjecting a wider range of agreements and practices to scrutiny, in line with evolving market dynamics. A third notable change is the imposition of a strict three-year deadline for information submission.[26] This underscores the importance of timely and accurate data reporting in the context of competition regulation. Moreover, the Amendment Act introduces a requirement for Central Government endorsement of the appointment of the Director General ("**DG**") of the CCI.[27] This adds a layer of government oversight with respect to the internal governance of the CCI.

Additionally, the amendment establishes a structured framework for settlement and commitment,[28] aiming to streamline dispute resolution

[24]The Competition Amendment Act, 2023 (9 of 2023) s 7(b).
[25]The Competition Amendment Act, 2023 (9 of 2023) s 4.
[26]The Competition Amendment Act, 2023 (9 of 2023) s 14 (a).
[27]The Competition Amendment Act, 2023 (9 of 2023) s 12.
[28]The Competition Amendment Act, 2023 (9 of 2023) s 35.

and cooperation between regulators and market participants. The introduction of a limitation period of three years to file complaints[29] is designed to prevent redundant legal actions, thereby improving efficiency in enforcement by establishing a definite timeframe of filing complaints. Further, the introduction of a penalty indexing system based on a company's global turnover[30] represents a fundamental change in penalty assessment, aiming to make penalties more equitable and impactful. Lastly, adjustments to the deal threshold value for Commission notification[31] expand the ambit of combinations that will be subject to the CCI's jurisdiction.

These amendments collectively signify a comprehensive reform of India's competition law landscape, addressing both substantive and procedural aspects of anti-trust regulation. These key changes pertaining to M&A and their implications on the deal-making process are expounded in the subsequent chapters.

IV. DEAL VALUE THRESHOLD: EXPANDING THE MERGER CONTROL REGIME

Competition law in India, as stipulated in the Act of 2002, regulates business combinations that have the potential to impede market competition. These combinations encompass acquisitions of enterprises, mergers, and amalgamations. Crucially, the Act of 2002 mandates that combinations crossing specific predefined thresholds necessitate prior approval of the CCI.[32] Failure to seek such approval places the entities involved at risk of facing rigorous competition law scrutiny and consequential penalties.[33] In addition to the existing asset and turnover related thresholds,[34] the amendment Act introduced the

[29]The Competition Amendment Act, 2023 (9 of 2023) s 14(a).
[30]The Competition Amendment Act, 2023 (9 of 2023) s 20.
[31]The Competition Amendment Act, 2023 (9 of 2023) s 6.
[32]The Competition Act, 2002 (12 of 2003) ss 5 and 6 (2).
[33]The Competition Act, 2002 (12 of 2003) s 43A.
[34]The Competition Act, 2002 (12 of 2003) s 5.

Deal Value Threshold ("**DVT**"). The introduction of this threshold is expected to act as a catalyst in achieving the CCI's objective to create and sustain fair competition in the economy that will provide a level playing field to the producers, and make the markets work for the welfare of the consumers.[35]

Furthermore, there was an increasing risk of killer acquisitions that called for the implementation of a newer threshold. Killer acquisitions include acquisitions of innovative targets by firms that are better in exploiting technologies in early stages of product development, thereby curbing potential competition in the early stages of development.[36] This is particularly evident in innovation-intensive industries like digital markets and pharmaceuticals. The first instance of such a transaction in India could be traced back to the merger of WhatsApp and Facebook, which was overlooked in lieu of the earlier threshold for notifying the CCI.[37] WhatsApp was a small company that had devised an instant messaging platform without wireless network or sustaining data fees which had the potential of disrupting digital markets due to its ever-increasing nature.[38] This could have proven to be a competition to Facebook, which was an online messaging platform and a major player of the market, but struggled to reach users in areas with sparse internet

[35]Competition Commission of India, 'About Us' <https://www.cci.gov.in/about-us#:~:text=Our%20goal%20is%20to%20create,the%20welfare%20of%20the%20consumers> accessed 29 August 2023.

[36]Colleen Cunningham, Florian Ederer and Song Ma, 'Killer Acquisitions' (2021) 129(3) Journal of Political Economy 649–702 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707> accessed 29 October 2023.

[37]Rupin Chopra and Apalka Bareja, 'Impact of Deal Value Threshold on Tech Industry – Competition Law' (*SS Rana & Co.*, 3 July 2023) <https://ssrana.in/articles/impact-deal-value-threshold-tech-industry/> accessed 29 August 2023.

[38]Alison L Duetsch, 'WhatsApp: The Best Meta Purchase Ever?' (*Investopedia*, 29 March 2022) <https://www.investopedia.com/articles/investing/032515/whatsapp-best-facebook-purchase-ever.asp> accessed 24 December 2023.

connectivity like WhatsApp had.[39] Therefore, the acquisition of WhatsApp by Facebook was a killer acquisition to curb competition.

The previous *de minimis* exemption provided to a transaction on the grounds of assets and turnover of the company[40] (i.e., assets in India of not more than INR 3.5 billion or turnover in India of not more than INR 10 billion) created loopholes for companies that did not have huge assets and investments. This was especially seen in the mergers taking place in the digital market sphere,[41] where the operations of companies were internet-based with minimal assets, thereby resulting in the circumvention of the CCI's jurisdiction.[42]

The scope of the *de minimus* exemption was further extended via the MCA notification of 2017,[43] which resulted in numerous combinations in the arena of digital markets passing under the radar of CCI which included Ola Cab's acquisition of Taxiforsure in 2015[44] and Zomato's acquisition of Uber Eats in 2020.[45] The CLRC noted that in such transactions in digital markets which derive data or business innovation of the target companies, these target companies do not have huge assets

[39]ibid.

[40]Ministry of Corporate Affairs, 'Gazette Notification S.O. 1193(E)' (16 March 2022) <https://cci.gov.in/images/combinationlegalframeworknotification/en/notification-regarding-extension-of-exemption-from-notifying-a-combination-within-thirty-days-men1655881355.pdf>.

[41]Avirup Bose, 'A Review Is Needed: Why India's Antitrust Regulator Should Scrutinize the Facebook-WhatsApp Merger' (2014) Competition Law Insight <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534732>.

[42]Rupin Chopra and Apalka Bareja, 'Impact of Deal Value Threshold on Tech Industry – Competition Law' (*SS Rana & Co.*, 3 July 2023) <https://ssrana.in/articles/impact-deal-value-threshold-tech-industry/> accessed 29 August 2023.

[43]Ministry of Corporate Affairs, 'Gazette Notification S.O. 989(E)' (27 March 2017) <https://www.mca.gov.in/Ministry/pdf/Notification_30032017.pdf> accessed 31 August 2023.

[44]Amit Tripathy and NM Leepsa, 'Ola Consolidating to Dominate the Cab Hiring Market' (2017) VIII(1) Journal of Case Research <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3132927>.

[45]Freny Patel, 'Eyes wide shut' (*India Business Law Journal*, 2 June 2022) <https://law.asia/eyes-wide-shut/> accessed 29 August 2023.

as their business model does not require the same. However, these target companies have considerable influence in the market due to their user reach.[46] This presented a challenge of regulatory oversight, which can be overcome by the introduction of DVT.

The DVT has been encapsulated by the insertion of Section 5(d) of the Act, which is yet to be notified.[47] Section 5(d) mandates the parties to notify the CCI regarding any transaction in connection with the acquisition of any control, shares, voting rights or assets of an enterprise, merger or amalgamation, whose *valuation* exceeds rupees two thousand crores,[48] provided that the party has Substantial Business Operations in India ("**SBOI**"). The Amendment Act explains the *value of transaction* as every valuable consideration, whether *direct* or *indirect* or *deferred* for any acquisition, merger or amalgamation.[49] The insertion of DVT has thus increased the CCI's power to regulate anti-competitive mergers, and the CCI can now exercise this power in *ex-ante* and *ex-post* manner.[50]

A. Comparison with foreign jurisdictions

DVT has been embodied by various countries in their anti-trust law framework. Countries have specific threshold for categorising the transactions having an appreciable adverse effect, based on deal value. For instance, in Germany, the standard DVT is EUR 400 million[51] and

[46]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.
[47]The Competition Act, 2002 (12 of 2003) s 5(d).
[48]ibid.
[49]ibid.
[50]Kuldip Singh et al, 'Working Paper on Balancing Different Forms of Competition Regulation in the Digital Economy' (2022) <https://www.cci.gov.in/images/economicconference/en/paper-on-balancing-different-forms-of-competition-regulation-in-the-digital-economy1663219896.pdf> accessed 29 August 2023.
[51]Werner Berg and Lisa Weinert, 'New merger control threshold in Germany – beware of ongoing transactions' (*Kluwer Competition Law Blog*, 7 June 2017) <https://competitionlawblog.kluwercompetitionlaw.com/2017/06/07/new-merger-

in Austria, it is EUR 200 million.[52] This demonstrates that the steps taken by the CCI to curb Anti-Competitive Practices are widely considered throughout the jurisdictions in the world.

However, merely establishing a DVT does not guarantee that the anti-competitive practices will be curbed, and countries have highlighted significant issues regarding DVT. For instance, Germany, in its presentation to the Organisation for Economic Cooperation and Development ("**OECD**") in May 2020,[53] noted that the introduction of DVT did not result in a substantial increase in the number of additional notifications[54] and additionally that, up until 2020, the German Federal Cartel Office ("**FCO**") had not encountered a significant case that had been notified based on the transaction value threshold. Similarly, in Austria, none of the transactions that had been notified under the deal value thresholds were identified as having anti-competitive effects.[55] Despite this, the DVT is an encouraging step towards curbing anti-competitive practices. However, numerous ambiguities have to be officially answered by the CCI to create a more comprehensive and substantial framework for the regulation of anti-competitive practices.

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control-threshold-germany-beware-ongoing-transactions/> accessed 29 August 2023.

[52]Michael Mayr, 'Austria Introduces Significant Changes to its Competition Law' (*Kluwer Competition Law Blog*, 20 September 2021) <https://competitionlawblog.kluwercompetitionlaw.com/2021/09/20/austria-introduces-significant-changes-to-its-competition-law/#:~:text=Austria%20introduces%20the%20significant%20lessening,as%20of%201%20January%202022.> accessed 29 August 2023.

[53]Directorate for Financial and Enterprise Affairs Competition Committee, 'Start-ups, killer acquisitions and merger control – Note by Germany' (*Organisation for Economic Co-operation and Development*, 28 May 2020) <https://one.oecd.org/document/DAF/COMP/WD(2020)20/en/pdf#:~:text=Given%20the%20new%20threshold%2C%20mergers,to%20be%20acquired%20shows%20significant>.

[54]ibid.

[55]Bundeskartellamt, 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)' (July 2018) <https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2>.

B. Challenges in implementing the DVT

The integration of DVT into competition law presents a multifaceted challenge, particularly within the context of emerging digital technology-driven enterprises. These challenges bring forth significant questions and uncertainties for both competition authorities and the entities involved, particularly with regard to two critical aspects: valuation of transactions and definition of SBOI.

a) Valuation of transaction

Historically, the subjectivity inherent in valuation has remained a persistent issue. Valuation is a complex process, further compounded by varying methodologies, fluctuating security prices, and an array of variables that make precise assessments elusive.[56] A prime illustration of this inherent variability can be found in the Facebook-WhatsApp Deal, where the valuation of the transaction underwent a notable shift from $19 billion USD in 2014 to $22 billion USD due to a substantial increase in the value of Facebook's shares.[57]

The draft CCI (Combinations) Regulation, 2023 ("**Combinations Regulation**") attempts to overcome this lacuna by laying down that the value of transaction would include every valuable consideration, whether direct or indirect, immediate or deferred, cash or otherwise. It shall include consideration for non-compete fees, inter-connected steps, transactional or incidental arrangements entered into between the parties anytime during two years from the date on which the transaction would come into effect; options or securities acquired, and occurrence

[56]Ananya Tewari, 'Exploring Deal Value Threshold: Understanding Significant Business Operations in different contexts' (*RGNUL Student Research Review*, 30 September 2023) <https://www.rsrr.in/post/exploring-deal-value-threshold-understanding-significant-business-operations-in-different-contexts> accessed 20 October 2023.

[57]Dominic Rushe, 'WhatsApp: Facebook acquires messaging service in $19bn deal' *The Guardian* (New York, 20 February 2014) <https://www.theguardian.com/technology/2014/feb/19/facebook-buys-whatsapp-16bn-deal>.

or non-occurrence of any uncertain future event as per the estimates of the acquirer.[58] It also lays down the method of calculation of the value of transactions in circumstances where the true and complete value was not recorded into agreement between the parties,[59] and when the transaction value of a deal cannot be determined with reasonable certainty.[60]

While this flows in the direction of reducing the subjectivity inherent in valuation of deals, and laying down a provision that is broad and effective in covering all kinds of circumstances that might arise, the provision fails to provide a mechanism for the calculation of the value of transactions in cases of non-compete clauses or incidental transactions. This poses a risk of creating gaps in the mechanism of computing the value of transactions, which may be prone to abuse.

b) Definition of SBOI

There has also been substantial debate and concerns over what would qualify as SBOI, and how the SBOI by a company would be determined. The Combinations Regulation[61] has attempted to address this concern by providing the scope and ambit of SBOI. Rule 4(2) lays down that a Company shall be deemed to have SBOI if the number of its users, subscribers, customers, or visitors at any point in time during a period of twelve months preceding the relevant date is 10% or more of its total global number of users, subscribers, customers or visitors respectively; or its gross merchandise value for the period of twelve months preceding the relevant date is 10% or more of its global gross merchandise value; or its turnover during the preceding financial year

[58]The Competition Commission of India (Combinations) Regulations, 2023 r 4(1).
[59]The Competition Commission of India (Combinations) Regulations, 2023 r 4(1) Explanation (c).
[60]The Competition Commission of India (Combinations) Regulations, 2023 r 4(1) Explanation (g).
[61]The Competition Commission of India (Combinations) Regulations, 2023 r 4.

in India is 10% or more of its total global turnover derived from all the products and services.[62]

The aforesaid definition will result in various transactions falling within the scrutiny of the CCI and additionally preventing instances of killer acquisitions, as this provision would subject transactions involving technological and digital markets not having substantial turnover or substantial assets to the CCI's domain. However, a downside to such a provision is that it may result in increased compliance in transactions involving targets with insignificant assets or turnover in India thereby making the law overbearing in nature. This also appears as a setback to the ease of doing business in India.

c) Other Challenges

Another formidable challenge for the CCI is the absence of established legal precedents and consultation papers. This challenge is exacerbated by the unique factual circumstances that underpin various market conditions for different combinations. For instance, the pharmaceutical industry during the COVID-19 pandemic experienced market conditions conducive to mergers.[63] Such exceptional dynamics, if prevalent in the future, would necessitate the CCI to evaluate combinations based on DVT in an environment devoid of legal precedents, and layered with subjectivity in market analysis.

Moreover, these thresholds can impose unwarranted compliance burdens, especially on start-up enterprises. For instance, if the government mandates notification for transactions exceeding a specific value, such as above Rs. 500 crores, it implies that all transactions surpassing this threshold are subject to review, regardless of their lower asset value or net turnover. Given the meteoric rise of digital

[62]The Competition Commission of India (Combinations) Regulations, 2023 r 4(2).
[63]Richard Harrock, 'The Impact of the Coronavirus Crisis on Mergers and Acquisitions' *Forbes* (17 April 2020) <https://www.forbes.com/sites/allbusiness/2020/04/17/impact-of-coronavirus-crisis-on-mergers-and-acquisitions/?sh=365431b9200a> accessed 29 October 2023.

technology in India, investments in start-ups, both domestically and internationally, have surged.[64] Consequently, start-ups may be embroiled in unnecessary CCI reviews solely based on deal value, even when there are no discernible adverse effects on competition stemming from these combinations.

In summary, introducing DVT in the current landscape necessitates a nuanced consideration of these intricate challenges. Additionally, although the Combination Regulations take a welcome step in defining the problems relating to valuation of transactions and determination of SBOI, care should be exercised by the regulator in ensuring that these provisions do not become overbearing while aligning them with the objective of scrutiny against misuse and anti-competitive practices. This can be addressed by providing a mechanism for the calculation of value of transactions in all cases listed in the regulation; laying down a subjective criterion distinguishing between killer acquisitions that need to be prevented and other transactions in relation to a target with insignificant assets and turnover, and creating special provisions for startups.

V. REDEFINING CONTROL: THE CONCEPT OF 'MATERIAL INFLUENCE'

The Indian merger control regime operates under a mandatory notification system, requiring businesses meeting specific asset or turnover-based thresholds to report transactions to the CCI.[65] The legal framework for this regime is primarily found in Sections 5 and 6 of the

[64]Sampath Sharma Nariyanuri and Shankar Krishnamurthy, 'Startups Riding Digital Infrastructure could transform Indian Economy' (*S&P Global*, 3 August 2023) <https://www.spglobal.com/en/research-insights/featured/special-editorial/look-forward/startups-riding-digital-infrastructure-could-transform-indian-economy> accessed 24 December 2023.

[65]The Competition Act, 2002 (12 of 2003).

Act of 2002,[66] supplemented by Regulations[67] and guidance notes. The central element in this process is the concept of 'control', as it determines which transactions fall under combination regulation, enabling the CCI to assess their potential impact on competition.[68] This section aims to explore the evolution of the concept of 'control' in the Indian merger control regime, emphasizing the recent shift towards the '*material influence*' standard.

A. Evolution of the concept of 'control'

The term 'control' lacks a universally agreed-upon definition in the Indian merger control regime, leading to variations in its interpretation over time.[69] While the Securities and Exchange Board of India ("**SEBI**") defines control as encompassing the ability to nominate directors, influence managerial decisions, and affect policy choices,[70] the CCI, initially, interpreted control broadly, including influence over strategic decisions, key personnel appointments, and budgetary matters.[71] In this regard, it became important to draw a distinction between investor's right to deliberate and vote over these matters and an attempt to gain control by an investor. Schedule I of the Combination Regulations provided exemptions based on specific

[66]ibid at ss 5 and 6.

[67]The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (3 of 2011).

[68]Avaantika Kakkar and Vijay Pratap Singh Chauhan, 'Evolving Character of the Indian Merger Control Regime', (2022) 3 Competition Commission of India Journal on Competition Law and Policy 1-19 <https://www.cyrilshroff.com/wp-content/uploads/2023/04/View-of-Evolving-Character-of-the-Indian-Merger-Control-Regime.pdf> accessed 19 October 2023.

[69]Umakanth Varottil, 'Defining "Control" in Takeover Regulations' (*India Corp Law*, 28 May 2013) <https://indiacorplaw.in/2013/05/defining-control-in-takeover-regulations.html> accessed 29 October 2023.

[70]Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011 r 2(1)(e).

[71]*Century Tokyo Leasing Corporation/Tata Capital Financial Services Ltd.* (2012) Combination Registration No. C2012/09/78 <https://www.cci.gov.in/uploads/filemanager/catalog/faqs/C-2012-09-78.pdf>.

conditions, such as shareholding below 25%; absence of special rights; non-participation in administrative affairs, and no voting privileges.[72]

However, the judgement in *Etihad Airways v. Jet Airways Ltd.* introduced ambiguity by deeming a 24% ownership stake as constituting control, when Etihad had the right to nominate two directors, out of the six shareholder directors, including the Vice Chairman, in the Board of Directors of Jet Airways.[73] This marked a deviation from the strict interpretation of the definition of control, and showcased the intention of the CCI to broaden the scope of 'control' and include matters that, albeit not strictly falling within the limits given in statutes and regulations, might be anti-competitive in nature. Moreover, in an order under Section 31(1) of the Act of 2002,[74] the CCI laid down that the ability of a party to exercise decisive influence over the management and affairs of the company would amount to control, and that the convertibility of the debentures into equity shares fell under the category of control.[75]

In summary, the strict criteria for classification of *control* in a company as laid down in statutes and regulations were watered down by the CCI in its differing interpretations as to what would amount to 'control' within the meaning of the Indian merger control regime.

[72]The Competition Commission of India (Procedure in regard to the transaction of business relating to combinations) Regulations, 2011 (3 of 2011) sch I.
[73]*Notice u/s 6(2) of the Competition Act, 2002, given by Etihad Airways PJSC and Jet Airways (India) Ltd.* (2013) Combination Registration No. C-2013/05/122 <http://164.100.58.95/sites/default/files/C-2013-05-122%20Order%20121113.pdf> accessed 28 October 2023.
[74]*Independent Media Trust Order Under Section 31(1) of the Competition Act, 2002, In re* (2012) SCC OnLine CCI 76 <https://www.cci.gov.in/uploads/filemanager/catalog/faqs/C-2012-03-47.pdf>.
[75]ibid.

B. Exploration of the shift towards 'material influence' as a determining factor

The Amendment Act brought significant changes to the definition of 'control' in Section 5.[76] Previously referring to authority over management and strategic decisions, the definition now centers on the capacity to exercise 'material influence' over these aspects. While 'material influence' lacks a statutory definition, the CCI's perspective can be gleaned from previous rulings.

In *Builders Association of India v. Cement Manufacturers' Association*, the CCI defined 'material influence' as the lowest level of control, encompassing factors like shareholding, special rights, expertise, board representation, and structural and financial arrangements.[77] Further, in *Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd*, the CCI acknowledged that minority shareholders could be *active investors* with 'material influence' over companies.[78] These highlight that there cannot be a numerical evaluation of control exercisable by a party, and even a minority shareholder can exercise control over the affairs of the company. Thus, control is not solely tied to majority ownership but involves a range of factors and circumstances shaping one entity's influence over another.

C. Comparison with international jurisdictions

International jurisdictions offer insights to understand the contours of control. In the EU, 'control' is broadly defined as having the potential to exercise decisive influence over a target company.[79] The mere

[76]The Competition Amendment Act, 2023 (9 of 2023) s 6 Explanation.
[77]*Builders Association of India v Cement Manufacturers' Association* (2012) SCC OnLine CCI 43.
[78]*Meru Travel Solutions Private Limited v Uber India Systems Pvt. Ltd*. (2016) SCC OnLine CCI 12.
[79]The European Commission Merger Regulation, 2004 art 3(2) <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A32004R0139>.

possibility of influence suffices for merger control obligations, with comprehensive guidance available through the Consolidated Jurisdictional Notice.[80]

The United States adopts a more interventionist approach under the Hart-Scott-Rodino Antitrust Improvements ("**HSR Act**") Act,[81] which inserted Section 7A to the Clayton Act[82] allowing broader review. This gives the Federal Trade Commission the power to review combinations and determine whether a merger or acquisition is anti-competitive in nature and to assess control.

Canada[83] and South Africa[84] also employ the 'material influence' standard, providing guidelines for assessing control factors such as share distribution, voting at meetings, special rights, and voting agreements.

D. Implications of the 'material influence' standards in India

The shift to the 'material influence' standard represents a fundamental transformation in the understanding and application of control in Indian merger control law. This shift acknowledges that 'control' extends beyond ownership, encompassing substantial influence over various aspects of another entity, including management, daily operations, and strategic decisions.

It further recognizes that control can manifest through diverse means, such as contractual arrangements, special rights, or influential

[80]Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the
control of concentrations between undertakings (2008/C 95/01) Official Journal of the European Union <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ%3AC%3A2008%3A095%3A0001%3A0048%3AEN%3APDF> accessed 24 October 2023.
[81]Hart–Scott–Rodino Antitrust Improvements Act, 1976.
[82]Clayton Antitrust Act, 1914 (15 U.S.C.) s 7.
[83]Canada Merger Enforcement Guidelines, 2011 para 1.5.
[84]South Africa Competition Act, 1998 (89 of 1998) s 12(2)(g).

relationships, and aids in clarifying the muddled position created by the Supreme Court in this regard. In *Subhkam Ventures (I) Pvt. Ltd. v. SEBI*,[85] the Securities Appellate Tribunal, ("**SAT**") while delving into the meaning of the term 'control', observed that it included only *proactive control* and *not reactive powers* or *negative control*. This provided protection to the acquirer and further protected the shareholders from the whims and fancies of the promoters. However, in the appeal for this matter, the Supreme Court, while dismissing the appeal, stated that this ruling could not be treated as a precedent, thereby prolonging the ambiguity regarding the nature of control.[86] This ambiguity was partially resolved when the Supreme Court, in the case of *ArcelorMittal India Pvt. Ltd. v. Satish Kumar Gupta*,[87] relied on the interpretation of 'control' made in the *Shubhkam* judgement. Therefore, the shift to 'material influence' standard is a step in further filling the gaps in the definition and scope of 'control', calling for close scrutiny.

Another area in which the 'material influence' standard has come to rescue is that of 'horizontal unilateral effects' wherein enterprises with financial stake in their competitors can strategically maximize profits without resorting to full mergers. This strategy involves unilaterally raising prices and reducing output, capitalizing on increased sales from the acquired firm.[88] These effects become even more potent when coupled with the acquisition of corporate rights.[89] In such instances,

[85]*Subhkam Ventures (I) Pvt. Ltd. v SEBI* Appeal No. 8 of 2009 <https://www.sebi.gov.in/satorders/subhkamventures.pdf>.
[86]Mukul Sharma, 'Subhkam Returns: SAT Ruling in NDTV Case' (*Cyril Amarchand Mangaldas Blogs*, 8 August 2022) <https://corporate.cyrilamarchandblogs.com/2022/08/subhkam-returns-sat-ruling-in-ndtv-case/#_ftn2> accessed 4 December 2023.
[87]*Arcelormittal India (P) Ltd. v Satish Kumar Gupta* (2019) 2 SCC 1.
[88]Gregory J Werden, 'Unilateral Competitive Effects of Horizontal Mergers I: Basic Concepts and Models' (2008) 2 Issues in Competition Law and Policy 1319 <https://appliedantitrust.com/09_merger_guidelines/unilateral/werden_unilateral_effects1_aba2008.pdf>.
[89]ibid.

buyers can compel competitors to raise prices or avoid competition, leading to higher profit margins, reduced competition, and increased market share, similar to full mergers, but without efficiency gains. Moreover, acquiring a minority stake in a competitor can trigger significant coordinated effects.[90] It increases incentives for coordination; improves the ability to detect deviations from coordinated outcomes; facilitates information exchange among competitors, and promotes transparency on strategic matters.

However, it is essential to note that acquiring a minority stake in a firm active in upstream or downstream markets may introduce foreclosure risks. In this scenario, the buyer gains incentives to restrict access to inputs or customers, potentially leading to market distortions.[91] When coupled with corporate rights, these risks are magnified as the buyer can benefit from increased downstream sales without fully sharing the losses incurred in the upstream market. Consequently, regulatory oversight and robust legal frameworks are crucial to safeguard competition and prevent anticompetitive practices in such acquisition scenarios.

In conclusion, the evolving concept of 'control' in the Indian merger control regime, particularly, the shift towards the 'material influence' standard, signifies a more comprehensive and adaptable approach. This expanded definition better addresses various situations where minority control or other rights could impact competition, aligning the Indian merger control law with international practices, while additionally emphasizing the importance of effective regulatory scrutiny in specific complex scenarios.

[90]European Commission, Directorate-General for Competition, 'Minority Power- EU Merger Control and the acquisition of Minority Shareholdings' (2014) Issue 15 Competition Policy Brief <https://op.europa.eu/en/publication-detail/-/publication/fa421b71-f18c-11e5-8529-01aa75ed71a1/language-en/format-PDF/source-304343716> accessed 24 October 2023.
[91]ibid.

VI. PROCEDURAL TIMELINES: STREAMLINING APPROVALS AND ENHANCING CERTAINTY

Another substantial paradigm shift ushered in by the Amendment Act of 2023 pertains to the procedural timelines governing the review process for proposed combinations, pursuant to the Act of 2002.[92] These temporal modifications, entrenched within the statutory framework, hold the dual objectives of expediting approvals while vigilantly preserving regulatory surveillance. In this section, the authors will elucidate upon these chronometric changes, deciphering their legal implications and jurisprudential relevance.

A. Reduction of time limit for approval of combinations

As per the Amendment Act, there is a reduction of the maximum waiting period for combination approval from the erstwhile 210 days to 150 days.[93] This signifies a substantial shift in the timeline within which combinations can be approved or denied, offering businesses and investors a more expeditious path to regulatory clearance. This reduction in the waiting period is expected to have a profound impact on the ease of doing business in India, fostering a more dynamic and investor-friendly environment.

Previously, the lengthy waiting period of 210 days under the Act of 2002[94] started either from the date of submission of the notice of combination to the CCI, or from the date when the CCI issued an order, whichever occurred earlier.[95] This often-protracted timeline presented challenges for businesses and investors eager to proceed with their combination related plans. The amended provisions provide for the CCI to now operate within a 150-day window from the official

[92]The Competition Amendment Act, 2023 (9 of 2023) ss 6 and 7.
[93]The Competition Amendment Act, 2023 (9 of 2023) s 7(b).
[94]The Competition Act, 2002 (12 of 2003) s 6(2A).
[95]ibid.

notification date to either grant approval for the combination, or issue an order related to it.

This significant reduction in the waiting period holds the potential to accelerate the approval process significantly, while also underscoring the government's commitment to promoting competition while ensuring regulatory compliance. By striking this balance between expediting transactions and maintaining oversight, the Amendment Act streamlines the regulatory process, making it more efficient and transparent, ultimately benefiting the broader economy and deal making landscape.

B. Intimation about combinations: Replacing the earlier prescribed timeline of 30 days

The Amendment Act further brings about a noteworthy shift in the timing of when parties involved in a combination are required to inform the CCI about the same. Prior to this amendment, Section 6 of the Act of 2002 mandated that any party planning to engage in a combination had a fixed period of 30 days from the approval of a merger, amalgamation, or the execution of any related agreement to notify the CCI.[96] This rigid timeframe applied uniformly to all cases, irrespective of their unique circumstances. However, the Amendment Act introduced a crucial change in this regard.

As opposed to the fixed timeline prevalent earlier, presently, the obligation to provide intimation to the CCI occurs after the approval of a merger, amalgamation, or related agreement, and can be completed before the actual consummation of the combination.[97] Hence, this shift introduces a significant degree of flexibility in the notification timeline, which allows businesses to align their notification obligations with the specifics of their transaction timelines.

[96]The Competition Act, 2002 (12 of 2003) s 6(2).
[97]The Competition Amendment Act, 2023 (9 of 2023) s 7(a)(i).

It thus recognizes that combinations can vary greatly in complexity and scope. By accommodating case-specific considerations in the timing of notification, the amended provisions demonstrate a more pragmatic approach to competition regulation. In essence, the amendment promotes a regulatory framework that is better equipped to accommodate the diverse nature of combinations, ultimately contributing to a more adaptable and responsive competition regulatory environment in India.

C. Introduction of deemed approval

A significant addition brought about by the Amendment Act is the concept of 'deemed approval' in the absence of a *prima facie* opinion by the CCI within the stipulated time frame. The Act now mandates that the CCI must form a *prima facie* opinion on the proposed combination within 30 days of the submission of the notice of merger or amalgamation. If the opinion is not arrived at within the specified timeframe, the combination is automatically deemed to be approved.[98]

This forward-looking measure aligns with global trends in merger and acquisition ("**M&A**") regimes, demonstrating India's commitment to ensuring legal certainty and promoting a competitive market. It also addresses concerns related to delays in the approval process and provides businesses with a greater sense of predictability in their strategic planning.

D. Formalization of pre-filing consultations and comparison of procedural amendments in merger control with international precedents

The Combinations Regulations formalize the procedure of Pre-Filing consultations in India.[99] This process seeks to provide an option to

[98]The Competition Amendment Act, 2023 (9 of 2023) s 23(c).
[99]The Competition Commission of India (Combinations) Regulations, 2023 r 7.

companies to seek consultations with the CCI prior to filing a notice to analyse whether the action falls within the meaning of the term 'combinations' which requires notification. This seeks to align the Indian merger control procedure with international standards. To gain a comprehensive understanding of the significance of the changes brought about by the Amendment Act and the Draft Combinations Regulations in the context of M&A regimes, it is essential to examine how these changes align with international practices. In this section, the authors delve deeper into the global comparisons to highlight the parallels and implications of India's legislative reforms with those of two prominent jurisdictions, the European Union ("**EU**") and the United States.

a) European Union

As is the case with India, the M&A mechanism in the EU involves a pre-notification discussion which, while not mandated by statutory law, plays a crucial role in the approval process. This pre-notification discussion is between parties involved in a proposed combination and the European Commission ("**EC**"),[100] which is responsible for competition policy in the EU.

During this pre-notification phase, parties voluntarily engage in discussions with the EC to provide detailed information about the proposed merger or acquisition.[101] This exchange allows the parties and the EC to address pertinent legal and competition-related concerns that may emerge during the subsequent investigation process. This practice has become an established and customary part of the EU's merger control procedure despite not being a statutory requirement.

[100]European Union Commission Regulation No. 804/2004 annex 1 s 1.1.

[101]William E Kovacic, Petros C Mavroidis and Damien J Neven, 'Merger Control Procedures and Institutions: A Comparison of the EU and US Practice' (2014) 59 Antitrust Bulletin 55-109 <https://journals.sagepub.com/doi/abs/10.1177/0003603X1405900104>.

This discussion exemplifies a proactive approach to merger regulation in the EU and ensures that M&A transactions align with competition principles. The fact that such discussions are not statutorily prescribed demonstrates the adaptability and flexibility of the regulatory framework in the EU.

b) United States

In the United States of America, the HSR Act provides for a pre-merger notification, wherein an initial waiting period of 30 days is provided to the parties.[102] If the agency believes that further inquiry is necessary, it is authorized to ask for additional documents under Section 7A(e) of the Clayton Act.[103] A second request may extend the waiting period usually for 30 days (which is 10 days for cash tender offers or bankruptcy filings).[104] During this period, the agency assesses whether there are any antitrust concerns. If such concerns are identified, the agency may pursue legal action by seeking an injunction in a Federal District Court to prevent the completion of the transaction.

The HSR Act in the United States establishes a structured and comprehensive process for reviewing M&A transactions for antitrust compliance. It places an emphasis on thorough evaluation and scrutiny, with provisions for extending the waiting period, if necessary. This approach ensures that potential antitrust concerns are addressed before transactions are finalized, contributing to the preservation of competitive markets.

Thus, the procedural amendments sought by the Amendment Act and Combinations Regulations are in line with international M&A practices, such as those in the EU and the United States. By adopting

[102]Hart–Scott–Rodino Antitrust Improvements Act, 1976 (94-435) s 201.
[103]Clayton Antitrust Act, 1914 (15 U.S.C.) s 7A(e).
[104]Federal Trade Commission's Premerger Notification Office, 'Introductory Guide 1- What is the Premerger Notification Program? An Overview' (2009) 13 <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf>.

practices akin to those in well-established jurisdictions, India enhances legal predictability and certainty for businesses engaged in M&A transactions. This can bolster investor confidence not only among the domestic players, but also creates an attractive environment for global players, thereby attracting foreign investment. The alignment with international public policy emphasizes India's commitment to fostering competitive markets and showcases its willingness to harmonize its regulatory framework with established norms, promoting consistency and collaboration in cross-border transactions.

VII. SETTLEMENT AND COMMITMENT MECHANISMS: A PARADIGM SHIFT IN RESOLUTION

A. Understanding the newly introduced settlement and commitment frameworks

The Amendment Act has made a pro-business overture by taking another edifying move of introducing the Settlement and Commitment framework ("**S&C framework**") for the companies accused of being engaged in anti-competitive practices. Under the said framework, companies may engage in settlement of the alleged contravention or provide commitments regarding the same in the prescribed manner. The framework has been referred to by various names in different countries and holds paramount importance in their competition regime.[105] The Madras High Court, in the case of *Tamil Nadu Film Exhibitors Association v. CCI*,[106] maintained that the envisaged framework already exists within the statutory framework, citing the

[105]Directorate for Financial and Enterprise Affairs Competition Committee, 'Executive Summary of the Roundtable on Commitment Decisions in Antitrust Cases held at the 125th meeting of the Competition Committee of the OECD' (*OECD*, 19 December 2016) <https://one.oecd.org/document/DAF/COMP/M(2016)1/ANN5/FINAL/en/pdf> accessed 23 May 2023.

[106]*Tamil Nadu Film Exhibitors Assn. v CCI* (2015) SCC OnLine Comp AT 37.

expansive powers granted to the CCI under Section 27 of the Act of 2002. Despite the court's perspective, the CLRC contested this interpretation. Instead, the CLRC advocated for the creation of a separate and explicit provision within the Act of 2002 to delineate the proposed framework. Consequently, the framework was subsequently incorporated into the Act by way of the Amendment Act, under Sections 48A[107] and 48B,[108] in alignment with the recommendations put forth by the CLRC. There is also a provision for the revocation of the S&C framework by the CCI under Section 48C of the Act.[109] The outlined mechanism has also been envisaged by SEBI under the SEBI Act[110] and the SEBI Settlement Regulations, 2014.[111]

Under the previous structure outlined in the Act, if the CCI, based on information obtained from the central or state government, or through an inquiry pursuant to Section 19 of the Act of 2002,[112] formed the opinion that the company had violated Section 3(1)[113] by engaging in agreements leading to an Appreciable Adverse Effect on Competition ("**AAEC**"), or Section 4(1) of the Act of 2002[114] by abusing its dominant position, it had the authority to direct an investigation by the Director General into the matter under Section 26(1) of the Act of 2002.[115] Currently, the proposed business-friendly regulatory framework under Section 48A of the Act allows the companies, against whom the investigation is to be carried out by the Director General, to file an application and pay the required fee for settlement of the alleged contravention under Section 3(4) or 4 of the Act of 2002. Such an application can, however, be made only after the report by the Director

[107]The Competition Act, 2002 (12 of 2003) s 48 A.
[108]The Competition Act, 2002 (12 of 2003) s 48 B.
[109]The Competition Act, 2002 (12 of 2003) s 48 C.
[110]Securities and Exchange Board of India Act, 1992 (15 of 1992).
[111]Securities and Exchange Board of India (Settlement of Administrative and Civil Proceedings) Regulations, 2014.
[112]The Competition Act, 2002 (12 of 2003) s 19.
[113]The Competition Act, 2002 (12 of 2003) s 3(1).
[114]The Competition Act, 2002 (12 of 2003) s 4(1).
[115]The Competition Act, 2002 (12 of 2003) s 26(1).

General is received by the concerned parties. The CCI is empowered to assess the gravity of the situation and if it is not satisfied with the settlement, it may continue with the inquiry into the matter. On a similar vein, Section 48B of the Act further enables companies, under investigation by the Director General, to submit an application and pay the requisite fee. This application should include commitments related to the alleged contraventions mentioned in the Commission's order pursuant to subsection (1) of Section 26. The offer for commitments is permissible after the issuance of the CCI's order under Section 26(1) of the Act, but before receiving the Director General's Report as per Section 26(4) of the Act.[116] The commitment framework enshrined in the act encompasses monetary penalty as well as behavioural remedies.[117]

Additionally, Section 48C of Act empowers the CCI to revoke the orders made under Sections 48A and 48B if, upon investigation, the Commission determines that the applicant failed to provide complete and accurate disclosure, or if there has been a material change. It may be pertinent to note that offences pertaining to cartelization are not included in the S&C framework, as leniency of parties is allowed by the CCI under Section 46 of the Act.[118]

Further, the mechanism outlined above is in consonance with internationally prevalent practices noted in jurisdictions such as the EU, the United States of America, Singapore and the United Kingdom.[119] For instance, in the EU, the settlement procedure is applicable on cartels,[120] though commitment frameworks are not

[116]The Competition Act, 2002 (12 of 2003) s 26(4).
[117]Parliamentary Standing Committee on Finance, 'Fifty Second Report on the Competition Amendment Bill, 2023' (December 2022) <https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf>.
[118]The Competition Act, 2002 (12 of 2003) s 46.
[119]ibid.
[120]Falvilo Laina and Elina Laurinen, 'The EU Cartel Settlement Procedure: Current Status and Challenges' (2013) 4(4) Journal of European Competition Law & Practice 304-311.

applicable on the same.[121] Similarly, while a settlement decision in the EU requires an infringement and necessitates an admission of guilt from the involved parties, a commitment decision neither confirms an infringement, nor demands any admission from the parties.[122]

B. Analysis of its potential to expedite dispute resolution and reduce litigation

The ever-increasing complexity of the cases before the Commission has not only significantly increased the time of the Commission to deliver justice to the parties, but also to collect the penalties imposed on the parties such as in the case of *Mr. Umar Javeed and others v. Google LLC*.[123] Additionally, according to the CCI Report 2021-22, there were 64 cases pending before the Commission.[124] The S&C framework can thus be the trump card for reducing the burden of the backlog of cases on the CCI by helping the Commission to dispose of the cases in a shorter period of time as compared to year-long legal proceedings.

Moreover, the S&C framework does not allow appeal under Section 53B of the Act.[125] With the elimination of appellate jurisdiction, the CCI finds it more streamlined to collect the imposed penalties from companies. Previously, the involvement of an appellate body often resulted in delayed penalty collection as parties would opt for this route. While the Appellate Tribunal affirmed the CCI's decision in

[121]'Antitrust: Commission introduces settlement procedure for cartels' (*European Commission*, 30 June 2008) <https://ec.europa.eu/commission/presscorner/detail/it/MEMO_08_458> accessed 30 October 2023.
[122]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) para 4.2 <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.
[123]*Umar Javeed v Google LLC* (2022) SCC OnLine CCI 61.
[124]Competition Commission of India, 'Annual Report 2021-22' (2021) <https://www.cci.gov.in/images/whatsnew/en/b1671704450.pdf> accessed 20 October 2023.
[125]The Competition Act, 2002 (12 of 2003) s 53B.

many instances,[126] the adverse effect of the Tribunal's delayed rulings was felt by the aggrieved party.[127] In addition, numerous other spheres of economic activity will be significantly positively impacted by the new framework, particularly time-sensitive deals such as share purchase and cross border deals.

C. Examination of the potential benefits and risks of opting for settlement or commitment

One of the benefits of adopting the S&C framework is that the leniency mechanism provided under Section 46 of the Act proves effective for cartels and hence, the proposed framework's inclusion of cartels could expedite the dispensation of justice for disputing parties. On the other hand, the implementation of the S&C framework entails some drawbacks that warrant careful consideration.

One crucial aspect is the need for proper regulation regarding the incorporation of behavioural remedies to ensure companies' committed adherence. While the framework is a welcome step in expediting the resolution of disputes and is industry-friendly, it becomes important to introduce measures that help the CCI in ensuring that the enterprise accused of the anti-competitive practices adheres to the commitments made by it and does not escape liability.

[126]Sagardeep Rathi et al 'India: CCI Increases enforcement activity and scrutiny of merger control' (*Global Competition Review*, 10 March 2023) <https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2023/article/india-cci-increases-enforcement-activity-and-scrutiny-of-merger-control> accessed 30 October 2023.
[127]ibid.

VIII. GLOBAL TURNOVER AND PENALTIES: IMPLICATIONS FOR MULTINATIONAL CORPORATIONS

A. Transforming turnover definition: Unveiling the dynamics of the new competition regime

Before the Amendment Act came into effect, if the CCI determined, in accordance with Section 26 of the Act of 2002,[128] that the Company had violated Section 3(4) of the Act[129] through agreements resulting in AAEC or Section 4 of the Act[130] by abusing its dominant position, then, as outlined in Section 27(b) of the Act,[131] the CCI possessed the authority to impose a penalty on the company. This penalty was capped at an amount not exceeding ten per cent of the average turnover over the last three preceding financial years.[132]

As per Section 2(y) of the Act, 'turnover' is defined as, 'the value of sales of goods or services.'[133] By virtue of this definition, the CCI was empowered to levy penalties based on the overall turnover of the accused company. However, this approach led to unjust and disproportionate penalties for companies providing multi-product service,[134] since the turnover of the entire company was used as a benchmark for imposing penalties, rather than the turnover of the specific product or service market in which the company allegedly abused the dominant position. This practice resulted in numerous cases where the CCI imposed substantial penalties on accused companies. One such instance prompted judicial intervention to establish clear

[128]The Competition Act, 2002 (12 of 2003) s 26.
[129]The Competition Act, 2002 (12 of 2003) s 3(4).
[130]The Competition Act, 2002 (12 of 2003) s 4.
[131]The Competition Act, 2002 (12 of 2003) s 27(b).
[132]ibid.
[133]The Competition Act, 2002 (12 of 2003) s 2(y).
[134]*Excel Crop Care Ltd. v CCI* (2017) 8 SCC 47.

limits on the CCI's authority to address and rectify this issue. In *Excel Crop Care Ltd. v. CCI*,[135] the CCI levied a penalty amounting to 9% of the total turnover of the companies, which amounted to an enormous amount of penalty. The Supreme Court of India, in this case, drew the yardstick for the CCI to levy a penalty by stating that the CCI can only impose a penalty on the 'relevant turnover' i.e., the turnover from the specific product or service market in which the company has abused the dominant position.

The Amendment Act has proposed an amendment to the definition of 'turnover', which has to be used as the threshold for levying the penalty. Under section 27 of the Act,[136] two *explanations* have been enumerated regarding 'turnover'. Under *explanation two,* turnover is considered to be *global turnover* for the penalty. It has been defined as value derived from all the products and services by a person or an enterprise. Additionally, under *explanation one,* the turnover has to be determined according to the regulation. As a result of the specified amendments, the CCI is once again authorized not only to collect penalties from the relevant product market, but also to impose penalties on all the products and services offered by the company.

Additionally, the term 'global turnover' signifies that the value of the company's net exports to countries other than the one where the abuse of dominant position occurred is also factored in when calculating the 'global turnover'. Henceforth, the amendment overrides the judicial pronouncement in *Excel Crop Care Ltd. v. CCI* by restoring the authority of the CCI to take into account the global turnover of the company.

[135]ibid.
[136]The Competition Act, 2002 (12 of 2003) s 27.

B. Examining the potential benefits of considering 'global turnover' as the threshold for penalties

The reinstated authority of the CCI, as granted by the Amendment Act, to impose penalties on all the goods and services provided by a company is poised to exert a deterrent influence on enterprises, dissuading them from engaging in agreements that run afoul of Sections 3 and 4 of the Act.[137] Moreover, the current legal approach is deemed more judicious in delivering justice to involved parties compared to the prior stance taken by the judiciary in the *Excel Crop Care Ltd. v. CCI*. This assertion finds support in both the CLRC Report[138] and the Fifty-Second Report of the Parliamentary Standing Committee on Finance,[139] underscoring the contemporary appropriateness of this regulatory framework.

Not only that, the 'relevant' market approach taken after *Excel Crop Care* encountered shortcomings as highlighted in the *Nagrik Chetna Manch v. Fortified Security Solutions & Ors.*[140] case. Here, the opposing parties falsely claimed to be manufacturers in the same line of business when they were not. They invoked *Excel Crop Care*, arguing that they lacked a 'relevant' market and, therefore, should not face penalties. However, the CCI rejected it by differentiating the facts and concluded that if 'relevant' turnover is considered, it would reduce the deterrent effect of Section 27 of the Act.[141] The CLRC supported this stance, emphasizing that using relevant turnover would exempt agreements employing the *Hub and Spoke method* from penalties. This

[137]The Competition Act, 2002 (12 of 2003) ss 3 and 4

[138]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.

[139]Parliamentary Standing Committee on Finance, 'Fifty Second Report on the Competition Amendment Bill, 2023' (December 2022) <https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf>.

[140]*Nagrik Chetna Manch v Fortified Security Solutions* Case No. 50 of 2015 <https://cci.gov.in/antitrust/orders/details/732/0>.

[141]ibid at para 95.

is because situations may arise where the Hub is not in the same line of business as the Spokes, and consequently, it does not derive direct income from the relevant market.[142]

Further, the opinion of the CCI and CLRC is in line with international jurisdictions such as the EU and Singapore. In the EU, the EC imposes penalties on companies based on global all-over-turnover.[143] Furthermore, in Singapore, the 'turnover' is considered, rather than relevant turnover for imposing penalties.[144] This ensures the deterrent effect on the parties while imposing relevant checks.

C. Analysing the potential drawbacks of considering 'global turnover' as the threshold for penalties

While the incorporation of 'global turnover' for imposing penalties, as per the amendment, brings about positive outcomes, it also carries potential adverse effects. These drawbacks might surpass the advantages of the established mechanism unless the CCI issues specific guidelines to limit and clarify the extent of penalties that can be imposed. The deterrent effect intended by the CCI can lead to negative consequences in various aspects.

One of the possible adverse effects of intending to establish a deterrent effect is that, it can negatively affect the ease of doing business in India. This is evident as the MNCs with multi-product/services will be at a disadvantage having to shoulder higher liability as compared to other companies in the same line of business, who are either single product or service companies, or do not operate in other parts of the world.

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[142]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) 78-82 <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.

[143]EC, Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02) Official Journal of the European Union <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2006:210:0002:0005:en:PDF>.

[144]Singapore Competition Act, 2004 s 69(4).

Additionally, this criterion can be unreasonable and disproportionate as it seems illogical to the court to penalise the party for the product in which it did not abuse the dominant position.[145] Moreover, a situation may arise where a multinational corporation ("**MNC**") with a diverse range of products or services is accused of abusing its dominant position in the relevant market of one particular service. However, the percentage of turnover from that specific product could be minimal compared to other products or services offered by the company. Under the current framework, the MNC could be subjected to substantial liability because the turnover from other sectors would also be taken into account, thereby failing the *proportionality test*. It is pertinent to highlight the observation in *Excel Crop Care* regarding the purpose of the legislation, wherein the court noted that the aim of the legislation is not to deviate from 'teaching a lesson' to the violators and lead to the 'death of the entity' itself.[146]

Furthermore, in the proposed mechanism, there is no certainty regarding *the calculation of the penalties* as well. While the upper cap that has been fixed is 10% of the 'global turnover', the CCI did not lay out any strategic framework to decide the penalty for the parties. Although it has been mentioned in Section 27 of the Act that penalty may be levied as the CCI deems fit, this would lead to absoluteness and arbitrariness.[147] The proposed framework may derive inspiration from the observations in *Excel Crop Care* in this regard, wherein the court introduced specific factors to arrive at the appropriate percentage of penalty based on aggravating and mitigating circumstances, thereby guaranteeing objectivity and certainty. The factors included, "*(a) the nature, gravity and extent of the contravention; (b) the role played by the infringer; (c) the duration and intensity of participation; (d) the bona fides of the infringer; (e) the profit/benefit derived from the contravention; (f) loss or damage suffered as a result of the*

[145] *Excel Crop Care Ltd. v CCI* (2017) 8 SCC 47.
[146] ibid.
[147] ibid.

contravention; (g) the market circumstances in which the contravention took place including the nature of the product; market share of the entity, and barriers to entry in the market."[148]

By imposing penalties that are both certain and proportionate, the CCI can effectively cross two hurdles with one leap – delivering justice to the parties involved and reducing the likelihood of appeals arising from penalties perceived as disproportionate, a situation exacerbated by the absence of a clear yardstick for proportionality until now. Even the Raghavan Committee Report highlighted that there ought to be penalty guidelines.[149] Therefore, the CCI has to come up with specific guidelines to ensure objectivity and certainty regarding penalties. The suggestions for the same have to be understood in consultation with the international competition law regimes.

UK, EU and various other jurisdictions have penalty guidelines for ensuring certainty and objectivity. The Competition and Markets Authority ("**CMA**") has been tasked in the UK with developing and publishing recommendations on the appropriate degree of penalty. Furthermore, the CMA is required by law to take the offered advice into account when establishing the proper level of a penalty.[150] In order to fulfil this duty, the CMA published the CMA Penalty Guidance, which, among other things, establishes the standards for calculating fines for violations of the UK Competition Act.[151] It also published Penalty Guidelines such as *Transparency and Disclosure: Statement of the CMA's policy and approach (CMA6)*[152] and *CMA's Guidance on*

[148]ibid.
[149]Chairman SVS Raghavan, 'Report of the High Level Committee on Competition Policy and Law' (2000).
[150]UK Competition Act, 1998 s 38(8).
[151]Competition & Markets Authority, 'CMA's Guidance as to the Appropriate Amount of a Penalty' (16 December 2021) <https://assets.publishing.service.gov.uk/media/622f73c58fa8f56c170b7274/CMA73final_.pdf> accessed 24 December 2023.
[152]Competition & Markets Authority, 'Transparency and Disclosure: Statement of the CMA's policy and approach' (January 2014)

Competition Disqualification Orders (CMA102),[153] amongst others, to further ensure transparency and reasonableness in delivering justice to the parties.

In a similar fashion, it has been put forward by the Court,[154] CLRC[155] and the Parliamentary Standing Committee on Finance[156] that the CCI shall also issue certain Penalty Guidelines to restrict the ambiguity which arises due to the present framework. The power to the CCI has been provided under Sections 64A[157] and 64B of the Act[158] to publish the Penalty Guidelines, which consequentially helps in meeting the objective of the Act i.e., *to defend consumer interests from anti-competitive behaviour, foster and sustain market competition, safeguard consumer interests, and guarantee other market participants' freedom of trade.*[159] Thus, overall, care must be taken to ensure that the adverse effects brought about by the incorporation of 'global turnover' do not overpower its positive implications or pose a threat to the ease of doing business.

<https://assets.publishing.service.gov.uk/media/5a7cc94aed915d63cc65cd6e/CMA6_Transparency_Statement.pdf> accessed 17 October 2023.

[153]Competition & Markets Authority, 'Guidance on Competition Disqualification Orders' (6 February 2019) <https://assets.publishing.service.gov.uk/media/5f3d3ca9d3bf7f1b164fe1a4/CMA102_Guidance_on_Competition_Disqualification_Orders__FINAL__PDF_A-.pdf> accessed 15 October 2023.

[154]*Excel Crop Care Ltd. v CCI* (2017) 8 SCC 47.

[155]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) 82-84 <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.

[156]Parliamentary Standing Committee on Finance, 'Fifty Second Report on the Competition Amendment Bill, 2023' (December 2022) <https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf>.

[157]The Competition Act, 2002 (12 of 2003) s 64A.

[158]The Competition Act, 2002 (12 of 2003) s 64B.

[159]The Competition Act, 2002 (12 of 2003) s 1.

IX. HUB AND SPOKE CARTELS: EXPANDING THE SCOPE OF ANTI-COMPETITIVE AGREEMENTS

A. Inclusion of hub and spoke cartels

There are two types of agreements that are entered into by companies i.e., horizontal and vertical agreements. Horizontal agreements have been defined as any agreement entered into between entities including cartels, engaged in identical or similar trade of goods or provision of services, which has AAEC.[160] Vertical agreements are entered into by entities at different levels of the production chain, which may cause AAEC.[161] There is also a unique form of agreement i.e., 'hub and spoke' cartels. They are different from the horizontal agreements as the spokes, i.e., competitors in the same field are connected through a 'hub'. Thereby, exchange of information happens indirectly through the main hub.[162] These agreements do not have a unified definition as they vary according to the territorial jurisdictions.[163] The OECD has defined hub-and-spoke arrangements as agreements among competitors operating in a specific market (referred to as "spokes"), coordinated by vertically associated intermediaries (known as "hub").[164] This coordination primarily occurs through the exchange of information.'[165]

Prior to the amendment, while Section 3 of the Act of 2002[166] encompassed cartels as well as horizontal and vertical agreements

[160]The Competition Act, 2002 (12 of 2003) s 3(3).
[161]The Competition Act, 2002 (12 of 2003) s 3(4).
[162]Yash Arjaria and Kunal Thawani, 'Hub and Spoke Cartels in the Indian Competition Regime: Sketching the way forward' (*Centre for Business and Financial Laws NLU Delhi*, 25 January 2023) <https://www.cbflnludelhi.in/post/hub-and-spoke-cartels-in-the-indian-competition-regime-sketching-the-way-forward> accessed 24 December 2023.
[163]ibid.
[164]ibid.
[165]ibid.
[166]The Competition Act, 2002 (12 of 2003) s 3.

between enterprises or associations or men in similar business, it did not cover hub and spoke agreements. Thus, the challenge for the CCI in handling hub and spoke agreements was evident, given the absence of any specific reference to such agreements in the entire Act. Consequently, in many cases, the CCI relied on Section 3(3) of the Act of 2002 to address matters related to hub and spoke agreements.[167] It was presumed under Section 3(3) of the Act of 2002 that horizontal agreements were presumed to have an AAEC, unless otherwise rebutted.[168] However, while spoke agreements were able to be captured in the prohibition against cartels, there was some conjecture that the hub may escape liability under the same.[169]

In addressing this gap, the Amendment Act introduced an additional proviso in Section 3(3) of the Act, holding companies accountable for participating in the advancement of an agreement. This encompasses both the Hub and the Spokes. This is done by creating a *rebuttable presumption* against an enterprise or association of enterprises if it is proved that such person or enterprise intended to actively participate in the furtherance of the agreement,[170] that is, the hub and spoke agreement.

The inclusion of the Hub and Spoke method under Section 3 of Act[171] has been supported by the CLRC[172] and the Finance Committee in the 52nd Annual Report.[173] The reason for inserting this provision through

[167]*Samir Agrawal v Competition Commission of India & Ors.* (2021) 3 SCC 136.
[168]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) 60-62 <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.
[169]ibid.
[170]The Competition Amendment Act, 2023 (9 of 2023) s 4(b)(iii).
[171]The Competition Act, 2002 (12 of 2003) s 3.
[172]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.
[173]Parliamentary Standing Committee on Finance, 'Fifty Second Report on the Competition Amendment Bill, 2023' (December 2022) <https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf>.

the amendment is that, in the absence of provisions governing the same, there were scenarios where the hubs tried to escape liability as they were not in the same line of business as the spokes, and claimed that they were not in the 'relevant market', thereby, no penalties shall be imposed on them.[174]

It is to be noted, however, that even prior to the Amendment Act, the recognition of 'hub and spoke' agreements was seen in the *Uber case*,[175] where the CCI identified two conditions for the presence of a 'hub and spoke' cartel: (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 the instant case, the CCI did not find a reason to make a finding of a hub and spoke cartel.

Additionally, in *Nagrik Chetna Manch v. Fortified Security Solutions & Ors.*,[176] the CCI faced a similar issue where the hub was not engaged in the same line of business as the spokes. In this case, the informant had made allegations of bid-rigging between the opposite parties and the report of the DG had found that there had been a meeting of mind and coordination between the parties on account of personal connection, internet protocol access, and one party emerging as the L-1 bidder in all the cases, and they were held liable under Section 3 of the Act. However, the parties claimed that they should be exempted from the application of Section 3 as they were not engaged in id*entical or similar trade of goods and provision of services* and since there was

[174]Directorate for Financial and Enterprise Affairs Competition Committee, 'Executive Summary of the roundtable on Hub-and-Spoke arrangements' (*Organisation for Economic Co-operation and Development*, 9 September 2020) <https://one.oecd.org/document/DAF/COMP/M(2019)2/ANN4/FINAL/en/pdf#:~:text=In%20a%20hub%2D%20and%2Dspoke,competing%20spokes%20occur%20only%20indirectly> accessed 29 October 2023.

[175]*Samir Agrawal v ANI Technologies Pvt. Ltd*. (2018) SCC OnLine CCI 86.

[176]*Nagrik Chetna Manch v SAAR IT Resources Private Ltd*. (2019) SCC OnLine CCI 28.

no entry-restriction, they were participating in the bidding procedure but could not be brought within the ambit of Section 3(3) of the Act of 2002. Nevertheless, the CCI rejected this argument, holding that the *business activities* for which the parties participated in the bidding procedure was relevant and not the actual business of the parties while deciding whether the parties could be included under Section 3(3) of the Act of 2002, and imposed a penalty based on the hub and spoke arrangement.

This was a testament of the gap present under Section 3(3) of the Act of 2002 which resulted in the hub escaping liability. However, the amendment brought in this provision can now bring any person or enterprise intending to actively participate in the hub and spoke agreement within the ambit of Section 3(3) and is a welcome and necessary change in the provision.

B. Examination of the challenges and concerns related to this expansion

The explicit inclusion of hub and spoke agreements within the scope of the Act comes with demonstrated benefits, as outlined earlier. However, certain drawbacks relating to the lack of clarity in the scope of the term 'intended to actively participate,' as emphasised by the CLRC and the Standing Committee,[177] need clarification from the CCI. The central argument that the CLRC advocated to include hub and spoke arrangements within the presumption structure given under Section 3(3) centred on *active participation* of the hub and not an *intention* or *knowledge* on its part as it would be difficult to prove such an intention or knowledge on part of the hub.[178] Addressing these concerns is essential to effectively implement the advocated principle

[177]Ministry of Corporate Affairs, 'Report of the Competition Law Review Committee' (26 July 2019) <https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf>.
[178]ibid.

in the Indian market, and to align with the goal of facilitating ease of doing business in India.

Furthermore, one of the prominent concerns regarding the application of the 'hubs and spokes' mechanism is understanding a means to establish a link between two vertical information exchanges, which is an essential to establish a hub and spoke agreement.[179] This problem particularly arises as a consequence of the differential treatment accorded to horizontal and vertical agreements, with the former being treated as anti-competitive *per se* while the latter being treated as anti-competitive on the application of the test of reason.

The CCI has held different opinions on what would amount to the establishment of vertical information exchange in different judgements pronounced by it. In the case of *Re: Anticompetitive conduct in the Dry-Cell Batteries Market in India*, the CCI upheld that any exchange of information between the hubs and spokes will lead to the establishment of such an agreement.[180] However, a differing stance was taken by the CCI which stated that only active exchange of information shall amount to the establishment of a vertical information exchange.[181] Further, in the case of *Shailesh Kumar v. M/S Tata Chemicals Ltd*., the CCI stated that if such information that is exchanged already exists in the public domain, then it does not amount to a vertical exchange information.[182]

Therefore, the changing stance of CCI in different judgements led to the rise of uncertainty and ambiguity over the essentials for establishing

[179]Lavanya Jha and Shreya Jha, 'Inclusion of the Hub-and-Spoke Agreement in the Draft Competition Bill, 2020' (*Centre for Business and Commercial Laws*) <https://cbcl.nliu.ac.in/competition-law/inclusion-of-the-hub-and-spoke-agreement-in-the-draft-competition-bill-2020/> accessed 29 October 2023.

[180]*Anticompetitive conduct in the Dry-Cell Batteries Market in India v Panasonic Corporation, Japan & Ors.* (2018) SCC OnLine CCI 81.

[181]*Samir Agrawal v ANI Technologies Pvt. Ltd*. (2018) SCC OnLine CCI 86 para 15; *Automotive Tyres Manufacturers Association v General Insurance Corporation of India* Case No. 21 of 2020 para 27.

[182]*Shailesh Kumar v M/S Tata Chemicals Ltd*. Case No. 66 of 2011 paras 66-72.

a vertical information exchange between the spokes and the hub and determining their liability in this regard. After various deliberations, the Amendment Act included of the criterion of when it can be proved that *parties intend to actively participate in the furtherance of the agreement*.[183] This criterion provides for the 'intention' of the hub to be proved to bring it under the presumption of the proviso. This criterion presents further challenges in proving tacit understanding and intention on the part of the spokes which might be difficult to establish due to the covert nature of such agreements. This might lead to inefficacy of the provision in preventing and penalizing instances of hub and spoke agreements.

In summary, a fundamental issue surrounding the implementation of the provision of hub and spoke agreements lies in proving vertical information exchanges. This has been further exaggerated by differing judicial interpretations and statutory amendments which call for intention and possible concerted action on the part of parties to establish vertical information exchanges. It is imperative to address this issue in order to ensure the effective implementation of the provision.

C. Implications for e-commerce platforms and industry associations

The conceptualized hub and spoke agreements in the competition regime of India are going to have a tremendous impact on the emerging e-commerce platforms and industry associations. This becomes pertinent in cases where these e-commerce platforms become the source of information for leaking sensitive information. In these cases, it becomes particularly difficult to establish collusion between the parties and the liability of the e-commerce platform.[184] This additionally becomes important in the post-pandemic society which has

[183]Parliamentary Standing Committee on Finance, 'Fifty Second Report on the Competition Amendment Bill, 2023' (December 2022) <https://loksabhadocs.nic.in/lsscommittee/Finance/17_Finance_52.pdf>.
[184]*United States v. Apple Inc.* 952 F Supp 2d 638 (S.D.N.Y. 2013).

significantly shifted its reliance to e-commerce platforms and enabled entities to enter into pricing parity agreements.[185]

Further complications arise with the rise in e-commerce, which in turn, has concomitantly led to the rise of pricing algorithms between online entities. These entities use the same information technology to tap into the preferences and behavioural patterns of customers and use this information to collate prices. In such a circumstance, the parties enter into an anti-competitive practice unintentionally, which leads to the formation of a tacit collusion between the parties.[186] This acts in contrast to traditional hub and spoke agreements and calls for the adoption of a nuanced approach in dealing with these agreements.

This issue, however, has previously come up in the case of *Samir Agrawal v. CCI*,[187] wherein it was alleged that Ola and Uber have entered into a price fixing agreement as they use similar price algorithms to decide the ride's fair and the buyer does not have negotiating capacity, causing anti-competitive practices. The CCI, NCLAT and the Supreme Court upheld that the cab aggregators did not enter into hub and spoke agreement as there was no evidence of collusion between hubs and spokes since they acted under a particular price algorithm.[188] The continuously evolving e-commerce platforms could exploit a loophole in the reasoning behind the aforementioned decision. This is may be by the way of a *concerted practice*,[189] wherein it might seem that hub-and-spoke cartels employ different pricing

[185]Vismay GRN, 'An Analysis of Hub and Spoke Cartels in the E-Commerce Sector' (2021) II (1) Indian Journal of Law and Legal Research <https://3fdef50c-add3-4615-a675-a91741bcb5c0.usrfiles.com/ugd/3fdef5_f528fe389d004fd697345d5f7752a738.pdf> accessed 29 October 2023.
[186]ibid.
[187]*Samir Agrawal v Competition Commission of India & Ors.* (2021) 3 SCC 136.
[188]*Samir Agrawal v ANI Technologies Pvt. Ltd.* (2018) SCC OnLine CCI 86; *Samir Agrawal v Competition Commission of India* (2020) SCC OnLine SC 1024.
[189]Ariel Ezrachi and Maurice E Stucke, *Virtual Competition: The Promise and Perils of Algorithm-Driven Economy*, (1st edn, Harvard University Press 2016).

algorithms, but in reality, the same algorithm has been acquired by them as these platforms perform similar operations.

At this juncture, it would be pertinent to make a reference to international standards in the treatment of hub and spoke agreements. The UK and the US are among certain mature regimes on hub and spoke agreements. The legislations of these countries are broad enough to include all the types of agreements, and even in absence of the same, there have been various judicial interpretations laid down by the courts of these countries that provide a complete and effective regime in tackling hub and spoke cartels.

For instance, in the US, the Sherman Act[190] deals with anti-competitive practices. Although the statute does not recognise hub and spoke agreements, courts have adopted the *inference standard* to determine hub and spoke agreements, where regulatory authorities recognize the absence of direct communication in agreements of this nature.[191] Hence, they appropriately consider circumstantial evidence and the existence of *plus factors* to infer the existence of a hub-and-spoke cartel. These 'plus factors' are additional elements that authorities examine to draw conclusions, which encompass aspects like the nature of shared information, the consequences of sharing, and the structure of the market.[192]

In the UK, Section 2(1) of the Competition Act[193] encompasses a carefully worded provision prohibiting practices that have the potential to affect trade adversely. This also includes civil hub and spoke cartels. Additionally, courts in the UK have penalized not only hubs, but also spokes for engaging in anti-competitive activities. Furthermore, the courts have placed heavy reliance on the *intention* of the hubs and

[190]Sherman Anti-Trust Act, 1890.
[191]*United States v General Motors Corp.* (1966) 384 U.S. 127.
[192]*Ginsberg v New York* (1968) 390 US 629; *Toys "R" Us, Inc. v Step Two*, S.A., 318 F.3d 446 (3d Cir. 2003); *United States v Parke, Davis & Co.* (1961) 365 US 125.
[193]UK Competition Act, 1998 s 2(1).

spokes to enter into anti-competitive agreements, rather than the *per se* rule.[194]

Even in India, during the drafting of the Bill, FICCI and ASSOCHAM submitted that *active participation* of the entity in anti-competitive agreements shall be removed as a metric to determine hub and spoke cartel and reliance shall be placed on *intention* of the parties and thereby, the contemporary clause was formulated. In the digital ecosystem with interconnected products, the e-commerce platforms with multifaceted business models may act as intermediaries to provide cross-platform information and establish an inter-ecosystem.[195] These intermediaries will be put at a disadvantage and greater scrutiny, as the amendment only calls for *participation and an intention to participate* by the person or enterprise and not its *intention to enter into a hub and spoke agreement*.

In conclusion, the rise of digital e-commerce platforms after the COVID-19 pandemic as a response to the demand of the economy has led to the rise of newer challenges regarding pricing algorithms and adverse parity control mechanisms between the entities which calls for a nuanced approach in dealing with the issue. In this context, reference can be made to international standards in the form of *inference model* and *concerted participation*. The developments made in this regard by the inclusion of a new proviso under Section 3(3) by the Amendment Act are a significant step in this direction to address the challenges posed by a post-pandemic economy. However, the aspect of *intention* still poses a risk of escaping liability by the hub due to difficulties in establishing tacit intent between the parties. A reference must be made

[194]Decision of the OFT, *Dairy products: investigation into retail pricing practices, Case No. CA98/03/2011* <https://www.gov.uk/cma-cases/dairy-products-investigation-into-retail-pricing-practices>.

[195]Sanjay Vashishta and Abhay Pratap, 'Navigating the Hub-and-Spoke Cartel in India: An Analytical Overview of the New Provision' 2023 SCC OnLine Blog Exp 75 <https://www.scconline.com/blog/post/2023/10/05/navigating-hub-and-spoke-cartel-in-india-an-analytical-overview-of-new-provision/>.

to circumstantial evidence and the appreciation of *plus factors* to overcome this lacuna.

X. CONCLUSION

The Amendment in the Competition Act marks a long overdue step in aligning the competition law regime in India with the technological and related advancements of the corporate arena and the newer forms of deal-making arrangements between companies. The Amendment brings about significant reforms in the areas of mergers, acquisitions and cartelisation. The introduction of DVT is a significant step in the direction of preventing anti-competitive practices like killer acquisitions and abuse of the *de minimis* exception. However, its application needs an intricate balance to be drawn between the need to prevent misuse and escape from provisions, and the aim to prevent the law from becoming overbearing and hindering the ease of doing business.

The shift towards the *material influence* test of *control* signifies a welcome change in the Indian merger control regime that is better adaptable and flexible, providing for a better understanding of non-traditional forms of control that can be exercised by an individual or entity. This is further effective in aligning the Indian provisions with the international standards of defining *control*. Further, the introduction of newer procedural timelines effectively aligns the law in India with the international M&A practices that brings about a greater level of certainty and showcases India's willingness to harmonize its competition regime with established norms and facilitate cross-border transactions.

The S&C mechanism presents a further instance of India's aim to make the competition regime more industry-friendly and signifies a more mature interpretation of the methods to prevent anti-competitive practices. It incentivizes firms to be better accountable and preserve their reputation at the same time, while providing them a way out of

the liability of the contravention of the Competition Act. However, it is imperative to set up a mechanism to ensure the adherence of the accused entities to their commitments and settlements.

The proposed provision of calculating penalties in proportion to the global turnover of companies is aimed to exert a deterrent effect on companies from entering into anti-competitive practices. However, it brings about a plethora of negative impacts that foreshadow its positive impacts. This would lead to a prominent setback to the ease of doing business in India and would be discriminatory, placing the MNCs that deal with multiple goods/services in multiple countries at a disadvantage, and would subject them to higher penalties even in defaults involving relatively smaller turnovers. This would result in disincentivizing the MNCs to conduct business in India and therefore, this provision must be altered to call for calculation of penalties based on relevant turnover.

The explicit inclusion of hub and spoke cartels in the Competition Act is in line with the objectives of the Act and international standards. It comes with various demonstrated benefits and helps in establishing a regime that does not allow for gaps which are prone to abuse by actors who escape liability, as a result of ambiguities in law. This pertinently marks a shift in addressing such arrangements in the digital market and e-commerce platforms which have historically escaped liability. However, this also necessitates a need to better define the criterion for establishing vertical exchange of information. The current provision introduced in the Amendment Act provides for *intention* as being one of the elements to prove collusion. This might be difficult to prove in cases that call for covert understanding between the parties and the objective for the inclusion of this provision would be defeated. In this regard, there is a need to introduce the evaluation of *circumstantial evidence* and *plus factors* in determining tacit collusion which is in line with the international standards.

The Competition Amendment Act, therefore, is a well-thought and meticulous step in making the Indian Anti-Trust regime effective in overcoming the challenges posed by a post-pandemic economy. It offers a fresh and mature perspective to building a platform that is both consumer-friendly and industry-friendly. It marks India's intent to align its policies with that of international standards and incentivize investment in the Indian economy.