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EDITORIAL NOTE

Ashna Chhabra & Aadhya Kancharla

The importance of a robust legal framework that takes into consideration data protection, privacy, and competition concerns has been emphasized by practitioners & academicians in the recent past more than ever. While regulators, both in India and globally, have been attempting to fine-tune their laws to monitor the digital markets as well as provide citizens with the right to privacy in a surveillance State, COVID-19 has tested the limits of the existing legal regime.

The shift to virtual workspaces as well as the collection of health data from employees by companies has tested the practicality of a consent-based approach embedded in our current data protection principles vis-à-vis the Information Technology Act, 2000 (“IT Act”) read with the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011. In lieu of the liability accorded to corporates under Section 43A of the IT Act, companies would have to circulate clear data privacy policies and increase transparency in their data collection and processing methods along with informing employees of technologically safe work from home practices.

Technological interventions, particularly in the form of contact tracing tools, have gained importance in curbing the spread of the pandemic. This has naturally led to emergence of concerns regarding the ethical processing and storage of personal data of individuals, with the onus being placed on regulators to strike a balance between protecting individuals’ right to privacy while ensuring public safety.

In the Indian context, both at the Central and State level, applications that incorporate mapping and location tracking techniques are being used to assist the authorities in monitoring & controlling the outbreak, and the privacy policies of the same indicate structural limits that even the Personal Data Protection Bill (“PDP Bill”), which is pending legislative assent, fails to address.

It remains to be seen how auditability, accountability, and retention periods of data collected, among other concerns would be dealt with given the current functioning of regulators across sectors.
On the competition law front, concerns as to the lack of regulation regarding Big Data and data-driven mergers remain. The recent CCI approval of the Jio-Facebook deal has led to speculations regarding the data-sharing practices of the platforms, highlighting the need for amendments to the existing merger control regime. Considering that CCI has allowed filing of combination notices under Green Channel through email, payment of the fee electronically and has also issued revised guidance notes to ease the same, there is a scope for increased M&A activity, particularly by the Tech giants, and would require a cross-sectoral cooperative approach to tackle privacy concerns within the competition regulation.

In Can India, equipped with the Personal Data Protection Bill, 2019, Reapply for an Adequacy Decision from the EU? the author, Ameya Foujdar, succinctly puts forward his opinion on the adequacy of the efforts being taken by India in the direction of adopting a robust Data Protection framework. He goes on to discuss the role played by the EU in modelling the Indian Data Protection Regime in light of the principles laid down by the General Data Protection Regulations (GDPR). He further analyses the underlying idea behind the Adequacy Decisions being granted by the EU, and concludes by putting forward a three-step approach and the stage on which India stands today to achieve its goal of being recognized as a data protection conscious economy.

Secondly, a comprehensive article by the author Souradeep Mukhopadhyay titled the American Rule of Reason in the Indian Competition Regime discusses the development of the two prominent principles i.e. ‘Per Se Rule’ & the ‘Rule of Reason’ in the U.S. Antitrust framework. He extensively delves into the extent of adaptation and application of these principles in the Indian Regime and presents a comparison highlighting the distinction in the standards applied in both these jurisdictions.

This is followed by another insightful piece by Sambhawi Sanghmitra & Vijay Rohan Krishna titled How Settling is the Settlement and Commitment Mechanism proposed by the Draft Competition (Amendment) Bill: A Comparative Analysis. The authors begin by discussing the basis of the Commitment and Settlement mechanism as it stands in the sphere Antitrust Law. The authors outline the models adopted by other mature jurisdictions by tracing their development through the legislative as well as the judicial lens. Thereafter, they extensively analyse the relevant decisions prior to the proposed Amendment and the concerns surrounding the proposed
introduction of the Settlement & Commitment Mechanism in the Indian framework in case of violation of Section 3(4) & 4 of the Competition Act.

_Akshita Goyal & Kanika Jain_, in the article titled **Minimum Advertised price: An International Perspective** begin with discussing in detail the concept of _Minimum Advertised Price_ (MAP) and its increasing relevance in the digital era. The Authors delve into the prevailing practices with respect to MAP adopted by developed jurisdictions. Further, the article presents an extensive discussion regarding the scope of the concept of Resale Price Maintenance (RPM) and the treatment of vertical restraints under the Indian Competition framework. The authors conclude by putting forward their recommendations by suggesting the appropriate model that can be adopted by India to introduce the concept in the existing framework.

Finally, _Prateek Joinwal_ presents an intriguing piece by initiating the discussion on _Demystifying the Role of Artificial Intelligence in Online Dispute Resolution_ in light of the changing contours of dispute resolution specifically in the face of the present unprecedented challenges posed in front of us. The author begins the discussion by evaluating the advantages of adaptation of an Online Dispute Resolution (ODR) framework. Subsequently, he advocates the adoption of Artificial Intelligence induced ODR framework by substantiating his arguments with the benefits posed by the existing platforms globally. He then critically examines the proposed system and advances an interesting perspective by delving into the ethical considerations attached to such a regime, and concludes by discussing the proposed system in the context of the Indian legal system.

_JICIL_ envisions being a true open-access journal, committed to keeping its readers updated on contemporary issues in the field of Technology, Competition, and Intellectual Property Laws and providing a quality platform to practitioners, academicians and students to put forward their research and analysis and trigger a discussion on the emerging concerns in the existing legal & regulatory framework both at the National and the Global level. We would like to sincerely acknowledge the constant support and guidance extended by the Publishing Unit throughout the entire process. We hope all of us come out of these challenging times undefeated and with even more conviction than before.

_Thank you._
OPINION: CAN INDIA, EQUIPPED WITH THE PERSONAL DATA PROTECTION BILL, 2019, REAPPLY FOR AN ADEQUACY DECISION FROM THE EU?

Ameya Foujdar, Senior Editor

India is moving close to passing a new sweeping regulation set out to revamp its data protection regime with the Personal Data Protection Bill (“PDP”). In this opinion, I will discuss the motivations behind this new regulation and try to envision the road ahead for India's journey to a data protection conscious economy, along with its current shortcomings.

HOW THE EUROPEAN UNION IS AN INFLUENCE IN INDIA'S BID TO DATA PROTECTION LEGISLATION

1.35 billion Indians are on the verge of being empowered with more control over their information, collected by companies, through the PDP Bill. It is no secret that this legislation enjoys motivation to be compliant with privacy-conscious economies, particularly the European Union (“EU”), which leads the world in matters of data protection legislation through the General Data Protection Regulation (“GDPR”). Europe, being India’s largest trading partner, brings to the table a significant financial reason to achieve harmony in data protection laws.

Upon its introduction in 2016, the EU’s GDPR deemed 12 counties to have adequate data protection. Article 45 of GDPR gives the European Commission (“EC”) the power to declare countries as having an adequate level of data protection (a favorable adequacy decision), thus enabling cross border transfers of personal data to such countries. Cross-border data transfers under GDPR require organizations to either be from countries that have a favorable adequacy decision or incorporate EC approved standard contractual clauses while satisfying GDPR data protection principles. Thus, the arrival of GDPR was followed by a wave of emails and notifications from companies and governments detailing that they are reworking their contractual clauses to enable cross-border data transfers with the EU. The Schrems II judgment worried many data controllers that the data transfer based standard contractual clauses may face changes but the Court of Justice of the EU (“CJEU”) affirmed its use.
The purpose of the Adequacy Decision Framework under Article 45 of GDPR is twofold; firstly, to ensure that cross-border data transfers provide an equal level of data protection and privacy standards and secondly, to reduce the compliance burden on organizations to enable smooth economic function. India attempted to take advantage of this framework in 2009-10 by applying for an adequacy decision hoping it would boost the information technology off shoring of Indian companies. Still, it has failed to procure one, at the time of the publication of this article. The study of Japan, the most recent country to successfully get a favorable adequacy decision from the EC, may shed some light on what India requires to secure a similar decision for itself.

The first step in the right direction: Constitutional recognition

Currently, India’s hopes of securing a favorable adequacy decision lie on the PDP Bill. India has come a long way to having a Bill tabled in the Lok Sabha. It all began in 2017, with the Supreme Court of India declaring the right to privacy as a fundamental constitutional right except for being overridden by state and public interests. The Supreme Court based the proportionality standard for the determination of infringements on Article 8 of the European Convention on Human Rights (ECHR). This basis set forth by the Supreme Court bids well for India's gambit to satisfy the EC’s Adequacy Decision framework.

The second step in the right direction: Privacy Principles

The updated PDP Bill of 2019 boasts of covering five out of the seven fundamental Privacy Principles found in Article 5 of GDPR, namely, the principle of purpose limitation, minimization of data, the lawfulness of processing, accountability, and accuracy of data. The storage limitation principle, after the 2019 update of the bill, allows organizations to retain data even after the purpose of processing is over but only upon procuring explicit consent.

The third misstep in enforcing the regulation and powers of public authorities, potentially leading to an unfavorable adequacy decision

GDPR, as any effective data protection regulation, ensures effective enforcement by appointing an independent authority. This authority is tasked with monitoring and requiring
compliance of the legislation without bias of any kind. The EC, while issuing its adequacy decision for Japan, judged the Japanese authority on its impartial functions and ability to monitor compliance independently. The process of drafting the Indian PDP Bill, which began with the Ministry of Electronics and Information Technology, setting up a committee headed by Justice B. N. Srikrishna, submitted the first draft in 2018. This draft was in 2019, accepted by the Cabinet Ministry, and tabled in the Lok Sabha but has received much criticism. The PDP 2019 bill undertakes an enforcement authority appointment but designates members of the executive branch to the committee that appoints such authority, thus diluting its independent nature. Since the enforcement authority's nature was a decisive factor in the Japanese decision, it is fair to assume that this non-independent nature of the PDP enforcement authority will impact the Adequacy Decision unfavorably.

Further, the PDP 2019 bill does not include safeguards to curtail the powers of the public authorities. Under Exemptions, it gives the central government the ability to 'exempt any of its agencies from the provisions of the Act' under specific conditions. These conditions include exemptions in the interest of the state's security, public order, and friendly relations with foreign states. 'Public order' significantly adds ambiguity and reduces the benchmark of when these exemptions are used to gain unhindered access to protected information. Such a provision of exceptions does not exist in the Japanese data protection laws and explicitly requires a court warrant to access protected data. Further, in the CJEU’s judgment on 16th July 2020, regarding the Schrems II case, one of the reasons why the CJEU abolished the Privacy Shield was the inadequacy of restraints and safeguards on the power of authorities under the US law. With such a recent precedent on the matter, it is clear that to get a favorable adequacy decision India needs to rework the limitations and safeguards on public authorities under the PDP Bill, 2019.

The Indian Information Technology Act also fails to curtail unhindered access to information by public authorities. The European Court of Justice, in the wake of the PRISM scandal, invalidated the Safe Harbor data-transfer agreement, showing the EU’s commitment to not giving unhindered access to protected data. Therefore, it is reasonable to say that the PDP 2019's exemption procedures do not bode well for India's desire to secure a favorable Adequacy Decision from the EC.
Although inspired by GDPR, the PDP 2019, for now, does not have the makings of a robust data protection regulation that may prepare India to apply for another the adequacy decision confidently. Among many who have voiced criticism of the PDP 2019 revision, media reports indicate that Justice B. N. Srikrishna, the chair of the original bill drafting committee, says that if passed, this bill may leave the possibility of creating an 'Orwellian State'.

It is also essential to not forget the primary purpose of any data protection regulation, which is empowering the people and protecting their personal information. Although a few steps have been taken in the right direction, the Indian Regulators still need to introduce significant changes to the PDP bill before it is capable of providing the people with their data protection rights complemented with an unbiased monitoring authority and safeguards against unhindered access by public authorities.
AMERICAN RULE OF REASON IN THE INDIAN COMPETITION REGIME

Souradeep Mukhopadhyay*

ABSTRACT

American competition law jurisprudence has a rich history of over a hundred years and has evolved much through various judicial pronouncements which have reinvigorated the old legislations with the capacity to deal with various emerging challenges over time. This process has caused the birth of several important legal principles which have not only become engrained in the American legal system but have also made their way into other legal regimes, though often with some changes and adaptations. This paper attempts to analyse the extent to which the American Rule of Reason and the Per Se Rule have percolated into the nascent Indian competition law regime. The author analyses the principles and puts them in contradistinction to the provisions of the Competition Act, 2002, to showcase how the Indian system emphasises on effect over form and almost universally applies an analysis of Appreciable Adverse Effect on Competition (“AAEC”), closely resembling a Rule of Reason analysis, to all cases of allegedly anti-competitive agreements.

Keywords: Rules of Reason, U.S. Antitrust Law, Competition Law Jurisprudence

* Advocate, Bar Council of Delhi, currently engaged as an Associate at Anand & Anand.
INTRODUCTION

Competition law, as we know it, has its prime object in securing economic order through measures meant to prevent disruptive forces in the economy which restrict trade or are otherwise unfavourable to the society, in general, and the economy, in particular. While it is a law based on and meant for the market economy, it may very well be seen as a law in conflict with the conventional understanding of *laissez-faire* which envisages minimal interference of the State in the economy.\(^1\) Therefore, there are those who are fiercely against competition law, advocating against it on the premise that it is a violation of an individual’s right to run a successful business\(^2\) or highlighting societal benefits of a monopoly. Again, there are some who believe that competition law should restrict its ambit to simply preventing gross abuse of monopoly, submitting that monopoly leads to reduced costs to society and increased welfare if the monopoly is not abused.\(^3\) However, notwithstanding the arguments against a competition law regime, over the past century, almost all major nations of the world have enacted laws to restrict or regulate anti-competitive practices and monopolies\(^4\) although the law has had a varied experience in various jurisdictions and has evolved accordingly.

The United States of America ("U.S.") is one of the first countries to have adopted a robust competition law regime and its experience has informed the legislative and judicial trends in other countries which have subsequently set up their own competition law regimes. This article aims to analyse the two major principles of American competition law, *i.e.*, the Rule of Reason and the *Per Se* Rule, and explores the extent to which these principles have percolated into the Indian competition law regime. The article begins with a brief introduction to American competition law, followed by a detailed analysis of the Rule of Reason and the *Per Se* Rule, as developed by the American courts over the years. Finally, the article assesses the applicability of the above rules in

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India and draws a contradistinction between the Indian approach of continually assessing Appreciable Adverse Effect on Competition (“AAEC”), and the American approach of alternatively applying the Rule of Reason and Per Se Rule.

AN INTRODUCTION TO AMERICAN COMPETITION LAW

The contribution of the U.S. in the field of competition law is unparalleled across the globe due to its long-standing impact on jurisprudence in various parts of the world for over more than a century. The reason for this is that it has not only been at the forefront of legislatively recognizing the field of law, but also exploring the myriad ways in which the law can evolve to meet the needs of changing times.

One must, however, note that, in the U.S., competition law is better known as antitrust law, and the reason for the same was the system of creating monopolies through trusts, prevalent in the 19th century. A striking example of the same was the Standard Oil Trust which comprised of the Standard Oil Company and several other companies of America engaged in retrieving, refining and selling oil. Through the trust agreement, the management of various businesses was handed over to 9 trustees led by John D. Rockefeller and the businesses were given a proportionate beneficial interest in the trust. Eventually, the trust went on to manage about 40 companies. This arrangement caused a major monopoly in the oil market of the U.S. and culminated in the landmark U.S. Supreme Court decision in Standard Oil Company v. United States (Standard Oil Case). The sheer magnitude of the monopoly which the Standard Oil Trust had created is clear from the fact that even though the Trust was broken down into over 30 companies, most of these companies held their own in the market. For instance, the famous ExxonMobil, Chevron, and Amoco were amongst the companies created.

In the U.S., antitrust laws are understood to be “a distinctive American means for assuring competitive economy on which our political and social freedom under representative government

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6 Id.

7 221 U.S. 1 (1911).
This field of law has developed for over a century through judicial pronouncements, though the three major legislations in the field were enacted over a century ago and have been scarcely amended and somewhat supplemented by certain legislations over the years.

The first legislation in this regard is the Sherman Act of 1890, and Supreme Court of the U.S. was not exaggerating when it drew a parallel of human rights and the Magna Carta with competition law and the Sherman Act, calling the Sherman Act the Magna Carta of competition law in the country. While the true intentions of Senator John Sherman in introducing the legislation in Congress were rather controversial and were often considered politically motivated, the major feature of the legislation was its attempt to prohibit restraints on trade and commerce and monopoly of market players. This regime is further supplemented by the Clayton Act of 1914, which deals with particular anti-competitive practices such as price discrimination, tying and exclusive dealing arrangements, mergers and acquisitions, and common directors or managerial personnel in competing companies. Also, the Federal Trade Commission Act, 1914 set up the Federal Trade Commission ("FTC") to not only enforce competition law, but also with a broader ambit of preventing unfair trade practices. These legislations continue to remain the major anti-trust legislations in the U.S. despite certain subsequent legislations, such as the Robinson–Patman Act of 1936 and the Celler–Kefauver Act of 1950 which have attempted to supplement the older legislations.

**Major Principles of Competition Law in the United States**

The above-discussed legislative framework, which is over a century old, has remained fairly constant, with few infrequent amendments, and the jurisprudence has continued to evolve over the past century through various judicial decisions and precedents, including several landmark

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judgments by the Supreme Court of the United States. These judgments have not only paved the way for the evolution of the law but have also led to the creation and growth of several principles which have now established themselves as fundamental in the global understanding of competition law.\textsuperscript{16} The evolution of these principles has enabled the courts to meet peculiar challenges posed by various fact situations and to fill up the gaps left by broadly-worded legislations.

It is interesting to note that the Sherman Act, as well as other competition law legislations in the U.S., is widely worded and contain broad legal principles, leaving it to the courts to interpret the law and also evolve the law with time to ensure adaptability with changing times. Taking note of the same, even the Supreme Court of the United States, in Appalachian Coals, Inc. v. United States\textsuperscript{17}, opined that the anti-trust laws have “a generality and adaptability comparable to that found to be desirable in constitutional provisions.” This approach to antitrust law is undoubtedly less certain than what could be achieved by a strictly worded and comprehensive statute, but nevertheless, it allows free and smooth adaptability to changing times, without the need for abrupt changes by legislative amendments.\textsuperscript{18}

Much like the English common law, this approach feels biological, insofar as there is a gradual adaptation to changing times through judicial precedents. In fact, one may argue that the reason why century-old legislations can still be used in the U.S. to effectively meet present day challenges to market competition is the fact that the legislations were widely worded,\textsuperscript{19} which only laid down the broad principles which were to be followed by the courts, leaving it to the courts to interpret the law in a manner so as to fill the gaps and make it applicable to various circumstances. \textit{For instance}, Section 1 of the Sherman Act simply states that all agreements in restraint of trade are void. However, as the U.S. Supreme Court correctly pointed out, a literal understanding of the above would proscribe all contracts since almost all commercial contracts restrain trade in some way or the other.\textsuperscript{20} This interpretation resonates with the U.S. Supreme Court’s ruling in \textit{Standard

\textsuperscript{16} Richard J. Pierce, \textit{supra} Note 5.
\textsuperscript{17} 288 U.S. 344, 360 (1933).
\textsuperscript{20} Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705, 2712 (2007).
Oil to hold that only agreements that imposed ‘unreasonable’ restraints on trade were prohibited. In fact, in the various Committee Reports concerning the FTC Act, the Congress expressly mentioned its intention to leave it open to the FTC to gradually evolve the jurisprudence to interpret what amounted to ‘unfair methods of competition’ which the Sherman Act prohibited.

Therefore, as things stand today, it is difficult to understand American anti-trust law without knowledge of the various principles which have evolved through judicial decisions, and the same may even be said for competition law as a field, since, American jurisprudence has greatly affected the legal framework adopted by other nations, including India. A notable principle in this regard is the Rule of Reason developed by the American Judiciary, which is complemented by the Per Se Rule, both arising out of similar jurisprudential thought but with mutually exclusive areas of application. Thus, before one proceeds to analyse the emerging Indian jurisprudence in competition law and highlight the applicability of American jurisprudence in India, it is appropriate to briefly set down the major principles of American antitrust law.

i. The Per Se Rule

The Per Se Rule entails that certain acts are so categorised that they will be considered anti-competitive without looking into the actual economic impact the actions may have in a particular case. These actions include instances of price-fixing and other such actions which, by their very nature, are considered anti-competitive and detrimental to the market competition. In fact, the U.S. Supreme Court has clearly explained the Per Se Rule in several cases, including in the case of Northern Pacific Railway Company v. United States, which is being quoted verbatim hereunder,

...there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Thus, the idea is to draw a reasoned generalization and prohibit certain agreements or transactions absolutely based on the fact that such actions are almost always harmful to competition and so

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21 Standard Oil Case, supra note 7.
rarely justified that it would be a sound legal policy not to require proof of an adverse effect on competition in order to prohibit or take recourse against such arrangements.\textsuperscript{25} This includes all categories of actions, which by logic and experience, are found to be highly and very frequently adverse to competition in the markets, to the extent that it would be wasteful to require a full judicial enquiry to ascertain the adverse impact and go through the tedious task of assessing the balance between the pro-competitive and anti-competitive impact of the particular act.\textsuperscript{26}

When an act falls within the category to which the \textit{Per Se} Rule applies, neither the intent of the party nor the effect is looked into and it is not a defence that the act was done with some noble objective in mind or had not resulted in any adverse impact on competition.\textsuperscript{27} Thus, the situation is much like one of absolute liability where no defence is available to avoid liability once the action categorised under the \textit{Per Se} Rule is proved.

Thus, fixing and maintaining prices was considered to be anti-competitive at all times and the Supreme Court in \textit{United States v. Trenton Potteries Co.}\textsuperscript{28} held that such actions, once proved, do not beckon a full judicial enquiry as to whether the price fixed was reasonable or unreasonable under the particular circumstances. Thus, actions like price fixing would be considered anti-competitive \textit{per se}.\textsuperscript{29} Another act which is considered \textit{per se} unlawful is entering into tying agreements.\textsuperscript{30} Similarly, as per \textit{Dr. Miles Medicine Co. v. John D. Park & Sons}\textsuperscript{31} (Dr. Miles), resale price maintenance, i.e. the act of a supplier determining the price at which goods are to be sold by the dealer, was considered always unlawful in the US since 1911. However, after much controversy over almost a century, such actions were made amenable to the Rule of Reason as the Supreme Court overruled \textit{Dr. Miles}\textsuperscript{32} with a 5:4 majority in \textit{Leegin Creative Leather Prods., Inc. v. PSKS, Inc.}\textsuperscript{33} based on antitrust policy considerations, stating that the rule of \textit{stare decisis} could be parted from, given the significant pro-competitive effects of retail price maintenance. The soundness of the judgment has been questioned by some who think it is irresponsible judicial

\textsuperscript{27} United States v. Topco Association, 405 U.S. 596, 610 (1972).
\textsuperscript{28} 273 U.S. 392 (1927).
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} North Pacific Railway Company v. United States, 356 U.S. 1, 5 (1958).
\textsuperscript{31} 220 U.S. 373 (1911).
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} 127 S. Ct. 2705, 2712 (2007).
activism\textsuperscript{34} but it nevertheless shows that the judiciary does make inclusions and exclusions from the list of acts which are considered \textit{per se} illegal.

\textbf{ii. The Rule of Reason}

The Rule of Reason is one of the fundamental principles of competition law evolved by the American Judiciary. The Rule of Reason approach requires that a particular act must be found to have led to anti-competitive effects in order to be illegal.\textsuperscript{35} According to Lemley and Leslie, the Rule of Reason approach is used to assess all conduct not expressly covered under the Per Se approach and forms the majority of the actions to which competition law scrutiny is applied.\textsuperscript{36} Under this approach, the courts take into consideration myriad factors, including nature and state of the relevant business and the market, the condition of the market and competition in the market before and after the action in question and other effects of the said action.\textsuperscript{37} The courts are, therefore, required to take a comprehensive view of the case and the approach is based on the understanding that the action complained of is not illegal \textit{per se}, but maybe considered illegal in the particular facts and circumstances.\textsuperscript{38}

The Rule of Reason approach is believed to have been first developed by the Chief Judge of the Sixth Circuit Court of Appeals, in the case of \textit{Addyston Pipe and Steel Co. v. United States}\textsuperscript{39}, which was also confirmed by the Supreme Court on appeal.\textsuperscript{40} In this case, the question was whether an agreement of bid-rigging, which entailed that all parties to the agreement would bid at a higher price except one, to ensure that the contract for which the bid was solicited would go to the party to the agreement who was to bid low, as long as no one who was not a party to the agreement entered a lower bid. While holding that the agreement was a violation of the Sherman Act, the Court of Appeals opined that not all restraints of trade are illegal and that a restraint of trade could


\textsuperscript{35} See 7 PHILLIP E. AREEDA & HERBERT HOVENKAMP, \textit{ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION} 1500-1501 (WOLTERS KLUWER 2017).

\textsuperscript{36} Mark A. Lemley & Christopher R. Leslie, \textit{Categorical Analysis in Antitrust Jurisprudence}, 93 \textit{IOWA L.R.} 1207, 1209-10 (2008).


\textsuperscript{38} \textit{Id.}

\textsuperscript{39} 85 F. 271 (6th Cir. 1898).

\textsuperscript{40} \textit{Addyston Pipe and Steel Co. v. United States}, 175 U.S. 211 (1899).
be valid if it was ancillary to the main purpose of the agreement and was necessary to protect the fruits of the agreement. Shortly afterwards, this approach was used by the Supreme Court in the landmark case of *Standard Oil Company*41 to hold that only ‘unreasonable’ restraints to trade were prohibited by the Sherman Act. However, since the Rule of Reason did not have express backing in the statute, some jurists criticized the approach, though others believed that such an approach was necessary to meet the legislative object. Nevertheless, the U.S. Supreme Court unanimously supported the approach in *Chicago Board of Trade v. United States*42 and also applied it in the landmark case of *United States v. American Tobacco Co.*43, where the court held that a monopoly itself was not prohibited but it was the unreasonable acquisition and maintenance of such monopoly which was declared illegal by the Sherman Act.

Thus, the Rule of Reason is a judicially created principle which entails reading down the bare wording of the legislation and applying the understanding that the acts to which the rule applies are not always prohibited, but may be prohibited in a particular circumstance, depending on the actual or expected adverse effect of the act on competition in the relevant market.

**Applicability of Per Se Rule and the Rule of Reason in India**

Even though the Monopolies and Restrictive Trade Practices Act of 196944 (MRTP Act) ensured that a semblance of competition law existed in India through the latter half of the 20th century, the law in its modern form came to exist only after the enactment of the Competition Act of 2002.45 (“**Competition Act**”). However, jurisprudence in this field began to develop even later as the enforcement of the legislation was delayed till 2009 by the Central Government. Despite the disadvantage of years and its currently nascent stage, Indian competition law also started with a distinct advantage - over a century of experience of the American legal system, as well as the legal systems followed by European countries.

A look at the Competition Act clearly highlights the lessons learnt from the law and practice in other jurisdictions. So, while American laws were broadly worded and had, therefore, led to

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41 *Standard Oil Case*, *supra* note 7.
42 246 U.S. 231 (1918).
43 221 U.S. 106 (1911).
controversy and strenuous judicial examination and interpretations, the Competition Act is comprehensive, clearly worded and detailed. It not only defines many of the important terms relevant for competition law (like ‘cartel’,46 ‘relevant market’,47 ‘dominant position’,48 ‘predatory price’,49 etc.), but it also lays down the duties50 and powers of the Competition Commission of India51 (“CCI”) and the circumstances it must consider52 when conducting or concluding an enquiry into an impugned anti-competitive act. The provisions are, therefore, less ambiguous and very detailed, making the law in this regard fairly clear and closed to interpretational anomalies.

Due to the above, the Indian courts and tribunals have not frequently faced the need to go beyond the statute and read principles into the law which are not expressly stated in the legislation but which would be necessary for practically effectuating the legal policy. The Indian legislature was not unaware of the important judicial approaches developed in foreign jurisdictions, such as the American concept of per se illegality and the rule of reason, but it is submitted that it consciously decided to set forward a modified version of the same, through Section 3 of the Competition Act. In the succeeding portions of this article, the author will briefly elucidate the salient features of the Indian law in this regard and also highlight the differences with the U.S. law.

i. Appreciable Adverse Effect on Competition (AAEC)

A unique feature of the Competition Act is the conception of the term ‘AAEC’ as a qualifier to prohibit anti-competitive agreements. Section 3 begins with a broad and blunt prohibition on-

“...any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.”53

This covers all agreements which deal with any of the specified market phenomena, as long as it is found to cause an ‘AAEC’. While there is a presumption of AAEC in certain agreements (discussed later in this article), the concept of AAEC becomes crucial, since, no agreement can be

46 Id., at § 2(c).
47 Id., at § 2(r).
48 Id., at § 4.
49 Id.
50 Id., at § 18.
51 See e.g., Id., at §27, 28, 31, 32, 33 & 42.
52 See e.g., Id., at §19 & 20.
53 Id., at § 3(1).
considered to be in violation of Section 3 of the Competition Act, unless it entails AAEC. However, what may or may not be considered as AAEC is a moot point and the same has to be decided on a case-to-case basis by the CCI, though guidance is provided under Section 19(3) of the Act, which enjoins the CCI to look into various effects of the impugned agreement. These considerations include whether the agreement would create barriers to entry in the market or drive existing competitors out. The CCI is also to assess the effect of such agreement on the consumers and the production or distribution of goods and services. Interestingly, the CCI is also to look at the effect of the agreement on technical, scientific, and economic development.\(^{54}\)

It must also be noted that while the Act talks of AAEC within India as the threshold, the CCI has understood it to mean AAEC in the relevant market alone,\(^{55}\) and the same has been affirmed by the Supreme Court of India.\(^{56}\) The guidelines to determine the relevant product and geographical market are also given under Sections 19(6) and 19(7) and it is necessary to ascertain both the relevant markets in a case. Thus, myriad considerations must be analysed to determine whether a particular agreement is likely to cause AAEC in the relevant market and a lot will also depend on the nature of the relevant market and the prevailing condition of such a market. For instance, in a situation where barriers of entry are relatively low in the downstream market, the threshold to establish AAEC due to a vertical agreement among players will be higher. On the other hand, a vertical agreement may be considered more likely to cause AAEC in case there are significant barriers to entry in the downstream market.

From a global perspective, the conception and statutory recognition of AAEC in India is a sign of a shift in the approach toward the competition analysis of anti-competitive agreements. At the beginning of jurisprudential development in the U.S., the general notion was that certain structures or certain categories of acts were themselves bad for competition and should be restricted by law. Thus, there was a stress on the per se rule. However, soon, the American Judiciary found that the per se rule was not fit for all situations and keeping in mind the objectives of the law, the rule of reason developed. Consequently, certain conduct was considered bad for competition and was,

\(^{54}\) Id., at § 19(3).


\(^{56}\) Competition Commission of India v. Co-ordination Committee of Artists and Technicians of W.B. Film and Television, AIR 2017 SC 1449.
thus, restricted. The Indian concept of AAEC, however, enshrines greater stress on an ‘effects-based’ approach. According to this, an agreement is bad in law, not in isolation, but only in the context of its effects on the market. Interestingly, while the need to establish the likelihood of AAEC is necessary to prohibit a Combination (i.e. acquisition, merger or amalgamation of enterprises) under Section 6 of the Competition Act, no such AAEC is required to be established in actuality. However, there is no requirement to prove AAEC for a dominant enterprise’s conduct to be concluded as being an abuse of dominant position under Section 4 of the Competition Act.

ii. AAEC in Horizontal and Vertical Agreements

A noteworthy feature of the Competition Act is the evidently different treatment meted out to horizontal agreements, as compared to vertical agreements. The difference is established through a presumption which entails that certain horizontal agreements are presumed to cause AAEC. Thus, the AAEC requirement need not be established to prove an anti-competitive practice.

A horizontal agreement, in this context, means an agreement between enterprises or persons, or their associations, engaged in identical or similar trade of goods or provision of services. This means an agreement between entities at the same level of the economy, like producers of the same or similar goods, or the supplier of similar services. However, there is another fold to the idea of presumptive AAEC. The agreement must,

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

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

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

(d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition...  

58 Id., at § 4.  
59 Id., at § 3(3).  
60 Id.
Further, there is an exception from this presumption for joint venture agreements which increase market efficiency in production, supply, distribution, etc.\(^{61}\)

This is a close resemblance to the \textit{per se} rule followed in the U.S. and developed by its Judiciary. The clear wording and legislative mandate, however, ensures that the Judiciary has less freedom in determining where to apply the presumption of AAEC, thus, bringing much-needed certainty in the law - something the U.S. has not yet been able to achieve in this regard.

Apart from the distinction between horizontal and vertical agreements in general, through the above-explained presumption of AAEC, the Competition Act also specifically deals with certain types of vertical agreement and mandates that such agreements must be found to be causing or likely to cause AAEC for them to be illegal. These specified agreements include tie-in agreements, exclusive supply agreements, exclusive distribution agreements, refusal to deal, and resale price maintenance agreements,\(^{62}\) therefore, ending the controversy whether such agreements are always unlawful. This is again a great boon for the Indian system insofar as it provides complete certainty that a competition analysis similar to the American rule of reason must be applied to establish that any such agreement is anti-competitive and in contravention of Section 3.

\textbf{iii. Emphasis on Effect over Form and the Perpetual Rule of Reason under Indian Law}

It is the author’s submission that under Indian law, all agreements are subject to the Indian version of the rule of reason, which is the test of AAEC. Now, it must be noted that this submission is restricted to cases falling under Section 3 of the Competition Act, 2002 and not in case of abuse of dominant position as per Section 4, which is not conditioned by a need to establish AAEC. Nevertheless, the insistence to prove AAEC under Section 3 for an agreement to be anti-competitive is a major deviation from U.S. law as the specific agreements which are to be presumed as anti-competitive are enumerated exhaustively, leaving no room for the Judiciary to further expand the presumption.

Another intriguing factor is that the horizontal agreements which are presumed to be anti-competitive are also not conclusively so and such a presumption is rebuttable on meeting the

\(^{61}\) \textit{Id.}, at proviso to § 3(3).
\(^{62}\) \textit{Id.}, at § 3(4).
burden of evidence required.\textsuperscript{63} Therefore, once the existence of such an agreement is proved, the enterprises which have been found to indulge in such an agreement have the option to lead evidence to show that the agreement has not led to any AAEC in the relevant market.\textsuperscript{64} However, it is not a defence that the cartel was not formed for, or has not resulted in, any profits to the members.\textsuperscript{65} The presumption has been used frequently though, since bid rigging, cartel formations, etc. are relatively common anti-competitive phenomena in the market, and this has led to some jurisprudence in the area.\textsuperscript{66}

Similarly, the CCI regularly applies the test of AAEC to alleged vertical anti-competitive agreements,\textsuperscript{67} and an express finding of AAEC is mandatory for the CCI to be able to direct the DG to initiate investigations under Section 3(4) of the Competition Act.\textsuperscript{68} Moreover, various factors to be considered by the CCI while determining AAEC are exhaustively enumerated under Section 19(3) the Competition Act, leaving little room for debate over extraneous considerations. Notably, the creation of market efficiencies, consumer benefits and promotion of technical, scientific and economic development are considered mitigating factors that could save an agreement, which would otherwise be in violation of the Competition Act. In fact, even the CCI has recognised that market efficiencies created by an agreement may, under some circumstances, override competition concerns, though it is a question of degree of effect on competition.\textsuperscript{69} Therefore, determination of AAEC requires the CCI to take a broad-based and balanced perspective while determining the legality of an agreement among market players.

Thus, a facet of the Rule of Reason is perpetually applicable to all agreements which are allegedly anti-competitive and an analysis of their effect on the market is necessary in all cases, except the enumerated horizontal agreements presumed to be anti-competitive, in which too, the alleged defaulter may lead evidence to show that the market competition was not adversely affected.

\textsuperscript{63} Id., at § 3(3).
\textsuperscript{64} In re: Cartelization in respect of tenders floated by Indian Railways for supply of Brushless DC Fans and other electrical items, 2017 SCC OnLine CCI 56, ¶ 6.37-6.38.
\textsuperscript{65} Id., at ¶ 6.36.
\textsuperscript{67} See Reliance Big Entertainment Ltd. v. Karnataka Film Chamber of Commerce, 2012 CompLR 269 (CCI).
\textsuperscript{68} Star India Pvt. Ltd. v. Competition Commission of India, W.P. (C) 9175 & 10110 of 2018 (Bom HC).
\textsuperscript{69} Shamsher Kataria v. Honda Siel Cars India Ltd., 2014 CompLR 1 (CCI).
Therefore, there is no *per se* illegality in India and even the horizontal agreements are only presumed to be causing AAEC unless shown otherwise. The effect of the presumption, therefore, is simply to reduce the burden on the informant/complainant in case of certain enumerated horizontal agreements, making it easier for the CCI to declare such agreements as anti-competitive, unless the presumption is rebutted. This shows how the Indian competition law stresses on ‘effect’ of impugned actions in competition analysis, leaving behind considerations or overt stress of structures and forms of arrangements and other theoretical considerations; though it may be noted that the stress of effect of actions also, to an extent, takes away the advantages of the *Per Se* Rule which saved judicial time and effort necessary to go into a full-scale enquiry of effects in case of an agreement which, in general, and through experience, has been found to adversely affect competition in the market.

**CONCLUSION**

Indian competition law regime is a fairly new entrant relative to long-standing and time-tested competition law regimes, and its jurisprudence still has a long way to go before the system acquires the virtues of predictability, consistency, and stability. However, being a late entrant, the Indian regime has some unique advantages, one of which is the opportunity to carefully observe the challenges faced in other jurisdictions over the years and adapt well-developed principles with necessary modifications to best meet its objectives. The Indian Legislature has endeavoured to reap the benefits of this advantage by creating a unique statutory framework, which attempts to balance the convenience of the *Per Se* Rule as well as the dependability of the Rule of Reason, by adopting a middle path.

The Competition Act’s insistence on establishing AAEC before finding any agreement in violation of the Act is a uniquely Indian way of meeting the above objective. As discussed in this article, while the determination of AAEC is similar to a Rule of Reason analysis in the U.S., the presumption of AAEC in case of certain statutorily enumerated horizontal agreements provides advantages similar to the *Per Se* Rule, which allows the CCI to hold against such an agreement without diving into a detailed and time-taking analysis of the actual effect of the agreement on the relevant market. Thus, the Indian competition law regime focuses on effects over form, while also recognising that certain type of agreements are almost always anti-competitive and deserve to be
dealt with strictly, through a rebuttable presumption of AAEC, in order to save time and effort which would otherwise go into the determination of the actual effect of such agreements in the relevant market. Thus, the Indian regime has taken full advantage of the experiences of other jurisdictions, and has attempted to mould the law to best meet emerging challenges; though the ultimate success of the regime now rests on the shoulders of the administrative and judicial set-up to ensure that the system remains robust, and the statutory provisions are supported by a sound jurisprudential foundation which will allow the system to face the myriad challenges it is likely to be confronted with in the future.
HOW SETTLING IS THE SETTLEMENT AND COMMITMENT MECHANISM PROPOSED BY THE DRAFT COMPETITION (AMENDMENT) BILL: A COMPARATIVE ANALYSIS

Sambhawi Sanghmitra & Vijay Rohan Krishna*

ABSTRACT

Many antitrust regimes across the globe have the power to accept remedies from the parties to an antitrust proceeding which helps the competition authorities in expediting the process and is beneficial for a procedural economy. In August 2018, the Competition Law Review Committee was constituted to propose necessary changes to the Competition Act, 2002 in light of the evolving global antitrust regime. One of the noteworthy recommendations of the committee was to introduce a settlement and commitment process under the Indian competition regime. Consequently, the Draft Competition (Amendment) Bill introduces Sections 48A and 48B which enables the Competition Commission of India to accept commitments and settlements from the parties for the alleged contravention of Section 3(4) and Section 4 of the Competition Act. This paper highlights the settlement and commitment mechanism prevalent in the antitrust regimes of the United States and European Union and also discusses the current position and judicial precedents in respect of settlement and commitment under the India competition regime. The paper will further analyse the settlement and commitment mechanism as proposed by the Draft Competition (Amendment) Bill, 2020, and its implications.

Keywords: Settlement, Commitment, Procedural Economy, Efficient enforcement, Judicious use, Deterrence effect.

* The Authors are enrolled in III Year, B.A. LL.B. (Hons.), Chanakya National Law University, Patna & V Year B.A. LL.B. (Hons.), National University of Study & Research in Law, Ranchi respectively.
INTRODUCTION

Usually, antitrust proceedings end with either the conviction of an entity for contravention of antitrust laws and imposition of an appropriate penalty, or closure of the proceedings with a non-infringement decision. However, competition authorities in many regimes have been granted a third option of passing settlement or commitment decisions which address the competition concerns without undergoing the trial process. The option of accepting settlements or commitments enables the competition regulators to accept remedies suggested by the parties to antitrust proceedings without going through a lengthy adjudicatory process.¹

The Ministry of Corporate Affairs (MCA) had set up a 10-member committee headed by the Secretary of Corporate Affairs, Injeti Srinivas in August 2018. The Competition Law Review Committee (“CLRC”) was set up to assess the Competition Act and the ancillary rules and regulations and was entrusted with the task to review and recommend a robust competition regime in light of the changing business dynamics. The Committee submitted its report in July 2019 and 45 out of its 50 recommendations were incorporated in the Draft Competition (Amendment) Bill, 2020. One of the key recommendations of the CLRC was to amend the Indian Competition Act so as to enable the Competition Commission of India (“CCI”) to accept settlements and commitments from parties for the alleged contravention of Section 3(4) and Section 4 of the Competition Act, 2002. The CLRC took note of the settlement mechanism under the SEBI Act, 1992 and the Income Tax Act, 1961, and the settlement and commitment mechanism prevalent in other competition regimes. The SEBI Act, 1992 read with the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014 (SEBI Settlement Regulations) implements a settlement mechanism wherein specific violations can be settled on the payment of a certain sum by the alleged defaulter without admission of guilt and may also entail imposition of certain non-monetary terms. In the light of existing precedents and in the interest of procedural economy and efficiency in enforcement action, the Committee recommended the inclusion of a commitment and settlement mechanism under the Competition Act.²

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The concept of enabling the parties to an antitrust dispute to enter into settlements was first recognized by the Madras High Court in the case of *Tamil Nadu Film Exhibitors Association v. CCI*[^3] and interpreted section 27(g) of the Competition Act to grant enough powers to CCI to accept such settlement if the terms of the settlement addressed the competition concerns. However, the judgment only identified the scope of an inter-party settlement but did not entertain the possibility where the parties could offer settlements to CCI. Therefore, the scheme where CCI has the power to accept and monitor settlements and commitments is new to the Indian antitrust regime. This article aims to assess the scheme of settlements and commitments which the Draft Competition (Amendment), 2020 proposes and then analyses the implications of the same in light of the mechanism prevalent in the more evolved antitrust jurisdictions of the United States (“U.S.”) and the European Union (“EU”). Likewise, the article aims to establish that the cautious and judicious application of the settlement and commitment provisions is imperative for achieving the desired results under the Indian antitrust regime and that the CCI cannot risk using this mechanism as a substitute for traditional competition enforcement.

**COMMITMENT AND SETTLEMENT**

Commitment decisions are enforcement tools that can terminate an investigation that has been initiated against a party if it commits to certain behavioural or structural remedies. Commitments can be behavioural if it relates to the conduct of an undertaking or structural if it changes the structure of the market. Divestment of a part of the business by an undertaking to a third party in cases of abuse of dominance is an example of behavioural commitment; whereas, prohibition or modification of exclusivity clauses and other clauses restricting competition is an example of structural commitment[^4]. An undertaking may offer commitments to a competition authority to resolve the competition concerns raised by the regulator without admitting liability for the same. The competition authority can adopt a decision to make these commitments binding on the undertaking and on the adoption of such commitment decision, the authority no longer has grounds for action against the alleged defaulter. Before the competition regulator can accept commitments from the parties, it will have to consider the nature and ability of the commitment to address the

[^4]: Antonio Capobianco & Satoshi Ogawa, *supra* note 1, at 12.
antitrust concerns, nature of the antitrust violation, the deterrence effect of the commitment offered, and the interest of the third parties and the market in general.\(^5\)

On the other hand, settlement decisions involve the establishment of contravention of antitrust laws by the competition authority. An entity, on being convinced of the evidence against them, can acknowledge their guilt and liability and in return for their admission. Consequently, the fine imposed on them is reduced by a certain percentage and no proceedings are initiated against the entity. The settlement procedure is different from leniency provisions in the sense that leniency provisions reward an entity for voluntarily disclosing information whereas, settlement warrants an entity to admit contravention of competition laws when it is convinced of the evidence against itself. Leniency provision is used as an instrument to gather evidence and parties are rewarded for voluntary disclosure of information. Whereas, a settlement is an efficient instrument and the parties are rewarded for contributing towards procedural efficiency by admitting the alleged violations.\(^6\)

Both settlements and commitments are used as enforcement tools under competition regime but operate in different spheres. The common benefits include shorter and expedited process, procedural economy, and reduced number of appeals.

The main difference between settlement and commitments in antitrust regimes is that usually commitments warrant the investigated party to commit to behavioural remedies to address the competition concerns with or without the conclusion of infringement. Whereas, a settlement decision typically establishes admission of guilt and so they can be used as legal precedents and have precedential value as they establish infringement of competition laws in most of the antitrust regimes.\(^7\) Moreover, settlement procedures often result in a reduction in the fine imposed in exchange of cooperation but commitment decisions make the commitments offered by the undertaking binding on the parties in exchange of termination of further proceedings. Therefore,

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\(^7\) Antonio Capobianco & Satoshi Ogawa, *supra* note 1, at 7.
settlements squarely aim to prevent past actions of the defaulter whereas, commitments aim to regulate the future behaviour of the alleged defaulter.  

**Settlement and Commitment Mechanism Under US and EU Antitrust Regimes**

**United States**

The mechanism of negotiated settlements is prevalent in the U.S. which is exercised through consent orders and consent decrees and as such does not envisage the differentiated operation of commitments and settlements. The Sherman Antitrust Act of 1890 does not contain a provision for settlement in antitrust suits. Only Section 5 of the Clayton Act, 1914, mentions consent decrees and it stipulates that consent judgments or decrees cannot be used in private lawsuits for damages as evidence of antitrust violations. A consent decree was first used in 1906 by the Antitrust Division of Department of Justice in the case of *Swift & Co. v. United States*. Subsequent legal decisions evolved the legal basis and framework of consent decrees.

The U.S. Department of Justice Antitrust Division ("**DOJ**") and the U.S. Federal Trade Commission ("**FTC**") can resolve merger and non-merger antitrust cases using negotiated settlements by following a similar but parallel procedure. Consent decrees can be filed by the DOJ in a U.S. federal district court (trial court) to obtain efficacious remedy without taking the case to trial. FTC, under its statutory authority, can issue negotiated consent orders to address antitrust violations without the need for trial of the case. Consent decrees and consent orders can be used to settle merger cases and also antitrust violations including unilateral conduct such as exclusive dealing and monopolization and concerted action cases such as anti-competitive agreements. Consent decrees are not filed by the DOJ in cases of hard-core horizontal conduct like price-fixing, market allocation, or bid-rigging which entails criminal prosecution by the DOJ. FTC cannot pursue criminal prosecutions and it refers such cases to the DOJ. Settlements are reached by negotiating the scope of relief and then an agreement is reached between the parties according to which they waive their rights to initiate any further proceedings and the parties agree to comply with the terms of the final orders. The DOJ, along with the consent decree, also files the

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Competitive Impact Settlement stating the impact of the settlement in resolving the competition concerns raised by the alleged antitrust infringement. The settlement procedure to be followed by the DOJ is governed by the Antitrust Procedures and Penalties Act of 1974, also known as the Tunney Act.\(^{11}\)

The settlement procedure followed by the FTC is governed by the FTC’s Rules of practice. On reaching an agreement with the parties, the FTC executes the Agreement Containing Consent Order (‘\textbf{ACCO}\’) which contains critical representations and waivers and then issues the Consent order. The parties have to waive their right to seek judicial review of the consent order and also concede that the final Consent Order can be enforced just like any other order of the FTC. Once the majority of the Commission is convinced that the proposed agreement accomplished the remedial goals of the FTC, the Commission votes to invite public comments on the proposed Consent order for a period of 30 days. And only after a second vote is obtained, the FTC issues the Consent Order as a final FTC order.\(^{12}\)

Section 16(e) of the Tunney Act provides that before entering any consent judgment the court shall determine that the entry of such judgment is in the public interest-

\begin{quote}
\textit{For the purpose of such determination, the court shall consider-}
\end{quote}

\begin{itemize}
\item[(A)] the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
\item[(B)] the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.\(^{13}\)
\end{itemize}

If the following objectives are not attained through the proposed settlement then the courts will achieve an effective result through litigation. Since both parties agree to the consent decree, no


\(^{12}\) \textit{Id.}, at 4.

\(^{13}\) 15 U.S. Code, § 16.
appeal is allowed from the final order. In the case of *United States v. Microsoft*\(^{14}\), the DC Circuit Court observed that the district courts must accept consent decrees under the Tunney Act unless the consent decree makes a mockery of the judicial power.

Using the Consent Orders and Consent decrees, the antitrust agencies can obtain an outcome without admission of guilt which allows settlement on favourable terms\(^{15}\) except in cartel cases in which admission of guilt is mandatory.\(^{16}\)

The use of negotiated remedies is often compelling due to the benefits of procedural economy, faster resolution and efficiency in enforcement and usage of resources. Consent decrees and orders not only save the competition authorities from litigation formalities including collection of evidence and investigation but also enables the authorities to timely obtain effective remedies from the parties in highly complex cases or in dynamic markets.\(^{17}\) For example, in the *Microsoft Case*, after the revision of the DOJ’s order to split Microsoft into two units and the order by the Court of Appeals to formulate a remedy\(^{18}\), the DOJ had to finally settle the case with Microsoft citing the settlement reached as an effective enforcement tool in the dynamic high-tech market.\(^{19}\) As per FTC data, out of 162 non-merger enforcement actions, 121 were resolved by way of consent between 1996 -2020. And out of 536 merger enforcement actions, FTC issued 336 consent orders.\(^{20}\) On the other hand, between 2011 -2016, the DOJ settled 24 non-merger civil cases and litigated only 2. Meanwhile, in merger cases, the DOJ settled 42 cases but litigated only 2 cases between 2011-2016 period.\(^{21}\)

In order to derive maximum benefit from both ex-post litigation approach and ex-ante settlement approach, it is imperative for the competition agencies to strike a harmonious balance between the

\[^{14}\text{United States v. Microsoft, 56 F. 3d 1448.}\]


\[^{17}\text{Antonio Capobianco & Satoshi Ogawa, *supra* note 1, at 21.}\]

\[^{18}\text{United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir. 2001).}\]


\[^{21}\text{Note by United States, *supra* note 11, at 7.}\]
two approaches which can be attained by restricting the applicability of these approaches to suitable cases. However, as discussed above, the FTC’s and DOJ’s antitrust enforcement action has largely been driven by adoption of negotiated solutions which nullifies the benefits of such remedies as efficacious antitrust enforcement tools. A transition from the litigation approach to a regulatory approach results in increased usage of settlements and less litigation which in turn hinders the development of antitrust jurisprudence because consent decrees and consent orders only recognize what is unlawful and do not discern the contours of lawful conduct. Increased reliance on usage of negotiated remedies by competition authorities impedes the development of antitrust laws which is not only detrimental to the interests of consumer welfare but also inhibits the evolution of substantive rules in the arena of antitrust laws and the development of common law through judicial precedents.22

The U.S. antitrust jurisdiction gives pre-eminence to economic analysis in antitrust disputes23 but the resolution of disputes through settlements disincentives the competition agencies to conduct an economic analysis of the anti-competitive conduct because then the primary focus shifts from assessing the underlying harm to negotiating terms of the settlement with the parties to the dispute.24 Moreover, even though district courts are required to assess if the consent decree is in the public interest under the Tunney Act, 1974 before entering such decree as a judgement25, the district courts have, in deference, often relied on the DOJ’s conclusion in the consent decrees and entered the decree as a judgement after ascertaining the DOJ’s good faith in entering the settlement and without analysing its impact on ‘public interest’.26 Another collateral effect of over-employability of consent decrees and consent orders is the diminution of the deterrent effect of litigation and trial in antitrust disputes. Non-establishment of infringement and cost-saving quicker

resolution of disputes may prompt businesses to indulge in anti-competitive behaviour and evade liability by entering into settlements.\(^\text{27}\)

Further, increase in the number of consent decrees filed by the DOJ and consent orders issued by the FTC may nullify the benefits of procedural economy because an increase in usage of such remedies will entail regulatory monitoring of compliance with the settlement terms by the parties and diversion of resources towards monitoring compliance will offset the resources saved from non-pursuance of a full-fledged inquiry and trial process.\(^\text{28}\) Also, it is important for the agencies to structure robust consents that can sustain the dynamics of the particular market and are not rendered obsolete in time and require minimum quasi-regulatory oversight of the agencies.\(^\text{29}\) For example, in the case of *United States v. IBM Corp.*\(^\text{30}\) the consent decree filed in 1956 was terminated in 1998\(^\text{31}\) due to the drastic changes in the computer industry which had rendered the provisions of the consent decree archaic.\(^\text{32}\) The IBM case is also a classic example which highlights the need to review consent decree periodically.

Another downside of excessive usage of negotiated remedies is the risk of ‘regulatory leveraging’ or abuse of powers by the competition agencies to the detriment of consumer welfare. A case in point for abuse of power will be the consent order issued by FTC in the case of *Graco Inc.*\(^\text{33}\) wherein even though Graco had never used loyalty discounts, it restricted the scope of loyalty discounts that Graco could offer much to the prejudice of consumers.\(^\text{34}\) Many a times, the agencies may also obtain certain remedies from the parties which bear a resemblance to the goals of the antitrust but in reality are not at all congruous with such goals. This ‘mission creep’\(^\text{35}\) was witnessed in the case of *Nevada v. United Health Group*\(^\text{36}\) where one of the conditions imposed by

\(^{27}\text{Antonio Capobianco & Satoshi Ogawa, supra note 1, at 21.}\)

\(^{28}\text{The Relationship Between Competition And Regulation, Second Roundtable – On Consent Decrees, United States, Department Of Justice, Antitrust Division, 3 (2018), https://www.justice.gov/atr/page/file/1057596/download.}\)

\(^{29}\text{Michael E. DeBow, Judicial Regulation of Industry: An Analysis of Antitrust Consent Decrees, UNIVERSITY OF CHICAGO LEGAL FORUM, 353 (1987).}\)

\(^{30}\text{1956 Trade Cas. (CCH) ¶ 68, 245 (S.D.N.Y. 1956).}\)

\(^{31}\text{United States v. IBM Corp., 163 F.3d 737 (2nd Cir. 1998).}\)

\(^{32}\text{John E. Lopatka, United States v. IBM: A Monument To Arrogance, 68 (1) ANTITRUST LAW JOURNAL (2000), pp. 145-162.}\)

\(^{33}\text{In Re: Graco Inc., FTC File No. 101-0215 (2013).}\)

\(^{34}\text{Joshua D. Wright & Douglas H. Ginsburg, supra note 24, at 7.}\)

\(^{35}\text{Gary W. Jenkins, Who’s Afraid of Philanthrocapitalism?, 61 CASE W. RES. L. REV., 753 (2011).}\)

\(^{36}\text{State v. United Health Group Incorporated, Case No. 2:08-cv-00233-JCM-(RJJ) (2008).}\)
the consent decree included a donation of $15 million by the United Health Group over a five-year period for health-related activities.

Further, when it comes to the selection of cases that are to be resolved by use of consent decrees and orders, instead of selecting cases that further the goals of antitrust laws, the agencies choose cases where obtaining the settlement is easy and the terms can be enforced quickly. Resolution of antitrust disputes through negotiated remedies is always an attractive and convenient option for competition authorities but excessive employability of such remedies shifts the focus of such authorities from ensuring consumer welfare to economizing its resources without fully assessing the underlying impact of the anti-competitive conduct on the market and the consumers which often interdicts the development of antitrust laws and harms consumer welfare.

The European Union (EU)

The concept of commitment decisions was introduced in the European Union competition regime in 2004 by Regulation 1/2003. Article 9 of the Regulation empowers the Commission to end investigations with the help of commitment decisions. Article 101 and Article 102 of Treaty of Functioning of European Union deal with anti-competitive agreements and abuse of dominance and normally to end investigations under these articles in a cooperative way, article 9 of Regulation 1/2003 is applied. The Recital 13 of the Preamble of Regulation 1/2003 states that if in the course of proceedings the undertakings offer the Commission commitments which meet the concerns of the Commission, then it can take decisions so as to make such commitments binding on the parties except in cases where the Commission intends to impose fine. Further commitment decisions are taken without the conclusion of contravention. Article 9 of the regulation provides that if the undertakings offer commitments to the Commission, the Commission can adopt decisions to make these commitments binding on the undertaking concluding that there exist no longer grounds for action by the Commission. Article 9(2) provides that the Commission can reopen the proceedings – (i) when there has been a material change in any of the facts on which the decision was based. (ii) where the undertakings concerned act contrary to their commitments; (iii) where the decision was based on incomplete, incorrect, or misleading information provided by the parties. The

Commission in the case of Commission v. Alrosa\(^38\) (“Alrosa”) held that Article 9 of Regulation 1/2003 was based on the considerations of a procedural economy. The main difference between Article 7 and Article 9 of the regulation is that Article 7 provides for compliance with behavioural or structural remedies as directed by the Commission on finding there has been an infringement whereas, Article 9 empowers the Commission to adopt decisions to make the commitments offered by the undertaking without concluding whether there has been an infringement or not.

Settlement procedure for cartels was established in 2008 by the EU Regulation No.622/2008 and the Commissions’ Settlement Notice. The settlement procedure allows the Commission to settle cartel cases and under the procedure the parties may peruse the evidence in the commission file and on the basis of the strength of the evidence decide whether they want to admit their involvement in the alleged cartelisation. In return for their admission, a reduction of 10% in the fine imposed on the party can be made by the Commission. The objective of settlements is to free the resources of the Commission to allow it to pursue other cases and reduce litigation. The parties can either communicate their decision of settlement to the Commission or the Commission may invite the parties to settle but it cannot proceed unless the parties submit a written request. Parties to the dispute neither have the right nor the duty to settle but a settlement can be reached when it finds that the Commission has strong evidence regarding their involvement in the cartel. The Commission can at any stage before the final decision abandon the settlement procedure and return to the standard procedure. The settlement procedure was used for the first time in 2010 in the DRAMs cartel case.\(^39\) Till date, the Commission has only once, in the Smart Card Chips Cartel Case,\(^40\) abandoned the settlement procedure due to lack of progress. The use of settlement procedure was restricted to cartels only till 2016. In 2016, the Commission in the case of Alstoff Recycling Austria\(^41\) extended the use of settlement procedure to abuse of dominance cases and reduced 30% of the fine imposed as a result of Alstoff’s cooperation.\(^42\)

The use of commitment decisions ensures swift resolution of anti-competitive concerns with the engagement of fewer resources. From 2005 to 2014, the European Commission adopted

\(^{38}\) Case C-441/07 P.
\(^{39}\) Case COMP/38.511.
\(^{40}\) Case COMP/ AT.39574.
\(^{41}\)Alstoff Recycling Austria AG v. Commission, ECR II-975.
commitment decisions in 63% of the cases, i.e., 29 out of the 46 non-cartel antitrust decisions were commitment decisions. Since commitment decisions involve fewer resources, an increase in infringement decisions due to diversion of the saved resources to resolve other antitrust conduct would seem to follow as a natural corollary. However, statistics show that while adoption of commitment decisions has been on the increase, the number of antitrust and infringement decisions have declined.\textsuperscript{43}

In the \textit{Alrosa} judgement, the European Court of Justice held that even though the principle of proportionality was applicable to Article 9 decisions, its application was restricted to ascertaining if the proposed commitments addressed the antitrust concerns and the Commission was not required to compare the proposed commitments with the remedies that it could have obtained in an infringement decision under Article 7. The \textit{Alrosa} judgement restricts the scope of judicial control in commitment decisions because it restricted the scope of judicial review only to determine if the Commission’s decision was “manifestly incorrect” and grants wide discretionary powers to the Commission in commitment decisions.\textsuperscript{44} \textit{For example,} in the \textit{ENI Case}\textsuperscript{45} the Commission held underinvestment in pipelines amounted to a refusal to supply and abuse of dominant position. The commitment decision of the Commission in this particular case required the ownership unbundling of the underinvested pipelines. The other costs associated with increased usage of commitment decisions include limiting the development of common law and inhibiting the deterrent effect of antitrust enforcement. Since commitment decisions do not establish infringement, they negatively affect legal certainty and private actions for damages.\textsuperscript{46}

In case of a settlement, the time taken to reach a settlement in a cartel case is almost akin to the duration of passing an infringement decision because the Commission still has to investigate the matter before settling the case but the time saved in the appeal process contributes its bit to the procedural economy.\textsuperscript{47} Unlike U.S., which follows the process of hybrid settlement, in EU, a cartel


\textsuperscript{44} Florian Wagner-Von Papp, \textit{Best And Even Better Practices In Commitment Procedures After Alrosa: The Dangers Of Abandoning The ‘Struggle For Competition Law’}, \textit{49 CML Review}, 930 (2012).

\textsuperscript{45} Case COMP/39.315.

\textsuperscript{46} Antonio Capobianco & Satoshi Ogawa, \textit{supra} note 1, at 23.

case cannot be settled unless all the offenders agree to settle the case which places the Commission at a weak bargaining position.  

**JUDICIAL PRECEDENTS WITH RESPECT TO SETTLEMENT AND COMMITMENT**

Currently, the Competition Act does not envisage or includes a provision for settlement and commitment nor does it contain provisions allowing withdrawal of information once filed before the CCI. However, there are judicial precedents which have given a legal push to the idea of adoption of settlements and commitments in the Indian competition regime.

In the case of *Tamil Nadu Film Exhibitors Association v. CCI & Ors.*, the Madras High Court observed that the CCI was empowered to accept a memorandum of settlement or compromise reached between the parties in exercise of the residuary powers granted to it under section 27(g) of the Act.

In the aforementioned case, Raaj Kamal Films International had solicited CCI’s intervention when the Tamil Nadu Film Exhibitors Association (“TNFEA”) boycotted the former’s movie ‘Viswaroopam’. The Commission was of the opinion that there existed a prima facie case and directed the Director General (“DG”) to conduct an investigation under section 26(1) of the Competition Act, 2002. The TNFEA approached the Madras High Court while the director general’s investigation was pending. The Madras High Court allowed the DG to complete the investigation but ordered the CCI not to continue with the matter without the leave of the court. While the DG’s investigation was pending, Raaj Kamal Films International and TNFEA reached a settlement according to which the former agreed to withdraw its complaint against the latter. Both the parties filed a memo for recording their compromise memo before the Madras High Court but CCI submitted before the Court that DG had already submitted its report holding the TNFEA guilty of violation of section 3(3)(b) of the Act and that inter-party settlement cannot rescind the proceedings under the Competition Act.

The Madras High Court framed two questions of primary importance in the following case:

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i. Whether it is possible, in the context of the scheme of the Competition Act, 2002, for two adversaries to reach a settlement, thereby closing the doors for an investigation or inquiry;

ii. Whether this Court can record a memorandum of settlement like the one that the parties have reached in this case.

In context of the two relevant issues, the Madras High Court held that the Commission is a body which was set up to address anti-competitive practices and not to adjudicate upon the private disputes between individuals. Further, the Court held that since CCI had residuary powers under section 27(g) of the Competition Act, 2002 which empowers the Commission to pass such orders or issue such directions as it may deem fit and its powers to pass such orders are wide in amplitude, so the CCI had the power to accept the settlement reached between parties. The High Court observed that by accepting the settlement the Commission would actually be saved of the bother to proceed with the full-fledged inquiry. The Court observed that even though the Act does not allow the parties to enter into a compromise or settlement but the CCI should accept such settlement if it is satisfied that (a) it would lead non-continuance of anti-competitive practices; (b) it would lead to non-continuance of abuse of dominance; (c) it would not be prejudiced against consumer interests or freedom of trade. Thereafter the Court directed TNFEA to file the memorandum of settlement before the Commission which would peruse it and either accept it or reject it after taking into consideration the aforementioned three factors.

The Madras High Court’s decision in this case was a step towards the evolution of negotiated solutions and settlements under the Indian competition landscape. The kind of antitrust settlement recognized by the Madras High Court was more in the line of a civil settlement between parties as envisaged under section 89 of Code of Civil Procedure because even though the Court held that two adversaries to an antitrust dispute could reach a settlement between themselves but it failed to entertain the possibility of the parties offering a settlement to CCI. Further, the observation of the High Court, that imposition of fines should not prevent CCI from accepting settlements reached between the parties if the settlement addresses the anti-competitive concerns, fails to contemplate the deterrent effect of penalties under the Act and the susceptibility of such an interpretation to misuse where a compromise could be reached between the said parties to evade penalty. Also, the order failed to specify a procedure to monitor the after-effects and compliance with the terms of the settlement reached by the parties. Significantly, since the order only recognized inter-party
settlement, it failed to consider that private settlement was not a solution to market distortions and competition concerns. Moreover, the Madras High Court failed to clarify whether the CCI could accept a settlement before reaching a finding of contravention because Section 27 applies only when the CCI has arrived at a finding of contravention.

Therefore, the judgement given by the Madras High Court raised more questions than it could solve. The glaring ambiguities and lacunae in the judgement and lack of comprehensive guidelines did not incentivize the CCI to accept an inter-party settlement in the later cases. In Re: Naveen Kataria and Jaiprakash Associates Ltd., the CCI refused the withdrawal of the case when the informant wanted to withdraw the case after having resolved the issue through a settlement with the defendant and also held that its goal was to protect competition and not decide on disputes between the parties. However, the Delhi High Court held that an informant can withdraw the case on reaching a settlement with the opposite party but the settlement will not bar the CCI from pursuing action against the opposite party. Further, In Re: House of Diagnostics and Esaote S.p.A, the CCI’s order was not affected by the fact that the contractual dispute between the parties was resolved by way of settlement. Further, the Bombay High Court in the case of Nhava Sheva International Container Terminal Pvt. Ltd. v. The Union of India & Ors., had directed the informant to withdraw the case pending before CCI and had set aside the order of investigation when the parties by way of a memorandum of agreement had resolved all the pending disputes.

THE MECHANISM PROPOSED BY THE DRAFT COMPETITION (AMENDMENT) BILL 2020

The Competition Amendment Bill, 2020 enables the investigated party to offer a settlement or to voluntarily offer certain commitments with respect to the alleged contravention. The mechanism of operationalization of the settlement and commitment procedure will be brought into effect through subsequent regulations.

50 ABIR ROY, COMPETITION LAW IN INDIA: A PRACTICAL GUIDE, §1.10 (KLUWER LAW INTERNATIONAL 2016).
54 W.P. No. 14277 (Aug. 06, 2019).
Settlement

To this effect, the bill introduces section 48A which allows the inquired party to submit a written application for contravention of section 3(4) or section 4 to the Competition Commission of India proposing for settlement of the proceeding initiated against the alleged contravention. Sub-clause (2) of the introduced section provides that such an application for settlement can be submitted at any time after the receipt of the Director General’s report under section 26(4) but before the final order under section 27 or Section 28 is passed. After considering the ‘nature, gravity and impact’ of the alleged violation, CCI may accept the settlement proposal subject to payment of a certain sum by the applicant and it may also impose certain other terms on the applicant in accordance with the regulations which will be framed under the Act. Subsequently, the CCI will lay down the procedure for implementing and monitoring the terms of the settlement as per the aforementioned regulations. In case the CCI rejects the proposal for settlement either because a settlement will not be appropriate in the present circumstances or because the parties are unable to reach an agreement on the terms of settlement, then it can proceed with its inquiry under Section 26 of the Act. Sub-clause (6) of section 48A provides that the decision of the CCI accepting or rejecting the proposal for settlement is not appealable to the appellate Court.55

Commitment

The introduction of section 48B will allow the investigated party to submit a written application for the alleged contravention of section 3(4) or section 4 to the CCI and offer commitments in respect of the alleged contraventions stated in the Commission’s prima facie order under section 26(1). Sub-clause 2 of section 48B states that such an application for offering commitments can be made by the investigated party at any time after the prima facie order initiating investigation is passed but before receipt of the DG’s report of the investigation. CCI may accept the commitment application on an assessment of the ‘nature, gravity and impact’ of the alleged violation and the efficacy of the proposed commitments in addressing the concerned violation and then stipulate the procedure by which such commitments will be implemented and monitored pursuant to the regulations which will be framed under the Act in case the CCI rejects

the application offering commitments either because it is not appropriate in the present circumstances or because the parties are unable to reach an agreement on terms of the commitment, then it can proceed with its inquiry under section 26. In addition, the order of the CCI accepting or rejecting an application for settlement or commitment is not appealable to the appellate court as per sub-clause 6 of section 48B.\textsuperscript{56}

**Revocation**

The Bill proposes to introduce section 48C according to which an order of the Commission under section 48A or section 48B shall stand revoked and withdrawn if –

i. The applicant fails to comply with the order of settlement or commitment.

ii. It comes to the notice of the Commission that the applicant has not made full and true disclosure.

iii. If it comes to the notice of the Commission that there has been a material change in the facts.

In case the applicant fails to comply with the order of settlement or commitment and/or fails to make full and true disclosure of facts, then such applicant may be liable to pay the appropriate legal costs which the Commission has incurred which may extend to one crore rupees. The Commission may also restore or initiate the inquiry against the applicant.\textsuperscript{57}

**ENSUING IMPLICATIONS AND ANALYSIS**

The main objective behind the introduction of the commitment and settlement process in the Indian competition landscape is procedural economy and effectiveness in enforcement action. It will enable quicker resolution of antitrust cases and tackle the problem of high pendency while freeing up the scarce resources of the competition authorities. As per the CCI Annual Report 2018-19,\textsuperscript{58} out of the 981 cases in which investigation was ordered at the prima facie stage, contravention could be proved only in 135 cases till March 2019. The low rate of conviction can be attributed to the determination of numerous factors involved in proving a contravention and the complex

\textsuperscript{56} Id.

\textsuperscript{57} Id.

method of assessment of violation. The settlement and commitment mechanism can help address antitrust concerns without going through a lengthy and complex adjudicatory process. Further, out of the 13881.73 crore rupees fine levied by the CCI till March 2019, it managed to realise only 0.4% or 60.37 crore rupees. The low realisation of fines levied can be ascribed to the high pendency of cases in the appeal process against the Commission’s orders which essentially interdicts the process of speedy resolution in antitrust cases. The introduction of settlement and commitment mechanism under the Indian competition regime is likely to increase the realization of fines imposed by the CCI on the pretext that both sides can arrive at rational and favourable terms of agreement and also because such commitment and settlement orders will be non-appealable.

Although the introduction of a settlement and commitment mechanism has its share of benefits, but the newly added provisions also have its share of shortcomings which need to be rectified. For instance, the Draft Competition (Amendment) Bill does not provide clarity regarding the retrospective or prospective application of the introduced sections. Moreover, the proposed Bill does not clarify whether the settlement or commitment order is likely to be construed as an admission of guilt or not which is squarely going to affect the decision of parties in applying for settlement or commitment process under the introduced sections. Further, the Bill does not specify whether the settlement or commitment order passed by the Commission can be used against the applicant in a compensation claim under Section 42A or section 53N of the Act. Also, the settlement mechanism as proposed by the Bill does not include a reduction in penalty for the applicant which can act as a potential incentive for the alleged party to settle. The draft Bill fails to adequately differentiate between the operation of settlement and commitment orders. But again, the existing lacunae can be remedied by the enactment of the subordinate regulations.

As held by the Supreme Court in CCI v. SAIL, the main objective of competition law is to promote economic efficiency and therefore, the procedure for competition law enforcement itself should be efficient. Therefore, the introduction of provisions enabling parties to offer settlements and commitments to CCI will facilitate the efficient usage of the Commissions’ scarce resources.

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59 Id., at 23.
It can also prove very useful in digital markets or highly dynamic market where the long litigation-oriented competition enforcement loses its significance due to the ever-changing nature of the market.

Nevertheless, the trade-off between the traditional formalistic approach and the economics-based approach can have dire consequences if not used judiciously. Experience can be drawn from the antitrust regimes of U.S. and EU where the excessive usage of negotiated remedies did more harm than good. For a nascent antitrust regime like India, it is highly imperative for the Commission to ensure that the proposed settlement and commitment mechanism does not stunt and distort the development of Indian competition laws or affects the deterrent effect of traditional litigation-oriented competition law enforcement. Moreover, the applicability of settlements and commitments to only cases of vertical agreements and abuse of dominance is a welcome move considering the evolving and embryonic stage of Indian competition law.

It is crucial for the Commission to accept settlement and commitment in select cases after conducting an economic analysis of the proposed remedies in the relevant market and overall consumer welfare. CCI should accept settlements and commitments from parties in only those cases where acceptance of such remedies outweighs the benefits of pursuing a full-fledged investigation and trial process. Also, settlements and commitments should not be used in cases that deal with unsettled or complex areas of competition laws. 62 Before pursuing litigation or settlement, the authorities must analyse the likelihood of conviction, costs of settlement and costs of litigation, resources of the parties to the dispute and unpredictability of the final outcome. 63 Currently, the proposed mechanism of settlements and commitments under the Indian Competition schema requires a lot of clarity and guidelines in terms of procedure but at the outset one thing is clear that CCI will have to be very cautious and judicious in making use of the proposed settlement and commitment mechanism. It is also important for CCI to timely review its settlement and commitment orders so that such orders are not rendered redundant with time and changing market dynamics.

62 Antonio Capobianco & Satoshi Ogawa, supra note 1, at 22.
CONCLUSION

The U.S. antitrust regime allows the use of settlement mechanism in merger as well as non-merger cases. The EU antitrust regime enables commitment to be offered in non-cartel antitrust cases and accepts settlements mostly in case of cartels having extended it to the case of abuse of dominance only in 2016. The proposed Competition Bill stipulates the introduction of section 48a and section 48B which will enable the CCI to accept settlements and commitments under the Competition Act in cases of vertical anti-competitive agreements under section 3(4) and abuse of dominance under section 4. The proposed section 48C corresponds to Article 9 of Regulation 1/2003 and deals with the revocation of settlement and commitment order. Further, sections 48a and 48B also provide that no appeal shall lie against the orders passed by the Commission under these sections.

U.S. jurisdiction relies most on negotiated instruments and relief. Since 1995, FTC has closed 95% of the antitrust cases through consent orders. Since 1980s, DOJ has closed more than 90% of the antitrust cases through consent decrees. Between 2004 and 2014, the European Commission closed 60% of the non-cartel antitrust cases by way of commitment decisions.64 Thus, introduction of sections 48A and 48B can facilitate expeditious disposal of cases and will spare the time of the Commission from time-consuming investigations in cases where a settlement can be reached between the parties or where certain commitments can be undertaken by the applicant. The CLRC recommended the inclusion of these provisions as to attain fast-track and optimal disposal of cases, prevent loss of business and promote ease of doing business. The proposed provisions for settlement and commitment contemplate the benefits of procedural economy and efficacious enforcement action under the Indian competition regime. Settlement and commitment mechanisms can also help in obtaining an improved quality of remedies.

However, extensive use of settlement and commitment mechanisms can cause a shift from the classic ex-post review of past behaviour through infringement decisions to forward looking ex-ante regulatory approach to change market structure.65 Due to the limited scope of judicial review

64 Antonio Capobianco & Satoshi Ogawa, supra note 1, at 8.
in orders of settlement and commitment, it may further lead to a weakening of due process and procedural rights. So, what is required is the adoption of an effective approach by the competition regulator in selecting the cases in which the settlement and commitment mechanism should be followed and in obtaining better remedies from the party through such mechanism which not only address the competition concerns but also has the required deterrence effect. Any newly added provision should not only ease the burden of the respective authorities but should also supplement and augment the efficacy of the law. The newly introduced provisions should not be viewed as a proxy to general litigation in a bid to avoid trial as this approach will be detrimental to the deterrence effect of the Competition Act. The speedy resolution of cases facilitated by the introduced settlement and commitment mechanism can be a boon to the Indian antitrust regime but can turn into a bane if the usage of the proposed mechanism is not effective and judicious.
MINIMUM ADVERTISED PRICE: AN INTERNATIONAL PERSPECTIVE

Akshita Goyal & Kanika Jain*

ABSTRACT

Minimum Advertised Price is an arrangement in which a supplier sets a lower limit on the prices that its resellers may advertise for the supplier's products. Before delving into the implementation of Minimum Advertised Price in India; the authors will discuss the advantages, disadvantages, and its application in today’s e-commerce market, the understanding of which is imperative to appreciate the concept as it stands today. Subsequently, U.S., UK, Canada and Australia’s legal and practical stances on the application of MAP will be ventured upon as these countries are considered to be India’s biggest trading partners. The paper then analyses the law in force in India concerning vertical restraints and whether the concept of Minimum Advertised Price falls under the ambit of Resale Price Maintenance. The paper further discusses the interpretation of vertical restraints elucidated upon by the Competition Commission of India. Lastly, the authors conclude that the U.S. model proves to be the most effective model that could be adopted in India due to its successful application in the competitive market of the U.S., and rational legal position that would be favourable to India’s current economic standing.

Keywords: Competition Law, Vertical Restraint, Advertised Price, Resale Price Maintenance, Selling Price

* The Authors are enrolled in III Year, B.A. LLB. (Hons.) and B.B.A LLB (Hons.), Symbiosis Law School, Pune respectively.
INTRODUCTION- WHAT IS MINIMUM ADVERTISED PRICE?

Minimum Advertised Price (“MAP”) is an arrangement in which a supplier sets a lower limit on the prices its resellers may advertise for the supplier's products. MAP programs may take the form of a unilateral policy imposed by the supplier or an agreement between the supplier and its resellers. When it is in the form of an agreement, then the MAP set by the manufacturer would apply uniformly to all the retailers. MAP applies to all forms of advertisement- print, digital, online, etc.

The aforementioned policy has been in the works globally since the 1900s, post the Industrial revolution. However, MAP is relevant now more than ever due to the increasing competition, globalization, and spread of e-commerce. It prohibits retailers/resellers from selling such products at high discounts in order to gain profits. It also sets rewards and punishments for the retailers/resellers in order to ensure compliance with such policies. Rewards such as discounts, authorized reselling, etc. and punishments such as refusing to continue business with that reseller, fines, etc. can be set. Financial rewards and expected losses would render compliance highly probable.¹ The MAP is no manner similar to the Minimum Selling Price of a product. Agreeing to a MAP does not imply that the reseller cannot sell the product at a price lower than the price set, instead, it only means that the product cannot be advertised lower than the price set by the MAP.

For example, brand ‘A’ sets Rs. 1000 as its MAP, and reseller ‘B’ advertises it at Rs. 1200 but sells it at Rs. 800; that would not violate the MAP policy. However, if ‘B’ advertises it at Rs. 800, then it would violate the MAP policy.

Furthermore, by not setting a MAP, not just customers, but even other potential retailers may assume that the product being sold is of a relatively lower quality and would therefore, refrain from engaging in business with such a product.²

The legal position of MAP is not uniform throughout the world. It is legal in countries like United States of America (“U.S.”)\(^3\) and Canada,\(^4\) it is illegal in countries like United Kingdom (“UK”)\(^5\) and other countries of the European Union (“EU”),\(^6\) and it has no explicit statutory standing in countries like India.\(^7\)

The implementation of the MAP does not merely offer visible benefits to the larger brands, but is beneficial for the market as a whole. It primarily serves as a protection for manufacturers. By implementation of MAP, in addition to the protection of the brand image, an insight into which retailers are trustworthy can also be attained. By setting a fixed MAP for its products, the manufacturers can prevent the resellers from advertising the products at absurdly low prices, and this would, therefore, disassociate the premium brand of the manufacturer from cheaper products. This would also help in establishing long term relations with the retailers, which subsequently would lead to rewards, contracts, clients, and other benefits. Customers are also benefited by the usage of MAP because they can avoid being tricked into purchasing a commodity which is more expensive as compared to the actual value of the product. Microeconomics and the laws of demand and supply function on a basic assumption that the consumer is a rational one with a reasonable awareness of the market position.\(^8\)

A consumer is under the impression that a product ‘X’ is advertised and sold at the same price in the entire market. If in this scenario, a retailer decides to advertise or sell the same product at a lower cost, it would be arbitrary to the customer since he cannot avail this discounted price due to the assumption of a ‘perfectly competitive market’. It ensures the protection of small & medium-sized retailers from the giants because the business model of the latter affords them an opportunity to advertise their products at discounted prices.


\(^{6}\) *Id.*


since the size of their retail setup can absorb any loss that may arise due to such a risk. However, smaller retailers cannot afford to compete with, for example, Amazon may advertise the product at an 85% discounted rate. The implementation of the MAP here would ensure that fair pricing and competition are thus maintained. MAP prevents retailers from gaining popularity in the market by lowering advertised prices, and it helps in providing clear cut margins of profits that the retailers will earn. It ensures that the cost is worth the value of the product and also aids the assessment of competition.

However, there are some disadvantages also attached to the usage of MAP. MAP inevitably results in artificial inflation of prices because no manufacturer wants to advertise its products at a price lower than it’s worth. This would let cheaper products to gain a foothold in the market as not every consumer has the purchasing power to afford higher-priced products. With the present technology and innovative mindset of the youth, the authors believe that similar cheaper alternatives of high premium branded products can be manufactured, which would then become the consumer’s preference.

It is also pertinent to understand in brief, how the MAP works in the e-commerce market. Online resellers tend to offer huge discounts of up to 85% on various products so that their websites gain not just traffic, but also profits. This would not be possible if the MAP system is applied, so how do they do it?

Online resellers have found a way to get around the imposition of MAP. The online resellers display the discounted prices only once the product is added to the cart and viewed from the shopping cart. This would mean that the price shown in the cart is no longer ‘advertised’ and is now the selling price. Therefore, the online resellers would no longer violate the terms of their MAP Agreement with the manufacturers, and at the same time would continue to provide customers discounted prices while also earning huge profits at the same time.

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10 Id.

11 Using MAP and MRP to Manage Online Retail Prices, Pricing Solutions, https://www.pricingsolutions.com/pricing-blog/map-mrp-online-retail-strategy/.

12 Id.
An important question that is always asked is- *Is MAP the same as Price Fixing?*

Some countries like the UK believe that MAP is similar to price-fixing and is therefore an anti-competitive practice.\(^\text{13}\) However, there is a need to draw a distinction between price-fixing and MAP\(^\text{14}\) so that this unsubstantiated claim does not hold.

This distinction can be explained through an *illustration*- Price fixing would be when companies A, B, and C are all resellers of the same product and decide to lower the selling price so that companies D and E incur losses. Through this practice, companies D and E are placed at a disadvantaged position because of a mutual agreement between A, B, and C. It would, therefore, amount to a horizontal price-fixing. This would amount to an illegal arrangement since it violates the antitrust laws of most countries and is in violation of the underlying antitrust principles.

Vertical price-fixing arrangements, on the other hand, occur when Manufacturer ‘X’ sells its products *via* retailers A, B, and C. But X gives permission only to retailer ‘A’ to sell its products at a lower price than retailers B and C. This would cause heavy losses to B and C. Such a practice would also be illegal as it violates antitrust laws of most countries and is against the general antitrust principles.

The essence of MAP policies, however, is based on the ‘advertised’ price as opposed to the ‘selling’ price. In a MAP, there is no unequal treatment between any reseller and all of them would have to adhere to the uniform prices set by the manufacturer.\(^\text{15}\) This ensures prevention of price-fixing, instead of amounting to price-fixing itself.

**POSITION IN INDIA**

Competition law and unfair trade practices in India are governed by the Competition Act, 2002 (*the Act*) which establishes the Competition Commission of India (*CCI*) with quasi-judicial powers. The CCI is a statutory body of the Government of India responsible for enforcing the

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\(^\text{13}\) Dan White, *supra* note 5.


\(^\text{15}\) *Id.*
Competition Act, 2002 throughout India and to prevent activities that have an Appreciable Adverse Effect on Competition ("AAEC") in India.

**VERTICAL RESTRAINTS AND MAP**

Section 3(4) of the Act\(^{16}\) essentially deals with vertical agreements amongst enterprises at different stages of the production chain in respect of production, supply, distribution, storage, sale or price of, including RPM and declares the same to be void if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

It is of utmost importance that the definition of RPM only includes those agreements which impose a condition on ‘prices to be charged on the resale’ by the purchaser. The Section, however, fails to specifically contemplate a situation where such a restrain is imposed on the price at which the goods are advertised and not actually sold.

**TEST OF AAEC**

Vertical restraints are prohibited only if the CCI, upon an inquiry, arrives at the conclusion that they cause, or are likely to cause, an AAEC in India. In the discharge of such an inquiry, the CCI is required to weigh the likely pro-competitive benefits against the potential anti-competitive harms arising from vertical restraints. Section 19 of the Act lays down certain factors that the CCI must take into consideration while assessing whether an agreement has AAEC in India, which are enlisted below:

i. Creation of barriers to new entrants in the market;
ii. Driving existing competitors out of the market;
iii. Foreclosure of competition by hindering entry into the market;
iv. Accrual of benefits to consumers;
v. Improvements in production or distribution of goods or provision of services; and

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vi. Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

In addition to the above, an analysis of the market position of the enterprise enforcing the vertical restriction is also inherent in the CCI’s assessment of market foreclosure.

CCI’s assessment in dealing with restrictions that may cause AAEC in India is largely influenced by the U.S. antitrust law which analyses the nature of such restrictions under the ‘rule of reason’ test. In the landmark judgment of *Hindustan Lever Ltd.*, the Supreme Court has stated that in case of competition, the test of ‘rule of reason’ has got to be adopted. The Supreme Court observed that the ‘per se’ rule in respect of a provision is not applicable under Indian laws notwithstanding that such rule may be applicable under the American legal system. Therefore, according to the Supreme Court, one has to look at the provisions of the Indian laws and ‘rule of reason’ and come to a conclusion. In order to understand U.S.’s stance on the ‘rule of reason’ test better, it is essential to comprehensively analyse U.S.’s law on MAP.

**POSITION IN THE US**

Minimum Advertised Price under the U.S. law is adjudicated by the test of ‘rule of reason’ which focuses on the state of competition within a well-defined relevant agreement. The ‘rule of reason’ test usually analyses a contract, combination or the like that unreasonably restraint trade, and does not fit into the ‘per se’ category.

The ‘per se’ rule deals with restraints that are so inherently anti-competitive and damaging to the market that they warrant condemnation without further inquiry into their effects on the market or the existence of objective competitive justification.

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The ‘rule of reason’ test is considered to be a less stringent form of the ‘per se’ rule. It distinguishes between restraints with an anti-competitive effect which may result in conduct that is likely to cause such injury and are harmful to the consumer, and restraints stimulating competition that are in the best interest of the consumer.\(^{22}\)

On critical analysis of the two tests: the ‘rule of reason’ and the ‘per se’ rule, the latter appears to have its roots in the literal rule of interpretation and the former seems to be an amalgamation of the purposive rule and the mischief rule of interpretation. Hence, the ‘rule of reason’ analysis appears to be more rational and judicial as it takes into consideration all the aspects and effects of a particular agreement in the relevant market.

Antitrust claims are usually analysed by the U.S. Courts under this test where it considers whether the agreement imposes an unreasonable restraint on competition in the market. In doing so, the court must consider certain factors which are, \textit{inter alia}: 

i. The intent and purpose of the dominant party in adopting the restriction;\(^{23}\)

ii. The competitive position of the dominant party with special emphasis on information about the relevant business, its condition before and after the imposition of restraints, and its history, nature and effect;\(^{24}\)

iii. The existing structure and competitive conditions of the relevant market;\(^{25}\)

iv. Barriers to entry in the particular market;\(^{26}\)

v. The existence of an objective justification for the restriction.\(^{27}\)

However, it must be noted that none of the factors stated above are decisive and Courts must strive to maintain a balance between them to determine whether a particular restraint of trade is


\(^{26}\) \textit{Id.}

\(^{27}\) California Dental Association v. FTC, 526 U.S. 756 (1999).
competitively unreasonable. For instance, in the case of Leegin Creative Leather Products Inc. v. PSKS Inc.,\textsuperscript{28} the court had observed that in the absence of vertical price restraints, the retail services that enhance inter-brand competition might be underprovided, the reason being that discounting retailers may free ride on retailers who furnish services and the increased demand those services generate.\textsuperscript{29}

The enforcement of antitrust laws in the U.S. is the function of an independent agency of the U.S. government, the Federal Trade Commission (“FTC”). Its principal mission is the promotion of consumer protection and the enforcement of civil U.S. antitrust law through the elimination and prevention of anticompetitive business practices.\textsuperscript{30}

The FTC in its recent guidelines has observed that if a manufacturer adopts a policy regarding the desired level of prices on its own, the law permits the manufacturer to deal exclusively with the retailers who agree to that policy. A manufacturer may refuse to deal with a retailer that does not follow its resale price policy. In other words, the FTC guidelines permit a manufacturer to implement a dealer policy on a ‘take it or leave it’ basis.\textsuperscript{31}

99 years ago, the United States Supreme Court held in U.S. v. Colgate and Co.,\textsuperscript{32} that a manufacturer is not prevented from (a) unilaterally announcing prices at which goods may be advertised and/or sold; and (b) subsequently refusing to deal with retailers that choose not to acquiesce with the announcement.\textsuperscript{33} There is a huge difference to be noted between unilateral policies and MAPs, because in the former there is no agreement, whereas in the latter there is a bilateral agreement between the manufacturers and the resellers. This bilateral agreement between the two parties in regard to MAP sets out the consequences of not adhering to the same as well.

Internet Minimum Advertised Price (“IMAP”) policy is a contractual arrangement that requires a retailer to display a minimum advertised price despite the actual selling price. The legality of such agreements has been upheld by U.S. regional courts in a catena of cases. The rationale behind such

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\textsuperscript{28} 127 S. Ct US (2007).
\textsuperscript{29} Id., at 10.
\textsuperscript{32} 250 U.S. 300, 306 (1919).
\textsuperscript{33} Id., at ¶18.
decisions is the restriction of only the minimum price for which a dealer could advertise on the internet and no restrictions with respect to the actual sales price.

Analysis of a few important cases in this regard has been provided below:

i. WorldHomeCenter.com Inc v. Franke Consumer Productions Inc\textsuperscript{34}

In the present case, the restraints imposed by the manufacturer were not considered to be anti-competitive in nature because the said policy provided internet retailers with more than one way to communicate lower prices to clients. This may be done by way of either allowing customers to call or email for a price quote or by offering a coupon to be applied at checkout. Hence, owing to the fact that there were no absolute restraints to price management, the said agreement could not be considered as Resale Price Maintenance ("RPM") and was held to be lawful.

ii. WorldHomeCenter.com Inc v. KWC America Inc\textsuperscript{35}

The Court observed that the ‘per se’ rule was inapplicable to MAP restrictions and elucidated that IMAP cannot be the basis of a vertical RPM claim because it does not restrain resale prices, but merely restricts the price at which the product is advertised. Hence, the Court rejected the claim of the petitioner that MAP violates U.S. antitrust laws according to the ‘per se’ rule because it amounts to vertical restraints.

Exceptions

However, MAPs have not been granted absolute immunity under the U.S. law and such a policy may violate U.S. antitrust law where:

i. The manufacturer defines ‘advertising’ broadly, and the resellers are required to adhere to the manufacturer’s MAP program on all in-store signs and displays as well as external advertising in order to benefit from the cooperative funding;

ii. Resellers may be excluded from all advertising funding for an extended period of time due to failure to adhere to a MAP provision;

\textsuperscript{34} No. 10 Civ. 3205 (BSJ), 2011.
\textsuperscript{35} No. 10 Civ. 7781 (NRB).
iii. Such restrictions are put into place with the anti-competitive intent of the manufacturer. Anti-competitive intent may include, inter alia, an intention to stabilise prices or limit retail price competition and may be demonstrated by an examination of both business’s conduct and the effect of the conduct on the competition.36

A landmark case where such restrictions were held to be against the competition law policy of the state is the case of Universal Music & Video Distribution Corp. v. UMG Recordings37 where the FTC had applied the ‘rule of reason’ test and declared that the restrictions imposed by the companies were unreasonable.

In the said case, the FTC challenged the MAP policies of five large distributors of pre-recorded music which prohibited advertisement with discounted prices, even if the retailer paid for the same with its own money which extended to in-store advertising. Further, a single violation of any such restriction required the retailer to forfeit funds for all of its stores for up to 90 days. The FTC observed that these policies were unreasonable and prevented retailers from educating consumers about discounts on records and CDs.

LEGAL FRAMEWORK IN EUROPEAN COUNTRIES: WITH SPECIAL REFERENCE TO THE UNITED KINGDOM

The European Union has rejected any possibility of MAP policies being valid and legal under its Competition regime. The EU and the UK believe that MAP policies promote anti-competitive practices as it ultimately leads to the emergence of RPM. The ratio behind the same is that the purpose of the discount is to stimulate sales and the imposition of MAP would restrict the retailers from setting their own discounts which may reduce the profits they wish to accrue.

Article 101(1) of the Treaty of Functioning of the European Union ("TFEU") prohibits those agreements which appreciably restrict or distort competition, while Article 101(3) exempts those agreements which confer enough benefits to outweigh the anti-competitive effects. Article 101 applies to vertical agreements that may affect trade between the Member States and that prevent,

37 No. 9710070 C-3974.
restrict or distort competition. It provides a legal framework for the assessment of vertical restraints, which takes into consideration the distinction between anti-competitive and pro-competitive effects.  

The petition for the aforementioned purpose advocated such policies as a good way to create and maintain a stable price so that all parties can obtain a healthy profit in principle. But the Parliament has explicitly held that MAPs will likely be restrictive of competition within the meaning of Article 101(1) of the TFEU. It observed that it would be difficult for companies to demonstrate in a case that the pro-competitive effects of the clauses outweigh the negative effects under Article 101(3). It elucidated that the development of online markets intensifies competition, which benefits the consumers as they can compare prices and find the best value for their money.

In the widely acknowledged UK decision of Commercial Refrigeration, Foster Refrigerator had issued a MAP policy to its entire network of resellers. Foster’s objective for implementing the MAP policy was to eliminate aggressive discounting on online sales, and thereby reduce competition between resellers engaged in online sales, as well as to reduce downward pressure on the Market Price. It also sought to protect its brand reputation through the policy.

The Competition and Markets Authority (CMA) held that Foster’s MAP policy restricted the ability of resellers to determine their online sales prices at a price below the MAP. It elucidated that this amounted to RPM, which infringed Section 2 of the UK Competition Act, 1998.

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POSITION IN OTHER JURISDICTIONS

Canada

MAP has been recognized in Canada since the 1985 and 2009 Amendments made it to Canada’s Competition law regime. It is allowed in the form of Unilateral Minimum Advertised Pricing Programs (“UMAP Program”). A UMAP Program is typically a supply agreement in which a supplier directly or indirectly prohibits or discourages its customers from advertising the former’s products below a certain price. Canada’s new price maintenance regime provides suppliers with improved flexibility so that they are able to influence the prices of their products. These Amendments were made so that Canada’s competition laws are in line with the U.S.’s antitrust framework, its major trading partner. The introduction of ‘adverse effect’ in section 76 of the Competition Act, will allow a reduction in the number of circumstances wherein the price maintenance practices are found to be contrary to the provisions of the statute.

Australia

The Australian Competition and Consumer Commission (“ACCC”) authorises or grants statutory protection to an applicant upon being satisfied that despite the breach of the Competition and Consumer Act (“CCA”), the public benefit would outweigh the likely anti-competitive element of such an act. National Associated Retail Traders of Australia (“NARTA”) sought authorization for MAP for 10 years because they believed it would help create a level playing field. The ACCC however, rejected NARTA’s application because it did not believe that by allowing MAP, the public benefit would outweigh the likely detriment to the public due to anti-competitive practices. In deciding against the imposition of MAP, ACCC also considered its

2Id.
3Id.
4Linda Evans, Elizabeth Richmond, E. & Benjamin Willis., Australia: The ACCC says "no" to minimum price advertising, Mondaq (Oct. 21, 2013), http://www.mondaq.com/australia/x/270058/Trade+Regulation+Practices/The+ACCC+says+no+to+minimum+price+advertising.
impact on online sellers and said that the competition offered by online trading would be lessened by such imposition.

**LEGALITY OF MAP in INDIA**

The CCI has not yet dealt with any such matter where restrictions were imposed by the supplier on the price at which goods were advertised and not *per se* sold. In such a situation, it becomes inevitable to analyse the response of CCI in earlier cases dealing with price-fixing and RPM arrangements.

In the past, the CCI has refused to investigate allegations of RPM when the alleged restrain allowed the supplier to recommend the maximum retail price but ultimately, the selling price was to be determined by the distributor and he was merely required to inform the supplier of its decision to allows a discount higher than the stipulated rate.\(^5\)

In a recent case,\(^6\) the CCI found that *Hyundai Motor India Limited’s* prescription of maximum permissible discount to its dealers stifled intra-brand competition and resulted in higher prices for the consumers. CCI elucidated that anti-competitive resale price restrictions could be achieved either directly or indirectly. This may be implemented by fixing of the distribution margin, making the grant of rebates or the allocation of promotional charges conditional on adhering to a fixed price level, fixing maximum level of discount, linking a resale price to the resale prices of competitors, or using warnings, intimidation, threats, penalties, delay or temporary suspension of deliveries as means of fixing the price charged by the reseller.

The CCI has not yet assessed the legality of MAP as a vertical restraint. As RPM restrictions are assessed under the ‘*rule of reason*’ test, the CCI is likely to consider the effects of the MAP restraints imposed in the relevant market and other factors such as market shares, duration of vertical restrictions and protection of brand image to negate the likelihood of market foreclosure.\(^7\)

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CONCLUSION

MAP policies and strategies may not have been of much relevance to competition in the market before the marketplace was occupied by a handful of e-commerce giants and the customers could conveniently shop and compare product prices on the internet and offline retail. E-commerce sellers are in a position to offer products at a lower price as compared to tangible stores in the marketplace owing to the relatively lower operating costs and fewer investment requirements. This hampers the interests of the manufacturers or suppliers who cannot offer a product at the same price as the price may not even cover the cost incurred on it. An individual seller offering a similar product at a lower price as prevalent in the market will cause disequilibrium in the market and flout the laws of demand and supply in the market.

With the development of technology and the growing involvement of behavioural science in marketing strategies, the use of such restrictions in the marketplace may become a practice. These practices, however, must not be *prima facie* considered to affect competition as they protect the interests of the manufacturer and other suppliers in the market. The reasonable nexus between the vertical restraint and interests of suppliers must be examined with due consideration to consumer welfare.

To conclude, while MAP is legal in some countries and illegal in others, it seems like in a huge trading market like that of India’s, the advantages would outweigh the disadvantages of implementing this system. It has the quality to protect the interests of manufacturers, retailers, as well as consumers. In doing so, it would create a balanced market that would not overlook the interests of small & medium-sized retailers who cannot afford to offer steep discounts. It is recommended that India must consider the pros and cons of implementing MAP and clear the ambiguity present in the current market, by introducing a legislation governing the same or incorporating adequate amendments to the Competition Act.
DEMYSTIFYING THE ROLE OF ARTIFICIAL INTELLIGENCE IN ONLINE DISPUTE RESOLUTION

Prateek Joinwal*

ABSTRACT

In recent years, several jurisdictions around the world have witnessed an unprecedented rate of technological innovation. Perhaps unsurprisingly, States have sought to capitalise on such innovations in the Information and Communication Technology regime by employing some of their tenets within the framework of alternate dispute resolution processes in a bid to enhance the efficiency with which disputes are resolved, outside the courtroom. Online dispute resolution platforms and systems such as the Victorian Civil and Administrative Tribunal, ‘Split Up’ and ‘Ailira’ have all employed an artificially intelligent software within their framework owing to the multitudinous advantages associated with using artificial intelligence in the legal regime, such as enhanced efficiency, reduced costs as well as a general increment in access to justice.

Although there are evident benefits of employing an artificially intelligent dispute resolution process, yet, the same is also marred by a few frailties which primarily revolve around the ethical considerations associated with implementing such a system of resolving civil disputes. This research paper is targeted towards addressing the aforementioned concerns related to the adoption of such artificially intelligent dispute resolution processes. In an attempt to establish a concrete ground, the paper firstly deals with the apparent benefits of replacing the traditional legal framework of resolving disputes with a technologically advanced system that is tailored to the needs of the concerned parties. In the succeeding sections, the aspect of ethical considerations associated with such systems is discussed in a bid to resolve the dichotomy associated with the widespread adoption of technologically advanced dispute resolution systems. This paper aims to present a case for the adoption of automated technologies in traditional ADR frameworks as well in the judiciary to aid the entire justice-delivery process in India.

Keywords: Technological Innovation, Artificial Intelligence, Online Dispute Resolution, Ethical Considerations

*The author is enrolled in III Year, B.A. LL.B. (Hons.), The West Bengal National University of Juridical Sciences, Kolkata.
INTRODUCTION

"People don’t want neurosurgeons. They want health. And I’ll tell you, people don’t want courts. They want the outcomes that courts can bring."

As times have changed, so has the way in which we engage with technology in our day-to-day lives. Earlier, the thought of employing the continuous advances in technology to address access to justice impasse was regarded as hopeful speculation at best. However, in recent times, several jurisdictions across the globe have attested to the digitisation of dispute resolution. Most commercial arbitrations are nowadays being conducted online through electronic communication. Similarly, there has been an increasing proclivity towards using machine learning software to expedite such dispute-resolution processes. Online Dispute Resolution ("ODR") thereby, is simply understood as an umbrella term used to denote the alternate dispute resolution ("ADR") processes that employ some tenets of Information and Communication Technology ("ICT") to resolve the conflict(s) of a particular case.

Praising the ODR system for the efficacy with which it handles offline disputes, some scholars believe that technology holds the potential to transcend the circumscribing boundaries of traditional legal frameworks so as to “open up justice to new actors”. Additionally, it is also believed that access to justice can be exponentially improved through the concerted implementation of artificial intelligence ("AI") based systems within the ODR framework. Scholars such as Schatsky have defined AI as “the theory and development of computer systems able to perform tasks that normally require human intelligence”. The implementation of AI in ODR systems involves the application of logic-based commands in a bid to automate legal

10 Id.
13 Darin Thompson, Creating New Pathways to Justice Using Simple Artificial Intelligence and Online Dispute Resolution, 2 INT’L. J. OF ONLINE DISP. RESOL.4, 5-6 (2015).
14 DAVID SCHATSKY et al., DEMYSTIFYING ARTIFICIAL INTELLIGENCE: WHAT BUSINESS LEADERS NEED TO KNOW ABOUT COGNITIVE TECHNOLOGIES 3 (Deloitte University Press 2014).
decisions. Machine learning is one subset of AI which is usually employed within several ODR regimes owing to its ability to learn and adapt from data algorithms, which allows programmers to bypass the need for explicit programming.15

Surprisingly, policymakers had already deliberated upon the notion of capitalizing AI to mitigate the rigours of legislative frameworks several decades ago.16 This deliberation later engendered the discipline of AI and law, which was focused on investigating ‘expert systems’ to address legal disputes.17 ODR systems nowadays incorporate such expert systems, automation technologies as well as algorithmic resolutions to handle several disputes, which reduces the cost of legal research along with personalizing the procedure as per the needs of the parties involved.18 The shift towards relying on the use of AI-assisted ODR frameworks which employ predictive coding, predictive analysis as well as machine learning is thus, clearly revolutionising the way in which client risk is assessed and legal information is presented to adjudicators.19

The Indian legal regime has long been marred by a discernible backlog of cases, an evil which has translated into numerous unenforced orders, automatic appeals, and vacancies from the Bench, among other things.20 The Law Commission of India had already stated that the country’s inefficient adoption of technological best practices was responsible for its dwindling judicial productivity.21 The preference for a lawyer-centric approach of adjudicating disputes22 even when ODR holds the potential to perfectly complement the existing legal framework23 is another reason for India’s reluctance towards implementing such technological changes within the judiciary.

While the benefits of adopting an AI-inclusive-ODR framework are apparent, there are still

15 Charlie Morgan, supra note 2.
22 Darin Thompson, supra note 6, at 8.
disparate views as to whether the same is bound to ultimately aid or hamper the dispute resolution process. However, considering the momentous advantages of switching over to technologically advanced ODR systems, why has there been an incipient reluctance to adopt these measures within our domestic legislative framework?

This research paper is aimed towards addressing such concerns vis-à-vis the adoption of an AI-inclusive-ODR regime. While Part II of this paper would furnish arguments in favour of implementing the aforementioned regime, the succedent sub-section shall present some limitations and ethical considerations associated with the implementation of the same. The discussion would culminate with the concluding remarks, offered in Part IV of the paper.

**ENDORSING THE NOTION OF AN AI-INCLUSIVE-ODR REGIME**

1. **Does deviating from the traditional legal frameworks guarantee an improvement in efficiency?**

   The deployment of an AI-induced ODR framework not only improves the efficiency of the dispute resolution process but also addresses several other limitations associated with traditional legal frameworks. Such ODR systems are known for engendering dispute resolution procedures align with the specific needs of the contesting parties. Additionally, by the implementation of ‘smart legal contracts’ (‘SLCs’) and distributed ledger technology, the AI-based systems are expected to revolutionise how contracting parties interact with each other.

   In traditional ADR processes, the aspect of having to meet up and interact with the opposing party has often been viewed with some vacillation, especially in cases where there is an apparent tension between the contesting parties. Although the process of mediation is centered on curbing the hostility between the parties, ODR systems eliminate such tension(s) from the very start by providing an avenue to resolve the dispute(s) on an online platform. Additionally, since both mediation and ODR are based on the same concept of ‘principled negotiation’ which was

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26 Id.
originally formulated by the Harvard Negotiation Project;\textsuperscript{28} there are no evident trade-offs associated with shifting to an online platform for resolving disputes.

Along with this, big data and AI have already expedited dispute prevention and detection by employing machine learning, data analysis, and predictive coding to curtail liability, risk, and injustice.\textsuperscript{29} Automated systems have portrayed immense potential to support decision-makers and as touted by Sourdin, may even “reshape the adjudicative role”.\textsuperscript{30} Owing to the ability of AI software to self-learn from data algorithms, it is usually employed to identify and narrow the issues in the dispute so as to mitigate the differences between the parties.\textsuperscript{31}

Also, it has been shown that it is possible to enhance the sophistication of these dispute resolution systems by blending expert systems with the tenet of machine learning, and the interface produced from this blend is often able to self-learn from different data-algorithms.\textsuperscript{32} Citing the evident advantages of enhancing the sophistication of these systems within the realm of medicine, the Law Society of England and Wales had expostulated in its report that the ability of ODR systems to effectively analyse a vast database of information was directly proportional to the level of their sophistication and fluency in natural language processing.\textsuperscript{33}

Perhaps unsurprisingly, technological advances in machine learning are garnering massive investments nowadays.\textsuperscript{34} These developments have engendered an increasing interest among pro-ODR scholars with respect to the creation of ‘court-annexed’ ODR systems and the enforcement thereof, in jurisdictions suffering from conspicuous backlogs.\textsuperscript{35} In recent years, several scholars\textsuperscript{36}

\textsuperscript{29} Leah Wing, Artificial Intelligence and Online Dispute Resolution System Design: Lack of Access to Justice Magnified, 4 INT’L J. OF ONLINE DISP. RESOL. 16, 18 (2017).
\textsuperscript{30} Tania Sourdin, supra note 12.
\textsuperscript{32} Felicity Bell, Family Law, Access to Justice, and Automation, 19 MACQUARIE L. J. 103, 108 (2019).
\textsuperscript{33} Tara Chittenden, Capturing Technological Innovation in Legal Services, 12 (Research Report, The Law Society of England and Wales, 2017).
\textsuperscript{34} TOBY WALSH, IT’S ALIVE! ARTIFICIAL INTELLIGENCE FROM THE LOGIC PIANO TO KILLER ROBOTS 49-50 (La Trobe University Press and Black Inc. 2017).
\textsuperscript{36} Robert J. Condlin, Online Dispute Resolution: Stinky, Repugnant, or Drab, 18 CARDOZO J. CONFLICT RESOL. 717, 718 (2017).
and judges\textsuperscript{37} have stated that ODR systems are likely to address the growing concerns over access to justice predicament.\textsuperscript{38} In several jurisdictions such as Australia and Canada, access to justice has been regarded as a pertinent problem in family law matters.\textsuperscript{39} Since delays often have a particularly detrimental impact on family law matters, the American Law Reform Commission had already espoused for ODR systems to alleviate the judiciary’s workload and thereby, ensure faster access to a resolution to the concerned parties.\textsuperscript{40} Accordingly, certain unsettled aspects of family law make it particularly susceptible to automation - the first being affordability and accessibility,\textsuperscript{41} and the second, the continuously falling standards of efficiency of the family law system.

While there have been attempts to codify the laws governing Arbitration in India via the promulgation of the Arbitration and Conciliation Act, 1996, no such attempt has been made to codify the possibility of integrating automated technologies with traditional arbitration and other ADR frameworks in India. Although these traditional frameworks have indisputably gone a long way in terms of easing the pressure on the formal adjudicatory processes, the fact that there still remains an evident backlog of about 4.5 million cases in the Indian High Courts,\textsuperscript{42} calls for a transmogrification in every possible mechanism which seeks to resolve disputes in India.

\textbf{ii. A brief account of some AI-backed ODR Instruments}

The Victorian Civil and Administrative Tribunal (\textquotedblleft VCAT\textquotedblright) is arguably the most successful AI-based ODR platform for tenancy related disputes. The AI interface allows tenants and landlords to pay fees, search for previous applications, and create notices.\textsuperscript{43} ‘Cybersettle’ and the ‘eBay

\textsuperscript{38} A.R. Lodder & J. Zeleznikow, 
\textsuperscript{39} JOHN EEKELAAR & MAVIS MACLEAN, FAMILY JUSTICE: THE WORK OF FAMILY JUDGES IN UNCERTAIN TIMES 210-24 (Hart Publishing 2013).
dispute resolution programme’ are other common ODR platforms. While the former acts as a blind-bidding system, the latter employs ADR to resolve disputes arising out of auction-related transactions on its website.\(^\text{44}\) Reaffirming the importance of online platforms to expediently adjudge family law disputes, several ODR platforms have been formed to specifically cater towards the regime of family law.

For instance, following the lines of the VCAT, an AI-backed ODR system called Rechtwijzer was formed in the Netherlands for resolving issues of family law and child support.\(^\text{45}\) In addition, Australian systems such as ‘Split Up’ and ‘Family-Winner’ survey the judgments of the family law courts to ascertain the probable distribution of property in a matrimonial dispute.\(^\text{46}\) Furthermore, by making use of a $581,000 seed funding from the Australian Government, the Legal Services Commission of South Australia is currently overseeing the design of an online portal that employs AI to guide former couples through the formal separation process.\(^\text{47}\) Another ODR system ‘Wevorce’ acts as a tax software for divorce which makes use of a complex data-algorithm.\(^\text{48}\)

Highlighting the potential of the automation processes associated with AI-assisted ODR, ‘Ailira’ provides tailored advice to victims of domestic violence along with carrying provisions for drafting civil protection orders.\(^\text{49}\) Recently, by partnering with a Conflict Analytics Lab, Queen’s Law had formulated an intelligent dispute resolution (“IDR”) system, an AI-powered tool that could offer legal predictions to litigants along with negotiation support.\(^\text{50}\) Along the same lines, an application

\(^{44}\) Robert Condlin, supra note 29, at 725.
\(^{50}\) Putting the AI in legal aid: dispute resolution program receives research grant, Queen’s University (Oct. 17, 2019), https://law.queensu.ca/news/putting-the-ai-in-legal-aid-dispute-resolution-program-receives-research-grant.
by the name of *coParenter* offers facilities for resolving parenting disputes between separated individuals by employing several facets of such IDR tools.\(^{51}\)

With respect to the realm of property law, significant strides have been made by the British Columbia’s *Civil Resolution Tribunal* ("CRT"), a permanent, publicly administered ODR system that resolves offline disputes. The CRT resolves strata property and small claims disputes to the value of CAD 5000, along with addressing disputes concerning claims for debt or recovery of possession of property.\(^{52}\) Accordingly, Lord Justice Briggs's *Civil Courts Structure Review* in the UK is an e-Court for claims up to £25,000.\(^{53}\)

A similar scheme for the Small Claims Courts was adopted by the Utah Supreme Court in 2018. Having its jurisdiction over claims of up to USD 11,000, the ODR system employed within the Court was capable of adjudicating an entire dispute online, as opposed to only a particular facet of a dispute.\(^{54}\) In the words of the Utah SC Chief Justice Deno Himonas, the implementation of this system was grounded in the SC’s “*commitment to access to justice and its desire to remain relevant in a changing world.*”\(^{55}\) In New Zealand, there has been an increasing implementation of an AI-based prediction model which handles claims under the State’s ‘Accident Compensation Scheme’.\(^{56}\)

Within other domains, *Lex Machina* pioneered the usage of predictive analytics to scrutinize patent decisions.\(^{57}\) Such ODR systems employing predictive analytics can help litigators make better strategic decisions by ferreting out subtle patterns in judicial decisions and predicting the odds of

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\(^{52}\) Shannon Salter, *Online Dispute Resolution and Justice System Integration: British Columbia’s Civil Resolution Tribunal*, 34 WINDSOR YEARBOOK OF ACCESS TO JUSTICE 112, 114 (2017).


\(^{55}\) *Id.*

\(^{56}\) Tania Sourdin, *supra* note 12, at 1118-19.

success on motions during the resolution process.58 In addition, Wolters Kluwer had also formulated an AI-based tool for predicting judgments known as Jurimetría, which essentially provides information on the probability of the success of an appeal lodged in the Spanish Courts, by conducting a thorough analysis of millions of court decisions.59 The ‘Siarelis robot’ is another example of an artificially intelligent system developed by Superintendencia de Sociedades desde Colombia,60 which employs ICT and predictive coding to resolve corporate disputes.

THE FRAILTIES ASSOCIATED WITH IMPLEMENTING AN AI-BACKED ODR REGIME: DELIMITING THE ‘ETHICS AND AI’ QUAGMIRE

While some scholars critique AI-backed ODR systems on the grounds of policy61 and ethics,62 most criticisms are nevertheless centered around the systems’ inability to take the human psyche into account, while resolving disputes.63 It has been argued that since human psychology is often at the core of several civil disputes, it is rendered imperative for ODR systems to bolster their ability to address the facet of human psyche.64 Evidently, the sentiment around an AI-inclusive ODR system’s inability to provide the same level of emotional understanding as that of a human mediator and/or adjudicator has been at the forefront of the debate around the implementation of these systems within the scheme of the dispute resolution processes.

The notion of justice can never be reduced to a simple algorithm, it is a real human virtue which often demands a thorough analysis of the circumstances surrounding a particular dispute. It has been argued that ADR practitioners are better equipped to cater to the needs of the concerned

61 Robert Condlin, supra note 29, at 737.
63 Jean R. Sternlight, Pouring a Little Psychological Cold Water on Online Dispute Resolution, J. DISP. RESOL. 1, 2 (2020).
parties as opposed to AI-assisted ODR systems, the role of which thereby, ought to be limited only to the mediating interactions between the parties. Empirical evidence has further corroborated the fact that ODR systems simply fail to take the emotional needs of the concerned parties into account. Thus, in the absence of any enforceable international standards regulating the implementation of these ODR systems, should the software developers be designated to the role of gate-keeping the enforcement of justice as well?

Statistics revealed that increasing dependence on technology for resolving disputes was observed to magnify risks of procedural injustice along with hampering transparency during the resolution process. Likewise, with respect to the increasing reliance on ODR systems to address matters related to family law, the Canadian scholar Noel Semple had stated that the “human aspects of professionalism” cannot be replaced by advanced software. By arguing that cyberspace was not a “mirror image” of the physical world, scholars had also highlighted the quintessence of lawyers while adjudging family law disputes by regarding them as ‘gatekeepers’ of the family law regime.

It has also been argued that in a liberal democracy, the notion of authority and accountability is the linchpin of the ‘core lawyering function’. Ascertaining the stakes in the normative debate over AI and law, the core lawyering function denotes the relationship between legal authority and the moral demand for accountability. Thus, supporting the moral aim of the law is centric to the functions a lawyer is expected to perform in a liberal democracy. In the absence of an overarching element of accountability, the law would fail to create any obligations and/or reasons

65 Dafna Lavi, supra note 39, at 507.
67 Leah Wing, supra note 22, at 17-18.
70 Felicity Bell, supra note 25, at 112.
73 Id., at 44.
for action; this is precisely where ODR systems fall short, i.e., at this juncture, they lack the requisite authority to play the ‘core lawyering function’ within a democracy.\textsuperscript{74}

Another reason for the withering of the credibility associated with these ODR systems is related to the failure of States such as China and India to promulgate legislations targeted towards institutionalising such systems.\textsuperscript{75} The case of ‘Anhui Online Mediation Rules’ further corroborates the fact that when a State refrains to accord legal status to the decisions and/or recommendations pronounced by ODR systems, the same fail to beget any perceptible legal effect.\textsuperscript{76} Extending the argument further, it has been espoused that the adoption of ODR systems as reliable mechanisms for resolving conflicts has still been marred by their inability to offer a justification for their decisions vis-à-vis the civil dispute resolution regime by substantive arguments.\textsuperscript{77}

The aforementioned concerns vis-à-vis the implementation of ODR systems have called for the enforcement of accountability mechanisms based on some shared ethical principles of ODR. These principles are focused towards ensuring that access to justice and procedural legislative safeguards are not unjustly circumscribed by the application of technology.\textsuperscript{78}

**ADDRESSING CONCERNS AROUND THE ADOPTION OF AN AI-BACKED ODR FRAMEWORK: THE NARRATIVE OF THE INDIAN JURISPRUDENCE**

As highlighted in the previous section, the inability of automated technologies to account for certain externalities such as human emotions while adjudging disputes online is probably one of the most glaring inconsistencies of ODR systems. This section, nevertheless, argues for the adoption of such systems within the Indian dispute resolution framework; by eliciting some measures which may address the aforementioned concerns surrounding the adoption of AI-backed ODR systems.

The dwindling state of India’s judicial productivity has continued to act as an impediment to the very essence of its citizens’ right to access to justice and an expeditious trial. As the body that

\textsuperscript{74} Id., at 48.
\textsuperscript{75} H. QISHENG, DISPUTE RESOLUTION MECHANISMS IN THE INTERNET ENVIRONMENT: CHANGE AND DEVELOPMENT 529 (Wuhan University Press 2009).
\textsuperscript{76} Yu Zhiqiang & Dong Peiwen, *On Practical Exploration and Development Path of Online Dispute Resolution System*, 7 CHINA LEGAL SCIENCE 54, 58 (2019).
\textsuperscript{77} Robert Condlin, *supra* note 29, at 755.
\textsuperscript{78} Leah Wing, *supra* note 22, at 19.
monitors the stance of pendency of cases in Indian Courts, the National Judicial Data Grid had recently revealed an estimated backlog of around 32 million cases in the country’s judicial framework. This backlog has been further exacerbated *inter alia*, by factors such as judicial vacancies, procedural inconsistencies, and inadequate infrastructure. But what if the judiciary began to employ the current advances in AI-backed technologies to scrutinize hundreds of closely related cases, so as to ease the conspicuous burden on its adjudicatory machinery? Furthermore, what if there was a way to enhance the efficiency of such technology-driven systems by addressing the ethical concerns surrounding their adoption in the dispute resolution regime?

While the benefits accruing out of adopting these ODR systems have been enlisted in the previous sections of the paper, this section shall focus on addressing the ethical concerns surrounding the adoption of these systems. At present, most AI-backed systems are marred by the failure to account for and/or mimic emotional responses while resolving disputes. That being said, most of the AI programs nowadays are being modified so as to make them work effectively with humans by accounting for the latter’s emotional considerations. *For instance*, ‘Mel- The Penguin Robot’ is one example of a rational agent that has the ability to track facial expressions to respond to human speech. Several AI systems have now adopted complex reasoning methods in their endeavour to simulate human thought. A case in point being the expert system called ‘MedEthEx’, which is an AI-based tool used to aid physicians in dealing with the ethical issues that arise in the course of clinical practice.

In addition to these developments within the field of AI, the incumbent multidisciplinary collaboration(s) and stakeholder engagement(s) are facilitating the enforcement of the Ethical Principles of ODR so as to fortify the transparency and ameliorate the facet of accountability of

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80 David Larson, *supra* note 28, at 123.


82 A. Lodder & J. Zeleznikow, *Artificial Intelligence and Online Dispute Resolution* in M.A. WAHAB et al. (eds.), *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 75 (Eleven International Publishing 2012).

ODR systems.\textsuperscript{84} Presently, the National Centre for Technology and Dispute Resolution's \textit{`Ethics Initiative'} has been working towards establishing interdisciplinary collaborations for the codification of the aforementioned Ethical Principles for ODR mechanisms.\textsuperscript{85} These principles seek to delimit a set of ethical standards for the functioning of such systems, to ensure that access to justice and fair resolution processes are not adversely impacted by the judiciary’s reliance on technological frameworks to resolve disputes.

Even the Indian narrative draws towards the adoption of these systems in as much as Chief Justice S. Bobde had recently spoken about the possibility of streamlining the processes that were outside the ambit of decision-making by employing AI-backed software.\textsuperscript{86} The importance of such online platforms has been brought to the forefront by the onset of the novel coronavirus pandemic, which has compelled the Hon’ble Supreme Court to host virtual hearings and video conferences to address its citizens’ right to a speedy trial and justice.\textsuperscript{87} It would be apposite to note that even before the outbreak of the current pandemic, several Indian start-ups had already been utilising ODR platforms to resolve disputes. Companies like \textit{`Nest Away'} had already relied on out-of-court arbitration by establishing the Centre for Alternate Dispute Resolution Excellence (CADRE). Likewise, even ICICI Bank had been using its own ODR platform known as ‘SAMA’ to help its users resolve disputes online.\textsuperscript{88}

Since ODR is still in a nascent stage in India, one does not expect it to act as a substitute to the role of an adjudicator. However, considering the multitudinous benefits accruing out of implementation of such systems, the most paramount of which deals with the improvement of efficiency of the justice-delivery systems; it is about time for the Indian legal framework to adopt these systems to at least aid the formal adjudicatory process. From being utilized in Courts to effectively scan through hundreds of similar judgments, to being employed in arbitration mechanisms to supplement the human mediator, the possible avenues for employing ODR frameworks are endless.

\textsuperscript{84} Karan, \textit{supra} note 35.
\textsuperscript{85} Leah Wing, \textit{supra} note 22, at 20.
\textsuperscript{87}\textit{Id.}
\textsuperscript{88} Karan, \textit{supra} note 35.
CONCLUSION

This research paper was aimed at highlighting the benefits and the myriad intricacies associated with implementing AI-inclusive-ODR systems to resolve offline disputes. While the advantages of replacing the traditional legal frameworks with the technologically advanced ODR systems are conspicuous, the same raise germane ethical concerns as well. Although scholars such as Leah Wing have spelled out the procedural inconsistencies within the framework of ODR systems; yet, the creation of a uniform set of ethical principles is likely to address such concerns along with expanding access to justice, and improving the effectiveness of dispute resolution processes which employ technology. The Indian Courts’ proclivity to transfer their hearing online owing to the outbreak of the Covid-19 pandemic has insinuated towards the fact that integrating technology with the formal adjudicatory processes is not as complex as it was once thought to be.

In any case, this paper aimed to draw out a case for adopting at least some facets of ODR systems in every dispute resolution mechanism in India, for, only if we strive to capitalize on the virtues of the current advancements in ICT can we truly aim to address our dwindling judicial productivity. It is thus, imperative for our policymakers to follow a principles-based approach to resolving disputes at this juncture, one which fosters judgment, deliberation as well as responsibility.
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ASHNA CHHABRA
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