Contemporary Developments in Corporate and Commercial Laws in India

A COLLECTION OF ARTICLES

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NLIU - TRILEGAL SUMMIT ON
CORPORATE AND COMMERCIAL LAWS,
2025

Foreword

As the NLIU – Trilegal Summit on Corporate and Commercial Laws celebrates its 10th edition, we find ourselves at a moment of both pride and reflection. Over the past decade, this Summit has grown from an ambitious initiative into a distinguished platform for rigorous academic inquiry, intellectual exchange, and industry engagement. It has brought together some of the finest minds in the field, fostering dialogue on pressing legal issues and shaping discourse that resonates beyond the academic sphere.

In the formative years of CBCL, my vision was shaped by the recognition of the need to foster scholarly discussions in corporate and commercial law. Over the years, CBCL has become a beacon of excellence, drawing participation from students, academicians, practitioners, and policymakers alike. Fulfilling its core purpose, the Summit has pushed boundaries, addressed contemporary legal challenges and offered insightful perspectives on evolving regulatory and business landscapes.

This 10th edition is particularly significant, not just as a commemoration of the Summit's legacy, but as a reaffirmation of its role in shaping legal thought and research. In an era of rapid technological advancement and regulatory evolution, the study of corporate and commercial law has never been more critical. The themes explored in this edition, ranging from the Essential Facilities Doctrine, Draft Digital Competition Bill, Rights of Guarantors in the Insolvency Regime, Investment Arbitration to Minority Shareholders Rights and Generative AI, underscore the dynamic nature of the field. The scholarship presented here is a testament to the depth of research and intellectual rigour that this Summit has come to represent.

Beyond its academic contributions, the Summit has played a pivotal role in fostering a spirit of collaboration between students and professionals. It has served as a bridge between theoretical exploration and practical application and equipped young legal minds with the insights necessary to navigate the complexities of the modern legal and commercial world.

Our longstanding collaboration with Trilegal, SCC Online, and Eastern Book Company has played an invaluable role in strengthening this initiative. Such partnerships bridge the gap between academia and industry, ensuring that legal research remains not just theoretical, but also relevant and impactful in practice. Their continued support has been instrumental in the Summit's success, and I look forward to furthering these meaningful collaborations in the years to come.

I would also like to highlight the unwavering commitment and dedication of the CBCL team, whose efforts and dedication to the Centre's academic mission, meticulous attention to detail and ability to manage stringent deadlines, have been instrumental in elevating this endeavour to new heights. The Editorial Board has worked tirelessly to uphold the highest standards of research and scholarship, making this publication a valuable resource for legal practitioners, academicians, and policymakers. I extend my sincere appreciation to every individual who has contributed to this endeavour.

This milestone edition also provides us with an opportunity to reflect on the journey ahead. The past ten years have laid a strong foundation, but the journey of academic inquiry is ever-evolving. The landscape of corporate and commercial laws continues to transform, driven by technological advancements, regulatory changes, and shifting market dynamics. In such an environment, the role of rigorous legal research becomes even more crucial. I urge students, researchers, and professionals to continue engaging in critical discussions, pushing the boundaries of legal thought, and striving for excellence in their contributions.

With great optimism, I congratulate the Centre for Business and Commercial Laws and everyone who has played a part in making this edition a success. May this Summit continue to thrive, carrying forward

its legacy of excellence. The next decade holds great potential, and I am confident that this initiative will continue to make meaningful contributions to legal academia, fostering important discussions in the years to come.

—Prof. (Dr.) S. Surya Prakash
Vice Chancellor,
National Law Institute University, Bhopal

Preface

The Tenth Edition of NLIU-Trilegal Summit on Corporate and Commercial Laws 2025 is pleased to present this book published by Eastern Book Company – our publishing partner. After a rigorous review, fifteen papers have been selected for publication in this book.

Unshackling the Sharks of India: Special Rights of Private Equity Investors, SEBI's Position, and the Recent Ambiguities deals with SEBI's directives requiring Initial Public Offering (IPO)-bound companies to relinquish private equity (PE) investors' special rights, highlighting legal loopholes and market disruptions. Analysing trends in Draft Red Herring Prospectus', the paper highlights irregular relinquishment of rights across companies. The paper argues that PE investors face regulatory hurdles and therefore, SEBI should clearly identify the constituents of special rights to balance investor protection with corporate governance to avoid discouraging PE investments in India.

The author in *Foreign Subsidies and Market for Corporate Control: Is India Ready for a Bold Regulatory Leap?* argues that India should adopt a Foreign Subsidy Regulation (FSR) similar to the EU's. The paper analyses the EU FSR's focus on both the acquisition process and post-merger effects, using examples to illustrate how subsidies can unfairly advantage certain bidders. It then examines India's existing regulations, finding them inadequate to address this issue as they focus on national security or general competition and not the specific distortions caused by subsidies. The article concludes by recommending an FSR-like framework for India that includes mandatory disclosure of subsidies, arguing that this is crucial for maintaining a fair market for corporate control.

Overlooked Claimants: Recovering Subrogation Rights for Guarantors in the Indian Insolvency Regime explores how the Insolvency and Bankruptcy Code, 2016 sidelines personal guarantors by denying them subrogation rights and excluding them from the Committee of Creditors. The paper highlights judicial inconsistencies and conflicts with the Indian Contract Act, 1872 and highlights systemic disadvantages faced by guarantors. It further delves into constraints like double proof and double claim and assesses their impact on recovery rights. It makes out a case for reinstating subrogation rights, drawing insights from creditor-in-control frameworks from across the world to build a more balanced insolvency system.

Delisting Déjà Vu: Minority Shareholders in the Privatisation Predicament explores the shift in voluntary delisting brought upon by the 2024 amendment to the Securities Exchange Board of India (Delisting of Equity Shares) Regulations, 2021. in light of the ongoing dispute between Tata Sons and Shapoorji Pallonji Group, the paper identifies the challenges faced by minority shareholders. It further delves into voluntary delisting frameworks of different countries namely USA, UK, Germany, Singapore, and the Philippines and explores how these frameworks may be used to better inform the Indian framework. It makes a suggestion for developing a hybrid model combining the fixed price delisting method and the reverse book building method to strike a balance between the interests of the shareholders and the company.

Debt, Disputes and Decrees: Demystifying Creditor-Cum-Award Holder Classification under the IBC through a Sliding Scale Test examines the inequitable treatment of arbitral award holders in corporate insolvency resolution under the Insolvency and Bankruptcy Code, 2016 (IBC). It develops a critique of their classification as ordinary decree holders often relegated to the residuary category under Section 53(1)(f) of the IBC which limits their rights and representation in the resolution process. The paper highlights alternative approaches by analysing cross-jurisdictional approaches from the UK, Singapore, and Hong Kong. It proposes a 'Sliding Scale Test'—a framework to assess the underlying nature of arbitral awards. It concludes with an examination of case law where the

test has been applied demonstrating its practical benefits in reconciling the policy intent behind both the IBC and the Arbitration Act.

Decoding the Initial Public Offering Rush: Market Influences, Retail Participation and Global Reflections explores the importance of balanced regulation and financial literacy to sustain long-term growth and ensure a resilient initial public offering (IPO) market in India. It analyses factors driving the recent surge in IPOs such as market influences, retail investor participation, and global comparisons. It compares Indian IPO trends with markets such as United States and China while assessing the role of speculation, valuation concerns, and post-listing performance. Key challenges such as market volatility, overvaluation risks, and regulatory gaps are discussed with recommendations for strengthening investor protection and market stability.

Un(Equal) Treatment Clauses in Companies with Dual Class Shares: Positioning to Stake a Claim in Change of Control examines the legal and regulatory landscape surrounding Dual-Class Shares (DCS) structures with a focus on ensuring equal treatment for low-vote shareholders, particularly in the Indian context. It discusses regulatory provisions such as the Listing Obligations and Disclosure Requirements (LODR) and the Takeover Code. Paper argues for a contract-based approach which treats corporations as a nexus of contracts between stakeholders and suggests that India's regulatory framework needs change to better accommodate DCS structures. It makes a suggestion that the regulatory framework, especially around takeovers, should be reformed to allow companies the flexibility to craft tailored contractual clauses, ensuring fair and equal treatment for all shareholders.

Navigating the Murky Waters at the Confluence of Arbitration and Insolvency: Why India Urgently Needs a Framework to Augment Certainty in Cases of Domestic Cross-Border Insolvency examines the intersection of law relating to arbitration and insolvency in India and highlights the challenges posed by cross-border insolvency. It suggests a structured framework to allow arbitration during insolvency proceedings drawing on successful models from jurisdictions like the UK and Singapore. It further suggests amendments to the IBC and adoption of

UNCITRAL principles to enhance legal certainty for creditors and facilitate efficient cross-border insolvency resolutions to make India an arbitration-friendly jurisdiction.

Breaking the Data Silos: A Case for In-Situ Data Sharing as a Remedy for Data Monopolies under Draft Digital Competition Bill 2024 proposes an in-situ Data Sharing Framework as a solution for promoting competition and innovation in digital markets while addressing privacy concerns under India's Digital Personal Data Protection Act, 2023 (DPDPA) and Digital Competition Bill (DCB). It argues that this framework allows business users to access anonymized, raw user data stored within a platform (Gatekeeper) without transferring it externally. This framework aims to foster competition by providing newcomers with access to valuable observed data which would otherwise be monopolized by dominant platforms while ensuring that consumer identities are protected. The paper further argues that in-situ sharing of raw user data mitigates collusion and provides real-world examples like healthcare data access and the open algorithms project which demonstrate the feasibility of in-situ data analysis.

The Data Dilemma: Reimagining the Essential Facilities Doctrine for the Digital Age, explores the challenges posed by data monopolies in competition law particularly through the lens of the Essential Facilities Doctrine (EFD) which requires a company to provide competitors with access to a facility on reasonable terms. It critically examines how data, now a cornerstone of market power can be classified as "essential" and thus, warrant access for competitors. It proposes innovative regulatory solutions such as data portability and open APIs, advocating for a reimagined EFD that addresses the complexities of the digital economy. This paper aims to balance consumer welfare with competition ensuring that data serves as a catalyst for innovation rather than an exclusionary tool.

Post-Achmea Investor Protection: Sunset Clauses and Alternative Strategies examines the impact of the EU's withdrawal from the Energy Charter Treaty and termination of intra-EU BITs on investment protection. It analyses the role of domestic court cases related to intra-EU Energy Charter Treaty arbitrations. It explores strategies investors can

use to protect investments, including alternative legal avenues and corporate restructuring. The paper investigates the future of intra-EU investment arbitration, considering the influence of international organizations, tribunals, and domestic courts.

Regulating the Silos: Harnessing DigiTwin Innovation to Unlock Secure and Efficient Cross-Border Payments in India explores how Digital Twin Technology (DTT) can address inefficiencies in India's cross-border payment system. While AI-driven advancements are transforming the sector; slow processing, high costs, and regulatory fragmentation remain key challenges. DTT by creating virtual replicas of financial infrastructures enables real-time monitoring, predictive analysis, and enhanced risk management, optimizing interoperability and security in transactions. It further examines legal and ethical concerns, emphasizing data privacy, regulatory compliance, and fraud mitigation. The paper highlights the need for strong governance frameworks and global regulatory collaboration to ensure responsible implementation.

Charting A Roadmap to Equitable Innovation: Assessing the Antitrust Conundrum of Big Tech Influence over the Generative Artificial Intelligence Market investigates the market characteristics of generative Artificial Intelligence (GenAI) including an issue regarding consolidation that stems from a big tech company's preferential alliance with a start-up. The article describes the GenAI value chain, analyses how tying, bundling, or comingled acquisitions leads to competitive foreclosure and market monopolization. It advocates for the adoption of GenAI as Core Platform Services under Digital Market Regulations. It touches upon anti-competitive agreements, abuse of dominant position, and market entry by tech giants seeking to exploit the GenAI sector. It addresses the problems of merger control within the GenAI ecosystem.

Front Running in India: A Regulatory Quandary Amidst Lax Laws analyses front-running in India's capital market and recent high-profile cases such as Ketan Parekh and Quant Mutual Fund. It analyses SEBI's regulatory regime in terms of oversight and investor protection gaps. Paper suggests a strong technical approach, such as ex-ante detection mechanisms, is suggested for preventing market misuse; formation of a

Market Abuse Detection Authority (MADA) for high-level surveillance; and real-time observation. The paper emphasises the importance of more stringent disclosure standards, data analysis, and internal anti-fraud mechanisms.

Global Policy Perspectives on the Draft Digital Competition Bill 2024: Insights from South Korea and the EU, analyses the Draft Digital Competition Bill 2024, (DCB). It argues that its broad 'Systematically Significant Digital Enterprises' designation and rigid regulations could stifle innovation. Comparing the DCB with the EU's Digital Markets Act (DMA) and South Korea's Telecommunications Business Act, 2010 (TBA), the paper highlights concern over excessive compliance burdens on emerging sectors like fintech and e-commerce. It suggests a balanced regulatory framework with inter-ministerial collaboration, streamlined grievance mechanisms, flexible exemptions, and market-based SSDE designations.

On behalf of Team – CBCL, we extend our heartiest congratulations to all the authors whose papers have been chosen for publication in this book.

We express our sincere gratitude to our Chancellor, Hon'ble Justice Shri Suresh Kumar Kait, the Chief Justice of the High Court of Madhya Pradesh for his invaluable encouragement, guidance, and support in our endeavour. We extend our heartfelt thanks to our Vice-Chancellor, Prof. (Dr.) S. Surya Prakash, for his steadfast support, insightful guidance, and continuous encouragement in our academic pursuit. Our sincere gratitude goes to Trilegal, for their significant contribution and support in organising the 10th Edition of the Summit.

As the Chairperson of CBCL, I wish to convey my thanks and appreciation to the Team - CBCL for their tireless efforts in successfully organising this Summit and facilitating the publication of this book. I extend my best wishes to Team – CBCL led by Ms. Anjali Catherine Varghese and Ms. Mahak Saxena (Joint Convenors, CBCL) and Ms. Sradha Santhanu (Secretary, CBCL), Ms. Gungun Anand (Head, Corporate Relations, CBCL), Mr. Kunal Dave (Head, Journal of Business Laws, CBCL) and

Ms. Purava Rathi (Head, CBCL Blog) whose commitment and diligence contributed significantly to the success of the Summit and this book.

I place it on record that the student body of CBCL has played a pivotal role in organising the Summit and overseeing the publication of this book. Their dedication and leadership have been exemplary, easing much of the burden of this undertaking. I trust that their enthusiasm for teamwork and independent initiatives will remain undiminished. As some among them prepare to graduate and embark on their professional journey, I extend my heartfelt best wishes to all of them.

We look forward to the 11th Edition of the NLIU – Trilegal Summit on Corporate and Commercial Laws in 2026 and are confident that it will be a truly remarkable event.

—Dr. Ghayur Alam
Senior Professor,
Business Laws and Intellectual Property Rights
NLIU-DPIIT IPR Chair Professor
Chairperson, Centre for Business and Commercial Laws

Message from Trilegal's Desk

As we celebrate the 10th edition of the NLIU-Trilegal Summit on Corporate and Commercial Laws, we reflect on a decade of insightful discourse, rigorous research, and the growing prominence of this Summit as a platform for young legal minds to engage with contemporary challenges in the corporate legal landscape. Over the years, we have witnessed a dynamic shift in commercial laws, shaped by evolving business models, regulatory advancements, and the increasing influence of technology across industries. In this ever-changing environment, the role of legal professionals extends beyond advisory functions to strategic foresight and risk mitigation, making academic exploration in corporate laws more relevant than ever.

India's legal and regulatory framework continues to evolve in response to economic ambitions, global integration, and the rapid digitalization of markets. With initiatives aimed at strengthening financial governance, facilitating cross-border transactions, and fostering innovation, the legal fraternity must be prepared to navigate new complexities. As legal practitioners, our commitment to continuous learning and adaptability remains crucial in ensuring the seamless application of laws to real-world commercial scenarios.

The NLIU-Trilegal Summit has consistently aimed to bridge the gap between theoretical knowledge and practical application by encouraging law students to research, analyze, and present their perspectives on emerging issues in corporate law. This year's edition, marking a significant milestone in our collaboration with NLIU, upholds the tradition of fostering legal scholarship in areas such as Mergers and Acquisitions, Competition Law, Insolvency and Bankruptcy, Private Equity, and

Technology Law, among others. The intellectual rigor demonstrated by participants over the years is a testament to the growing interest and excellence in corporate law research among students across the country.

The Summit Book for this edition is a culmination of months of dedicated effort by CBCL and Trilegal, bringing together 15 outstanding research papers selected from a highly competitive pool of submissions. These papers not only address pressing legal concerns but also propose forward-thinking solutions that contribute to the broader discourse in corporate and commercial law.

On behalf of Trilegal, we are honored to continue our association with NLIU, an institution known for its academic excellence and emphasis on research-driven legal education. We extend our sincere gratitude to the Hon'ble Vice Chancellor, faculty members, CBCL, and all those who have played a vital role in making this event a resounding success. As we mark a decade of this Summit, we look forward to many more years of collaboration, knowledge-sharing, and the development of the next generation of corporate lawyers.

We commend all participants for their hard work, thoughtful contributions, and insightful perspectives that have enriched this Summit—my personal best wishes to all!

—**YOGESH SINGH**
Partner & Head
Corporate Practice, Trilegal

Message from the Centre for Business and Commercial Laws (CBCL)

The Centre for Business and Commercial Laws (CBCL) at NLIU was established in 2008 as a Centre for Excellence with the objective of promoting research and analysis in the field of corporate and commercial laws. Since then, it has maintained an upward trajectory, continuously evolving and expanding the scope of scholarly research in this ever-expanding field. In furtherance of its core ideals and objectives, it is an honour to present before you the 10th NLIU-Trilegal Summit Book- a meticulously curated collection of articles that delve into contemporary developments in corporate and commercial laws in India.

This special 10th edition of the Summit Book, launched at the 10th NLIU-Trilegal Summit on Corporate and Commercial Laws, stands as a testament to a decade of academic excellence and thought leadership. Over the past ten years, the Summit has evolved into a premier forum for legal discussions, fostering critical engagement with pressing issues in the field of corporate and commercial laws. This edition not only reflects on the remarkable transformations that have shaped these laws but also anticipates future legal trends that will define the next decade of corporate governance and regulation.

The Summit book is the result of an extensive three-tiered review process, diligently undertaken by the editorial teams of CBCL and Trilegal in collaboration, based on which fifteen outstanding submissions have been selected for publication and presentation. These articles traverse a rich spectrum of themes, inter alia, exploring antitrust laws, securities laws, mergers and acquisitions, insolvency and bankruptcy laws and the intricate facets of competition law. We extend our heartfelt congratulations

to the authors, whose dedication and intellectual rigor have taken shape in the form of the Summit Book.

We take immense pride in carrying forward the legacy of the previous leadership of the Centre, whose unwavering efforts have been instrumental in shaping the Summit into what it is today. As we celebrate a decade of academic excellence, we extend our heartfelt gratitude to Trilegal, whose indispensable guidance and support over the past ten years have been pivotal in the continued success of the Summit and the resulting publication. Their commitment to fostering an environment of analytical thinking and result-oriented research is inspiring. We are forever indebted to the Hon'ble Vice Chancellor Prof. (Dr.) S. Surya Prakash and our esteemed Chairperson Prof. (Dr.) Ghayur Alam for their unwavering support and guidance, which continuously inspire us to do better. A heartfelt expression of gratitude is reserved for our publishers, Eastern Book Company, for their unwavering support throughout the publication process. Their relentless dedication has been instrumental in the triumph of this Summit and the subsequent publication of this book.

Finally, we express our warmest gratitude to the dedicated general body of CBCL, whose relentless efforts and commitment to uphold the highest standards of academic discourse has been the cornerstone of our success. Their unwavering dedication to the seamless organization of the Summit is heart-warming, and more importantly, indispensable for the resounding success of this edition. With great pride, we present to you the compilation of articles from the 10th NLIU-Trilegal Summit on Corporate and Commercial Laws, 2025, eagerly anticipating insightful feedback from our esteemed readers.

—**Anjali Catherine Varghese & Mahak Saxena**
Joint Convenors
Centre for Business and Commercial Laws

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ARTICLES

Unshackling the Sharks of India: Special Rights of PE Investors, SEBI'S Position, and the Recent Ambiguities

—*Rashi Upadhyay*[*]

ABSTRACT

The Securities and Exchange Board of India's ("SEBI") recent directive requiring 'to-be-listed' companies to forgo all special rights granted to investors has sent ripples of uncertainty through the financial and corporate sectors. SEBI, through a series of informal advisory notes to merchant bankers, has mandated that no investor should retain any special rights in a company at the time of its public listing. This move, which aims to create a more equitable environment for public shareholders, has nonetheless stirred significant concerns due to a lack of clear legal backing and differing interpretations by merchant bankers.

One of the primary sources of confusion lies in the absence of a concrete legal framework supporting SEBI's directive, which leaves substantial room for ambiguity. Without specific statutory provisions, it is unclear exactly when these special rights must be relinquished—whether at the time of filing the Draft Red Herring Prospectus (DRHP) or closer to the listing date. Furthermore, the definition of 'special rights' itself is vague, leaving it to the discretion of merchant bankers to determine which investor rights qualify as special. This has led to varying interpretations across different cases, with no uniformity in how the directive is applied.

Another pressing concern is the status of nominee directors appointed by investors, particularly when their tenure has not yet expired at the time of listing. The fate of these directors

[*] The author is a student at the National Law Institute University, Bhopal (NLIU).

remains uncertain under the current SEBI guidelines, further complicating the issue.

In this paper, the author critically examines SEBI's recent directives against the backdrop of market trends, as evidenced by the DRHPs filed by companies in recent months. The analysis highlights several potential pitfalls in SEBI's approach and proposes key modifications to the current framework to ensure clarity, consistency, and fairness in its implementation.

Keywords: Special Rights, Private Equity Investors, Shareholders' Agreement, Securities and Exchange Board of India, Initial Public Offer.

I. INTRODUCTION

Private Equity and Venture Capital funds have been in the headlines after the IPO boom in India. In 2024, the total value of initial public offerings ("**IPOs**") backed by private equity ("**PE**") surged by 130% compared to the previous year, reaching $3.3 billion, up from $1.4 billion in 2023. Additionally, the number of such deals saw a 33% increase year-over-year.[1]

However, in 2023, informal directives (collectively referred to hereafter as "**SEBI Directives**") released by the Securities and Exchange Board of India ("**SEBI**") to merchant bankers sent shockwaves across the industry. On May 29, 2024, SEBI advisory note (hereafter "**May Directive**") to merchant bankers noted that, in IPO-bound companies, investors (including PE Investors and Promoters) would have to relinquish any special rights granted to them under the Articles of Association ("**AoA**") or Shareholders' Agreement ("**SHA**"), **at the time of filing the Updated Draft Red Herring Prospectus** ("**UDRHP**").[2]

After a huge uproar against this directive by PE investors, this advisory note was finally revoked, and a new advisory was released on June 24,

1. EY, 'PE/VC Investments in 2024 cross US$56 billion helped by an all-time high volume of 1,352 deals: EY-IVCA Report' (*EY*, 23 January 2025) <https://www.ey.com/en_in/newsroom/2025/01/pe-vc-investments-in-2024-cross-us-dollor-56-billion-helped-by-an-all-time-high-volume-of-1352-deals-ey-ivca-report#:~:text=In%202024%2C%20exits%-20worth%20US,304%20deals%20in%202023> accessed 10 January 2025.
2. Ashish Rukhaiyar, 'Remove all special rights given to select shareholders before IPO, Sebi tells bankers' (*MoneyControl*, 7 August 2024) <https://www.moneycontrol.com/news/business/markets/remove-all-special-rights-given-to-select-shareholders-before-ipo-sebi-tells-bankers-12790070.html> accessed 3 January 2025.

2024 (hereafter, "**June Directive**"), which stated that "[a]ll special rights granted to shareholders under [the articles of association, shareholders' agreement] or through any arrangement or agreement shall lapse **on the date of listing.**"[3] These directives are not available in the public domain.

However, the withdrawal of the directive has not solved ambiguities surrounding the special rights of PE Investors. The lack of clarity in the law, different views undertaken by merchant bankers, and the reliance on informal directives have put the 'to-be-listed' companies in a state of turmoil.

In this paper, the author aims to elaborate on the special rights of PE Investors and the ambiguities surrounding the recent SEBI advisories. The paper is divided into five parts. This part (**Part A**) provided a brief introduction to the problem. **Part B** elaborates on what these special rights are and why they are important from the perspectives of the company and the investor. **Part C** thereafter deals with the reasons and rationale of SEBI for releasing these directives and provides a brief overview of the evolution of the regulatory framework concerning special rights. **Part D** undertakes an analysis of recent market trends by studying various recent Draft Red Herring Prospectus ("**DRHPs**") filed by the companies. In this context, the criticism of the advisories and the limited rights available to the PE Investors is analysed. Finally, **Part E** provides the conclusion of the findings along with suggestions.

II. INVESTORS AND SPECIAL RIGHTS

A. Special Rights – Scope and Definition

Special Rights refer to governance and protective provisions incorporated within Shareholders' Agreements to safeguard the interests of investors and company promoters. These rights play a crucial role in enhancing the appeal of investment opportunities and fostering investor confidence. These rights can be bifurcated into two parts:

i. Governance Related Rights
ii. Exit Rights

3. Ashley Coutinho, 'SEBI rolls back diktat to end special rights before IPO' (*BusinessLine*, 24 June 2024) <https://www.thehindubusinessline.com/markets/sebi-rolls-back-diktat-to-end-special-rights-before-ipo/article68328367.ece> accessed 3 January 2025.

Governance-related rights include nomination rights, veto rights, information rights, affirmative voting rights, etc. These rights empower investors to influence key corporate decisions, safeguard their financial interests, and mitigate risks associated with management actions.[4]

On the other hand, exit rights in a Shareholders' Agreement (SHA) are crucial for providing investors with clear mechanisms to liquidate their holdings and realize returns on their investments. These rights, including tag-along, drag-along, put options, and initial public offering (IPO) provisions, ensure flexibility and reduce investment risk.[5]

These rights, however, are not defined anywhere in law. Both the Companies Act and the SEBI guidelines and rules are silent on them.

However, SEBI first discussed these special rights in a consultation paper released on February 21, 2023, where it noted:

> *"Some of the common types of special rights are Nomination Rights, Veto Rights / Affirmative voting, Information Rights, Anti-Dilution Rights, Right of First Refusal, Tag Along Rights, Divestment Rights, etc."*[6]

It is important to note that SEBI has not provided any exhaustive list of these special rights. The scope of these rights is typically defined in the SHAs agreed between the parties. In light of the recent advisories, the lack of a definition of special rights has caused various concerns, which will be discussed in **Part D** of this paper. Apart from the problems caused by the advisories, these special rights also face enforcement issues, which will also be discussed in **Part D** of this paper.

B. Reasons for incorporating special rights in the SHAs of Investments

Private Equity and Venture Capital funds have been the backbone for investments in India, supporting new startups and ensuring the growth

4. Arjya B. Majumdar, 'The (Un?)Enforceability Of Investor Rights In Indian Private Equity' (2020) 41(4) University of Pennsylvania Journal of International Law 981.
5. ibid.
6. SEBI, 'Consultation Paper on Strengthening Corporate Governance At Listed Entities By Empowering Shareholders - Amendments To The SEBI (LODR) Regulations, 2015' (*SEBI*, 21 February 2023) <https://www.sebi.gov.in/reports-and-statistics/reports/feb-2023/consultation-paper-on-strengthening-corporate-governance-at-listed-entities-by-empowering-shareholders-amendments-to-the-sebi-lodr-regulations-2015_68261.html> accessed on 10 January 2025.

of legacy companies. The growth of the investments in PE Firms has been tremendous in the past few years. In spite of various challenges, reports suggest that India has experienced notable growth, achieving a total gross foreign direct investment (FDI) of $1 trillion since April 2000, which includes a nearly 26% increase in FDI to $42.1 billion during the first half of the fiscal year 2024.[7] This year also marked a growth in exits by PE investors, marking up to 40 such investments.[8]

During the **exit phase**, private equity (PE) investors aim to realize profits from their investments by divesting their shares. This stage is crucial, as the main goal of PE investors is to generate returns. Exits are generally accomplished through public market listings, such as initial public offerings (IPOs), or by selling stakes to other financial or strategic investors. IPOs, however, have been the preferred exit route for investors.[9]

From **investors' perspective**, these rights are extremely crucial as without structured exit mechanisms; investors may face difficulties in realizing returns or be forced to stay in unfavorable situations. It is important to understand that PE Investors enter a company with a clear objective: to maximize returns by increasing its valuation before making a profitable exit.[10] Their goal is to make the company more attractive to future buyers or public market investors. They do so by having some say in the management decisions through the governance-related special rights that they are granted in the SHAs.

From **the company's perspective**, although these rights generally do not affect the company's daily operations, they allow investors to provide

7. PIB, 'India's FDI Journey Hits $1 Trillion: First half of FY 2024-25 sees a 26% increase to $42.1 billion' (12 December 2024) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2083683#:~:text=First%20half%20of%20FY%202024,26%25%20increase%20to%20%2442.1%20billion&text=India%20has%20achieved%20a%20remarkable,%241%20trillion%20since%20April%202000> accessed on 10 January 2025.
8. EY, 'PE/VC Investments in 2024 cross US$56 billion helped by an all-time high volume of 1,352 deals: EY-IVCA Report' (*EY*, 23 January 2025) <https://www.ey.com/en_in/newsroom/2025/01/pe-vc-investments-in-2024-cross-us-dollor-56-billion-helped-by-an-all-time-high-volume-of-1352-deals-ey-ivca-report#:~:text=In%202024%2C%20exits%20worth%20US,304%20deals%20in%202023> accessed 10 January 2025.
9. Radhika Agarwal and Sharad Moudgal, 'In brief: acquisition and exit strategies for private equity firms in India' (*Lexology*, 9 March 2024) <https://www.lexology.com/library/detail.aspx?g=82ed44a9-0246-4bea-9902-2bee6243ca33> accessed 11 January 2025.
10. Alastair Green and others, 'Private equity exits: Enabling the exit process to create significant value' (*McKinsey & Company*, 25 July 2018) <https://www.mckinsey.com/industries/private-capital/our-insights/private-equity-exits-enabling-the-exit-process-to-create-significant-value> accessed 8 January 2025.

strategic guidance, which can help maintain or even increase shareholder value. Additionally, they serve as a safeguard against potential opportunistic behaviour by promoters, ensuring a balanced and accountable corporate structure. These rights help in corporate governance as they provide a valid check on the powers of the existing promoters and directors.

In recent times, shareholders' activism of this kind has prevented various disproportionate situations from arising within a company. A significant instance of investor pushback was the rejection of proposals to raise executive compensation. In August 2021, shareholders notably opposed a 10% salary hike for Managing Director Siddhartha Lal, creating a much-needed hurdle for Eicher Motors Ltd.[11]

Therefore, these rights not only help investors realise the maximum value of their investment and seek safe exits, but they also help in corporate governance.

III. SEBI AND THE ADVISORIES

A. Reasons and rationale of the directives

1. *Windfall Gains by PE Investors*

SEBI has been concerned about the powers granted to PE investors during the period between the filing of the DRHP and the listing of the issue. In new-age tech companies, the trend has been such that PE Investors hike up the pricing of the issue to inflate the position of the company. Thereafter, they seek a beneficial and lucrative exit while the public investors face a fall in share prices right after the listing of the issue.

PayTM, for example, provided an extremely lucrative exit to the PE/VC investors, gaining a 140% return,[12] while the public shareholders faced extreme losses as their shares plummeted 27% right after listing.[13]

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11. Gautam Khaitan and Arnav Chaudhary, 'Shareholder Activism in India' (*Advoc*, 31 October 2023) <https://www.advoc.com/news/shareholderindia#:~:text=The%20Rise%20of%20Shareholder%20Activism%20in%20India&text=Some%20of%20the%20most%20notable,PAFs')%20in%20the%20nation> accessed 3 January 2025.
12. Ashish Rukhaiyar, 'PE/VC investors of Paytm make a killing' (*Business Today*, 18 November 2021) <https://www.businesstoday.in/latest/corporate/story/pevc-investors-of-paytm-make-a-killing-312623-2021-11-18> accessed 3 January 2025.
13. Quentin Webb, 'Paytm IPO investors lose $900 million in two days as India's biggest listing flops' (*Livemint*, 22 November 2021) <https://www.livemint.com/companies/

Similarly, early investors of Ola Electric reaped around 824% profit on their investment[14] while the share value of Ola Electric fell around 7% post-listing, putting public shareholders in dismay.[15] Recently, the Vishal Mega Mart IPO led to huge windfall gains for its PE investors, who gained around 944 million USD through the IPO proceeds.[16]

In essence, the listing of several loss-making companies, such as Zomato, Swiggy, etc., leads to high profits for PE Investors, leaving public shareholders to face the losses.[17]

For this reason, arguably, SEBI does not want PE Investors to be involved in IPO-related decision-making. Special rights such as nomination powers to the board ensure that PE Investors can also get a seat in the IPO Committee and potentially influence the pricing of the issue for their own gains.

2. *Principle of Equitable Treatment*

The second reason for this decision is the **principle of equitable treatment** enshrined in Regulation 4(2)(c) of the SEBI LODR Regulations.[18] This principle ensures fairness, transparency, and protection for all shareholders, particularly minority and retail investors. Listed compa-

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news/paytm-ipo-investors-lose-900-million-in-two-days-as-india-s-biggest-listing-flops-116375851610o1.html> accessed 12 January 2025.

14. Akash Podishetti, 'Two early Ola Electric investors to reap up to 824% returns in biggest IPO this year' (*The Economic Times*, 29 July 2024) <https://economictimes.indiatimes.com/markets/ipos/fpos/two-early-ola-electric-investors-to-reap-up-to-824-returns-in-biggest-ipo-this year/articleshow/112107044.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 12 January 2025.
15. Hormaz Fatakia, 'Ola Electric Mobility shares fall 7%, back below IPO price, after three-month lock-in ends' (*CNBCTV18*, 5 November 2024) <https://www.cnbctv18.com/market/ola-electric-mobility-share-price-back-below-ipo-price-lock-in-period-ends-q2-results-date-19504145.htm> accessed 12 January 2025.
16. Justin Niessner, 'Partners Group secures its largest-ever India exit via Vishal Mega Mart IPO' (ION Analytics, 19 February 2024) <https://ionanalytics.com/insights/mergermarket/partners-group-secures-its-largest-ever-india-exit-via-vishal-mega-mart-ipo-deal-focus/#:~:text=Prior%20to%20achieving%20a%20domestic,for%20PE%20in%20the%20country.> accessed 21 February 2025.
17. Rajiv Singh and Pooja Sarkar, 'IPO Frenzy: Loss-making Indian tech startups are emulating their US counterparts, but that's not enough' (*Forbes India*, 19 July 2021) <https://www.forbesindia.com/article/take-one-big-story-of-the-day/ipo-frenzy-lossmaking-indian-tech-startups-are-emulating-their-us-counterparts-but-thats-not-enough/69229/1?utm_source=chatgpt.com> accessed 15 January, 2025.
18. Securities And Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, SEBI/LAD-NRO/GN/2015-16/013 reg 4(2)(c).

nies must provide timely and uniform disclosures to prevent any preferential advantage, ensuring that all investors have access to the same material information. Shareholders should also have proportional voting rights, preventing undue control by promoters or major stakeholders. Additionally, corporate actions such as dividends, buybacks, and rights issues must be applied uniformly to all eligible shareholders. By enforcing these principles, SEBI promotes investor confidence, prevents market manipulation, and strengthens corporate governance.[19]

Additionally, in the February Consultation Paper by SEBI discussed above,[20] SEBI has cited Paragraph 15 of Schedule VI of the SEBI ICDR Regulations. This regulation requires a statement that "the shares issued in the issue shall be pari passu with the existing shares in all respects, including dividends."[21]

On the basis of these regulations, SEBI has released directives to ensure that PE Investors and Promoters do not have superior rights at the time of listing.

On the basis of these regulations, SEBI has released the directives to ensure that PE Investors and Promoters do not have superior rights at the time of listing.

3. *Regulating Powers During the 'Sensitive Period'*

The period between the filing of the draft documents and the listing of the issue can be a 'sensitive period' for a company. For PE investors, this period can present an opportunity for profit, especially if they hold significant influence over the company's strategy or IPO pricing.

PE investors often have pre-agreed rights, such as exit options or pre-emptive rights, which allow them to sell their stake at a favorable valuation once the IPO is approved. Additionally, by leveraging their control or influence over the company, they may help steer the timing, pricing, or structuring of the IPO to maximize returns. Their ability to capitalize on market conditions or regulatory changes during this "sensitive period" enables them to realize substantial gains when the company goes public.

19. ibid.
20. n 6.
21. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, SEBI/LAD-NRO/GN/2018/31 Sch VI para 15.

SEBI, therefore, wants to regulate these powers that the PE investors hold to prevent future losses faced by PE Investors.

For the reasons cited above, SEBI, in its May directive,[22] wanted PE Investors to relinquish their rights at the time of filing the UDRHP and not at the time of listing. However, after facing severe backlash, this directive was replaced by the June directive[23] which instructed the merchant banks to ensure that PE investors do not hold any special rights at the time of listing.

B. Existing Mechanisms under Regulation 31B

These directives are not the first time that SEBI has aimed to regulate the special rights granted to investors.

As per Regulation 31B of the LODR Regulations, any special rights granted to shareholders in a listed company must receive shareholder approval via a special resolution in a general meeting at least once every five years from the date these rights were originally conferred. This regulatory measure by SEBI aims to prevent any investor from holding indefinite privileges by ensuring that special rights are periodically reviewed. By requiring reassessment every five years, SEBI intends to strike a balance between investor interests and corporate governance standards.[24]

However, critics argue that the regulation takes a one-size-fits-all approach, which may undermine the very purpose of such rights. They believe that imposing periodic approvals does not differentiate between rights that contribute positively to governance and those that unfairly consolidate power. This broad application could deter long-term investors, as it reduces the certainty and security associated with negotiated shareholder agreements, potentially making listed companies less attractive to strategic stakeholders.[25]

22. n 2.
23. n 3.
24. Securities And Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, SEBI/LAD-NRO/GN/2015-16/013 reg 31B.
25. Ritvik Mishra, 'Regulation 31 B: An Attack On Protective Investor Rights' (*The Competition and Commercial Law Review*, 18 December 2023) <https://www.tcclr.com/post/regulation-31-b-an-attack-on-protective-investor-rights> accessed 13 January 2025.

IV. CURRENT POSITION AND AMBIGUITIES

A. Criticism of the advisories

The release of the advisories has caused a wave of confusion for both the companies and the lawyers. The May directive, which instructed the falling away of these rights at the stage of filing the UDRHP, was criticised for a multitude of reasons.

Most importantly, it failed to consider a scenario where the IPO failed to go through. There are multiple instances where the planned IPO was eventually not listed due to reasons such as regulatory hurdles, unfavourable market conditions, and internal decisions.[26] In case of such a failure, if the rights are already relinquished, it might become difficult for the investors to restore such rights. More details on this aspect will be discussed in **Section II** of this Part.

However, even after the withdrawal of that directive, several ambiguities remain. Some of these ambiguities are referred to below:

1. *Lack of Legal Framework*

The framework of "falling away of rights" does not exist beyond the informal advisories issued by the SEBI. The closest legal provisions that exist are the principles of equitable treatment enshrined in LODR and ICDR Regulations, as discussed in Part B above. Additionally, Regulation 31-B of the LODR Regulations only requires that any special rights granted to investors are approved by shareholders through a special resolution every 5 years. Hence, it does not call for the relinquishment of these rights.

Formulating law through informal advisories is an extremely harmful practice as it causes uncertainties and increases the cost of compliance for the companies.[27] Additionally, it is difficult to challenge these advisories in courts as the courts have typically favoured the autonomy of SEBI in decisions related to IPO.[28]

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26. Mythri Murali, Fair Shares: Stripping Away Special Rights for Private Equity (*IRCCL*, 30 July 2024) <https://www.irccl.in/post/fair-shares-stripping-away-special-rights-for-private-equity> accessed 20 January, 2025.
27. Anushka Aggarwal, 'Advisories Without Borders? Analyzing SEBI's IPO Disclosure Advisories' (*CBCL Blog*, 30 October 2024) <https://cbcl.nliu.ac.in/capital-markets-and-securities-law/advisories-without-borders-analyzing-sebis-ipo-disclosure-advisories/> accessed 20 January 2025.
28. *Prakash Gupta v SEBI* (2021) 17 SCC 451.

2. *Different views taken by Merchant Bankers*

The Lead Merchant Bankers are responsible for ensuring the compliance of IPO-bound companies and reporting it to SEBI.[29] Additionally, Merchant Bankers are responsible for also conducting due diligence on the company and ensuring that it has complied it all the relevant laws.[30]

Since these directives are issued to merchant bankers, it is up to them to ensure that no special rights are retained by the Investors prior to the listing. Since the list of special rights does not exist in law, it gives leeway to merchant bankers to decide which rights would be relinquished. As a result, there might be differential views taken by merchant bankers.

3. *Continuing Term of a Director*

Usually through SHAs, PE investors are granted nomination rights. This entails that the PE investors can appoint a nominee director as per Section 161(3) of the Companies Act, 2013.[31] Since this is a special right, the same would be relinquished as per the SEBI Directives.

However, consider a hypothetical situation where, say, the date of the listing of the issue is May, 2024 and the nominee director is appointed in April, 2023 for a period of 3 years. In such a scenario, would the nominee director be asked to retire at the time of listing since they were appointed as a part of a special right? Or would the director be available to retain their position till their term ends?

This is an ambiguity that the directives leave. What happens now to the director's term is entirely left up to the discretion of the merchant banker.

4. *Overstepping its Ambit*

Regulation 31B already ensures that the special rights to investors are approved by shareholders and a check and balance is maintained. Hence, the purpose of granting equitable treatment to shareholders has already

29. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, SEBI/LAD-NRO/GN/2018/31.
30. Securities and Exchange Board of India (Merchant Bankers) Regulations, 1992, LE/11112/92, Ch III.
31. The Companies Act, 2013 (18 of 2013) s 161(3).

been achieved. However, SEBI might be overstepping its ambit and getting in the way of the shareholders' will by mandatorily relinquishing these rights.

In conclusion, the practice of formulating law by way of informal advisories is widely criticised. SEBI's approach to these special rights leaves ambiguities and confusion for both investors and lawyers alike.

B. Study of Existing DRHPs: Analysing and Understanding Trends

In order to understand the market practice in terms of the relinquishment of special rights of PE investors, the author undertakes an analysis of recent DRHPs filed by PE-backed companies. In the History Section of the Offer Documents, companies are required to mention SHAs entered into by them.[32] An analysis of recent trends shows that companies are now entering into an Amendment-cum-Waiver Agreement with their PE investors where such special rights are relinquished with the objective of enabling implementation of the Offer.

In the offer documents filed by **Veritas Finance Limited** recently on 18 January 2025,[33] the company mentioned that it entered into a "Waiver-cum-Amendment Agreement in order to facilitate the Offer."[34] This agreement mentions that all the special rights granted to the investors, such as drag-along rights, call options, information rights, nominee rights etc., will stand relinquished. It also mentions that if the offer is not completed within 12 months of the filing of DRHP ("**Long Stop Date**"), the rights under the SHA would automatically revive.

A similar provision is found in the offer documents of **Swiggy**, filed on 26 September 2024.[35] By way of the Amendment-cum-Waiver Agreement, all special rights would be relinquished at the time of listing. It also imposes an obligation on the company that "*on the listing of the Equity Share pursuant to the IPO, the Company shall undertake to place*

32. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, SEBI/LAD-NRO/GN/2018/31 Sch VI.
33. SEBI, 'Veritas Finance Limited' (*SEBI*, 21 January 2025) <https://www.sebi.gov.in/filings/public-issues/jan-2025/veritas-finance-limited_91063.html> accessed 13 January 2025.
34. n 33 para 268.
35. SEBI, 'Swiggy Limited - Updated DRHP' (*SEBI*, 27 September 2024) <https://www.sebi.gov.in/filings/public-issues/sep-2024/swiggy-limited-updated-drhp-i_87047.html> accessed 13 January 2025.

the following provisions in its Articles of Association for approval of its Shareholders through a special resolution."[36]

Interestingly, Ola Electric's Offer Documents, which were filed on December 22, 2023 (prior to the release of the directives), also mention a similar Amendment-cum-Waiver Agreement.[37]

However, surprisingly, the offer documents of companies like Vishal Mega Mart (January 2025) and Carlyle-backed Hexaware (September 2024) do not make any such disclosures for the relinquishment of special rights. Both of these companies are PE-backed.

Observations from the above findings:

It is observed from the above DRHPs that –

i. Companies are relinquishing special rights in an irregular manner. Some PE-backed companies (including companies where PE exits are observed) are entering into Amendment-cum-Waiver Agreements. However, other companies placed in similar circumstances are not. This entails that the regulations are not uniformly complied with, and they might be left to the discretion of the merchant bankers.

ii. The Long-Stop date for restoring the special rights in case the IPO fails differs for companies and is left up to their discretion. Additionally, for the purposes of enforcement of these rights, they will need to be added again to the AoA of the Company (discussed in detail in the next section). This is not mentioned in the Waiver Agreements.

In conclusion, the analysis of the recent trends entails that there is an ambiguity with regard to the enforcement of relinquishment of special rights prior to the listing.

C. Limited rights available to Investors

The cancelling of the special rights of the Investors needs to be looked at from the perspective of the already limited statutory rights available to PE Investors. There are multiple regulatory hurdles that PE investors face

36. n 35 para 236.
37. SEBI, 'Ola Electric Mobility Limited - DRHP' (*SEBI*, 26 December 2023) <https://www.sebi.gov.in/filings/public-issues/dec-2023/ola-electric-mobility-limited-drhp_80215.html> accessed 13 January 2025.

in the current regulatory system in India. Increasing those hurdles would only make the investment in India less lucrative. Relinquishing special rights and failing to provide a safe exit mechanism to PE Investors could lead to potential losses for Indian companies which require the technical expertise of private equity firms. Some of the regulatory hurdles faced by PE Investors are listed below:

1. *Enforcement Issues*

The protections granted to PE Investors under the SHA might face enforcement issues in the courts. From the ***Rangaraj*** case[38] to the recent Delhi High Court judgement of ***Messer Holdings***,[39] the position of the courts on the enforcement of the term of SHA has changed significantly. In order to ensure that these rights are enforceable in the courts, they might need to be incorporated in the AoA of the Company. The clauses of the SHA need not be incorporated in the AoA if they are in the nature of a private arrangement and do not affect the shareholders of the company.

However, some rights, such as drag-along rights or other exit waterfall mechanisms, may be argued to affect other shareholders of the company and may face enforcement issues.

This becomes specifically hectic in case an IPO fails. Articles of a company can only be amended through a special resolution.[40] While through a private arrangement between the parties, the rights can be restored in the SHA, the amendment to the AoA might face backlash and it would create an additional hurdle for the investors.

2. *Assured Returns under FEMA*

The erstwhile position of SEBI and Reserve Bank of India ("**RBI**") in terms of the 'put option' granted to investors was that it comes under "forward contracts" as mentioned in the Securities Contracts (Regulation) Act, 1956 ("**SCRA**") which are illegal in nature. Through various SEBI

38. *VB Rangaraj v VB Gopalakrishnan* (1992) 1 SCC 160.
39. *Messer Holdings Ltd. v Shyam Madanmohan Ruia* (2010) 5 Bom CR 589.
40. The Companies Act, 2013 (18 of 2013) s 5.

and RBI notifications, the enforceability of put options is allowed as long as they do not provide "assured returns."[41]

Additionally, cases of the Delhi High Court[42] and Bombay High Court[43] have allowed the enforceability of the put option in case it is drafted like downside protection and not as an "assured return" under FEMA.

Nevertheless, the drafting of the put option can be challenged on these grounds in courts and it leads to a regulatory hurdle for PE investors.

3. *Promoter Classification*

The informal advisories also come at a time when SEBI has been tightening its grip on promoter classification, specifically directing it towards the new-age "professionally run" companies. The promoter, as defined under Section 2(oo) of the ICDR Regulations, is a person who is identified as such in the company filings or has control over the affairs of the company.[44]

It is important to note that investment groups are excluded from this definition if they merely hold more than 20% of the equity capital of the company without exercising any control. However, recently, there have been reports that SEBI would classify any founder who holds more than 10% of the equity capital of the company as a promoter.[45]

The reasons behind this could be the disproportionate advantages that founders of some companies have undertaken while flouting the obligations of a promoter. For example, the founder of Paytm, Vijay Shekhar Sharma, was under scrutiny recently as he was allotted millions of shares

41. Securities and Exchange Board of India Notification under section 16 and 28 of Securities Contracts (Regulation) Act, 1956, No. LAD-NRO/GN/2013-14/26/6667; Foreign Exchange Management (Non-Debt Instruments) Rules, 2019 S.O. 3732(E) [F.No.1/14/EM/2015] r 9.
42. *Cruz City 1 Mauritius Holdings v Unitech Ltd* 2017:DHC:1911; *NTT Docomo Inc. v Tata Sons Ltd* 2017:DHC:2254.
43. *Percept Finserve (P) Ltd. v Edelweiss Financial Services Ltd.* 2023 SCC OnLine Bom 319.
44. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, SEBI/LAD-NRO/GN/2018/31 reg 2(oo).
45. 'New norms to widen promoter ambit for IPO-bound companies' (The Hindu Business Line, 20 February 2024) <https://www.thehindubusinessline.com/markets/new-norms-to-widen-promoter-ambit-for-ipo-bound-companies/article68259605.ece> accessed 21 February, 2025.

through the Employee Stock Option Plan.[46] It is important to note that ESOPs cannot be allotted to promoters of a company.[47] The issue centers on whether Sharma should have been classified as a promoter or a public shareholder when the company filed for its IPO in 2021, especially since, as a founder, he does exercise control of the company.[48]

In companies with no identifiable promoters, even PE Investors could be classified as promoters as they hold a significant share in the equity capital of the company.[49] In a professionally managed company named Health- vista India Ltd., the founders were classified as promoters. In the case of a company named SKS Microfinance Limited, the PE firm Sequoia Capital India was identified as a promoter.[50] In a Real Estate (Regulation and Development) Act, 2016 case, the PE Investor was classified as a promoter because they held veto rights.[51]

Promoters have multiple obligations, including lock-in requirements, disclosure obligations, and obligation to provide minimum contribution under the ICDR Regulations. They can also be criminally held liable for the misdeeds of the company.[52] In light of these obligations, if PE

46. Paytm's Q3 ESOP spend was greater than that of Zomato, Policybazaar, Delhivery, Nykaa combined' (Moneycontrol, 21 February 2024) <http://moneycontrol.com/news/technology/paytms-q3-esop-spend-was-greater-than-that-of-zomato-policybazaar-delhivery-nykaa-combined-12287481.html> accessed 21 February 2025.
47. Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations 2021 (India) <https://www.sebi.gov.in/legal/regulations/aug-2021/securities-and-exchange-board-of-india-share-based-employee-benefits-and-sweat-equity-regulations-2021_51889.html> accessed 21 February 2025.
48. Paytm in the hot seat again: Can Vijay Shekhar Sharma emerge unscathed from SEBI's ESOPs notice?' (Business Today, 16 September 2024) <https://www.businesstoday.in/magazine/the-buzz/story/paytm-in-the-hot-seat-again-can-vijay-shekhar-sharma-emerge-unscathed-from-sebis-esops-notice-446098-2024-09-16#:~:text=Paytm%20is%20back%20in%20the,its%20response%20to%20Sebi's%20notice.> accessed 21 February 2025.
49. Ashish Aggarwal and Nalin Dhingra, 'Investors in start-ups and probability of them being classified as promoters' (Mondaq, 24 April 2023) <https://www.mondaq.com/india/shareholders/1311074/investors-in-start-ups-and-probability-of-them-being-classified-as-promoters> accessed 21 February 2025.
50. BSE India, 'Placement Document' (2024) <https://www.bseindia.com/downloads/ipo/20145221940 29Placement%20Document%20Final.pdf> accessed 21 February 2025.
51. Trilegal, 'Equity investor with veto rights categorised as promoter under RERA' (Trilegal, 30 January 2024) <https://trilegal.com/knowledge_repository/equity-investor-with-veto-rights-categorised-as-promoter-under-rera/> accessed 21 February 2025.
52. Lakshmikumaran & Sridharan, 'Doctrine of attribution in corporate criminal liability' (Lakshmikumaran & Sridharan, 7 February 2024) <https://www.lakshmisri.com/insights/articles/doctrine-of-attribution-in-corporate-criminal-liability/> accessed 21 February 2025.

Investors are classified as promoters and they do not hold any special rights guaranteeing control in the company, the situation could prove to be extremely harmful for them.

In conclusion, the existing regulatory norms already fail to provide statutory provisions to PE Investors. Creating additional confusion through informal advisories only makes the situation worse.

V. CONCLUSION AND SUGGESTIONS

India is currently facing an investment boon, making it an attractive market for PE/VC players, crossing US$56 billion in 2024.[53] However, the regulatory hurdles posed by SEBI with regard to something as important as special rights might make India a less lucrative destination for investments.

To eliminate ambiguities and promote an investor-friendly environment, the following suggestions are proposed –

1. SEBI must clarify its position on the relinquishment of special rights through statutory amendments and not through informal advisories.
2. An exhaustive list of special rights should be included in the amendments to reduce the discretion granted to merchant bankers.
3. A distinction must be drawn between rights that grant disproportionate powers to Investors and rights that ensure corporate governance. Providing for a blanket cancellation of all rights might harm the advantages that these rights provide to both the company and the Investors.

In conclusion, SEBI might consider implementing stricter disclosure guidelines to guarantee that prospective investors have comprehensive knowledge of the governance framework and the specific influence of private equity (PE) investors. Such measures would support SEBI's goal of creating a more favorable investment environment in India, thereby attracting vital capital needed for the nation's economic progress and growth. However, providing a blanket restriction on these rights would affect the benefits these rights provide to corporate governance.

53. n 1.

Foreign Subsidies and Market for Corporate Control: Is India Ready for a Bold Regulatory Leap?

—*Malak Sheth*[*]

ABSTRACT

The globalisation of the world economy, coupled with increasing international trade after the end of the Cold War, opened the door for numerous new actors from every market globally to compete in one another's markets. This interconnectedness has always faced the challenge of integrating economies operating on fundamentally irreconcilable principles: liberal markets driven by market forces and State capitalist economies where the government exercises influence over market players in market-based economies. Despite years of global economic integration, the rise of China and a multipolar world order marked by rising national security concerns and growing protectionism, the fundamental incoherency in integrating these economies has become more pronounced. Further, there has been a realisation that China has been subsidising its domestic companies to carry out global mergers and acquisitions (M&A) without consequences. As a result, the European Union has enacted a Foreign Subsidy Regulation (FSR) to maintain the level playing field of the European internal market, disrupted by local EU companies being forced to compete with state-subsidised firms. Considering the resolution of the border issue with China, the call from industry players to allow Chinese investments and the Economic Survey Report 2024 advocating for the same, the article posits the enactment of an EU-FSR-like regime in India. The current regulatory landscape governing inbound M&A in India is inadequate to sufficiently address the disruption of the level

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playing field caused by state-subsidized M&A activity. Against the backdrop of this geo-political context and the opening of the Indian economy to Chinese investments, an EU-FSR-like law would be a strategic tool to ensure only investments conducive to India's economic growth are allowed. Finally, the article addresses concerns regarding the potential repelling of foreign investments fundamental to India's goal of a Viksit Bharat because of such legislation.

I. INTRODUCTION

The entry of the world's economy into the phase of globalisation, coupled with increasing international trade, has enabled numerous new actors from every market globally to compete in one another's markets. This interconnectedness has always faced the challenge of integrating economies operating on fundamentally irreconcilable principles: liberal markets driven by market forces and State capitalist economies where the government exercises influence over market players in market-based economies. Nevertheless, the period of growth was marked by a unipolar world order led by the United States after the Cold War,[1] along with the establishment of the World Trade Organization (WTO), which promoted free trade and facilitated the spread of globalisation despite this issue of irreconcilability.[2] However, after years of global economic integration, with the rise of China and a multipolar world order marked by rising national security concerns and growing protectionism, the fundamental incoherency has become more pronounced.

The most recent event underscoring the difficulties in attempting to reconcile these opposite market ideologies is the introduction of the Foreign Subsidy Regulation ('**FSR**') by the European Union ('**EU**').[3] The FSR regime is aimed at dealing with the distortive effects of state-subsidized firms operating within free-market economies, as well as the increasing presence of sovereign wealth funds in Mergers and Acquisitions ('**M&A**').

1. Global Times, 'US-led unipolar hegemonic order an abnormal state, will be reformed sooner or later' (*Global Times*, 11 April 2023), <https://www.globaltimes.cn/page/202304/1288893.shtml>, accessed 13th January 2025.
2. World Trade Organisation, 'Understanding the WTO' (*World Trade Organization*, 2015). <https://www.wto.org/English/Thewto_E/whatis_e/tif_e/understanding_e.pdf> accessed 13 January 2025.
3. 'Regulation - 2022/2560 - EN - EUR-Lex' (*Europa.eu*, 14 December 2022) <https://eur-lex.europa.eu/eli/reg/2022/2560/oj#> accessed 12 January 2025.

At its core, the framework combats the distortion within the market caused by "foreign" or non-EU subsidies to state-controlled firms, either directly or indirectly, that are used to finance economic activities such as acquisitions within the market.[4] Thus, it aims to augment the fairness, openness, and competitiveness of the EU internal market by ensuring a level playing field between state-supported foreign players and the non-subsidized local EU market participants. While the EU FSR provides the European Commission ('**EC**') with three new regulatory tools for this purpose, which will be discussed further, the present article is limited to exploring the M&A aspect of the FSR framework.

Although the FSR is not specifically targeted against China, controlling its influence on the level-playing field in the EU market has been a relevant factor in introducing this new framework.[5] This is because Chinese firms have access to the deep pockets of the still state-owned banks, which, along with the heavy corporate-state nexus in China, accentuates the problem of distorting competition.[6] Similarly, India's own policy towards Chinese investment is governed by Press Note 3 (2020), which was introduced to curb opportunistic takeovers/acquisitions of Indian companies during the pandemic.[7] It entails all Chinese investments to compulsorily seek government approval before entering the Indian economy. However, at this investment screening stage, the Government's concern is only national security, and little evidence exists to indicate that it also involves parameters aimed at ensuring the competitiveness of the Indian market, including its market for corporate control.

Further, as noted earlier, while market distortions caused by Chinese subsidies are a significant concern, they are not the sole factor, as other state-controlled economies also contribute to such distortions globally. Also, while foreign investment is permitted in most sectors in India, except for a small list of prohibited ones, investments in the permitted

4. ibid.
5. 'The EU Foreign Subsidies Regulation: What Does It Really Mean?' (*Frontier Economics*, 2023) <https://www.frontier-economics.com/uk/en/news-and-insights/articles/article-i20093-the-eu-foreign-subsidies-regulation-what-does-it-really-mean/> accessed 12 January 2025.
6. ibid.
7. Davar R, 'India – Press Note 3 Update' (*Mondaq.com*, 9 July 2024) <https://www.mondaq.com/india/corporate-and-company-law/1489936/india-press-note-3-update> accessed 12 January 2025.

sectors are made either through the automatic route or the approval route. Akin to the screening of Chinese investments, investments under the Government approval route are also screened only for national security concerns. Thus, the screening of Chinese investments under Press Note 3, or of other investments under the approval route, even if it involves an assessment of state subsidies—which further analysis in this article suggests it does not, may not be as robust or effective for the Indian market as the FSR is for the EU.

The present article aims to analyse the FSR framework in the EU and explore the underlying theory of harm to competition that underscores the FSR scrutiny of M&A transactions in the EU [**A**]. Further, it explicates the present framework regulating inbound M&A in India. Finally, while affirming the underlying theory of harm, the article recommends that India adopt an EU-FSR-like framework and counters potential criticisms against the same[**B**].

II. ANALYSING EU FSR'S AND INDIA'S M&A SCRUTINY: IS THERE A NEED TO REGULATE FOREIGN SUBSIDIES IN INDIA?

A. Understanding the EU FSR: A Bold Step to Tackle Distortions from Foreign Subsidies

The dichotomy between state-controlled and free-market economies, highlighted in the introduction, and the effort to integrate them through globalisation to create an international level playing field face significant roadblocks when either type of economy fails to observe global subsidy discipline.[8] Such a discipline is important because of the potential use—or misuse— of subsidies as tools by foreign governments to further their non-economic goals.[9] This is achieved by directing state-subsidised firms to engage in politically motivated behaviour, which often undermines the fundamental economic principles, including profit motive, that should dictate a firm's performance in the market. Moreover, such companies engage in unfair competition by not competing with other firms on merit but through the support of state resources.

8. OECD, 'SUBSIDIES, COMPETITION and TRADE' (*OECD*, 2022) <https://one.oecd.org/document/DAF/COMP/GF(2022)10/en/pdf> accessed 12 January 2025.
9. ibid.

Furthermore, in such cases, the international level playing field is also skewed against those who abide by the global subsidy discipline. For instance, the EU adheres to the said rule of discipline, which is evident by its internal framework that prevents Member States from granting State aid that unduly distorts competition in the internal market.[10] Therefore, it is natural for the EU to fear its integration with state-controlled economies through globalization that do not have such a state-aid control framework. This is because these companies compete with firms whose resources represent a distribution based on government intervention rather than by market forces. For instance, the U.S.-China Economic and Security Review Commission's 2020 Report found that the Chinese government supports companies capable of becoming national champions through loans, tax rebates, and other generous subsidies.[11] Such support helps these companies surpass and replace global market leaders. In 2023, the Chinese investment giant Fosun International received a bailout of $1.8 billion from state-owned banks as part of a Chinese strategy to assist debt-laden firms.[12] The escalating debt was incurred due to a buying spree by the company involving foreign acquisitions such as the Indian pharmaceutical giant Gland Pharma and Portugal's largest insurance group Caixa Seguros.[13] The Chinese government's backing in funding these acquisitions and the subsequent bailout exemplifies how the distribution of economic resources is dictated not by the market, but by state intervention.

The EU FSR was consequently introduced to improve the competitiveness within the EU's internal market by ensuring a level playing field between foreign and local EU market participants. As discussed before, the FSR regime provides the European Commission ('**EC**') with three new regulatory tools for this purpose: (1) an *ex-officio* mechanism with

10. 'What Is State Aid?' (*Department of Enterprise, Trade and Employment*) <https://enterprise.gov.ie/en/What-We-Do/EU-Internal-Market/EU-State-Aid-Rules/What-is-State-Aid-/> accessed 13 January 2025.
11. '2020 Report to Congress of the U.S.-China Economic and Security Review Commission' (2020) <https://www.uscc.gov/annual-report/2020-annual-report-congress> accessed 12 January 2025.
12. 'Fosun is Said to Near Securing $1.8 Billion China Loan'(*Bloomberg*, 10 January 2023) <https://www.bloomberg.com/news/articles/2023-01-10/fosun-is-said-to-near-securing-1-8-billion-china-loan> accessed 12 January 2025.
13. Ian Taylor, 'Fosun: What You Need to Know about the Chinese Conglomerate Set to Take a Majority Stake in Thomas Cook' (*Travel Weekly*, 19 July 2019) <https://travelweekly.co.uk/articles/338134/fosun-what-you-need-to-know> accessed 13 January 2025.

broad powers to investigate any market situations irrespective of thresholds; (2) a notification requirement in relation to potentially subsidised public-procurement bids; and (3) a requirement to notify certain M&A transactions.[14] While the EC already launched investigations under the former two tools within a few months of the FSR coming into force, it was only in June 2024 that the first M&A transaction ('**impugned transaction**') was notified for "Phase 2" of the FSR investigation. Under the FSR framework, Phase 2 investigation refers to the in-depth investigation conducted by the EC when it suspects that a foreign subsidy could distort the internal market.[15]

The impugned transaction dealt with the acquisition of sole control of PPF Telecom Group B.V. ('**PPF**'), a European telecommunication operator, by PJSC ('**e&**'), which is a State-controlled telecommunication operator based in the United Arab Emirates ('**UAE**').[16] The EC suspected that the unlimited guarantee and loans from UAE-controlled banks gave the firm an advantage during the acquisition process, thereby distorting it. Furthermore, it also suspected that such state support could lead to a distortion of competition in the EU internal market post-transaction. Based on these preliminary concerns, an in-depth investigation was launched under Phase 2 of the EU FSR.[17]

Consequent to the Phase 2 investigation, the EC gave its conditional approval of the transaction. However, it found that although the acquisition process itself was not distorted, it feared that the subsidies would unfairly enhance the merged entity's ability to fund its operations within the EU internal market, reducing its sensitivity to risk. For instance, it explained that the firm's capability to pursue investments, such as spectrum auctions, infrastructure development, or other acquisitions, is significantly greater than that of a comparable player without such subsidies.[18]

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14. n 3.
15. ibid.
16. Lauer A-K, F von S (Hogan Lovells), 'Calling It In: EU Commission Launches First In-Depth Investigation of M&A Deal under Foreign Subsidies Regulation - Kluwer Competition Law Blog' (*Kluwer Competition Law Blog*, 18 June 2024) <https://competitionlawblog.kluwercompetitionlaw.com/2024/06/18/calling-it-in-eu-commission-launches-first-in-depth-investigation-of-ma-deal-under-foreign-subsidies-regulation/> accessed 12 January 2025.
17. ibid.
18. 'Commission Opens In-Depth Foreign Subsidies Investigation into E&'S Acquisition of Parts of PPF Telecom' (*European Commission - European Commission*, 2024).

In order to address these concerns, the buyer committed to eliminating the unlimited guarantee, prohibiting the parent company from financing the target's operations within the internal market, and ensuring that the buyer will notify the Commission about any future acquisitions.[19] However, the proposed commitment by the firm regarding its market behaviour post-merger forces one to question the difference between the scope of the investigation under the merger and subsidy regulations. Further, the differences in the potential of the remedies to negative the distortion under both regimes are also fundamental to understanding the FSR regime. The author believes that the difference between the two regimes and the potential guidance for India's scrutiny can be unravelled by analysing the theory of harm underpinning the EU FSR regime.

B. EU FSR and the Theory of Harm: Insights and Learnings for India

A theory of harm ('**ToH**') in competition law refers to the analysis or argument that demonstrates why a certain type of conduct is a violation of competition law and how it harms competition.[20] Several potential concerns stemming from the enhanced competitive position of the firm, which also negatively affects market competition, as outlined in Article 4 of the FSR regulation, form the foundation of EU FSR's ToH.[21] As far as concentrations (deemed to occur when there is a change in control on a lasting basis because of mergers and acquisitions)[22] are concerned, the possible distortions in the internal market sought to be remedied are two-fold— (a) the acquisition process itself and (b) the firm's potential post-merger to affect competition.[23]

<https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3166> accessed 12 January 2025.

19. ibid.
20. Digital Freedom Fund, 'Theories of Harm in Competition Law Cases' (*digitalfreedomfund.org*) <https://digitalfreedomfund.org/wp-content/uploads/2020/05/4_-DFF-Fact-sheet-Theories-of-harm-in-competition-law-cases.pdf> accessed 13 January 2025.
21. Regulation (EU) 2022/2560 on foreign subsidies distorting the internal market, Art.4 (European Union).
22. n 21 Art.20.
23. Ahlqvist V, Abecasis PR and Haanperä T, 'Foreign Subsidies Regulation in the Context of Mergers: Tracing the Cause and Effect - Copenhagen Economics' (*Copenhagen Economics,* 30 October 2024). <https://copenhageneconomics.com/insight/foreign-subsidies-regulation-in-the-context-of-mergers-tracing-the-cause-and-effect/> accessed 12 January 2025.

The theory of the underlying distortion in the acquisition process is that access to the State's deep pockets skews the process in favor of companies that benefit from such capital.[24] For instance, considering a scenario in the Indian context, the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, which regulates the public market of corporate control in India, allows any person to make competing bids in response to a public announcement of an open offer.[25]

Now, such competing bids can be discouraged in cases where the firms making the offer are subsidised by foreign states, such as financial support from sovereign wealth funds or sovereign guarantees like in the case of e&.[26] Alternatively, when such firms are the ones making the competing bid, it can be enormously high for the original offeror to compete with. For instance, in 2016, the Essar Group's debt crisis forced it to put one of its conglomerate companies, Essar Oil, up for sale. According to reports, the company was in talks with as many as five companies for asset sale.[27] However, the deal was finally consummated with a Kremlin-backed Russian Oil Major,[28] Rosneft and partners for $10.9 billion—almost 12.5 times EBITDA (earnings before interest, tax, depreciation, and amortisation).[29] Rosneft paid a significant premium—considering that in 2017, even India's largest petrochemical company, Reliance Industries, was only valued at around seven times EBITDA.[30] The impact of Rosneft's access to Russian state resources, including support from state-controlled banks, on its ability to pay this significant premium and the consequences

24. n 8.
25. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 20.
26. n 16.
27. Philipose M, 'Why Has Rosneft Paid a Packet for Essar Oil?' (*Mint*,18 October 2016). <https://www.livemint.com/Money/C5LD6BeiXwnbuwKOoSFsQM/Why-has-Rosneft-paid-a-packet-for-Essar-Oil.html> accessed 12 January 2025.
28. Krauss C, 'Russia Uses Its Oil Giant, Rosneft, as a Foreign Policy Tool (Published 2017)' (*The New York Times*, 29 October 2017) <https://www.nytimes.com/2017/10/29/business/energy-environment/russia-venezula-oil-rosneft.html> accessed 12 January 2025; Mukherjee P, 'Rosneft Seals First Asian Refinery Deal with Essar Oil Purchase' Reuters (21 August 2017) <https://www.reuters.com/article/business/rosneft-seals-first-asian-refinery-deal-with-essar-oil-purchase-idUSKCN1B10PI/> accessed 12 January 2025.
29. n 27.
30. Kshitij Anand, 'Reliance Industries Hits 7-Year High: What Should Investors Do?' (*The Economic Times*, 26 September 2016) <https://economictimes.indiatimes.com/markets/stocks/news/reliance-industries-hits-7-year-high-what-should-investors-do/articleshow/54521056.cms?from=mdr> accessed 13 January 2025.

for skewing the acquisition process against the interests of other companies competing for the same were never assessed.

Like Essar Oil's multiple suitors, in 2016, several Indian pharma majors such as Torrent Pharma Ltd, US-based Baxter International, and global buyout firm Advent International were competing to gain control of Gland Pharma Ltd.[31] However, they lost the bid to China's Fosun Group's $1.26 billion offer,[32] which, as mentioned earlier, was on a buying spree, having spent as much as $38 billion on more than 130 mergers and acquisitions between 2010 and 2016.[33] Fosun's competitors, including the Indian pharma majors who lost out to Fosun's bid, opined that the deal should have fallen within the range of $800 million to $1 billion.[34] Furthermore, some reports also state that Fosun Group might have borrowed as much as $800 million to finance the deal.[35] The actual borrowing for the acquisition of Gland Pharma Ltd might vary, but it is widely acknowledged that Fosun has extensively borrowed from state-owned banks to support its cross-border M&A activities.[36] Therefore, like Rosneft's acquisition of Essar Oil, the skewing of the market for corporate control because of access to state resources was never assessed in the Indian context.

It is important to highlight here that the author does not argue that the level playing field was necessarily skewed in these cases but contends that, based on publicly available reports, it seemingly appears that access to state resources played a significant role in securing the successful bid. Thus, given the palpable validity of this ToH and the absence of a mechanism to investigate such distortion in the acquisition process,

31. 'China's Fosun to Buy Gland Pharma for $1.3 Billion | M&a Critique' (*M&A Critique | THE WHYS AND THE HOWS*, 28 July 2016) <https://mnacritique.mergersindia.com/news/chinas-fosun-buy-gland-pharma-1-3-billion/> accessed 13 January 2025.
32. Dandekar, V, 'Fosun Leads the Race to Buy Gland Pharma with $1.27 Billion Bid' (*Economictimes.com*,5 June 2016) <https://m.economictimes.com/industry/healthcare/biotech/pharmaceuticals/fosun-leads-the-race-to-buy-gland-pharma-with-1-27-billion-bid/amp_articleshow/52611608.cms> accessed 13 January 2025.
33. n 13.
34. Sharma EK, 'Shanghai Surprise' (*Business Today*, 19 August 2016) <https://www.businesstoday.in/amp/magazine/corporate/story/chinese-pharma-company-buys-an-equally-less-known-indian-firm-146817-2016-08-19> accessed 13 January 2025.
35. Lane E, 'Shanghai Fosun Snags India's Gland Pharma in $1.35B Deal' (*Piramal Pharma Solutions*, 29 July 2016) <https://www.fiercepharma.com/pharma-asia/shanghai-fosun-confirms-to-buy-india-s-gland-pharma-1-35b-deal> accessed 13 January 2025.
36. n 32.

a framework akin to the EU FSR would help ensure competitiveness in acquisitions in India.

While the harm to competition in the acquisition process is lucid, the distortions post-mergers are where the waters get a little muddy regarding the distinction between merger review and subsidy regulation. The EU Commission staff report attempts to address these seemingly, but not genuinely, overlapping concepts.[37] It states that while the merger regulations assess the impact of concentrations on the competition in the market, the FSR seeks to analyze the distortions in the level playing field caused by the foreign subsidies. In order to grasp this nuanced distinction, it is essential to analyze the scope of merger reviews. Such an analysis would also help determine if the current regulation of mergers in India under the Competition Act, 2002, should suffice to review market distortion brought by foreign subsidies.

Merger reviews worldwide have adopted an 'effects-based' approach to assess the merits of approving mergers as opposed to the prevention of dominance approach from the Harvard School of Thought.[38] Under the effects-based approach, mergers that strengthen dominant positions may still be allowed if they generate consumer welfare benefits. For instance, Section 20(4) of the Indian Competition Act provides a list of factors to determine if a merger has adverse appreciable effects on competition (AAEC).[39] These factors include the assessment of whether the relative benefits of the combination outweigh its adverse impacts, the relative advantage of the mergers in bringing economic development, including efficiency and so on.

Firms that receive foreign subsidies and can reduce costs might strengthen market competition because of such lower costs.[40] Furthermore, this might also be advantageous to consumers whose interest merger

37. European Commission, *Clarifications on the Application of the Foreign Subsidies Regulation* (Staff Working Document, 26 July 2024) SWD (2024) <https://competition-policy.ec.europa.eu/document/download/b4c8bb13-839b-4bfb-8863-78b188523d22_en?filename=20240726_SWD_clarifications_on_application_of_FSR.pdf> accessed 13 January 2025.
38. Lina M Khan, 'Amazon's Antitrust Paradox' (2017) 126 *Yale LJ* 710. <https://www.yalelawjournal.org/pdf/e.710.Khan.805_zuvfyyeh.pdf> accessed 13 January 2025.
39. The Competition Act, 2002 (12 of 2003) s.20(4).
40. Mette Alfter, Vikram Balachandar and Ors., 'The EU Foreign Subsidies Regulation: What Does It Really Mean?' (Frontier Economics2023) <https://www.frontier-economics

reviews seek to protect. Such mergers are typically permitted under all merger control regimes that are based on an 'effects-based' approach. However, such foreign subsidies are unfair to the competitors of such firms because of the unequal playing field where they are forced to compete on merit with such state-subsidized firms. Consequently, it can be inferred that the mandate of merger reviews to maintain the competitiveness of markets typically means that firms benefitting from state subsidies that positively impact the consumers might normally be allowed. For instance, in the case of Rosneft's acquisition of Essar Oil, the CCI[41] analysed the impact of the combination based on the existing presence of the acquiring firms in the market and based on the factors under section 20(4), it held that the combination is not likely to cause AAEC in the market. However, unlike the EU's scrutiny of the PPF- e& deal,[42] there was no assessment of the possible distortions post-merger because of Russian subsidies. Consequently, to ensure that such potential distortions do not go unnoticed, a regime similar to an FSR can address this issue by promoting a level playing field where merger reviews' mandate focuses solely on maintaining competitiveness in that level playing field. Since CCI does not possess adequate tools to maintain a level playing field in the Indian market, the adoption of an FSR-like regime in India becomes imperative. The next section will outline the legal landscape governing inbound M&A in India, aiming to assess whether the current regulatory framework adequately scrutinises distortions caused by foreign subsidies.

C. India's Regulation of its Market for Corporate Control: Missing Regulatory Eyes on the Competitiveness in Acquisition Procedures

The regulatory landscape governing inbound M&A in India is characterized by overlapping functions depending on unique considerations based on, among other factors, the deal value, the target industry sector in question, and the market power of the businesses involved.[43] A potential

.com/uk/en/news-and-insights/articles/article-i20093-the-eu-foreign-subsidies-regulation-what-does-it-really-mean/> accessed 12 January 2025.

41. *Notice u/s 6(2) by Petrol Complex Pte.Ltd. and Kesani Enterprises Co Ltd.,* CCI Combination Regulation 2016/10/448.
42. n 16.
43. Duggal RP, Hartmann T and Ivey TJ, 'Navigating Inbound M&a in India: An Overview' (*Skadden.com*, 13 August 2024) <https://www.skadden.com/insights/

acquirer must navigate three identifiable regulatory frameworks before investing in India.[44]

The first regulatory sphere is defined by the Reserve Bank of India's ('RBI') regulation of banks and all borrowing and lending activities in India.[45] It includes the Foreign Exchange Management Act of 1999, along with its associated rules and regulations, such as the Foreign Exchange Management (Non-Debt Instruments) Rules of 2019 and the Foreign Exchange Management (Cross-Border Merger) Regulations.[46] According to the preamble of the RBI Act of 1934, the mandate of the Reserve Bank is to ensure monetary stability as well as the advantageous operation of India's currency and credit system.[47] Therefore, it can be inferred that any approval sought by the RBI under the aforementioned instruments will not consider the distortion of the acquisition procedure due to foreign subsidies, which fall outside the RBI's mandate.

The second regulatory sphere consists of the Government's foreign investment policy, which is contained in the Consolidated Foreign Direct Investment Policy ('FDI'), 2020.[48] As explained in the introduction, foreign investment in permitted sectors may be through the automatic or government approval routes.[49] Further, since 2020, as per the Press Note 3, any investor from a country sharing a land border with India (Afghanistan, Bangladesh, Bhutan, Myanmar, China, Nepal and Pakistan) can only make investments under the government approval route.[50] Investments under the automatic route do not undergo much regulatory scrutiny unless it triggers the thresholds under the competition law, which will be discussed later.[51] Investments falling under the Government approval route, including investments from countries under Press Note 3, have to

publications/2024/08/navigating-inbound-ma-in-india-an-overview> accessed 13 January 2025.

44. Abhinav Chandrachud, 'The Emerging Market for Corporate Control in India: Assessing (and Devising) Shark Repellents for India's Regulatory Environment', 10 Wash. U. Global Stud. L. Rev. 187 (2011), <https://openscholarship.wustl.edu/law_globalstudies/vol10/iss2/2> accessed 13 January 2025.
45. n 42.
46. ibid.
47. *Internet and Mobile Association of India v Reserve Bank of India*, AIR 2021 SC 2720.
48. Consolidated FDI Policy, DPIIT Ministry of Commerce and Industry, Effective from October 15 2020.
49. ibid.
50. n 7.
51. n 44.

apply through the Foreign Investment Facilitation Portal, which offers a single-window clearance system, forwarding applications to the relevant Ministry for further processing.[52]

Since the end of the pandemic, the Press Note 3 still governs Chinese investments in India. Therefore, it is necessary to analyze the nature of scrutiny under the Government approval route to see if the Government considers the access to the deep pockets of the State or foreign subsidies as a potential threat to the level playing field in India's market.[53] However, at the outset, it must be underscored that the Government's review of foreign investments in India is shrouded in considerable mystery.[54] The nebulous nature of the Government's review would become more evident with further analysis.

A brief overview of the Government's standard operating procedure would reveal the documents required under the FDI policy, including the following:[55] (1) the charter documents (which are the foundational documents or the Indian equivalents of the Memorandum of Association and Articles of Association) of both the foreign investor and investee entity, (ii) audited financial statements and tax returns of both entities, (iii) a diagram illustrating the flow of funds from the foreign investor to the investee entity, and (iv) a summary of the FDI proposal. Further, foreign investment into certain sectors may also require the Ministry of Home Affairs prior security clearance. After the online filing of the proposal, it is forwarded to the concerned ministry/department under which the proposed investment falls.[56] The Indian government and the concerned ministry enjoy wide discretion when deciding on the proposal.

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52. Nishith Desai Associates, 'Government Issues New SOP for FDI Proposals' (*Nishith Desai Associates*, 16 November 2023). <https://www.nishithdesai.com/SectionCategory/33/Research%20and%20Articles/12/49/49/12829/1.html> accessed 13 January 2025.
53. CCG NLU, Delhi, 'Press Note 3 of 2020: FDI Policy and the Expanding Sphere of National Security - MEDIANAMA' (*MEDIANAMA* May 2020) <https://www.medianama.com/2020/05/223-press-note-3-of-2020-fdi-policy-and-the-expanding-sphere-of-national-security-2/> accessed 12 January 2025.
54. European Commission, 'Joint EU-India Stakeholder Event on Foreign Direct Investment Screening' (8 February 2024) <https://policy.trade.ec.europa.eu/events/joint-eu-india-stakeholder-event-foreign-direct-investment-screening-2024-02-08_en> accessed 13 January 2025.
55. 'SOP for FILING FDI PROPOSALS by DPIIT, M/O COMMERCE& INDUSTRY Standard Operating Procedure (SOP) for Processing Foreign Direct Investment (FDI) Proposals (2023). <https://www.fifp.gov.in/Forms/SOP.pdf> accessed 12 January 2025.
56. ibid.

The list of documents suggests that the companies are not required to disclose sources of foreign subsidies in a separate document. Under Indian law, there is no reporting obligation for foreign subsidies. Additionally, no indicators imply the various considerations of the ministry or the criteria they apply in the risk assessment process before approving or rejecting a proposal.[57] For instance, while other nations allow actions based on the 'likelihood' of an effect or the 'potential' risk to national security, countries like Portugal and Slovenia_require 'actual and sufficiently serious threats' to public order and security_to limit a transaction.[58]

According to current policy in India, the relevant ministry conducts a subjective evaluation and makes a decision. This broad discretion, including the subjective assessment_by ministries in India, indicates that adequate regulatory space is provided for ministries to consider foreign subsidies or access to state capital as a factor before approving an investment.[59] However, it remains uncertain whether Indian authorities conduct an actual assessment of foreign subsidies and their potential to fuel mergers and acquisitions in India. Moreover, even if one argues that national security parameters would typically encompass an evaluation of the extent of the state's involvement in the company's affairs and that such cases may be identified at the threshold of the Government approval process. Currently, however, the scope is too narrow, as state-controlled economies extend beyond land-bordering nations. Additionally, there is no government oversight in the automatic route. Therefore, the current regime is inadequate, resulting in potential underenforcement of cases regarding distortions in the competitive acquisition process.

Finally, the third regulatory sphere concerns the Combination Regulation under the Competition Act 2002.[60] As discussed in the previous section, CCI evaluates the adverse impact of the combination, as defined under Section 5 of the Competition Act to include acquisitions,

57. ibid.
58. Sarah Bauerle Danzman,, 'Naïve no more: Foreign direct investment screening in the European Union', Global Policy Vol 14 S3 pg.40-53, <https://doi.org/10.1111/1758-5899.13215> accessed 12 January 2025.
59. James Hsiao and Royston C, 'Foreign Direct Investment Reviews 2024 : India' (*White & Case*, 2024). <https://www.whitecase.com/insight-our-thinking/foreign-direct-investment-reviews-2024-india> accessed 12 January 2025.
60. The Competition Act, 2002 (12 of 2003).

mergers and amalgamations, on competition in the market.[61] However, it lacks the mandate to examine whether the acquisition's competitiveness has been maintained or if the level playing field remains intact after the combination. Consequently, none of the regulatory frameworks in India, apart from the review under the Government approval route within the FDI policy where such a consideration might be relevant, explicitly allow for examining distortions in the Indian market for corporate control. In light of the inadequacies in the current framework in addressing distortions caused by foreign subsidies, the next section proposes the introduction of an EU FSR-like law in the Indian context.

III. RECOMMENDATIONS AND WAY FORWARD

The golden era of global trade, facilitated by the establishment of the WTO and globalisation following the Cold War, has transitioned into a phase of deglobalisation characterised by diminishing global interdependence and increasing protectionist measures.[62] The WTO's expansion, marked by the admission of Russia in 2012, Vietnam in 2007, Saudi Arabia in 2005, and China in 2001, aimed to facilitate the transition of these state-controlled economies towards free-market principles through integration into the global trading system.[63]

However, in recent times, it has become evident that, contrary to initial expectations, these state-controlled economies did not fully transition into free-market systems, leading to concerns about unfair competition with countries adhering to free-market principles. This resulted in the USA's obstructing Appellate Body appointments, which virtually made WTO defunct because of members' indefinite appeals against panel rulings.[64] The trend of inward-looking and highly protectionist economic policies is most apparent in the shift of one of the leading proponents of

61. The Competition Act, 2002 (12 of 2003) s 5.
62. The World Bank, 'Protectionism Is Failing to Achieve Its Goals and Threatens the Future of Critical Industries' (*World Bank*, 29 August 2023) <https://www.worldbank.org/en/news/feature/2023/08/29/protectionism-is-failing-to-achieve-its-goals-and-threatens-the-future-of-critical-industries> accessed 12 January 2025.
63. P Mattiolo, ''Is the EU Foreign Subsidies Regulation Compatible with WTO Law?' (*CELIS Blog*, 29 January 2024) <https://www.celis.institute/celis-blog/is-the-eu-foreign-subsidies-regulation-compatible-with-wto-law/> accessed 13 January 2025.
64. Simon Lester, 'Ending the WTO Dispute Settlement Crisis: Where to from here?' (*IISD*, 2 March 2022) < https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis#:~:text=World%20Trade%20Organization%20

global trade and free-market principles— the USA.[65] President Trump's political slogan, 'Make America Great Again', aims at targeted and specific subsidies to bring back manufacturing jobs to the USA.[66]

Furthermore, several commentators have highlighted a negative trend of a global race to the bottom among nations in the context of subsidies to attract investments.[67] A 'race to the bottom' refers to a situation of heightened competition between states, which results in the progressive lowering or worsening of standards. In the context of subsidies, it means that countries which rigidly follow principles of free market and competition and refuse state support such as tax benefits, production-linked incentives and so on lose out business to countries that provide generous subsidies. This, in turn, makes them want to lower their standards to keep firms' manufacturing activities and their associated benefits, such as employment, in its jurisdiction, hence driving the race to the lowest standards. In light of this paradigm shift in the international and geopolitical context, the proposal for an Indian version of foreign subsidy regulation should be seen as a strategic tool to ensure that the rising trend of protectionism does not unlevel the domestic playing field.

Further, while such a trend does not bind India, it is also important to highlight the global trend in legislating laws to combat the distortive effects of state subsidies from a competition law perspective. For instance, following the footsteps of the EU, even the United States of America ('USA') also introduced the Foreign Merger Subsidy Disclosure

(WTO)%20dispute,and%20leaving%20the%20dispute%20unresolved.> accessed 13 January 2025.

65. 'Biden signs $740bn health, climate, tax 'Inflation Reduction Act' (*Al Jazeera*, 16 August 2022) < https://www.aljazeera.com/news/2022/8/16/biden-signs-740bn-health-climate-tax-inflation-reduction-act> accessed 12 January 2025 (The enactment of the Inflation Reduction Act, 2022, in the United States, attempts to transition to clean energy by providing significant industrial subsidies to domestic American industries at the expense of imports and foreign companies, is a prime example). Tim Reid, 'Trump pledges to take jobs and factories from allies, China' (*Reuters*, 25 September 2024) < https://www.reuters.com/world/us/trump-set-offer-federal-lands-other-incentives-firms-relocating-us-2024-09-24/> accessed 12 January 2025.
66. Kevin Rhode, ' Trump's Policy Shifts: What's Ahead for U.S. Manufacturing & Distribution' (*The Bonadio Group*, November 13, 2024) < https://www.bonadio.com/article/trumps-policy-shifts-whats-ahead-for-u-s-manufacturing-distribution/> accessed 12 January 2025.
67. DDG Anabel, 'Five reasons to fear a global subsidy race and what to do about it', (*WTO*, 27 June 2023), < https://www.wto.org/english/blogs_e/ddg_anabel_gonzalez_e/blog_ag_27jun23_e.htm> accessed 12 January 2025.

Act in 2022. The law imposes reporting obligations in the pre-merger notification process regarding foreign subsidies from "foreign entities of concern," defined as specific foreign governments and associated organizations "that pose strategic or economic risks to the United States".[68] The Act enables the Competition authorities to act, when necessary, by allowing them access to all important information to identify foreign government subsidies.[69]

The analysis of the regulatory landscape, including the list of documents required before the government approval for inbound mergers in the previous section, indicates that no such disclosure requirement exists in India. Therefore, to provide all relevant information to the authorities in India, a disclosure obligation regarding foreign aid must be imposed on Companies seeking to engage in any M&A activities in India. Such disclosure can only be made once the scope of the term 'foreign subsidy' is clearly defined, which requires dedicated legislation. For instance, 'foreign subsidies' are broadly defined under the FSR regime to include all 'financial contributions provided directly or indirectly by a third country if it confers a benefit and is limited to one or more undertakings or industries'.[70] Thus, the FSR targets active EU and non-EU corporations that have received direct or indirect financial contributions from a non-EU government.

Furthermore, the introduction of a framework akin to the EU-FSR is recommended, as India already acknowledges the potential national security risks stemming from the corporate-state nexus in state-controlled economies such as China.[71] Therefore, there is little reason not to regulate the distortive effects that access to state resources may have on the level playing field of the Indian market. Additionally, the underlying policy consideration of Press Note 3, which is aimed at curtailing

68. 'Congress Increases U.S. Merger Filing Fees, Adds Foreign Subsidy Disclosure Requirements, and Empowers State Attorneys General', (V&E, 10 January 2023) <https://www.velaw.com/insights/congress-increases-u-s-merger-filing-fees-adds-foreign-subsidy-disclosure-requirements-and-empowers-state-attorneys-general/> accessed 12 January 2025.
69. ibid ; 'US Legislation Implements New Filing Fees, Adds Foreign Subsidy Disclosure Requirements to HSR Rules' (*Latham Watkins*, December 2022) <https://www.lw.com/admin/upload/SiteAttachments/Alert%203046.pdf> accessed 12 January 2025.
70. n 3 Article 3.
71. n 53.

opportunistic acquisitions and hostile takeovers of Indian companies,[72] should be further refined to ensure both the competitiveness of the acquisition process and a level playing field. Furthermore, considering the resolution of the border dispute to the status quo as it existed prior to 2020, Chinese investments are expected to be welcomed in India once again.[73] The Economic Survey Report 2024 has also advocated for increased Chinese investments in India, which can help enhance India's participation in the global supply chain and boost exports.[74] Therefore, in light of the anticipated opening up of the economy to Chinese investments and the pronounced corporate-state nexus in China, India must implement regulations that not only screen foreign investments based on national security considerations but also ensure that they do not distort the market for corporate control in India. The subsequent part of the article will address the necessary preconditions for introducing a framework similar to the EU-FSR in India to strengthen the robustness of the Indian markets and its competitive processes.

D. National Champions of India: A Concerning Trend Deviating From The Vision Of The Competition Act

The emergent factors, such as the internal state aid control necessitating investigations into the funding sources of foreign companies, are absent in India. State-sponsored subsidies are not uncommon in India, and they already skew the level playing field in favor of a few players.[75] Additionally, Indian firms operating in the EU and benefitting from Indian subsidy schemes are also expected to be affected by the FSR regulation. Commentators have recommended negotiating a solution within the text of the currently deliberated Free Trade Agreement ('FTA') with

72. ibid.

73. 'As Disengagement Progresses, India May Give Nod to Chinese FDI Proposals' (*The Federal*, 22 February 2022) <https://thefederal.com/amp/business/as-disengagement-progresses-india-may-start-approving-fdi-proposals-from-china/> accessed 13 January 2025. ; Business Today Desk, 'Hindi-Chini, Buy-Buy? Economic Survey Makes a Case for FDI from China despite Ban' (*Business Today*22 July 2024) https://www.businesstoday.in/union-budget/story/hindi-chini-buy-buy-economic-survey-makes-a-case-for-fdi-from-china-despite-ban-438220-2024-07-22 accessed 12 January 2025.

74. Government of India, *Economic Survey 2023-2024*, (*Ministry of Finance*, 2 July 2024) <https://www.indiabudget.gov.in/economicsurvey/doc/echapter.pdf> accessed 12 January 2025.

75. CUTS, 'Competition Distortions in India- a Dossier' (2011) <https://cuts-ccier.org/wp-content/uploads/2019/01/CDIDossier-Oct-Dec11.pdf> accessed 12 January 2025.

the EU, alongside a caution that India should not agree to any FTA text that prohibits countervailing measures against FSR.[76] While this might be an external response to the FSR, the author suggests that internal measures be adopted to reduce the scope of Indian subsidies, as they promote productive inefficiencies and undermine competitive processes in any market. Moreover, there have been increasing calls from various sectors indicating that more than just subsidies are needed to turn India into the 'manufacturer for the world'.[77] Thus, India could focus instead on investing the substantial funds it allocates to subsidy schemes—such as Rs. 2 Trillion on the PLI scheme—on enhancing infrastructure and strengthening Indian institutions.[78] Such an internal response to the FSR framework would also provide India with the legal and moral authority it currently lacks to implement regulations countering foreign subsidies.

India's economic policy, as espoused by many, including Mr. Viral Acharya, former Deputy Governor of the Reserve Bank of India, seems to hint at the creation of 'national champions'.[79] The same is akin to the South Korean chaebols and Japanese keiretsu in the second half of the twentieth century.[80] Mr. Acharya, in his paper at the Brookings Papers on Economic Activity ('BPEA') conference, gathers empirical evidence to showcase that 'national champions' in India are given preferential project allocation and leniency from regulatory agencies towards practices like

76. PTI, 'EU's Foreign Subsidies Regulation May Hit India's Exports to Europe: GTRI Report' (*Outlook Business*, 19 July 2023) <https://www.outlookbusiness.com/news/eu-s-foreign-subsidies-regulation-may-hit-india-s-exports-to-europe-gtri-report-news-303998> accessed 12 January 2025.
77. Press Trust of India, 'Focus on Quality, Export Competitiveness Won't Come from Subsidies: Goyal' (*BSindia*, 16 October 2024) <https://www.business-standard.com/industry/news/focus-on-quality-export-competitiveness-won-t-come-from-subsidies-goyal-124101600258_1.html> accessed 12 January 2025.
78. Sharma M and Bloomberg, 'View: Make in India? It Will Take More than Just Subsidies to Turn India into the next China' (*The Economic Times*, 11 November 2022)
<https://economictimes.indiatimes.com/news/economy/policy/view-make-in-india-it-will-take-more-than-just-subsidies-to-turn-india-into-the-next-china/articleshow/95452183.cms?from=mdr> accessed 12 January 2025.
79. Aiyar SSA, 'For World-Class Firms, Is India Going Korea Way?' (*timesofindia.indiatimes.com*, 22 June 2024) <https://timesofindia.indiatimes.com/india/for-world-class-firms-is-india-going-korea-way/articleshow/111191647.cms#:~:text=Without%20any%20announcement%20or%20perhaps,take%20on%20western%20corporate%20giants.> accessed 13 January 2025.
80. ibid.

predatory pricing.[81] This is also directly related to the spurt in M&A activity in India by these 'national champions' whose share in overall activity has increased from under 3% in 2015 to 6% in 2021 despite the overall decline in the total number of M&A deals since 2011.[82] Such an industrial policy undermines the fundamental principles of fair competition and open markets in India. This is also in stark contrast to the staff report by EC's Directorate-General for Competition that highlights that one of their guiding principles is 'competition at home', which pushes back on calls for European champions.[83] The said observation is significant because India, like the EU, believes in a free, open and competitive market, which is axiomatic by the enactment of the Competition Act, 2002, in India.

However, while India has endorsed and enacted the substantive principles of competition in its law, its enforcement history and industrial policies indicate a different story, as described above. Therefore, India must correct its course from creating 'national champions' by setting its sails to fulfilling its vision in 2002 of having a free market. While creating more resilient markets is necessary before adopting an EU FSR-like framework, one might still question its necessity, given India's reliance on foreign investments for growth. The next section will address this question and alleviate concerns about the potential discouragement of investments due to such a framework.

E. Balancing Investment-led Growth with Fair Competition: Can Foreign Subsidy Regulation Translate into More Investment?

India aspires to become Viksit (developed) by 2047, and the Government has laid out a vision for investment-led growth to fulfil this goal.[84] One might argue that foreign investment is fundamental to achieving such a

81. Acharya V, 'India at 75: Replete with Contradictions, Brimming with Opportunities, Saddled with Challenges' (2023) <https://www.brookings.edu/wp-content/uploads/2023/02/BPEA_Spring2023_EM-Panel_Acharya_unembargoed_updated.pdf> accessed 13 January 2025.
82. ibid.
83. European Commission, *Protecting Competition in a Changing World : Staff Report 2024* (European Commission, June 2024) <https://competition-policy.ec.europa.eu/system/files/2024-06/KD0924494enn_Protecting_competition_in_a_changing_world_staff_report_2024.pdf> accessed 13 January 2025.
84. 'The Prime Minister Shri Narendra Modi addressed the Nation from the ramparts of the Red Fort on the 78th Independence Day' (*Press Information Bureau*, 15 August 2024).

goal and that FSR merely adds an extra layer of scrutiny, which could negatively impact foreign inflows. Furthermore, the economies of the EU and the USA, which have introduced such a framework, are considerably larger than that of India.[85] In this context, it is prudent to question the feasibility of adopting such legislation in a developing economy like India's.

However, if implemented correctly, the author believes such a framework should not discourage foreign investments. On the contrary, it might lead to more approvals for inbound investments in India. Currently, cases where there is significant state support in the form of subsidised loans, unlimited guarantees, and so on, can only be impeded on 'national security' grounds, which is the only strategic tool available in India's contemporary regulatory landscape for blocking investments. This is particularly true for investment proposals from countries like China, engaged in a diplomatic rift with India. Such requests for investment that require government approval are either rejected or not acted upon, effectively sending the file to cold storage.[86] The only recourse against such rejection by the Government under the FDI Policy, 2020, is to challenge it via a writ petition in court. Moreover, it is essential to highlight that FDI screening in India operates on a binary basis of either approved or rejected.

Recently, succumbing to the pressure from Indian industries, the Indian Government has been approving Chinese investments provided they meet certain criteria.[87] This includes clarifying that the investment is necessary to develop local manufacturing supply chains and ensuring that Chinese firms remain junior partners in any joint venture with firms operating in

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<https://pib.gov.in/PressReleaseIframePage.aspx?PRID=2045606> accessed 13 January 2025.

85. 'Top 10 largest Economies in the World' (*Forbes India*, 10 January 2025) <https://www.forbesindia.com/article/explainers/top-10-largest-economies-in-the-world/86159/1> accessed 13 January 2025 ; Pallavi Rao, 'These are the EU countries with the largest economies', (*World Economic Forum*, Feb 1, 2023) <https://www.weforum.org/stories/2023/02/eu-countries-largest-economies-energy-gdp/> accessed 13 January 2025.
86. Singh V, 'Nod for close to 80 FDI Proposals from China' (*Thehindu.com,* 23 July 2022) <https://www.thehindu.com/news/national/govt-allowed-80-fdi-proposals-from-countries-sharing-land-border-since-april-18-2020/article65674844.ece/amp/> accessed 13 January 2025.
87. GT staff reporters, 'India Reportedly Approves Chinese Investment Proposals in Electronics Manufacturing, as Action Is Needed to Win Back Trust - Global Times' (*Globaltimes.cn*,2024) <https://www.globaltimes.cn/page/202408/1318528.shtml> accessed 12 January 2025.

India. Furthermore, since the screening takes place on a binary basis and there is increasing pressure from Indian industries to review the curbs on Chinese investments, the Government has no choice but to approve certain investments without any behavioural assurances. However, if an FSR-like regime is adopted, it would enable the appropriate authority to seek commitments and settlements from such firms to ensure that they operate at arm's length from their respective Governments. Such behavioural commitments would also ensure that the level playing field is not skewed in favour of these companies. For instance, in the e& case, the buyer agreed to eliminate unlimited guarantees from the state-backed bank and agreed to prevent the parent company from financing the target's operations in the internal market.[88]

Therefore, in the present status quo, the only alternative to blocking investments perceived as hostile, opportunistic, or skewing the market for corporate control because of significant state funding is allowing them. Unlike the present situation, the adoption of an FSR-like framework enables the authority to impose conditions or accept behavioural commitments from firms to ensure the competitiveness of the level playing field. An alternative in the form of behavioural commitments to rejecting or accepting the proposal for investments *sans* condition increases the possibility of a greater number of approvals for inbound investments in India.

Furthermore, the EU's FSR also contains a balancing test under Article 6, which empowers it to take into consideration the positive effects of foreign subsidies and assess if they outweigh the negative effects before allowing or rejecting them.[89] This includes considering the positive effects of foreign subsidies in meeting important policy objectives of the EU.[90] Thus, if the FSR is taken as a model for India's legislation, it would have a similar balancing test, which would ensure that investments critical to the growth of India are not subjected to unnecessary hurdles. Therefore, adequate checks and balances can be built into the framework of the law to ensure that foreign investments fundamental to India's growth are not rejected. Concludingly, the aforementioned benefits of adopting an EU-FSR-like regime over the present status quo sufficiently address

88. n 17.
89. n 3 art 6.
90. ibid.

the concerns regarding the impact on inbound investments by such a measure.

IV. CONCLUSION

Prof. Prabhash Ranjan, in his article titled 'The Crisis in International Law', highlights the transition from the post-Cold War unipolar world, marked by "relative harmony", to a multipolar world characterized by the rise of an 'autocratic' China and an 'expansionist' Russia.[91] He attributes the growing trend of economic protectionism to this shift and the collapse of the neo-liberal consensus on interdependence. In light of this geopolitical context, the present article has proposed adopting an EU FSR-like regime in India to ensure that this growing trend of protectionism does not disrupt the level playing field in the Indian market.

To this end, the theory of harm underpinning the EU's FSR was analysed and distinguished from that informing merger control regimes. Subsequently, examples such as Rosneft's and Fosun's acquisitions of Essar Oil and Gland Pharma, respectively, from India's history of mergers and acquisitions, were presented to validate this theory of harm within the Indian context. Furthermore, the regulatory landscape governing inbound M&A in India was examined to ascertain whether the existing regulations suffice to counteract the negative effects of foreign subsidies on the level playing field. Finally, in light of the shortcomings in the current framework in addressing distortions caused by foreign subsidies, the introduction of dedicated legislation is proposed to address this legislative gap.

A nation's policy-making and legislative enactments should reflect the economic realities of the time. For instance, India's approach to the international investment treaty framework during the Cold War era was informed by Nehru's pragmatic economic nationalism, wherein global engagements, including foreign investments, were eyed with suspicion. However, following the disintegration of the Soviet Union and the rise of an unipolar world order, the adoption of neo-liberal principles became quintessential, which resulted in India's robust engagement with bilateral

91. Prabash Ranjan, 'The Crisis of International Law', (*The Hindu*, 7 January 2023), <https://www.thehindu.com/opinion/lead/the-crisis-in-international-law/article66346154.ece> accessed 13 January 2025.

treaty-making in the 1990s.[92] Similarly, in response to the global race to the bottom in subsidies and the rising trend of protectionism that characterizes the current global economic order, it is recommended that India's law and policy adapt to this shift by adopting an EU-FSR-like law. Such legislation would create a level playing field for local Indian players competing with globally subsidized firms, while protecting national interests without undermining the levels of inbound investment in India.

92. Prabhash Ranjan, *India and Bilateral Investment Treaties: Refusal, Acceptance, Backlash*, (OUP, 2019).

Overlooked Claimants: Recovering Subrogation Rights for Guarantors in the Indian Insolvency Regime

—*Soham Niyogi*[*]

ABSTRACT

This paper critically examines the treatment of personal guarantors under India's Insolvency and Bankruptcy Code, 2016, particularly their exclusion from the rights conferred to other stakeholders. The core issue revolves around denying the Personal Guarantor's equitable right of subrogation, and their subsequent exclusion from the Committee of Creditors, leaving them unable to be reimbursed from the corporate debtor's estate while the guarantor pays the guarantee in full. Effectively imposing a duty, without any right or privilege to benefit off of. By delving into the foundational principles, including the "Theory of Clean Slate," and the primacy of the Committee of Creditors in the form of the Doctrine of Commercial Wisdom, the paper ropes in these fundamental identities of the IBC to make sense of the unequal liabilities of the personal guarantor.

The paper highlights the conflict between the Indian Contract Act, 1872 and the IBC and goes to lengths to bring light to the hypocrisies that can be found throughout the courts of India, deferring conflicting judgments concerning the rights of the personal guarantor. The piece preceding the solutions provides for an explanation of the rule of Double Proof, and Double Claim for they are restrictions that the paper may not practically breach when discussing the solutions.

The seminal part of this paper lies in the solutions to allow the conferment of the right of subrogation back to the personal

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guarantors. Each solution is lucidly dissected, highlighting its weaknesses as well as its strengths. This is followed by a section highlighting foreign creditor-in-control jurisdictions like India, wherein the sureties are allowed the right of subrogation in insolvency proceedings.

Keywords: Personal Guarantors, Right of Subrogation, Committee of Creditors, Doctrine of Commercial Wisdom.

I. INTRODUCTION

India is at the edifice of a revolution of its legal systems as though the relicts of a bygone era are going through a cleansing with the introduction of newer legislations founded on new ideals, and objectives. To address the leaning towards the settlement of disputes on non-adversarial grounds' the Mediation Act, 2023 was introduced,[1] and the Digital Privacy Data Protection Act addresses the binary gold that IT companies would sell their hearts and limbs for.[2] Similarly, when there is a belief that there is grace in saving a company, preserving its goodwill, along with all of its employees, a new idea is brought forth. The idea of second chances culminated in the Insolvency and Bankruptcy Code of 2016 ("the Code").

The Code has revolutionized the landscape for insolvent corporates for whom the price of mistakes has been minimized and a "clean slate" is provided gratis.[3] This ideal of second chances is principally and in practice honorable, but a tricky affair. It is said to be tricky when it causes harm to others in the holding of this ideal. This paper will shed light on the maltreatment meted out to personal guarantors ("PG") of the Corporate Debtor ("CD") in their equitable right of subrogation by the Committee of Creditors ("CoC").

The equitable right of subrogation is a right mandated to the surety as per Sections 140 and 141 of the Indian Contract Act 1872 ("ICA").[4] The

1. The Mediation Act, 2023 (32 of 2023).
2. The Digital Personal Data Protection Act, 2023 (22 of 2023).
3. Insolvency and Bankruptcy Board of India, *Understanding the IBC: Key Jurisprudence and Practical Considerations* (International Finance Corporation 2020) <https://ibbi.gov.in/uploads/whatsnew/e42fddce80e99d28b683a7e21c81110e.pdf> accessed 18 January 2025.
4. The Indian Contract Act, 1872 (9 of 1872) s 140, 141.

provision applies when the PG completes the necessary payments from their end to the creditor on the debtor's behalf. The provision entitles the surety to a position similar to that of the creditor and allows the surety to enforce the same securities that the creditor held against the debtor for reimbursement. Essentially, the securities that the creditor had against the debtor devolve to the surety rather than back to the debtor until the debtor reimburses the surety for their payment.

However, the law plays a different track in insolvency proceedings, as in the Corporate Insolvency Resolution Process ("CIRP"), wherein it allows the CoC to write off the surety, or the PGs entitlement in the Resolution Plan ("the Plan") in the absence of the PG in the CoC. With no right to reimbursement, and the enforcement of the PG's liability as iterated in Lalit Kumar Jain v. Union of India,[5] the PG is left with no rights but only duties.

This paper would attempt to reclaim this very right of subrogation for the PGs, and for the success of the same; the paper would highlight all the necessary tangents that one must be well-versed in to understand the recommendations so put forward. Accordingly, a brief introduction to the core principles on which the Code is built is necessary to be discussed. The "Clean-Slate Theory" and the supremacy of the CoC in tandem with the Creditor-in-Control model of the Code provide the Code, with a distinguishing quality. Subsequently, the paper maps what the right of subrogation entails, along with an overview of the conflict between the ICA and the Code. Finally, this paper attempts to discuss recommendations to solve this issue with inspiration from foreign jurisdictions, as well as domestic happenings like that of the inclusion of homeowners into the CoC.[6] This would be preceded by a restriction, within which the solutions given must be practiced, that is the Rule of Double Proof and Double Claim.

II. FOUNDATIONAL PRINCIPLES OF THE CODE

For this paper to make contextual sense, the author tames forward two principles, which are immutable and congruent to the basic structure of the Code without which the code would become unrecognizable.

5. *Lalit Kumar Jain v Union of India* (2021) 9 SCC 321.
6. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (26 of 2018).

Firstly, the Theory of Clean-Slate would be disseminated, a premise of the preamble of the Code. Secondly, a distinguishing character of the Code is the Creditor-in-Control model of proceedings in a CIRP in the way of the Doctrine of Commercial Wisdom.[7]

A. Clean-Slate Theory

The objectives of the code have been drafted in favour of the CD, in adherence to ideals of value-maximization and preservation of the CD, and its assets.[8] The revival of the CD has been the foremost concern of the Code from its inception, with liquidation being the very last resort.[9] To allow the CD to win complete absolution of all of its outstanding debts is the objective of the Code. This is a much-needed relief, for before the operation of the Code, the CDs were abused and forced into liquidation with no scope for restructuring.

This objective of the Code is the "Clean-Slate Theory,"[10] that is the CD gets a new chance at life, with no outstanding debts payable to any of its creditors after the approval of the Plan by the Adjudicating Authority ("AA"). Sections 31 and 32 of the Code[11] realize this principle and make all creditors to the CD bound to the Plan as approved by the CoC.[12] To prevent "hydra heads popping up", specifying late creditors who had not submitted claims during the CIRP from applying to the estate after the fact.[13]

B. Primacy of the Committee of Creditors

The approval by the AA of the Plan is governed majorly by the Doctrine of "Commercial Wisdom," which is premised upon the super-importance given to the CoC's knowledge of the CD's business.[14] As per Section 28(5)

7. *K. Sashidhar v Indian Overseas Bank* (2019) 12 SCC 150.
8. Insolvency and Bankruptcy Board of India (n 3).
9. *Swiss Ribbons (P) Ltd. v Union of India* (2019) 4 SCC 17.
10. Debdutta Mukherjee, 'The Theory of Clean Slate under the IBC, 2016 in light of the Ghyansham Mishra Case' (*IBC Law*, 17 January 2025) <https://ibclaw.in/the-theory-of-clean-slate-under-the-ibc-2016-in-light-of-the-ghyansham-mishra-case-by debdatta-mukhopadhyay/?print=pdf#:~:text=This%20Question%20of%20Law%20was,of%20Claims%20of%20the%20Creditors> accessed 11 January 2025.
11. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 31, 32.
12. *Manish Kumar v Union of India* (2021) 5 SCC 1.
13. *Essar Steel India Ltd. Committee of Creditors v Satish Kumar Gupta* (2020) 8 SCC 531.
14. *K. Sashidhar v Indian Overseas Bank* (2019) 12 SCC 150.

of the Code,[15] the Resolution Professional ("RP") or the AA may not take any action regarding the CD's assets, without the approval of the CoC.

Section 30 of the Code provides for the submission of the Plan to the RP, by the Resolution Applicant ("RA"), for the critique of the same by the CoC.[16] While there are certain conditions to keep the CoC's power in check, essentially these conditions are futile, and act as a mere decoration fronting the immense power of the CoC in their commercial wisdom. Section 30(2)(e) may serve as a restriction upon the RA to ensure that the Plan does not contravene any of the provisions of the "law" for the time being in force.[17] Yet in virtue of Section 238 of the Code,[18] which provides for the prioritization of the Code over other laws that are inconsistent with the former, Section 30(2)(e) is rendered effectively a paper tiger.

In *Kalpraj Dharamshi v. Kotak Investment Advisors*,[19] the court held that the AA is not allowed to interfere with the commercial wisdom of the CoC even if the due process of law established in the Code is not followed. Still, the CoC must take into consideration the interests of all the stakeholders of the CD's estate when approving the Plan; however, even this is ineffectual when the PG is not even considered a stakeholder.[20]

III. EXPLORING THE RIGHTS AND LIABILITIES OF PERSONAL GUARANTORS IN A CIRP

A. Indian Contract Act, 1872 v. Insolvency and Bankruptcy Code, 2016

The provisions of the ICA and the IBC have been in favour of each other whenever it is convenient to the Plan and in conflict when it is the inverse. Using the ICA to enforce liabilities, and the IBC to take away the rights.

Lalit Kumar Jain v. UOI,[21] had realized the liability of the surety to the CD as per Section 128 of the ICA due to the co-extensive liability that both the CD and the PG have in consonance, but unlike the same

15. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 28(5).
16. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 30.
17. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 30(2)(e).
18. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 238.
19. *Kalpraj Dharmashi v Kotak Investment Advisors Ltd* (2021) 10 SCC 401.
20. *Essar Steel India Ltd. Committee of Creditors v Satish Kumar Gupta* (2020) 8 SCC 531.
21. *Lalit Kumar Jain v Union of India* (2021) 9 SCC 321.

way, Sections 133, 134, 135 and 139[22] of the ICA have been completely done away with. These provisions deal with the discharge of the surety in the event of a certain variance in the facts and circumstances of the debt. Essentially, even if the CD is discharged of a particular debt via the Plan, the PG may be asked to pay off the same debt that the CD has already been discharged from. In furtherance, the non-dischargement is not a breach of the powers of the CoC as there exists an "automatic" discharge of the CD's debt by the law, which does not apply in the same way for the PG.[23]

B. A Primer on the Right of Subrogation

The right of subrogation is the entitlement that a surety enjoys after they discharge the guarantee payable to the creditor. This right ensures that the surety would acquire a similar position to that of the creditor and thus, ask for reimbursement of the money given by the debtor.[24] This can be found in Section 141 of the ICA,[25] and is the moot point of discussion in this paper.

The Supreme Court ("SC") denies the right of subrogation and has held that the CIRP is not a recovery proceeding for the PG to be reimbursed, but rather only to maximize the CD's assets and to minimize the pressure on the same.[26] If the subrogated amount due to the PG is not mentioned in the Plan, then the right remains extinguished.[27] Thus, this leaves the PG with no possible routes via which the lost amount is reimbursed. The PG does not hold a position on the CoC for there to be a consideration of the PG's interests, and not classification for PGs, as creditors exist, whether it be of an operational creditor ("OC") or a financial creditor, ("FC").

Necessarily, if the CoC approves of it, the contractual terms between the CD and the PG may be altered, however, the opinion of the PG is not included in the alterations. There is abject unjust enrichment of the CD due to the CoC's lax treatment of the former, with harsh reparations to

22. The Indian Contract Act, 1872 (9 of 1872) s 133, 134, 135, 139.
23. *SBI v V. Ramakrishnan* (2018) 17 SCC 394.
24. *Economic Transport Organization v Charan Spg. Mills (P) Ltd.* (2010) 4 SCC 114.
25. The Indian Contract Act, 1872 (9 of 1872) s 141.
26. *Essar Steel India Ltd. Committee of Creditors v Satish Kumar Gupta* (2020) 8 SCC 531.
27. *Lalit Kumar Jain v Union of India* (2021) 9 SCC 321.

the PG, since they are paying off the CD's debt, without a right to reimbursement. There have been instances where the AA interfered with the Plan, and one of the only times that this happened, the Plan approved by the CoC was to allow the extinguishment of the PG's liability, without the consent of the Creditor.[28] Interestingly, the inverse has never been addressed by the Court, and the PGs are forced to fend for themselves.

The right of subrogation, as is explained, is enshrined in Section 141, and the Courts deny this right with the use of Section 238. The paper maintains that the right of subrogation does not fade out even with the application of Section 238, since the right of subrogation is not a contractual, or merely a statutory right but rather is a principle of natural justice and equity,[29] which cannot be found in any one legislation. In light of this, the Code would not render supreme, yet this fact is looked over the status quo continues to be maintained.

Yet, in the rarities of cases, it is not unheard of that a PG, after repaying the CD's dues, is elevated to the position of an FC and is allowed to pursue their right of subrogation against the CD. In the case of *Orbit Towers Pvt. Ltd. v. Sampurna Suppliers Pvt. Ltd.*,[30] the PG was allowed to file for a CIRP under Section 7 of the Code against the CD. CIRP, typically, can be initiated only by a FC. However, when the AA permits a PG to file for CIRP, it shows that a PG can also acquire the status of a FC, on the condition that a prior CIRP has taken place.

However, instances like this are few in number, and the persisting exclusion of the PG from the CoC is due to technical obstacles. This makes the CIRP tiresome and frustrating for the creditors, as well as the RP. These technical obstacles delineate this paper's restrictions when solutions to this issue are discussed, starting with the Rule of Double Proof, and Double Claim or Double Insolvency.

C. Rules on Double Proof and Double Claim

The Rule of Double Proof and Double Claim serve as boundaries in which this paper discusses probable solutions that are intended to be practicable.

28. *Jaypee Kensington v NBCC* (2021) AIRONLINE SC 224.
29. *Amrit Lal Goverdhan Lalan v State Bank of Travancore* (1968) SCC OnLine SC 246.
30. *Saarabjit Cold Storage Pvt Ltd & Ors v Gopal Singh & Ors* (2020) SCC OnLine NCLT 16286.

The rule of double proof has no counterpart in the Indian jurisdiction, and while the two terms, 'double claim' with 'double proof' are confused as interchangeable, such is not true. As the PGs are not allowed any hand in the estate of the CD at all, in India, 'double proof' never evolved to be something in consideration. On the other hand, the creditor-heavy regime evolved a 'double claim' instead.

Double proof is an application that evolved in the common law of Australia,[31] whose main purpose is to stop the unjust enrichment of the creditors at the CD's expense.[32] The rule is commonly applied to the claims of the sureties, and prevents such sureties from claiming any amount of money from the CD's estate until the principal creditor to whom the guarantee is owed, is paid in full.

Essentially, the payment of monies from CD's estate for the same debt is prevented,[33] thus, necessitating the fact that the principal creditor and the surety must prove their claims. By proving, it merely means to check whether the debt has crystallized or not, and such only happens when the PG has paid his dues to the creditor in full; until then the right to reimbursement is subordinated to the claims of the FC.[34]

There are certain specific evolutions that rules and principles go through as per the culture of the statutory law in all jurisdictions. In jurisdictions where sureties are treated in parity with the other creditors, a rule of double proof evolves giving more attention to a surety, and while in India where the culture is creditor-friendly and the sureties are often deemed to be ignored, no such rule evolves. Instead, the rule of Double Claim is observed in this jurisdiction.

Double Claim is essentially the ability of the creditor to initiate two CIRPs against the PG as well as the CD for the whole of the debt, twice over. In the case of *Dr. Vishnu Kumar Agarwal v. Piramal Enterprises Ltd.*,[35] such an action by the creditor was grossly criticized and disallowed. However, it is now known that such standing was overruled

31. *National Mutual Property Services (Aust) Pty Ltd v (1995) Citibank Savings Ltd* 132 ALR 514, 536.
32. Andrew R. Keay, *Mcpherson & Keay: Law of Company Liquidation (4th edn, Sweet & Maxwell 2017)* 542-543.
33. *In re Kaupthing Singer & Friedlander Ltd (in administration)* (No 2) [2011] 3 WLR 939.
34. Andrew R. Keay, *Mcpherson & Keay: Law of Company Liquidation (4th edn, Sweet & Maxwell 2017)* 542-543.
35. *Hussan Kadri v Edelweiss Asset Reconstruction Co. Ltd.* (2020) 9 Comp Cas-OL 393.

by Lalit Kumar Jain.[36] The co-extensiveness of the guarantor with the debtor allows the creditor to pursue a CIRP against the PG without having exhausted his remedies against the CD, and thus, the same claim is allowed on two different debtor estates.[37]

Both Double Proof and Double Claim may be similar in character but they apply to different individuals and recognize different rights to each. While in double proof, a surety is considered to be a contingent creditor, and no such right is conferred upon the PG in double claim, but rather reinforces their liability, with no rights.

The validity of the extinguishment of the PG's only right against the CD has been disproved extensively by this paper, and even though there is a plethora of literature and appeals against this denial, there is a lack of solutions for the same. This paper attempts to provide some grace to the situation in order to effect change with the following solutions.

IV. RECOMMENDATIONS FOR THE CREATION OF SUBROGATION RIGHTS FOR PERSONAL GUARANTORS

A. Elevation of the Personal Guarantors to the class of FCs and their Subsequent Inclusion into the CoC

Firstly, the paper recommends that the PGs should be added to the CoC and be recognized as a secured or unsecured financial creditor based on the securities that it acquires against the CD, as per Section 141 of the ICA. Such a solution is not far-fetched in consideration of indemnity obligations coming well within the meaning of a "financial debt" as per Section 5(8) of the Code. Thus, qualifying the PG to become an FC as per (7) of the said section.[38]

Additionally, since the Code's inception; the constitution of the CoC has been significantly expanded with the addition of a completely new class of investors, and to add PGs into the fold too is not a demand far-extending. Homeowners, who bought properties through real estate companies, have been categorized as FCs under the IBC, as per the IBC

36. *Lalit Kumar Jain v Union of India* (2021) 9 SCC 321.
37. *Jagannath Ganeshram Agarwala v Shivnarayan Bhagirath* (1939) AIR 1940 BOMBAY 247.
38. *Andhra Bank v F.M. Hammerele Textile Ltd.* (2017) SCC OnLine NCLT 12120.

(Second Amendment) Act 2018.[39] Such was undertaken even when the purchase of apartments in the literal sense cannot be considered to be "borrowing", for it to qualify as a "financial debt" in the Code.

In multiple cases, PGs have been recognized as financial creditors; thus, in a similar circumstance,[40] there is no need to apply legal gymnastics to force upon the PG, a title of FC either. They deserve a seat on the CoC as much, if not more than the homeowners due to their existing entitlements bestowed by law.

Nevertheless, it has been clarified that a PG may not be a secured creditor as per Section 34 of the Code, simply due to the absence of a security interest being created exclusively for the PG under the modes specified under Section 3(31).[41]

However, this paper carries the stance that according to Section 141 of the ICA,[42] the surety is entitled to the benefit of every security that the creditor has against the CD at the time when the contract of suretyship is entered into. Thus, the surety of a secured creditor would acquire all the same assets whether it be hypothecated, mortgaged, or otherwise. Thus, a PG should not only be treated as an unsecured financial creditor but also as a secured financial creditor as per the facts and circumstances of the case in hand.

Admittedly, there are a few difficulties in applying this;

Firstly, as per Section 60(2) of the Code, the creditors of the CD are allowed to file a CIRP against the PG while the CIRP against the CD is also pending before the AA, credit to the Lalit Kumar Jain Judgement.[43] Thus, separate proceedings against the CD as well as the PG happen simultaneously. In the majority of cases, the CIRP against the PG takes too long, and the plan from the CIRP against the CD has already been approved off, hence the debt owed to the PG remains unrealized, and subsequently gets written off. Thus, there is no opportunity given to the RA to incorporate the PG's debt in the Plan.

39. The Insolvency and Bankruptcy Code (Second Amendment) Act, 2018 (26 of 2018).
40. *Orbit Towers (P) Ltd v Sampurna Suppliers (P) Ltd* (2020) SCC OnLine NCLT 16286.
41. *K.V. Jayaprakash v SBI* (2022) SCC OnLine NCLAT 3146.
42. The Indian Contract Act, 1872 (9 of 1872) s 141.
43. *Lalit Kumar Jain v Union of India* (2021) 9 SCC 321.

Additionally, there may be objections raised by existing FCs, or tax authorities who may have an issue with the change in the status quo due to the *pari passu* distribution of proceeds becoming lesser with the increase in the number of creditors. Claims by the government that are replenished at the very end may also demand an elevation in their status, if there are frequent new additions to the CoC.[44] In truth, there are huge haircuts in the amounts received by FCs,[45] any change in the CoC would further decrease the amount. Such a frustration is justifiable and is evident in the case of homeowners as well.[46] There remains no solution for the public outrage, as it is an expected by-product of any change in policy.

Practically, if PGs are added to the CoC, the CIRP against the PG must be wrapped up as soon as possible. If the same is not feasible, the AA could instead put the amount owed to the PG in an escrow account. If the PG pays the Creditor the whole amount in full, then the former is entitled to the amount kept aside, or else the amount is redistributed among the secured FCs. In GLAS Trust Company LLC v. Byju Raveendran and Ors.[47] the SC has opined the same while awaiting a separate judgment on whether Byju's owed monies to Glas Trust. The case of Byju's is not similar to the case of PG's but both the cases discuss the right of a creditor against the release of the latter's claims to the CD's estate. For Byju's, it was a private settlement that extinguished GLAS Trust's claim, and for the PGs, it is the process of a CIRP itself.

Escrow accounts have been instrumental in insolvency proceedings, for they act as a safehouse for contentious assets.[48] Acknowledging how long insolvency proceedings go on for, stretching to 500+ days at times,[49] an escrow account ensures the escrow amount's severance from the rest of the CD's assets. The escrow agent, or the supervisor of the escrow

44. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 53.
45. *Vallal RCK v Siva Industries & Holdings Ltd* (2022) 9 SCC 803.
46. *Pioneer Urban Land and Infrastructure Ltd v Union of India* (2019) 8 SCC 416.
47. *Mineral Area Development Authority v M/s Steel Authority of India* (2024) SCC OnLine SC 4064.
48. 'Escrow' (*LII / Legal Information Institute*2021) <https://www.law.cornell.edu/wex/escrow>.
49. Aggam Walia and Sukalp Sharma,' With long delays and steep haircuts, chorus for revamping Insolvency and Bankruptcy Code grows louder' (*The Indian Express*, 6 October 2024) <https://indianexpress.com/article/business/economy/with-long-delays-and-steep-haircuts-chorus-for-revamping-ibc-grows-louder-9605768/> accessed 18 January 2025.

account, is usually declared by the Court, along with the details of maintenance charges and other logistical support. There is no single formula that the court uses time and again, for there is a chance that the escrow account must be maintained for whom the amount is so held, that is the PG in this case. Or, the account is put under the blanket of CIRP Costs extracted out of the CD's assets.[50]

There have been several instances of the usage of escrow accounts for contesting creditors, wherein an amount is set aside for when an assenting FC proves their titles, and the FCs are allowed to relish in the escrow amount, and if not; the "deferred" amount is redistributed to the CoC.[51] Here, the "escrow agent," or the person in charge of supervising the account was voted in by the CoC. Thus, while it may be used sparingly, it remains an effective tool at the Court's and the assenting FCs disposal.

B. Recovery of Debt by the Personal Guarantor Post-CIRP

Avoiding the CIRP against the CD altogether could be our next best bet for the PG to undertake their reimbursement from the CD. This approach would observe the successive management of the CD, that is the RA succeeds not only in the assets but also in the liabilities of the CD, particularly the amount owed to the PG. This is irrespective of such a liability being written off in the Plan or not, since veritably; the PG's claim at the time of the CIRP against the CD has not crystalized yet and was an immature claim during the CIRP against the CD.

This is not unheard of since in *Andhra bank v. M/s. F.M. Hammerle Textile Ltd.*,[52] the New Delhi Bench of the NCLAT allowed the PG's claim to persist through the handing over of the management of the CD to the RA post-CIRP, irrespective of the mention of the claim in the plan itself.

The IBBI (Bankruptcy Process for Personal Guarantors to Corporate Debtors) Regulations, 2019 (hereinafter, "Regulations") already allows "future claims" to be filed to a Bankruptcy Trustee, which is the counterpart of an RP in a Bankruptcy proceeding. These regulations allow

50. *The Federal Bank Ltd v Pramod Dattaram Rasam* [2022] I.A. 2025/2022 (NCLT Mumbai).
51. *Nitin Suresh Satghare v Pancard Clubs Ltd.*, 2024 SCC OnLine NCLT 2343.
52. *Andhra bank v M/s. F.M. Hammerle Textile Ltd* (2017) SCC OnLine NCLT 12120.

a person entitled to a future claim, that is a claim which is not due or payable on the commencement date of the bankruptcy to file for such a claim against the RA if the CD survives the CIRP. Whether the policy used in bankruptcy proceedings would transition well into insolvency proceedings or not cannot be expanded upon in this paper, and would rather require a more nuanced and focused piece. Nonetheless, an alternate policy similar to the Regulations could be drafted for insolvency proceedings to achieve similar goals.

As mentioned above, this goes against the ethos of the Code since the intention of the Code makers was to sever the RA of all liabilities of the CD and assist the new management to embark upon the world anew, relieved of all outstanding debts. Suggesting that the RA should recover dues to the PG post-CIRP might allow several more dubious creditors like the PG to crop up. The court clarified that no additional liabilities are allowed to be imposed on the RA after the approval of the plan since it would cause the CD to become unworkable and would go against the "clean slate" that the RA should start on.[53] There is no workaround for this; it expressly bars the imposition of the CD's debts on the RA after the approval of the Plan, and yet we must choose to ignore this for the betterment of the PG.

While there is no recovery of "debt" per se post-CIRP, financial instruments, like debentures or securities, are a form of borrowing that a publicly listed company would give out. As per a consultation paper by the SEBI in Recalibration of Threshold for Minimum Public Shareholding norms, Enhanced Disclosures in Companies which undergo Corporate Insolvency Resolution Process, a similar approach has been used.[54] Herein, it takes cognizance of the minimum public shareholding of a company to be at 25% of its total shareholding. This, in consideration of a company newly coming out of a CIRP, is given the leeway of 3 years to bring public shareholding to 25%. In a sense, this is an audience which is entitled to the shares of the successive management's assets, for many

53. *Ghanashyam Mishra & Sons (P) Ltd v Edelweiss Asset Reconstruction Co Ltd* (2021) 9 SCC 657.

54. SEBI, "*Consultation Paper on Recalibration of Threshold for Minimum Public Shareholding Norms in Corporate Insolvency Resolution Process (CIRP) Cases- Enhanced Disclosures*" <http://aibi.org.in/DISCUSSION_PAPERS/Recalibration_of_threshold_for_Minimum_Public_Shareholding_norms_enhanced_disclosures_in_Corporate_Insolvency_Resolution_Process_CIRP_cases.pdf> accessed 18 January 2025.

are shareholders who could not purchase shares at minimum values during the CIRP. Subsequently, these minority shareholders of the CD are deferred for another 3 years to be entitled to their rights.

Similarly, a timeframe can be devised by executive bodies to offer leeway to the RA for the repayment of the debt due to the PG, and some form of confidence and resolution is given to the PG, putting their minds at ease, just as how the SEBI has done for the minority shareholders.

Before concluding this paper, the paper highlights foreign jurisdictions where one can find similar provisions in place for the right of subrogation of the PG.

V. TREATMENT OF PERSONAL GUARANTORS IN FOREIGN CREDITOR-IN-CONTROL JURISDICTIONS

There are several creditor-in-control jurisdictions, wherein primacy is offered to the creditors of a CD, but equitable rights to the sureties of the CDs is also accorded. A few of the cases from such jurisdictions are enshrined in the following.

Jurisdictions	**Model followed within Insolvency Framework**	**Right of Reimbursement and Subrogation, available in Insolvency Proceedings?**	**Right, when available?**	**Voting Rights?**	**Status of PG if the CD's debt is waived off**
Australia	Creditor-in-Control	Yes	After full payment of guarantee	Yes	Discharged
United Kingdom	Creditor-in-Control	Yes[55]	After part-payment of guarantee[56]	Yes	Discharged
United States of America	Debtor-in-Possession	Yes[57]	After full payment of guarantee	Yes	Discharged
India	Creditor-in-Control	No	Not applicable	No	Must pay the guarantee

55. ELG Tyler, *Fisher and Lightwood's Law of Mortgage* (10th edn, Butterworth & Co 1988) 568.
56. *Knaffl v Knoxville Banking Co*, 133 Tenn. 655, 182 S. W. 232 (1915).
57. U.S. Code Title 11, Bankruptcy, 2011, s 509(a).

Following this table, certain explicit clauses differing in these foreign jurisdictions are far and wide, with most of the framework being essentially the same.

Like how in Australia, the claim for subrogation is valid and should also be admitted for voting purposes into the CoC, unless there is no valid contract of guarantee explicitly stating the existence of a surety, the principal creditor, and the corporate debtor.[58]

Additionally, in the United States of America, there are quid pro quo dealings and only allow the surety to take as much as they have given. If there is a discharge of the CD's debt, then the surety is also discharged, and if there is only a part payment, then the surety is subordinated to the FC claims until all are paid in full.[59]

The policymakers of India must take due regard for all these practices in foreign jurisdictions, and incorporate them into the Indian landscape. It must be noted that that in all these jurisdictions, the money is recovered during the insolvency, or administration proceedings itself, thus; following the clean-slate theorem. The paper recommends that for the enforcement of the methods followed by these jurisdictions, the first and foremost problem to solve is the delays in the CIRP or liquidation proceedings. Without fixing that first, due to the depreciation of assets, there would be nothing for the PG to earn or the RA to lead. There can be absolutely no excuses to incorporate the approach undertaken by these foreign jurisdictions, for here there are examples wherein the reality that the paper tries to manifest already persists, and is alive and breathing.

VI. CONCLUSION

One of the foundational principles that law is built upon is that there may be no rights without duties, and the inverse is also true. The unjust enrichment of the CD at the expense of the PG is an abuse of the process of law. While giving a clean-slate to the CD, and ensuring its survival are noble pursuits, whether it be the thousands of jobs which are saved

58. *Commissioner of State Revenue v Gleeson*, [2009] VSC 464; In the matter of Dalma Form Specialist Pty Ltd (subject to deed of company arrangement) [2024] FCA 908, [163].
59. *Western Casualty and Surety Co v Brooks (In re Bruns Coal Co.)* 362 F.2d 486, 491 (4th Cir. 1966).

in the process, or the investments into the CD not being for naught, such achievements done by breaking the backs of the PGs is not an achievement.

Veritably, the paper acknowledges that conferring subrogation rights to the PG may lead to the collapse of the CD which is already under immense pressure from the FCs, principally; it is like beating a dead horse. Yet the paper argues that there is a loss of virtue even when justice is denied to a single person, despite an objective of the greater good, there is no lesser or greater evil to nitpick in these cases.

In light of the foreign jurisdictions wherein such a right exists and in practice, and a parallel drawn to the Indian jurisdiction, the paper is not a criticism of the ideal of second chances, or the "clean slate" given to the CD. The paper is an ideal in itself, striving for the co-existence of the CD post-CIRP as well as the incorporation of the PG's claim among the other FCs.

A wake-up call for the policymakers to address the ruinous effects of the IBC is of the utmost importance. Not just restricting itself to the plight of PGs but also the haircuts that all FCs suffer due to the deference of proceedings. Delays and similar proclivities have rendered the CD's assets bone dry, with the majority of CIRPs taking over 600 days to conclude, and depreciation runs awry.[60]

The author recommends that consideration must be given to the right of subrogation instilled during the CIRP proceeding itself, which would observe the CIRP against the PG to be wrapped up as fast as possible, or halt the CIRP against the CD until the former elapses. This may have major reservations with regard to depreciation, and the further delaying of the process, but it must be noted that if all procedure is followed on time, and no step is unnecessarily elongated, all of it can be done within the time limit as prescribed by the Code.

Additionally, something that may be looked into which has not been focussed upon by the author, and what could be considered to be an avoidance transaction of a kind,[61] is to put aside the amount for the PG in an escrow account before the CIRP is even instituted. This is a

60. Insolvency and Bankruptcy Board of India, *Record Resolutions by NCLT* (2024) <https://www.ibbi.gov.in/uploads/resources/ae17460f98b2f326b16380f4a917c8a1.pdf> accessed 18 January 2025.
61. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 43.

private approach, which can only be shaped or put into practice by the contracting parties, and is an amount set aside on the contingency that the PG pays back the guarantee, and is allowed their reimbursement from the account, rather than the CD's assets. This leaves behind a prong on which someone may research further, and adduce practical observations out of. It is crucial to win back the trust of the PGs for if the status quo continues, no number of securities or safeties would motivate an investor from acting as a PG to any corporation. The ease of doing business which India has been constantly in the pursuit of is declining steadily for there is an entire market of sureties that is being eliminated, asked to pay for a debt that they did not accrue. Ultimately, only the lawmakers can make a difference, with the Courts rending a blind ear, and it is imperative that this cry is heard, and the IBC is balanced to ensure fairness and equity among all FCs.

Delisting Déjà Vu: Minority Shareholders in the Privatisation Predicament

—*Abhinav Shukla & Muskan Suhag*[*]

ABSTRACT

Voluntary delisting has become a crucial aspect of India's evolving corporate landscape driven by market dynamics and economic headwinds. The 2024 amendments to the Securities Exchange Board of India (Delisting of Equity Shares) Regulations, 2021, inter alia, (re)introduced, the Fixed Price method for ease of doing business.[1] *However, this change has significant ramifications for the equilibrium of power between the majority and minority shareholders. This paper critically examines the Fixed Price method's impact on the rights of minority shareholders, particularly focusing on aspects like the reduction of their influence in price determination and the systemic lack of viable alternatives if they choose to retain their shares post-delisting.*[2] *Using the ongoing Tata Sons- Shapoorji Pallonji Group feud as a case study,*[3] *this paper explores the practical challenges minority shareholders face when a delisted company transitions to a private entity, including an analysis of key issues like illiquidity risk, undervaluation, and pledging of shares.*

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1. Securities Exchange Board of India, 'Securities and Exchange Board of India (Delisting of Equity Shares) (Amendment) Regulations, 2024.
2. Shaneen Parikh and Namita Shetty, 'Protection and Redressal of Minority Shareholder Rights' *CAM India Corporate Law* (6 March 2023) <https://corporate.cyrilamarchand-blogs.com/2023/03/protection-and-redressal-of-minority-shareholder-rights/> accessed 21 January 2025
3. Sakate Khaitan, 'The Tata-SP Feud: A Corporate Battle that Could Redefine Shareholder Rights' *Outlook Business* (26 December 2024) <https://www.outlookbusiness.com/columns/the-tata-sp-feud-a-corporate-battle-that-could-redefine-shareholder-rights> accessed 14 January 2025.

Building on this analysis, the paper proposes two layers of measures to strengthen minority shareholder rights- first, it advocates making amendments to both the methods existing framework individually, and second, it supports the introduction of a third method for delisting pricing, by combining international best practices with specific needs of the Indian milieu. This paper bolsters the existing body of work by offering a comprehensive critique of the fixed price regime, bringing out a holistic view of minority shareholder woes in the current system and presenting reforms based on practicalities and reliable practices across jurisdictions. Ultimately, it aims to balance corporate efficiency with minority shareholders' rights, thus ensuring sustainable growth in India's corporate and commercial governance framework.

Keywords: Voluntary Delisting, Fixed Price Method, Minority Shareholder Rights, Corporate Governance.

I. INTRODUCTION

Voluntary Delisting refers to the process of removing the company's shares from stock exchanges on the initiative of the company's promoters or acquirers, thereby choosing to transition from a public to a private entity.[4] This strategic move is undertaken to restructure the operations by enhancing operational flexibility and reducing regulatory compliance costs. It further facilitates gaining greater governing autonomy by consolidating the ownership and correcting the valuation of the company.[5]

Recently, India has gained a notable increase in the attempts of voluntary delisting. In the period between 2018 and 2023, the country recorded 114 voluntary delisting attempts, out of which 86 were successful.[6] The

4. Securities Exchange Board of India, 'Securities and Exchange Board of India (Delisting of Equity Shares) (Amendment) Regulations, 2024.
5. SEBI, 'SEBI Consultation paper on Review of Voluntary Delisting Norms under SEBI (Delisting of Equity Shares) Regulations, 2021' *SEBI* (14 August 2023) <https://www.sebi.gov.in/reports-and-statistics/reports/aug-2023/consultation-paper-on-review-of-voluntary-delisting-norms-under-sebi-delisting-of-equity-shares-regulations-2021_75335.html > accessed 15 January 2025.
6. Touchstone Partners, 'Voluntary Delisting Trends in India (2018-2023)' (*Touchstone* Partners, 9 January 2024) <https://touchstonepartners.com/wp-content/uploads/2024/01/Voluntary-Delisting-Trends-in-India.pdf> accessed 15 January 2025.

successful voluntary delisting were mostly recorded in small capital companies whose shares were frequently traded, while fewer attempts were recorded amongst middle and large capital companies. However, a surge in attempts by this segment is anticipated in the coming years.[7] While such numbers may present an encouraging picture of the voluntary delisting regime, the process is fraught with several regulatory and procedural challenges as evidenced by 28 unsuccessful attempts out of the total 114, the reasons being, *inter alia,* the minimum shareholding criteria and hiked delisting share prices.[8] An overall increase in attempts at voluntary delisting is predicted in future years, accompanied simultaneously by unsuccessful attempts.[9] Therefore, the voluntary delisting process requires several reforms to bring about ease of doing business, keeping in line with such market trends.

Keeping up with the same, the Securities Exchange Board of India ("***SEBI***") brought in several reforms to address these obstacles, including major amendments to the delisting legal framework. On September 25, 2024, SEBI amended the SEBI (Delisting of Equity Shares) Regulations, 2021, ("***2021 Regulations***") and introduced the fixed price mechanism for voluntary delisting alongside the extant Reverse Book Building ("***RBB***") method.[10] The fixed price method offers simplification of the process, where acquirers can set a predetermined price at least 15% above the floor price,[11] as opposed to the volatility inherent in the RBB method. While the fixed price mechanism is introduced with great promise, this method raises significant questions regarding its negative impact on minority shareholders. These regulatory developments and changing market trends combined underscore the necessity for a resilient legal structure for voluntary delisting and protecting minority shareholders.

Therefore, given the burgeoning significance of voluntary delisting in times to come, this paper aims to make a case for strengthening minority shareholders' rights in this sphere. The second part sheds light on the

7. Cyril Amarchand Mangaldas, 'Voluntary Delisting Current Trends: A Detailed Report' (*Cyril Amarchand Mangaldas*, 11 November 2020) <https://www.cyrilshroff.com/publications/voluntary-delisting-current-trends-a-detailed-report/> accessed 15 January 2025.
8. n 6.
9. ibid.
10. Securities Exchange Board of India, 'Securities and Exchange Board of India (Delisting of Equity Shares) (Amendment) Regulations, 2024.
11. SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 20A(1).

reduced say of minority shareholders at the time of delisting owing to the Fixed Price method, brought in by the 2024 amendments to the 2021 Regulations, as opposed to the erstwhile RBB method.[12] Then, it delves into the issues encountered by minority shareholders who decide against tendering their shares and continue as shareholders in the now-private company in the third part. For this, the ongoing Tata Sons - Shapoorji Pallonji ("***SP***") Group feud shall be analyzed to understand the actualities, including illiquidity risk, the debate over the pledging of such shares, and concerns regarding the undervaluation of shares.[13] Building on this discussion, two layers for strengthening minority rights under the Indian regulatory regime shall be developed in the fifth part, taking a lead from foreign frameworks discussed in the fourth part- first, by making amends to the two methods provided for under the extant framework to make each of them conducive for minority shareholders and second, via the provision of a third method which is primarily a mix of the best from the existing methods across the analyzed jurisdictions. Conclusively, recommendations are put forth to ensure that stability and ease of business in the voluntary delisting mechanism in India is maintained, all the while not leaving behind minority shareholders' interests.[14]

II. THE COMEBACK OF THE FIXED-PRICED METHOD

The fixed price method in delisting is not new to the Indian regulatory regime. It roots back to 1998, when SEBI issued a Circular deploying this method as an exit option for shareholders in a voluntary delisting.[15] In this method, an offer to acquire shares at a predetermined price is made to public shareholders by the promoter. While this method is known for the stability it brings, it led to dissatisfaction amongst the minority shareholders owing to concerns surrounding the undervaluation of shares and thus not being reflective of the true market value, lack of transparency, etc. This was because shareholders had little say in the determination of

12. SEBI (Delisting of Equity Shares) Regulations, 2021.
13. Nisha Pasari and Parul Sardana, 'Analysing the Tata- Mistry Feud: A Quest for Balancing the Stakes and Upholding Corporate Democracy' 2021 2 DMEJM 65, 66.
14. Sandip Bhagat, Mohit Gogia, Kanika Khanna and Sakshi Jain, 'Voluntary Delisting in India' (*S&R Associates*, 1 July 2024) < https://www.snrlaw.in/voluntary-delisting-in-india/ > accessed 22 January 2025.
15. Ayush Gorana, 'Striking a Balance: SEBI's Fixed Price Method in Voluntary Delisting' (*IndiaCorpLaw*. 22 July 2024) < https://indiacorplaw.in/2024/07/striking-a-balance-sebi-fixed-price-method-in-voluntary-delisting.html> accessed 14 January 2025.

the share prices due to the absence of a competitive bidding process to determine share prices.[16]

Consequently, in the interests of transparency and equity, SEBI brought in the RBB process in the SEBI (Delisting of Securities) Guidelines, 2003.[17] Under this method, the acquirer establishes a minimum price following the prescribed procedure and subsequently presents it to the public shareholders. Additionally, to enhance the appeal of the offer, the acquirer may put forth a premium over the established floor price; following which, the public shareholders would tender their shares via the stock exchanges, providing their asking price for the sale. For the delisting to proceed successfully, the acquirer needed to increase their stake to over 90% of the total shares.[18] However, if the acquirer found the price unsatisfactory, they could, under certain conditions, issue a counteroffer. One such condition is that of exceeding 90% of total shares, depending upon the tally of public shareholders ready to accept the counteroffer price.[19] Thus, this process gave shareholders the power to negotiate the price for selling their shares. However, the trends of unsuccessful delisting were concerning.[20] One of the reasons for such failures was demands of unreasonable delisting prices by a small group of shareholders, which were often rejected by the acquirer.[21] It was found that most firms that voluntarily delisted through the RBB process paid premiums with a median value of 125% between 2015 and 2018.[22] Adding on, speculative trading

16. ibid.
17. SEBI (Delisting of Securities) Guidelines [2003].
18. SEBI (Delisting of Equity Shares) Regulations [2021], reg 21.
19. Ramya Suresh and Amitabh Abhijit, 'SEBI Unveils Fixed Price Option for Voluntary Delisting' (*Saraf & Partners*, 16 October 2024) <https://www.sarafpartners.com/sebi-unveils-fixed-price-option-for-voluntary-delisting/> accessed 14 January 2025.
20. Gautam Gandotra & Arnav Shah, 'Analysis of recently attempted Voluntary Delistings'(*CAM India Corporate Law*, 12 July 2022) <https://corporate.cyrilamarchandblogs.com/2022/07/analysis-of-recently-attempted-voluntary-delistings-india/ > accessed 22 January 2025.
21. Cyril Shroff and Gautam Gandotra, 'Need for Amendments to the Delisting Regime in India' *(CAM India Corporate Law,* 21February 2023) < https://corporate.cyrilamarchandblogs.com/2023/02/need-for-amendments-to-the-delisting-regime-in-india/> accessed 22 January 2025.
22. Ojas Singh & Tanuj Goyal, 'Challenges of SEBI's New Fixed Price Delisting Mechanism' (*NLIU CBCL*, 18 October 2024) < https://cbcl.nliu.ac.in/capital-markets-and-securities-law/challenges-of-sebis-new-fixed-price-delisting-mechanism/ > accessed 21 January 2025.

around delisting events led to significant price volatility further leading to exorbitant premiums on shares.[23]

In view of such concerns,[24] SEBI amended its 2021 regulations last year and reintroduced the fixed price delisting method for companies whose shares are frequently traded. This alternative to the existing RBB process is sought to promote ease of doing business.[25]

Now, the acquirer must offer a price at least 15% higher than the floor price.[26] However, neither is there any choice in reality nor is the fixed price method a panacea as has been elucidated further in part three of this paper, especially not for the minority shareholders to say the very least.

III. WHEN FIXED MEANS FLAWED

The revival of the fixed price method has sparked debates surrounding its impact on minority shareholders. As this section explores, this method has not only curtailed the influence of minority shareholders in price determination but also leaves minority investors with no viable alternatives, thus amplifying concerns of undervaluation, inequity, and opaqueness in the procedure.[27]

A. Fixed Price Revived: Fare thee well to RBB

Under the RBB method, the delisting price is determined through a democratic approach. Public shareholders bid for their equity, which mostly results in higher delisting prices, showcasing the true market value of the shares.[28] This market-driven democratic approach provides minority

23. Abhishek Dadoo, 'Amendments To Delisting Regulations: Delisting Process Simplified' *BW Legal World* 6 September 2024) < https://bwlegalworld.com/article/amendments-to-delisting-regulations-delisting-process-simplified-532063 > accessed 22 January 2025.
24. SEBI, *Delisting of Equity Shares Review of "Reverse Book Building Process"* (DP, 2018).
25. See n1; Flexibility in Framework for Voluntary Delisting: Amendment to SEBI (Delisting of Equity Shares) Regulations, 2021.
26. SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 20A(1).
27. n 15.
28. Business Today Desk, 'Sebi tweaks rules for voluntary delisting of companies, fixed price process in place' (*Business Today*, 26 September 2024) <https://www.businesstoday.in/markets/stocks/story/sebi-tweaks-rules-for-voluntary-delisting-of-companies-fixed-price-process-in-place-447679-2024-09-26> accessed 21 January 2025.

shareholders with an opportunity to influence the delisting price and protect their interests.

However, the newly introduced fixed-price method requires the acquirer to set a predetermined exit price, which should be at least 15% above the floor price.[29] Though this method promises a straight and predictable exit for shareholders, it fundamentally benefits the acquirer or promoter as they can determine and control the delisting price. As the fixed-price method offers acquirers with financial advantage and predictability regarding determining and controlling delisting prices, it can be safely presumed that the acquirers will predominantly opt for fixed-price delisting, rendering the RBB method obsolete.[30]

Furthermore, the fixed-price delisting can only be opted for by companies with frequently traded shares,[31] and as noted above, the trend of delisting is also more common among small companies with frequently traded shares.[32] Therefore, a large number of minority shareholders of these companies will find themselves compelled to accept the acquirer's predetermined without any significant recourse. Thus, introducing fixed-price delisting undermines the RBB method and leaves the minority shareholders at a disadvantage without any meaningful alternative.[33]

B. The Illusion of Transparency in Fair Share Value

The introduced fixed price delisting method also raises significant concerns pertaining to the determination of the delisting fixed price or exit price. Under the method of fixed-price, the acquirer unilaterally sets the delisting price which minority shareholders are bound to accept if they want to be a part of the delisting process.[34] This method presents an inherent risk where the majority or controlling shareholders may collude with the acquirer to set a favorable exit price that serves their interests, thereby injuring minority shareholders' interests and marginalizing them. This inherent risk of collusion may transpire into a delisting price which

29. ibid.
30. n 15.
31. SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 20A(2).
32. n 7.
33. n 14.
34. The Hindu, 'SEBI introduces fixed price process for voluntary delisting' (*The Hindu*, 27 September 2024) <https://www.thehindu.com/business/sebi-introduces-fixed-price-process-for-voluntary-delisting/article68687795.ece> accessed 21 January 2025.

may not show the true valuation of shares, successfully coercing the minority shareholders to accept the undervalued exit price.[35]

Further, as already highlighted by several studies, the majority or controlling shareholders may decide to delist when the shares' market value is undervalued, thus setting a delisting exit price for minority shareholders that may not reflect the shares' true and intrinsic worth. The acquirers are thus able to exploit the information asymmetries between the minority and majority shareholders and set the delisting prices below the share's actual value. This concern is not unique to India and the fixed price delisting mechanism internationally has faced criticisms for paving the way for potential undervaluation.[36]

The sheer absence of a transparent and market-determined price mechanism considerably weakens the minority shareholders and leaves them bereft of any ability and opportunity to negotiate a favorable price for their shares, thus increasing their vulnerability in the delisting mechanism.[37]

C. Minority Say in Price Determination and Opposition Rendered Nugatory

The shift from the RBB method to the fixed price method significantly curtails the influence of minority shareholders in the determination of the delisting price and opposition to the proposed delisting.[38] Unlike the RBB method, which allows price discovery via a competitive bidding process, the fixed price method sets a pre-established price decided by the acquirer, which might not accurately represent the shares' true worth. Moreover, a distinctive system based on the interaction of three separate price points: the floor price, indicative price and the discovered price, which is the price established through bidding, was deployed under RBB in India. Additionally, the threshold of ninety percent was used to bar the

35. Harpreet Kaur, 'Delisting Regulations in India and the Position of Minority Shareholders' (*Oxford Business Law Blog*, 27 September 2023) <https://blogs.law.ox.ac.uk/oblb/blog-post/2023/09/delisting-regulations-india-and-position-minority-shareholders> accessed 14 January 2025.
36. Alcino Azevedo, Gonul Colak, Izidin El Kalak, Radu Tunaru, 'The Timing of Voluntary Delisting' (*Science Direct*, May 2024) <https://www.sciencedirect.com/science/article/pii/S0304405X24000552> accessed 15 January 2025.
37. n 15.
38. n 35.

proposal. By acquiring enough shares to prevent reaching the 90% target, and either submitting an unreasonably high bid above the indicative price or by rejecting a counteroffer if made, minority shareholders were successfully able to restrict the proposed delisting, as demonstrated in Vedanta Resources Ltd's delisting attempt.[39]

At present, the majority shareholders have the sole authority to determine the appraisal price or exit price of the shares, without the minority's input. Despite the fundamental principles of due diligence, fairness, and SEBI's directive for boards to address diverse interests equitably, these safeguards may not be powerful enough to bolster minority shareholders' concerns. Hence, this move undermines the participatory framework which was the hallmark of the RBB method, disproportionately favors the majority and in turn, goes against SEBI's mandate of protecting minority shareholders who are vulnerable as is in the Indian concentrated shareholding system.[40]

While it is true that the RBB method was not without its drawbacks, it cannot be ignored that the RBB method had its positives too, including better transparency and providing better safeguards to the minority shareholders, which became the reason why the erstwhile fixed price method was replaced by the RBB method in 2003. Now, by reintroducing the fixed price method without doing much to rectify the attendant issues that led to its replacement in the first place, SEBI has left much to be desired.

D. Trapped Without Alternatives

The fixed price method leaves the minority with no viable alternative if they are dissatisfied with the delisting offer. In the RBB method, the minority shareholders had a greater say in the determination of prices, ensuring better valuations.[41] However, the fixed price method leaves them with a stark choice: either accept the predetermined price or continue as a minority shareholder in the delisted company and face the illiquidity risks of holding shares in an unlisted company, as is elaborated in the next part of this paper.

39. n 35.
40. ibid.
41. n 15.

Moreover, the two provisions of SEBI Regulations hailed as offering protection to the small shareholders often fall short. Firstly, Regulation 11(4) of the 2021 Regulations mandates that the shareholder resolution should have the approval of at least 66% of shareholders.[42] Although this may seem like protection at first blush, it is often rendered futile as this threshold is mostly met by majority or controlling shareholders who hold significant voting power, and minority shareholders who on average hold only 7-10% of the shareholding are sidelined in this approval process. Secondly, Regulation 21(a) requires that to successfully delist the company, the acquirer's shareholding shall achieve at least ninety percent of the overall issued share capital.[43] Similarly, while this is a well-meaning measure aimed at safeguarding the minority shareholders, it is rendered inefficient as fixed price delisting offers no room for negotiation of the delisting price. In effect, this provision reduces the situation to a binary outcome: either the delisting fails, or the minority shareholders are coerced into selling their stake at the pre-determined prices, leaving no room for negotiation even if the threshold is not met. Further, data from 2018 -2023 reveals that almost 30% of the voluntary delisting attempts were unsuccessful due to this criterion of post-offer 90% shareholding.[44] These unsuccessful attempts also bring to light the longstanding inefficiencies in the voluntary delisting framework.

Further, Regulation 26 of these regulations provides the remaining shareholders whose shares were either not accepted or were not tendered at all, with an opportunity to tender their shares within one year after the delisting of the entity.[45] The shares of these delisted entities mostly face severe illiquidity risks owing to the absence of a regular share market and the presence of restrictive pre-emptive rights in the Articles of Association ("***AoA***"). Therefore, this illiquidity risk forces remaining small shareholders to transfer their shares at lower prices once the stipulated period of one year is over.

Similarly, Regulation 27 of these regulations which provides that the manager of the delisting offer shall publish advertisements and ensure follow-up communications intended to protect minority shareholders'

42. SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 11(4).
43. SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 21(a).
44. n 6.
45. SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 26.

interests, ultimately serves little purpose.[46] The minority shareholders, as noted before, face illiquidity risks and this mechanism is largely superficial in nature. They do not address the major plight of the remaining shareholders i.e. ensuring liquidity.

Therefore, the minority shareholders are trapped with no viable recourse whether they accept the delisting offer or remain part of the delisted company. In the latter case, they face compounded illiquidity challenges, undervaluation, and restricted rights of shareholders as their interests are at the mercy of the acquirer, as highlighted in the following part.[47]

IV. THE PRICE OF STAYING: HOW DELISTING LEAVES MINORITY SHAREHOLDERS STRANDED

Regulation 21 of the 2021 Regulations stipulates that an equity share purchase offer will be deemed successful only if, after the offer, the acquirer's shareholding, combined with the shares tendered by public shareholders, constitutes 90% of the overall issued capital.[48] This begs the question-what about the remaining shareholders? Since minority shareholders would no longer have their erstwhile power to determine prices under the fixed price method, the prominent way out left for shareholders who do not wish to tender their shares in the offer is not to participate i.e. the participation in the offer is optional for public shareholders.[49] In the event of shareholders refusing to tender their shares during the delisting process, they may remain as shareholders in the now-private company. However, this does not provide more room for the minority shareholders either. In such closely held companies, minority shareholders are faced with limited opportunities to access liquidity due to governance structures dominated by the majority.[50] Unlike their publicly traded counterparts, private companies have greater leeway in drafting shareholder agreements, which are often detrimental to minority interests.[51] The Tata case underscores the importance of striking a balance between preserving strategic authority

46. SEBI (Delisting of Equity Shares) Regulations, 2021, reg. 27.
47. n 35.
48. SEBI (Delisting of Equity Shares) Regulations [2021], reg 21.
49. n 21.
50. SEBI, 'Discussion Paper on 'Review of Delisting Regulations' *SEBI* (9 May 2014) <https://www.sebi.gov.in/sebi_data/attachdocs/1399633833837.pdf> accessed 22 January 2025.
51. n 3.

and enabling financial flexibility - a consideration that is growing ever more pertinent as companies navigate economic headwinds.

The ongoing feud between Tata Sons and the SP Group raises unprecedented concerns about corporate governance and showcases the plight of minority shareholders in a delisted company. This tussle between maintaining cohesion among shareholders within a private company and providing financial flexibility for minority shareholders uncovers an unending conflict between controlling and minority shareholders.[52]

A. The Tata- SP Feud: A Testament to Post-Delisting Perils

Tata Sons was originally registered as a private company in 1917.[53] By operation of law, it later became a deemed public company in 1975.[54] However, the company successfully passed a resolution to again go back to its private status in 2017.[55] The SP Group insisted on listing the Company to unlock value and enhance liquidity for every shareholder, including the Trusts.[56] Instead, the company has even paid back its debts to the Reserve Bank of India to prevent mandatory listing.[57] Today, it stands as a delisted private company wherein Tata Trusts holds nearly 66% shares and the SP Group holds an 18.37% stake in Tata Sons.

In 2020, the SP Group sought to divest its holdings in Tata Sons through a minority oppression lawsuit. A swap of its 18.4% stake for shares in Tata Sons' publicly listed subsidiaries was proposed by filing a scheme of separation;[58] However it faced stiff opposition from the

52. Umakanth Varottil, 'SP Group Shares in Tata Sons and The Illiquidity Risk for Minority Shareholders' (*Outlook Business,* 20 December 2024) <https://www.outlookbusiness.com/columns/sp-group-shares-in-tata-sons-and-the-illiquidity-risk-for-minority-shareholders-2> accessed 14 January 2025.
53. Megha Mandavia, 'Tata Sons' shareholders vote to become a private company' (*The Economic Times*, 22 September 2017).
54. Kala Vijayraghavan, 'Tata Sons can continue operations as hybrid company: Top Executive' *The Economic Times* (14 July 2020).
55. n 53.
56. Bureau O, 'SP Group Insists on Tata Sons Listing' (*BusinessLine*, 18 September 2024) <https://www.thehindubusinessline.com/companies/sp-group-insists-on-tata-sons-listing/article68655513.ece> accessed 2 February 2025.
57. Livemint, 'Tata Sons Pays ₹20,000 Crore Debt to Avoid Mandatory Listing: Report | Stock Market News' (*mint*, 26 August 2024) <https://www.livemint.com/market/stock-market-news/tata-sons-pays-20-000-crore-debt-to-avoid-mandatory-listing-report-11724668803993.html> accessed 2 February 2025.
58. Upadhyay JP, 'Mistry Firms Offer Cashless Separation to Tatas in Lieu of Stake in Group Firms' (*mint*, 29 October 2020) <https://www.livemint.com/companies/news/

company,[59] and the judgment ultimately came out in favor of the Tata Group.[60] Owing to the financial crisis it was facing and the considerable value of shares it held in Tata Sons, SP Group leveraged its entire stake in Tata Sons to secure $2 billion from private credit investors for debt restructuring.[61] The 2021 Supreme Court (***"SC"***) judgment allowed for such a move,[62] and the repayment of the loans on these shares is due over the next few months.[63] Now, the SP Group seeks to refinance these same loans after exhausting other options for raising money,[64] Thus leading to the ongoing dispute.

While Tata Sons argues that its shares are not freely transferable under the company's AoA following its conversion to a private company,[65] The SP Group contends that pledging shares is not equivalent to transferring ownership.[66] In accordance with legal provisions regulating private companies, Tata Sons' AoA imposes restrictions on share transfers, thereby conferring substantial advantages upon the majority shareholders.[67]

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mistry-family-proposes-share-swap-to-separate-from-tata-sons-116039707602l3.html> accessed 2 February 2025; 'Shapoorji Pallonji Group Eyes Partial Monetisation of Stake in Tata Sons: Report - Companies | ET Now' <https://www.etnownews.com/companies/shapoorji-pallonji-group-eyes-partial-monetisation-of-stake-in-tata-sons-report-article-114240706> accessed 2 February 2025

59. Rautray S, 'Tata Sons Rejects Mistrys' Settlement Proposal as "Nonsense"' *The Economic Times* (11 December 2020) <https://economictimes.indiatimes.com/news/company/corporate-trends/tatas-oppose-sp-group-proposal-in-supreme-court-to-swap-18-37-stake-in-tata-sons-with-other-group-firms/articleshow/79665665.cms?from=mdr> accessed 2 February 2025
60. *Tata Consultancy Services Ltd v Cyrus Investments (P) Ltd* [2021] SCC OnLine SC 272; Varghese George Thekkel, 'Tata v. Mistry: A Case for Greater Protection of Minority Shareholders' Rights' (*SCC Times*, 15 May 2021) <https://www.scconline.com/blog/post/2021/05/15/tata-v-mistry-a-case-for-greater-protection-of-minority-shareholders-rights/ > accessed 14 January 2025.
61. n 58.
62. 'SP Group May Soon Raise Funds from Offshore Banks by Pledging Entire Tata Sons Stake' (5 July 2021) <https://www.timesnownews.com/business-economy/companies/article/sp-group-may-soon-raise-funds-from-offshore-banks-by-pledging-entire-tata-sons-stake/780518> accessed 2 February 2025.
63. Sundeep Khanna, 'SP Group stake issue in Tata group defies resolution even under Noel Tata' (*Mint*, 17 December 2024) < https://www.livemint.com/mint-top-newsletter/companyoutsider17122024.html > accessed 14 January 2025.
64. Pavan Burugula, 'MC Explains: Why SP Group wants to pledge Tata Sons shares and Tata Trusts are concerned?' (*MoneyControl*, 29 May 2024) < https://www.moneycontrol.com/news/business/mc-explains-why-sp-group-wants-to-pledge-tata-sons-shares-and-tata-trusts-are-concerned-12735585.html > accessed 14 January 2024.
65. n 53.
66. n 3.
67. Umakanth Varottil, 'SP Group Shares in Tata Sons and The Illiquidity Risk for Minority Shareholders' (*Outlook Business*, 20 December 2024) < https://www.outlookbusiness.

Among these provisions is the Right of First Refusal ("***RoFR***") clause, which grants existing shareholders the priority to acquire shares that are proposed to be sold or transferred.[68] While it is understandable that such restrictions are necessary to prevent shareholders from selling their stakes to potential buyers who may not align well with the current, closely-knit shareholder group, it is crucial to acknowledge that these limitations considerably limit the flexibility of minority shareholders in liquidating their shares.[69]

Adding on, the articles stipulated that the minority shareholders would be required to get the approval of the company's board if they wished to create encumbrances. It is quite unlikely that a majority-ruled board would pay heed to the funding needs of a minority.[70] Also, given the right to pre-emption given to shareholders within the company, one could argue that should the lenders decide to invoke the pledge, they would be obligated to present the shares before the current shareholders before selling them. This provision bolsters Tata Trust's capacity to preserve its influence over the company's shareholding structure, even in cases of financial hardship.[71] Furthermore, by restricting the utilization of pledged shares, Tata Trusts has significantly limited the capacity of SP Group to raise funds through capital markets. This restriction may trigger a ripple effect on the SP Group's financial stability, resulting in the liquidation of assets or defaults.[72]

Tata Trusts- the majority shareholder in Tata Sons contends that the governance framework of Tata Sons can be disrupted due to such pledging, Further, it risks disclosure of sensitive information to external factions and weakens Tata's control over its flagship holding company.[73] Hence, while the stance of Tata Trusts stresses the potential hazards of external interference over governance, for SP Group, these pledged shares

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com/columns/sp-group-shares-in-tata-sons-and-the-illiquidity-risk-for-minority-shareholders-2> accessed 14 January 2025.

68. n 2.
69. n 2.
70. n 67.
71. n 3.
72. Shailesh Haribhakti, 'Tata Sons vs SP Group: A Corporate Clash with National Stakes' (*Outlook Business*, 18 December 2024) <https://www.outlookbusiness.com/columns/tata-sons-vs-sp-group-a-corporate-clash-with-national-stakes> accessed 20 January 2025.
73. n 3.

are a crucial means to refinance debt and regain stability. These shares act as concrete securities for a strained borrower, serving as an avenue to achieve solvency. However, the stakes, associated risks, and implications are considerably elevated when such pledges involve a company of Tata Sons' prominence.[74] Tata Sons is not just a business conglomerate- it epitomizes India's soft power at the international level. It holds significance beyond financial considerations too. Therefore, apart from financial considerations, measures in this regard should be tested on the touchstone of its strategic and national implications as well. On the global stage.[75]

While the matter is yet to be adjudged, it bears no easy resolution. It raises important questions regarding the position of minority shareholders in a delisted private company and more broadly on corporate governance principles in India. It, *inter alia*, showcases the illiquidity risk that minority shareholders experience in a private company and highlights that the minority shareholders have very little arena to maneuver in a private company already.[76]

While it is true that the delisting of Tata Sons did not happen via the fixed price method, yet, the implications of the now implemented fixed price method cannot be understated. Even under the erstwhile RBB method, the realm for minority shareholders within a delisted company was very limited;[77] and now the fixed price method only makes such troubles a more probable outcome for minority shareholders as their say in determining the share price at the time of delisting has been taken away. Now, dishearteningly enough, the minority shareholders who refuse to be dictated by the price determined by the company's board have been rendered defenseless to a considerable degree even after holding rightful shares in the company.[78]

Thus, minorities like the SP Group find themselves in quite an uncomfortable predicament- they cannot use these crown jewels to tackle their financial crisis, owing to a "contractual lock-in" effected by the AoA of the delisted company. The Courts in India too, as witnessed in the 2021

74. n 3.
75. ibid.
76. n 2.
77. n 15.
78. n 2.

SC judgment of the Tata Sons case,[79] generally refuse to intervene and tilt towards maintaining the sanctity of contractual arrangements in private companies. Though the Companies Act offers protection, the stringent requirements set by the Act for obtaining any relief will make it unduly difficult for minority shareholders to avail of any.[80]

This friction is further manifested in the question over the valuation of shares in the Tata - SP feud. On 29 October 2024 the SP Group in an affidavit before the Supreme Court informed the SC of its intention to withdraw from Tata Sons, proposed a proportional distribution of the holding company's assets as part of the deal, and asserted that its stake in Tata Sons was valued at Rs 1.75 lakh crore.[81] In contrast, Tata Sons contended that the value of this stake was merely between Rs 70,000-80,000 crore.[82] Hence, in keeping with global standards and to guarantee equity and clarity, a comprehensive overhaul of the valuation process becomes vital.[83] While the matter is yet to be decided in the SC, the challenges abound and the tough battle awaiting a minority shareholder in a delisted company even in its attempt to sell its shares and exit it, is visible enough.

Hence, considering that judicial recourse is a tough line to walk for minorities and greater government regulation might prove to be counterproductive,[84] Private companies would do well to construct their AoA in a way that avoids imbalances among shareholders and provides better exit options for minority shareholders, to provide them some legal succor and prevent predicaments akin to the one the SP Group now finds itself in. Although provisions such as the RoFR are essential for safeguarding strategic objectives, they should also take into consideration the rightful concerns of the minority shareholders, particularly in times of financial distress.[85]

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79. n 50.
80. n 46.
81. Swaraj Singh Dhanjal, 'SP group's stake value may be new point of friction with Tatas' *Hindustan Times* (24 September 2020) < https://www.hindustantimes.com/business-news/sp-group-s-stake-value-may-be-new-point-of-friction-with-tatas/story-jEdtaxiESrDOPCYJqnPCjI.html > accessed 22 January 2025.
82. ENS Economic Bureau, 'Tata Sons to Supreme Court: SP Group stake worth up to Rs 80, 000 crore' (*Indian Express*, 9 December 2020) < https://indianexpress.com/article/business/companies/sp-groups-18-37-pc-stake-in-tata-sons-worth-rs-80000-cr-tatas-to-supreme-court/ > accessed 22 January 2025.
83. n 3.
84. n 67.
85. n 3; n 72.

V. INTERNATIONAL APPROACHES TO VOLUNTARY DELISTING

Voluntary Delisting frameworks in different countries encompass varied unique approaches to balance the ease of doing business and the interests of majority and minority shareholders. An assessment of these jurisdictions reveals the effectiveness of different legal and regulatory strategies adopted to protect shareholders during voluntary delistings.[86] To draw a comparative analysis, this part specifically focuses on the United States ("***US***"), the United Kingdom ("***UK***"), Germany, Singapore, and the Philippines. The reason is their adoption of starkly distinct frameworks. For instance, while the US system focuses more on the fiduciary duties of the directors, the mechanism in the UK focuses on dual approval of Directors and shareholders. Besides, other nations implement distinct yet impactful strategies too.[87] Further, this comparison would be helpful in proposing amendments to the existing regulations and pave the way for devising a third hybrid model method in the next part of the paper, which combines the best practices for harmonizing the minority shareholders with the company as a whole.

A. USA's Judicial Oversight

In the United States, voluntary delisting is primarily regulated by the Securities Exchange Act, 1934, coupled with the rules of individual exchanges like the New York Stock Exchange and NASDAQ.[88] The entities planning to delist must adhere to the provisions under Rule 12d2-2 of the Securities Exchange Act, 1934,[89] And shall submit a formal application in form 25 to the Securities Exchange Commission, along with the board of directors' approval.[90] Minority shareholders are provided

86. S&R Associates, 'Voluntary Delisting in India' (*Legal 500*, 2 July 2024) < https://www.legal500.com/developments/thought-leadership/voluntary-delisting-in-india/ > accessed 22 January 2025.
87. Fahad A. Alzumai and Fahad N. Alshammari, 'Balancing Business Objectives and Shareholders' Rights in Voluntary Delisting: A Comparative Analysis Of Selected Legal Jurisdictions' (2023) 29 CLR 45, 50.
88. Martin Gelter and Steven Thel, 'Delisting in the United States' (*Fordham University,* 1 October 2024) <https://dx.doi.org/10.2139/ssrn.4973561> accessed January 15 2025.
89. Securities Exchange Act, 1934, r 12d2-2.
90. Martin Gelter and Steven Thel, 'A survey of Delisting in United States' (*Oxford Law Blogs,* 31 October 2024) <https://blogs.law.ox.ac.uk/oblb/blog-post/2024/10/survey-delisting-united-states> accessed January 15 2025.

with constant access to public disclosures and financial justification for delisting mandated by the Regulation on Fair Disclosures.[91] Further, the decision of directors is subject to judicial review where shareholders can approach the court to demand a court-determined fair valuation under Section 262 of the Delaware General Corporation Law.[92] They can also seek to set aside the decision of the directors which negatively affects the minority shareholders and violates their fiduciary duties.[93] The US is a good example of the directors' primacy model as the board of directors is authorized to approve the voluntary delisting resolution and the shareholders do not have any right to vote.[94] Therefore, the US delisting regime reposes faith in the board of directors, empowering them to exercise their authority in alignment with their fiduciary duties for the welfare of the company and shareholders.[95]

Overall, the US framework guarantees enhanced transparency and robust disclosures so that the minority shareholders are better informed. Further, while direct judicial review in the former ensures better intervention by the Courts in cases of oppression of minorities, the Indian judiciary generally tilts towards preserving the sanctity of contracts and rarely intervenes in such matters unless there is clear evidence of fraud or misconduct- a bar that is in effect a bit too high for minority shareholders to cross.[96]

B. UK's Fairness

In the United Kingdom, delisting is governed by the United Kingdom Listing Rules under the supervision of the Financial Conduct Authority ("***FCA***"). The Companies seeking to delist must submit a formal

91. Securities and Exchange Commission, 'Selective Disclosure and Insider Trading' (*U.S. Securities and Exchange Commission,* 7 April 2023) <https://www.sec.gov/rules-regulations/2000/08/selective-disclosure-insider-trading> accessed 15 January 2025.
92. Delaware General Corporation Law, s. 262.
93. *United Funds, Inc. v Carter Prods., Inc.* [1963] Cir. Ct. Baltimore City, Md.
94. *Fahad A. Alzumai and Fahad N. Alshammari* (n 87) 50-51.
95. ibid.
96. Abdulrahman Nabil Alsaleh, 'Protecting Minority Shareholders in Close Corporations: An Protecting Minority Shareholders in Close Corporations: An Analysis and Critique of the Statutory Protection in the Saudi Analysis and Critique of the Statutory Protection in the Saudi Companies Law' *Maurer Theses and Dissertations* (2019) <https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?params=/context/etd/article/1062/&path_info=Alsaleh_Dissertation.pdf> accessed 21 January 2025.

application,[97] accompanied by a shareholders' resolution passed with the approval of 75% votes in the General Meeting[98] A proper explanatory memorandum must be circulated in advance before the meeting containing the reasons and benefits for delisting the entity.[99] Furthermore, FCA mandates that the shareholders must get a fair and reasonable valuation under Section 983 of the Companies Act.[100] And allows the shareholders to seek an Independent Financial Advisor ensuring that the decision of controlling shareholders is based on accurate market analysis and in the benefit of the company.[101] The United Kingdom's mechanism is an instance of the shareholder's primacy model. It empowers the shareholders to determine the decision for delisting and addresses the possibility of majority or controlling shareholder abuse during the process.[102]

Notably, while the UK framework stipulates the requirement of an explanatory memorandum detailing the reasons for delisting and benefits to shareholders, there is no such mandatory stipulation in India. Further, the requirement of fair valuation is not expressly provided in India while the former's Companies Act expressly mandates it. Additionally, minority shareholders do not possess a statutory right to seek an Independent Financial Advisor for valuation purposes which would prove quite useful in ensuring a fair and forthcoming decision-making process, based on accurate market analysis.

C. German Valuations

In Germany, voluntary delisting is governed by the German Stock Exchange Act and the German Securities Acquisition and Takeover Act.[103] Delisting applications shall be submitted along with the approval of board management and supervisory board along with a shareholder-approved

97. UK Financial Listing Rules, 2024, L.R. 5.2.4.
98. UK Financial Listing Rules, 2024, L.R. 5.2.7(3).
99. UK Financial Listing Rules, 2024, L.R. 5.2.5(2).
100. UK Companies Act, 2006, s. 983.
101. UK Financial Listing Rules, 2024, L.R. 5.2.5(1)(a).
102. *Fahad A. Alzumai and Fahad N. Alshammari* (n 87) 55-56.
103. Federal Financial Supervisory Authority, 'Company Takeovers and Delisting' (*BaFin*, 1 January 2024) <https://www.bafin.de/EN/Aufsicht/BoersenMaerkte/Transparenz/Unternehmensuebernahmen/unternehmensuebernahmen_artikel_en.html> accessed 15 January 2025.

resolution passed with a supermajority vote.[104] The Securities Acquisition and Takeover Act mandates that the entity shall make the delisting offer at the price determined by an independent valuation and the delisting proposal must comply with the highest price rule outlined in section 31, which mandates that minority shareholders be offered the maximum price paid by the acquirer in the preceding six months.[105] Further, minority shareholders have the right to challenge the delisting offer price in court under Section 305 of the German Stock Corporation Act to seek a fair valuation price.[106] Germany's approach stands apart from the UK and US by making it mandatory for the acquirer to offer shareholders a compulsory buyout after the delisting, at a price based on the last six months' weight average of the stock price of the company.[107]

The minority shareholders are in a lot better position than their Indian counterparts, owing to statutory recognition of their right to oppose the offer price and to have the best possible share prices. Moreover, the fact that such pricing has to be based on the maximum price paid by the acquirer herself during the past six months ensures that these prices cannot be termed arbitrary or unreasonable by the acquirer and are based on ongoing market valuations, thus preventing both undervaluation and overvaluations concerns.

D. Singaporean Efficiency

The delisting framework of Singapore offers a unique approach and offers adequate protection to the minority shareholders. The delisting is regulated by the Singapore Exchange Listing Manual where Rule 1307 of the manual mandates that the delisting shareholder resolution must be approved by 75% of the shareholders present and voting and the votes against the resolution must not be more than 10%.[108] It further mandates that an independent committee of directors must be organized to

104. Richard Mayer-Uellner, 'New Delisting Rules in Germany' (*Lexology*, 9 December 2015) <https://www.lexology.com/library/detail.aspx?g=4228d3d6-17a5-4bb0-a55e-d0a264af3542> accessed 15 January 2025.
105. Securities Acquisition and Takeover Act, s. 31.
106. German Stock Corporation Act, s. 305.
107. German Stock Exchange Act, s 39 para 2 sentence 3 No. 1.
108. Singapore Exchange Rules, amended up to 2019, Chapter 13 Trading Halt, Suspension and Delisting, r. 1307(2).

ensure that the delisting process is undertaken fairly and equitably.[109] Furthermore, the shareholders must seek an opinion from an independent financial advisor whose opinion shall be made public to ensure transparency and eliminate information asymmetry.[110]

The thrust on fairness and equity in this system is notable. The provision of formulating an independent committee of directors ensures the protection of minority shareholders from lopsided decisions by the majority, thus strengthening their say in the decision-making process itself. This would efficiently serve to nip the evil in the bud and prevent subsequent challenges. Further, the mandate of seeking an independent external opinion bolsters the position of minority shareholders by ensuring equitable outcomes and transparent valuations.

E. Philippian Novelty

Similarly, the Philippines has also adopted an approach that protects the minority. Their mechanism is governed by the Philippines Stock Exchange Rules on Delisting[111] which mandate that the delisting shareholder resolution shall be passed with at least a two-thirds majority vote of shareholders present and voting[112] and a separate resolution mandating specific two-thirds majority approval from minority shareholders.[113] Further, the rules also mandate that the delisting offer shall be determined by independent valuation which a committee of independent directors shall oversee.[114] The Philippines Stock Exchange also serves as a mediator in disputes between majority and minority shareholders.[115]

While the principles of fairness and transparency run through this system as well, the novelty of this system is the incorporation of mediation

109. Singapore Exchange Rules, amended up to 2019, Chapter 13 Trading Halt, Suspension and Delisting, r. 1308(1).
110. Singapore Exchange Rules, amended up to 2019, Chapter 13 Trading Halt, Suspension and Delisting, r. 1308(2).
111. Philippines Stock Exchange Inc., 'Memorandum: Amendments to the Voluntary Delisting' (*PSE*, 21 December 2020) <https://documents.pse.com.ph/wp-content/uploads/sites/15/2022/07/Supplemental-Rule-8.1-Amendments-to-the-Voluntary-Delisting-Rules.pdf> accessed 15 January 2025.
112. Philippines Stock Exchange Delisting Rules 2020, s. 2(a).
113. Philippines Stock Exchange Delisting Rules 2020, s. 2(a).
114. Philippines Stock Exchange Delisting Rules 2020, s. 2(d).
115. Philippines Stock Exchange Delisting Rules 2020, s. 3.

as a method to settle disputes between minority and majority shareholders.[116] This is an effective intervention to prevent the relationship between both sides from souring unnecessarily, thus promoting a conducive environment for economic growth in the country. The provision for oversight of independent valuations by an independent committee further fortifies minority rights.

An overall evaluation of these global frameworks reveals the incorporation of targeted minority- protections across jurisdictions, proven to be successful in ensuring a simplified delisting process coupled with transparency, fair valuation, and comprehensive protection. While the USA's judicial review ensures that the courts are more accessible for the minority shareholders, Philippian mediation can prevent the souring of relations like the Tata- SP feud. A tad of statutory recognition of minority rights to fair valuation from the UK and Singapore along with the formulation of a committee of independent Directors from Singapore can make up for an apt mix in the Indian voluntary delisting regime.[117] Further, Germany's involvement in the price paid by the acquirer herself in the determination of the offer price, to ensure the best possible exit price for minority shareholders, has the potential to address not only the majority's concerns of overvaluation but also undervaluation concerns of the minority.

Therefore, exploring the suitability of these best practices in the Indian context is worth exploring in the interests of promoting a conducive economic environment and balancing the larger objective of enhancing ease of doing business with the rights of vulnerable shareholders with smaller shareholdings.

VI. REVAMPING VOLUNTARY DELISTING: KEY RECOMMENDATIONS

The aforementioned evaluation and assessment of the global framework along with the analysis of the latest amendments to the 2021 regulations

116. Eric M. Runesson and Marie-Laurence Guy, Mediating Corporate Governance Conflicts and Disputes' *Global Corporate Governance Forum* <https://www.ifc.org/content/dam/ifc/doc/mgrt-pub/focus4-mediation-12.pdf> accessed 22 January 2025.
117. Sanjiv Chaturvedi and Pooja Shukla, 'Independent Directors: A Comparative Study Of India And Singapore' *BSSS Journal of Commerce* (2023) <Publish_498.pdf> accessed 22 January 2025.

highlight the necessity for significant revisions to the voluntary framework in India, in both its procedural and regulatory mechanisms.[118] In relation to these concerns, the authors herein argue that a successful voluntary delisting regime must fulfill three objectives to enhance market efficiency and ease of doing business. The first goal of the voluntary delisting regime should be to eliminate the information asymmetry between the directors and shareholders, ensuring that the company provides complete disclosure of the delisting decision to its shareholders. Second, the framework should minimize any subjective bias in the Directors' decisions and assess whether the delisting aligns with the company's interests, and corresponds to the projections and representations made to shareholders.[119] Lastly, the framework must prioritize comprehensive protection for minority shareholders, safeguarding them from potential abuse by controlling shareholders. Keeping these objectives in mind, the authors suggest that India's regulatory watchdog can either amend the existing voluntary delisting framework to make it protective of minority shareholders or adopt a proposed third hybrid model to harmonize the interests of the minority shareholders and the company.

A. Amendments to the RBB Reverse Book Building Method

The Securities Exchange Board of India while relaxing the post-offer shareholding threshold to 75% for delisting to be successful could have also introduced the requirements of two-thirds majority approval among the small shareholders to safeguard and adequately represent the interests of the minority shareholders as mandated by the Philippines in its Stock Exchange Rules.[120] Building upon the mandatory disclosures in the US,[121] SEBI must consider mandating complete disclosure of the reasons and benefits that the voluntary delisting aims to provide to the shareholders. Additionally, the shareholders can be provided a reasona-

118. Pahle Indian Foundation, 'Lead Poisoning: A Review of the Indian Legal Framework and International Frameworks' *Pahle India Foundation* (August 2024) <https://pahleindia.org/wp-content/uploads/2024/08/Lead-Poisoning-A-review-of-the-Indian-Legal-Framework-and-International-Frameworks.pdf> accessed 22 January 2025.
119. SEBI, 'Review of SEBI (Delisting of Equity Shares) Regulations, 2009' *SEBI* (April 2021) <https://www.sebi.gov.in/sebi_data/meetingfiles/apr-2021/1618812674300_1.pdf> accessed 22 January 2025.
120. n 112.
121. n 91.

ble time span to seek independent financial advice regarding such disclosures. Further, the disclosures should be based on objective projections and well-substantiated reasoning, rather than relying on the directors' ostensible assertions. As observed in the majority of countries discussed above, there is a need for an independent valuation report before making a delisting resolution. Therefore, an independent valuation report can be mandated to ensure that the shareholders are adequately informed regarding the accurate and impartial valuation of the company. This will allow the shareholders to bid for their shares reasonably and will also result in a more satisfactory and successful delisting.

B. Amendments to the Fixed Price Delisting Method

As noted above, the fixed-price delisting method gives more power to the acquirer in determining the delisting price and gives no room to the minority for negotiation of the price. To control the same, the delisting price or exit price can be determined by an Independent Financial Valuer registered with SEBI by giving a true and fair market valuation of the shares. Further, drawing inspiration from the Philippines, an independent committee of directors can be composed to oversee price determination by the Independent Financial Valuer.[122] This will serve to alleviate SEBI's responsibility of overseeing the veracity of the valuer during price determination, while also ensuring that the final price is fair and objective. Similarly, the SEBI can also consider mandating separate two-thirds majority approval from minority shareholders; to begin with the delisting process in the first place, and as suggested above, SEBI can mandate the making of verified and objective disclosures of the reasons and benefits for the delisting. In addition, an additional safeguard can be adopted from the Shanghai Stock Exchange,[123] where the independent directors are mandated to issue an independent note on the viability of delisting and its potential advantages and disadvantages. Similarly, Independent Directors can be asked to issue a formal note on whether the offer price offered represents their true value and whether the delisting process will be viable for the shareholders.[124] Further, based on the Philippian model,

122. n 116.
123. Rules Governing the Listing of Stocks on the Shanghai Stock Exchange (2019), Rule 14.4.2.
124. n 14.

the Independent Committee of Directors can closely oversee this entire process, thus ensuring that the concerns of both majority and minority shareholders are adequately addressed.[125]

C. A New Approach: Exploring a Third Method

Although the above-suggested amendments to the RBB and Fixed Price delisting can be quite constructive in protecting minority shareholders, there appears to be a need for a third, hybrid model that can offer greater effectiveness and efficiency in in terms of the protection of shareholders.[126] This hybrid model is proposed to ensure that shareholders are adequately represented, protected, and benefitted from the delisting, along with facilitating the company's ability to make business decisions that align well with the interests of the company.

1. *Commencement of Delisting*

The delisting can start with the shareholders' approval after the resolution is passed in the board meeting. It is proposed that the criteria of 66% votes of present and voting shareholders in favor of the delisting resolution be changed to 66% votes of total shareholders of the company. This is because there is uncertainty regarding the number of shareholders who participate in these meetings,[127] and therefore, this 66 % criterion does not represent the totality of shareholders but only those who are present and cast their votes.[128] Further, a requirement of two-thirds majority approval among identified minority shareholders can be mandated. This will make certain that they are adequately represented in the decision-making of the company and a three-step model to complete the voluntary delisting will be consequently developed.[129]

Additionally, the company can be mandated to issue a complete disclosure based on objective and verified facts, explaining why del-

125. n 116.
126. Zoya Farah Hussain and Digvijay Khatai, 'SEBI's New Amendment: Delisting methods at Crossroads?' (*NLIU CBCL*, 14 September 2024) https://cbcl.nliu.ac.in/capital-markets-and-securities-law/sebis-new-amendment-delisting-methods-at-crossroads/ accessed 22 January 2025.
127. n 87 55.
128. ibid.
129. n 36.

isting is a favorable and beneficial move, and how it aligns with the best interests of both the company and shareholders, as demonstrated in the US.[130] Along with this, the company should engage with an Independent Valuer registered with SEBI to produce an independent valuation report. Based on this report, a range of pre-determined prices should be proposed, drawing on past averages and other financial metrics.

Furthermore, shareholders can be allowed to consult an independent financial advisor for better decision-making making and the committee of independent directors can also be mandated to issue a formal note commenting on the viability of the delisting decision and offered price range for tendering the shares as seen in the Shanghai Stock Exchange Rules.[131] These steps will ensure transparency, and fairness in valuation and foster trust among the shareholders, leading to an adequate proportion of tendered shares and successful minority squeeze-out.

2. *During Delisting*

Drawing from RBB, the shareholders should be allowed to bid their value of shares based on the pre-determined price ranges suggested by the independent valuer and these bids should be averaged to come up with the final price for tendering the shares. Thereafter, shareholders can tender their shares to the company. This entire process should be overseen by the independent committee of directors as discussed under the Philippian model,[132] and specifically a small shareholder director. The small shareholder director is an independent director and has to be appointed in every company in keeping with the provisions of the Companies Act, 2013.[133] Since the very reason he holds that position is to safeguard minority shareholder interests, he can be allowed to oversee this process and his role in airing grievances of the minority shareholders during delistings is also worth exploring. This will ensure that the interests of

130. n 91.
131. n 115.
132. n 116.
133. Companies Act, 2013 s 151.

minority shareholders are actively represented in front of the controlling stakeholders.[134]

3. *Post Delisting*

After the conclusion of the delisting, a minimum of a three-year window must ideally be given to the remaining shareholders to tender their shares.[135] This window will ensure that the remaining shareholders are not coerced to make a hasty and undervalued decision to avoid the illiquidity risk of their shares.[136] Additionally, the remaining shareholders could be allowed to tender their shares at a price determined by the independent valuer who carried the independent valuation at the start of the delisting process. Drawing from Russian Rules of the stock exchange, the buyout of shares post-delisting should only be offered to the shareholders who were present in the General Meeting which approved the delisting but chose to remain with the company during delisting.[137] This will serve two purposes. First, it will encourage greater shareholder attendance at the General Meeting approving the delisting, thereby making it objectively hard for the company to meet the minimum vote requirements and second, reducing its liability to the remaining shareholders.[138] Moreover, SEBI can be granted enhanced regulatory authority in delisting matters, ensuring not only that the prescribed procedure is followed but also acting as the final arbiter of the delisting decision-making process. SEBI must also be given the power to postpone or reject voluntary delisting in order to avoid potential losses to investors and minority shareholders. This can be observed from Kuwait, where the Capital Market Authority has the final say in determining whether the company will be delisted.[139] This will make certain that SEBI is accessible to the minority shareholders, allowing the small shareholder directors to approach SEBI to represent their concerns and foster trust in the country's governance setup.

134. n 2.
135. n 87.
136. ibid.
137. World Trade Organization (WTO), Federal Law No. 208-FZ on Jointstock Companies, 1995, art 75(1).
138. n 85.
139. The Executive Bylaws of the Kuwaiti Capital Market Authority Law 7 of 2010, mod 12, art 3-5-1-1.

Further, incorporating alternate dispute resolution mechanisms like mediation and negotiation under the oversight of SEBI would assist in maintaining cordial relations between the minority and majority shareholders, in turn fostering a collaborative outlook. These promising, time-honored measures have the potential to ensure fair and transparent valuation and offer adequate protection to the minority shareholders at the start of delisting, during the delisting, and also after the delisting.[140]

The incorporation of these suggestions would help address primary concerns of the minority and fix critical gaps, by ensuring fair valuation and greater participation of the minority shareholders. A hybrid approach combining the strengths of the RBB and fixed price methods would foster transparency while maintaining the efficiency of the process. Together, these reforms would also serve to invigorate investor confidence, encourage ethical corporate practices, and position India amongst stellar regulatory frameworks in the global corporate governance landscape.

VII. CONCLUSION

By and large, the current framework for voluntary delisting in India, particularly after the reintroduction of the fixed price method, underscores the pressing need for a balanced regulatory approach that promotes ease of doing business, all the while safeguarding minority shareholders' interests. The analysis of the Tata Sons- SP Group feud demonstrates the practical challenges faced by minority shareholders in a delisted private company, ranging from illiquidity risks to the undervaluation of shares. The fixed-price method as it stands disproportionately tilts the scales in favour of majority shareholders, considerably curtailing the participatory rights of the minority.

Thus, to rectify these inherent issues, looking outward toward the frameworks adopted by foreign nations provides valuable lessons in ensuring transparency, fair valuation, and equity amongst shareholders. The established mechanisms of the US, UK, Germany, Singapore, and the Philippines illustrate the benefits of independent valuation, amicable settlements, and participatory safeguards. India can significantly enhance its framework with such an outward-looking approach, borrowing

140. n 35.

methodologies that suit the Indian milieu. Further, introducing a hybrid model that combines the simplicity and objectivity of the fixed pricing method with the participatory elements of RBB can be quite helpful in bridging the existing gaps.

Ultimately, the success of India's voluntary delisting framework lies in its ability to balance corporate autonomy and efficiency with shareholder equity, thus driving long-term, sustainable growth while upholding the rights of all the stakeholders involved in the process.

Debt, Disputes and Decrees: Demystifying Creditor-Cum-Award Holder Classification under the IBC through a Sliding Scale Test

—*Mohak Dua**

ABSTRACT

The interplay between Arbitration and Insolvency law posits a critical policy tension between party autonomy in settlement of disputes and ensuring expedience in resolution of the corporate insolvency. Moreover, this intersection becomes particularly problematic when disputes over the debt are presented to halt the insolvency proceedings, leading to arbitration, for the resolution of such disputes. Though, in India, even after an arbitral award is secured, the award holder frequently faces challenges in his classification as a creditor. The creditor is not treated as he would have been in the initial stage, before the presentation of the dispute, but would be relegated to the class of "other creditors" under Insolvency and Bankruptcy Code, resulting in an inequitable treatment and diminished rights under the Corporate Insolvency Resolution Process. This article examines this conundrum, drawing on cross-jurisdictional jurisprudence from the United Kingdom, Singapore and Hong Kong to highlight the different approaches in these jurisdictions. To address this gap, the article proposes a 'Sliding Scale Test', a framework designed to evaluate the underlying nature of the arbitral awards, by focusing upon the transactional origins of the dispute. The article finally concludes by highlighting cases wherein this approach has found substance and highlights how the same bridges the divide between the two laws and ensures harmony between the policy objectives of both regimes.

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Keywords: Arbitration and Insolvency Law, Party Autonomy, Creditor Classification, Corporate Insolvency Resolution Process, Sliding Scale Test.

I. INTRODUCTION

The enactment of the Insolvency and Bankruptcy Code, 2016[1] ["**IBC**"] marked a transformative shift in India's insolvency framework, addressing long-standing challenges of inefficiency and fragmentation. The legislation traces its origins to the recommendations of the 2014 Bankruptcy Law Reforms Committee ["**BLRC**"],[2] which in its recommendations, based the design of the proposed draft law on the UNCITRAL Legislative Guide on Insolvency Law ["**UNCITRAL Guide**"].[3] This global influence is reflective of India's intent to align the domestic framework with international standards, to promote robust and time-bound insolvency resolution mechanism.[4] Similarly, India's Arbitration and Conciliation Act, 1996[5] ["**Arbitration Act**"] is fundamentally modeled on the UNCITRAL Model Law on International Commercial Arbitration,[6] ["**UNCITRAL Model Law**"] reflecting the legislature's intent to also align the arbitration framework with internationally accepted standards, and promote the adoption of Arbitration as a dispute resolution mechanism.

Despite their independent purposes, the intersection of these laws often reveals policy tensions, particularly in cases where an arbitration award is used as evidence of a debt to initiate insolvency proceedings against a debtor. The conflict arises between the two competing public

1. The Insolvency and Bankruptcy Code, 2016 (31 of 2016).
2. Bankruptcy Law Reforms Committee, *The Report of The Bankruptcy Law Reforms Committee* (Ministry of Finance, 2015).
3. United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law* (United Nations, 1997).
4. Insolvency and Bankruptcy Board of India, *IBC: Idea, Impressions and Implementation* (Insolvency and Bankruptcy Board of India, 2022) <https://www.ibbi.gov.in/uploads/publication/b5fba368fbd5c5817333f95fbb0d48bb.pdf> accessed 1 January 2025.
5. The Arbitration and Conciliation Act, 1996 (26 of 1996).
6. United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration* (United Nations, 1985).

policy considerations- ensuring party autonomy in settlement of disputes and ensuring expedience in resolution of the corporate insolvency.[7]

A. The evolution of Insolvency vis à vis Arbitration Jurisprudence

In the United Kingdom ["**UK**"] and other common law jurisdictions, jurisprudence has evolved to address this complex interplay. Earlier, the UK Court of Appeal ["**UK CoA**"], in *Salford Estates (No. 2) Ltd. v. Altomart Ltd.*,[8] ["**Salford Estates**"] underscored the principle of party autonomy, holding that a winding-up petition should be dismissed if the debt underlying the petition was disputed and fell within the scope of an arbitration agreement, regardless of whether the debtor was alleging the same for tactical reasons.[9] The approach led the courts to dismiss applications for winding up in case the other party alleged a dispute over the debt which forms the evidence of the firm's inability to pay.

However, this approach was recalibrated in *Sian Participation Ltd. v. Ling Ling Co. Ltd.*, ["**Sian Participation**"] where the Privy Council ["**UK PC, PC, The Board**"] shifted focus to the authenticity of disputes raised in response to insolvency proceedings. It held that only genuine disputes, those with a valid basis and supported by evidence, could justify staying a winding-up petition. The decision in *Sian* is in line with similar jurisprudence in other common law jurisdictions. In Singapore, the Singapore Court of Appeal ["**SCA**"] in *AnAn Ltd. v. Pacific Fertility Centre*[10] ["**AnAn**"] applied what came to be known as the *AnAn Requirements* to ascertain the authenticity of a dispute.[11] Meanwhile, in Hong Kong, the courts have followed a *multi-factorial* test, as established in *Re Southwest Pacific Bauxite (HK) Ltd.* ("Lasmos")[12] ["**Re Southwest**"] and

7. White & Case LLP, 'Arbitration and Insolvency: A Comparative View from England & Wales, Singapore and Hong Kong' (*Whitecase.com*, 19 September 2024) <https://www.whitecase.com/insight-alert/arbitration-and-insolvency-comparative-view-england-wales-singapore-and-hong-kong> accessed 1 January 2025.
8. *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575.
9. ibid.
10. *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33; *Founder Group (Hong Kong) Ltd (in liquidation) v Singapore* JHC Co Pte Ltd [2023] SGCA 40.
11. n 10 para 56.
12. *Re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426; *In Re Southwest Pacific Bauxite (HK) Ltd* [2018] 2 HKLRD 449.

later clarified in *Re Simplicity*.[13] The UK PC in *Sian Participation* discussed these cases, in order to ascertain the test to be applied in the UK and the British Virgin Islands ["**BVI**"].

In India, a similar balance was articulated by the Supreme Court ["**SC**"] in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*[14] ["**Mobilox**"], as early as 2017.

B. The Classification of Creditors: IBC's Waterfall Mechanism

In India, the insolvency regime is governed by the "waterfall mechanism", codified under Section 53 of the IBC.[15] This provision lays down the order of priority in which proceeds from the liquidation of the Corporate Debtor's assets are to *flow*. The hierarchy is designed to ensure fairness, and reflects the nature of different claims, placing them based on their impact and importance in the resolution process.

At the apex are insolvency resolution, process costs, and liquidation costs,[16] which must be settled before addressing creditor claims. The code places secured creditors, and workmen dues for up to 24 months preceding the commencement of liquidation, in the next tier.[17] Next are unpaid employee dues for the preceding 12 months.[18] Followed by Unsecured Creditors. Last placed are equity shareholders and residuary claims.[19] This is because by design, shareholders hold residual rights to the company's assets, after the discharge of all liabilities. This is in line with the concept of limited liability.

C. Gaps in the framework

The IBC framework differentiates between financial and operational creditors, with distinct roles and levels of representation on the Committee of Creditors ["**CoC**"]. Section 2(10) of the Code broadly defines creditors to include financial creditors, operational creditors, secured and unsecured

13. *Re Simplicity & Vogue Retailing (HK) Co. Limited* [2024] HKCA 229.
14. *Mobilox Innovations Pvt Ltd v Kirusa Software Pvt Ltd* [2018] 1 SCC 353.
15. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 53.
16. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 53(1)(a).
17. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 53(1)(b)(i).
18. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 53(1)(c).
19. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 53(1)(f).

creditors, and decree holders.[20] The distinction between financial and operational creditors is significant, as operational creditors only gain representation on the CoC if their claims exceed 10% of the total debt, and even then, they lack voting rights.[21] Financial creditors, as defined under Section 5(7),[22] are owed financial debt, and hold a dominant position, as they can unilaterally initiate the Corporate Insolvency Resolution Process (CIRP) by filing an application under Section 7.[23] Operational creditors, in contrast, must obtain court approval under Section 9 to trigger the CIRP.[24] This framework places financial creditors at the forefront, while ensuring operational continuity.

Decree holders, while mentioned under Section 2(10),[25] are not clearly categorized as either financial or operational creditors. This lack of definition results in ambiguity regarding their treatment within the CIRP, often relegating them to the residuary category under Section 53(1)(f), with limited representation or rights in the resolution process.

D. Arbitration Awards and the CIRP

The ambiguity surrounding the treatment of decree holders under the IBC becomes particularly pronounced in the context of arbitration awards. A creditor initiating insolvency proceedings under Section 7 or Section 9 of the IBC, based on an unpaid debt, may face a debtor invoking the existence of an arbitration agreement and raising a genuine dispute regarding the debt. In accordance with the principles established in *Mobilox,* and internationally in *Sian Participation*, the courts are required to assess whether the dispute is bona fide and supported by substantial evidence. If the dispute satisfies these criteria, the courts may prioritize the arbitration agreement, directing the parties to arbitration and consequently delaying the insolvency process. However, even after an award is obtained, the creditor faces further challenges in the classification under the CIRP.

20. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 2(10).
21. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 21(6).
22. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 5(7).
23. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 7.
24. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 9.
25. The Insolvency and Bankruptcy Code, 2016 (31 of 2016), s 2(10).

An award rendered under the Arbitration Act is treated as a civil decree to ensure finality and enforceability by a civil court.[26] However, within the IBC's framework, this treatment creates challenges. Arbitration awards, often arising from clear financial or operational disputes,[27] are classified as decrees and hence relegated to the residual category of claims under the CIRP, same as ordinary decree holders. This misclassification disregards the commercial nature of the award(s), leading to inequitable treatment of creditors.

The issue is compounded by judicial inconsistencies, as was observed by the NCLT (Ahmedabad Bench).[28] Some judgements focus on the underlying transactions that gave rise to the arbitration, while others adhere strictly to their categorization as decrees, often going as far as to summarily reject applications under Section 7 by parties attempting to enforce arbitral awards.[29] This duality in treatment of arbitration awards may undermine the confidence of parties in opting for arbitration as a dispute resolution mechanism, as under the current standards, there is a shift in classification post the passing of an award. To ensure consistency, arbitration awards must be classified and treated in alignment with their transactional origins, as was the case prior to the dispute. Aligning this approach with global jurisprudence, as seen in Singapore, the UK, and Hong Kong, would align the IBC with international standards, while also harmonizing the policy objectives of the two legislations.

The next chapter undertakes a cross-jurisdictional analysis of the standard(s) for determining the existence of a *dispute* as a ground to set aside a creditor's insolvency plea. There are three main jurisdictions discussed for this apart from India, i.e., the United Kingdom ["**UK**"], Hong Kong, and Singapore.

The third chapter discusses the issues faced by arbitral award holders in India, when such a dispute is alleged, and the subsequent treatment of their claim in the insolvency process. The chapter envisions a sliding-scale test to determine the nature of the claim and their subsequent treatment.

26. The Arbitration and Conciliation Act, 1996 (26 of 1996), s 36.
27. James Clanchy, 'Arbitration Statistics 2023: Rising Caseloads and Repeat Appointments' (*LexisNexis*, 2023) <https://www.lexisnexis.co.uk/blog/research-legal-analysis/arbitration-statistics-2023-rising-caseloads-repeat-appointments> accessed 1 January 2025.
28. *Wrinkle Marketing Pvt Ltd v Roselabs Bioscience Pvt Ltd* [2021] NCLT Ahm 669.
29. *International Asset Reconstruction Co. Pvt. Ltd. v Jayant Vitamins Ltd.* WP No 19452 of 2023 (Madhya Pradesh High Court, 9 August 2023).

The paper concludes with the aim of reconciling the policy intent behind both the IBC and the Arbitration Act, highlighting the evolving jurisprudence and suggesting cases where the proposed test has found application.

II. MAPPING THE DIVIDE: CROSS JURISDICTIONAL INSIGHTS AND THE INDIAN POSITION

The conflict between insolvency and arbitration is almost paradoxical, as it arises despite the common objective of fostering business development. Under the insolvency jurisprudence, it is in the public interest for an insolvent company to be put into liquidation, or in the alternative, the insolvency resolution process commenced without any undue delay. This is to ensure that its remaining assets are safeguarded and distributed equitably among its creditors. Conversely, the arbitration framework rests upon the sanctity of party autonomy, and where parties agree to resolve any dispute(s) by arbitration, the courts should uphold this arrangement.

Given this dichotomy, different jurisdictions have developed varying approaches to reconcile these competing interests. Common law jurisdictions, and ones where both frameworks are based on the UNCITRAL Guide, like the UK and Singapore, have refined their jurisprudence to strike a balance, providing valuable lessons for the others.

A. The United Kingdom: Salford to Sian

1. *Salford Estates*

In *Salford Estates*, the UK Court of Appeal ["**UK CoA, CoA**"] addressed the intersection of the mandatory stay provisions under Section 9of the Arbitration Act, 1996[30] and a creditor's winding-up petition. The CoA made a critical distinction, clarifying that a winding-up petition is not an attempt to recover a debt per se, but rather a means of demonstrating the company's insolvency, with the petition serving as evidence that the company cannot meet its financial obligations.

The court expanded the definition of dispute, and it correctly ruled, based on said reasoning that a winding up petition does not automatically

30. The Arbitration and Conciliation Act, 1996 (26 of 1996), s 9.

trigger the mandatory stay provision under the English Arbitration Act. It further clarified that the underlying policy of the legislation provides that in cases where an arbitration agreement exists, the request for stay of the insolvency would generally be granted, "save in wholly exceptional circumstances".[31]

2. *Sian Participation*

In *Sian Participation*, the UK PC provided a crucial clarification on the treatment of disputed debts in the context of winding-up petitions and arbitration agreements, specifically departing from the approach in *Salford Estates*. The case originated from an appeal against a judgment of a court of the BVI, wherein the facts were of a creditor initiating winding-up proceedings against a corporate debtor for failing to repay a loan. The debtor contested the petition, asserting that the debt was disputed due to a crossclaim in separate proceedings, thereby invoking the reasoning in Salford Estates, which permitted stays of winding-up petitions in the case of disputed debts under arbitration agreements.

The Board, however, rejected this broad application. It reiterated that winding-up proceedings are not designed to resolve the substantive issues of a disputed debt but rather to determine the company's insolvency, and their presentation is in this limited capacity, as proof of debt. This distinction is critical because the winding-up process does not, by its nature, address the underlying dispute regarding the debt but rather serves as a mechanism to assess the company's financial stability and protect creditor interests. The Board noted that the mere existence of a dispute is not sufficient to trigger the mandatory stay provisions in the UK Arbitration Act or similar legislative frameworks.

The Board presented two main grounds for its decision. First, it required a *genuine* dispute on *substantial* grounds to set aside the insolvency plea and direct the parties to arbitration, as frivolous challenges would cause both unnecessary delays and costs, making the overall process inefficient. Second, it noted that staying of winding-up petition over insubstantial disputes covered by the arbitration agreement could discourage creditors from using arbitration as a dispute resolution mechanism. This outcome,

31. *Salford Estates (No 2) Ltd v Altomart Ltd* [2014] EWCA Civ 1575.

the board opined, would undermine the role of arbitration in commercial disputes.

The court also drew reasoning from judgments in other common law jurisdictions such as Singapore and Hong Kong.

B. Singapore

In Singapore, the *AnAn* requirements, derived from the Singapore Court of Appeal ["**SCA**"] decision in *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Co)*,[32] provide for three interrelated criteria for dismissal or stay of winding up proceedings- the prima facie validity of the arbitration agreement, whether the dispute falls within its scope, and whether the debtor's actions constitute an abuse of the court's process, with the third condition being the most pertinent.

Although the test is of a high threshold, the court also identified patterns that will suffice the same. Instances such as a debtor admitting liability but seeking a stay solely to delay proceedings, waiving arbitration rights through subsequent agreements, or attempting to shield assets from legitimate claims under the insolvency regime, would fall within the definition of *abuse*.[33]

While both jurisdictions share a similar jurisprudential approach, the articulation of patterns that would suffice as abusing the process of the court, by the SCA could be integrated by other legal frameworks, including the UK, as well. The same allows for admission of genuine claims, where there is a prima facie compliance with the *AnAn* requirements.

C. Hong Kong

The approach adopted by Hong Kong is reflective of a hybrid middle ground, influenced by the decision in *Salford*, yet tempered by their own distinct legal principles. The foundational case of *Re Southwest Pacific Bauxite (HK) Ltd* ("*Lasmos*")[34] ["**Re Southwest**"] initially took a pro-arbitration stance, stating that a winding-up petition would be dismissed if the debtor disputed the debt, the contract contained an arbitration clause

32. *AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)* [2020] SGCA 33.
33. n 32 para 99.
34. *Re Southwest Pacific Bauxite (HK) Ltd* [2018] HKCFI 426.

covering such dispute, and the debtor therein had taken substantive steps to commence arbitration.

However, subsequent decisions evolved these conditions, providing for a balanced and fact-oriented methodology. The Hong Kong Court of Appeal ["**HCA**"] in *Re Simplicity*,[35] articulated a "multi-factorial" approach; In alignment with the reasoning in *Sian Participation,* the decision required courts to assess the bona fides of the debtor's dispute and the authenticity of the intent to arbitrate. Although these criteria have been stated, the general presumption falls to stay the winding-up petition, if an alleged dispute thereon is covered by an arbitration agreement, barring exceptional reasons.

However, the reliance on *Salford* has faced critical scrutiny in Hong Kong.[36] The HCA in *But Ka Chon*[37] raised significant reservations and emphasized that the Hong Kong Arbitration Ordinance, nor its travaux préparatoires, mandate the strict curtailment of the court's discretion in winding-up. These critiques have paved way for potential shifts in doctrine, as highlighted in the recent decision in *Re Mega Gold,*[38] wherein the court, bound by precedent, reiterated the multi-factorial approach, but acknowledged the influence of the Privy Council's shift in reasoning in *Sian Participation*.

The divergence between the two decisions highlights ongoing tension within the jurisprudence. While the current stance favours a discretionary approach, there is a likelihood of convergence with the broader principles of *Sian Participation* in future appellate decisions.

D. India: A foresighted position

The debate surrounding the definition and standard of *dispute* in the context of insolvency and arbitration framework in India was discussed as early as 2017, in *Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd.*,[39] ["**Mobilox**"]. Extensively referring to the formulative international frameworks, in particular the UNCITRAL Model Law on

35. *Re Simplicity & Vogue Retailing (HK) Co. Limited* [2024] HKCA 229.
36. *Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd* [2020] HKCFI 311.
37. *But Ka Chon v Interactive Brokers LLC* [2019] HKCA 873.
38. *Re Mega Gold Holdings Limited* [2024] HKCFI 2286.
39. *Mobilox Innovations Pvt Ltd v Kirusa Software Pvt Ltd* [2018] 1 SCC 353.

Insolvency Legislation and various Finance Committee Reports, the SC underscored the policy objective of the code. The court then provided a detailed interpretation of what constitutes a "dispute" under Section 8(2)(a) of the IBC[40]. The Court emphasized that a "*dispute*" need not be limited to cases where proceedings are already pending in a court or arbitral tribunal. Instead, it adopted a purposive approach, reading the word "*and*" in Section 8(2)(a) as "*or*" to align with legislative intent and avoid anomalies. This interpretation ensured, considering the court expressing its doubts over the contrary, that even disputes arising shortly before the receipt of a demand notice can be considered, preventing operational creditors from initiating insolvency processes prematurely or for extraneous purposes.

The court further went on to clarify that for a dispute to be valid, it must be bona fide, substantial, and supported by evidence. The standard excludes frivolous, spurious, or hypothetical claims, this exclusion is akin to SCA's demarcation of patterns to determine abuse of the court's process.

Thus, in line with the decision in *Sian Participation* and *AnAn*, the decision underscores that a genuine dispute, backed by plausible contentions requiring further investigation, must lead to the rejection of an insolvency application.

E. Complexity in Classification: Obscurity due to overlooking of core dispute

As previously stated, the winding-up process does not, by its nature, address the underlying dispute regarding the debt but rather serves as a mechanism to assess the company's financial stability and protect creditor interests. However, paradoxically, the same principle has led to serious perplexity in India's insolvency jurisprudence. By disregarding the underlying disputes, creditors with previously contested claims now materialized through an arbitral award (or court decree) twhich was directed by an Adjudicating Authority ["**AA**"], or otherwise, find themselves relegated to a residual category within the IBC, undermining both their ability to initiate, and treatment within, the CIRP.

40. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 8(2)(a).

This quandary underscores the necessity for an analysis of the underlying nature of the debt, and the dispute, that led to the arbitration and the subsequent award. Undertaking an analysis of the specifics of the claim, creditors may be positioned along a proposed *sliding-scale*, wherein the debt classification ascertains the placement of creditors as either financial or operational nature. Such an approach would more accurately reflect the economic substance of their claims, allowing for the appropriate treatment post initiation of the CIRP.

III. BRIDGING THE DIVIDE: REDEFINING CREDITOR HIERARCHIES IN INSOLVENCY THROUGH THE SLIDING SCALE TEST

The issue regarding classification of award holders under the CIRP framework is not *res integra*. Various judicial pronouncements, most notably, the SC's judgment(s) in *Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy*[41] ["**Dena Bank Case**"] and *Kotak Mahindra v. A Balakrishnan*[42] ["**Kotak**"], and the NCLAT's judgment in *Kakade Estate v. HDFC Ventures*[43] ["**HDFC**"] have dealt with this issue before. However, the lack of uniformity in the application of these precedents has resulted in a fragmented legal position scattered across the judgments' respective reasonings.

The issue was explicitly brought to the forefront for the first time in the case of *Shubhankar Bhowmick v. Union of India*[44], in the Tripura High Court ["**Tripura HC**"], the petitioners in this case, challenged the absence of clarity regarding "other creditors" in Section 3(10) of the IBC,[45] arguing that this omission violated Article 14 by creating an artificial classification that left decree holders without effective remedies. The petition specifically sought to include decree holders under the purview of Regulation 9A as financial creditors.

41. *Dena Bank (Now Bank of Baroda) v C. Shivakumar Reddy* [2021] SC 349.
42. *Kotak Mahindra Bank Ltd. v A. Balakrishnan* [2022] SCC OnLine SC 706.
43. *HDFC Ventures Trustee Company Limited v Kakade Estate Developers Private Limited* (2023) NCLT, C.P. (IB) No. 747MB-IV/2022.
44. *Shubhankar Bhowmik v Union of India & Anr* [2022] Tripura HC WP(C)(PIL) No 04/2022.
45. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 8(2)(a); s 3(10).

A. The High Court's Reasoning

The Tripura HC, in its judgment, dismissed these arguments. The operative segment of the judgment stated,

> *"the rights of decree holders are inchoate and do not automatically translate into financial or operational debts under the IBC."*

The court relied heavily on the statutory framework of the IBC, emphasizing that the moratorium under Section 14(1)(a)[46] prohibits the execution of decrees once the Corporate Insolvency Resolution Process (CIRP) is initiated. The court further reasoned that "*Section 3(10) read with Section 53 establishes a clear hierarchy of creditors, and decree holders do not find an explicit mention within the categories of financial or operational creditors*".[47]

The court's reasoning for excluding decree holders' rests on the premise that litigation is an adversarial[48] process, in contrast to the CIRP under the IBC, which is intended to be a more cooperative, business-recovery mechanism. The court drew upon the Supreme Court's rulings in *Swiss Ribbons Pvt. Ltd. v. Union of India*[49], *Essar Steel India Ltd.*,[50] and *Committee of Creditors v. Satish Kumar Gupta*[51] to support this view, emphasizing that decree holders possess an inchoate right limited to execution. However, this reasoning fails to account for the distinct nature of arbitral awards, whose treatment as decrees is solely restricted to enforcement, warranting a differential treatment in the insolvency framework, a process which is not a mere enforcement mechanism.[52]

The Supreme Court has acknowledged that while an arbitral award is not a decree under Section 2(2) of the Civil Procedure Code (CPC),[53] it carries the characteristics of a decree for enforcement. This distinction is further clarified by the Telangana High Court in *M/S. Bhoomatha Para Boiled Rice and Oil Mill v. M/S. Maheshwari Trading Company &*

46. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 14.
47. *Shubhankar Bhowmik v Union of India & Anr* [2022] Tripura HC WP(C)(PIL) No 04/2022.
48. ibid.
49. *Swiss Ribbons (P) Ltd v Union of India* (2019) 4 SCC 17.
50. *Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta* (2019) 4 SCC 17.
51. ibid.
52. *GLAS Trust Company LLC v BYJU Raveendran & Ors* [2024] INSC 811.
53. The Code of Civil Procedure, 1908 (5 of 1908) s 2(2).

Ors.,[54] which recognized that arbitral awards, by legal fiction, are imbued with the characteristics of a decree solely for the purpose of enforcement.

In light of these considerations, the exclusion of arbitral award holders from the CIRP framework is unwarranted. Arbitration, unlike litigation, is not inherently adversarial. It is a party-driven process, founded on mutual consent, and offers flexibility through tailored mechanisms, such as liability caps, or other contractual terms that can mitigate the impact on the corporate debtor. These mechanisms make arbitral awards theoretically more acceptable for the losing party to effectuate, further aligning with the debtor's interests.

Thus, the differential treatment of arbitral award holders, as compared to that of civil decree holders, under the IBC is not only justified but also necessary to align the policy objectives of both frameworks. By recognizing arbitral awards as financial debts, subject to a nuanced classification based on the underlying claim, the legal landscape can better reflect the evolving jurisprudence surrounding business recovery and dispute resolution.

B. Apparent Affirmation by the SC

The problematic nature of the Tripura HC's judgment in *Shubhankar* has further been magnified due the SC's summary dismissal of the Special Leave Petition [**"SLP"**] in *Shubhankar Bhowmick v. Union of India* [**"Shubhankar Appeal"**],[55] adding another layer of complexity to the ongoing debate. The brevity of the order—stating merely, *We are not inclined to interfere with the impugned judgment*—has led to confusion about its implications and whether it should be regarded as a binding precedent under Article 141 of the Constitution of India.

C. Nature of the Dismissal and Precedential Value

The dismissal of an SLP *in limine*, without detailed reasons or a full examination of the merits, does not amount to a declaration of law under Article 141.[56] This principle has been consistently upheld by the Supreme

54. *M/S. Bhoomatha Para Boiled Rice and Oil Mill v M/S. Maheshwari Trading Company & Ors* 2009 SCC ONLINE AP 808.
55. *Subhankar Bhowmik v Union of India* SLP (C) No. 6104 of 2022.
56. The Constitution of India, 1950 art 141.

Court. In *The State of Odisha v. Dhirendra Sundar Das* (2019 SCC 6 270),[57] the Court categorically stated that such dismissals should not be construed as binding precedents. The Court explained:

> *"It is a well-settled principle of law... that the dismissal of a S.L.P. in limine simply implies that the case before this Court was not considered worthy of examination for a reason, which may be other than the merits of the case. Such in limine dismissal at the threshold without giving any detailed reasons, does not constitute any declaration of law or a binding precedent under Article 141 of the Constitution."*

Thus, the one-line dismissal in *Shubhankar* cannot be relied upon as a definitive interpretation of the IBC or the treatment of decree holders. It merely indicates that the Court chose not to interfere with the judgment of the lower court for reasons that remain undisclosed.

D. Sliding Scale Test and Nature of Arbitral Awards

To resolve this conundrum, a 'sliding scale test' is proposed, where the Resolution Professional (RP) or the court, as the case may be, must evaluate the nature of the underlying claim of the arbitral award and determine its appropriate classification within the Committee of Creditors (CoC). Unlike the approach in *Shubhankar*, wherein the petitioners aimed at a unilateral classification of arbitral award holders as financial creditors, the proposed test involves a thorough analysis of the underlying claim before assigning the award holder to the appropriate category.

The justification for granting the arbitral award holder a place in the CoC as financial creditor is rooted in the fact that they have an interest in the continued business operations of the corporate debtor, owing to their status as a creditor. Such continuity ensures that the contractual relationship which the award stems from can be further effectuated. Unlike the adversarial nature of litigation, where the aim is often to resolve disputes through termination or enforcement, arbitration seeks to resolve differences without necessarily ending the contractual relationship.

Furthermore, the passing of an arbitral award does result in some degree of crystallization of the underlying claim, of either a financial

57. *The State of Odisha v Dhirendra Sundar Das* (2019) 6 SCC 270.

or operational nature.[58] This is due to factors such as the- (i) finality of the award, (ii) distinction from pending claims, (iii) deemed status as a decree. However, the execution of that award is hindered by the moratorium imposed under the CIRP. While the award may carry the *mantle of a decree* through legal fiction for enforcement purposes,[59] the moratorium specifically halts the civil execution process but does not affect the classification of the award holder's claim for inclusion in the CoC. This reasoning finds footing in the Supreme Court's decision in *Kotak Mahindra Bank v. A. Balakrishnan*, wherein, considering the plea of the respondents (applying a similar reasoning as that of the Tripura HC) the court stated:

> *"Insofar as the contention of the respondents with regard to clause (a) of subsection (1) of Section 14 of the IBC is concerned, we do not find that the words used in clause (a) of subsection (1) of Section 14 of the IBC could be read to mean that the decreeholder is not entitled to invoke the provisions of the IBC for initiation of CIRP. A plain reading of said section would clearly provide that once CIRP is initiated, there shall be prohibition for institution of suits or continuation of pending suits or proceedings against the corporate debtor including execution of any judgment, decree or order in any court of law, tribunal, arbitration panel or other authority. The prohibition to institution of suit or continuation of pending suits or proceedings including execution of decree would not mean that a decreeholder is also prohibited from initiating CIRP, if he is otherwise entitled to in law. The effect would be that the applicant, who is a decreeholder, would himself be prohibited from executing the decree in his favour."*

In light of the *Kotak Mahindra* decision, it becomes evident that while the moratorium may bar the execution of decrees, it does not prevent a decree holder, including an arbitral award holder, from being classified as a financial creditor under the IBC.

The decision in *Shubhankar* was also subject to a review petition before the Tripura HC, in the case of *Review vs Sri Subhankar Bhowmik, 2022* [**"Shubhankar Review"**] the HC affirmed the NCLT's decision, clarifying that the property, while in the possession of the provisional liquidator,

58. Global Arbitration Review, 'The Arbitral Award: Form, Content, Effect' (25 January 2025) <https://globalarbitrationreview.com/guide/the-guide-challenging-and-enforcing-arbitration-awards/3rd-edition/article/the-arbitral-award-form-content-effect> accessed 1 January 2025.
59. *Subhankar Bhowmik v Union of India* SLP (C) No. 6104 of 2022.

was held in constructive trust for the decree holder under Bombay High Court's orders. The court interpreted Section 18's explanation, recognizing the property as the decree holder's asset. However, this reasoning applies specifically to cases where execution proceedings are underway, and there is an explicit court order favouring the decree holder. In the absence of such a situation, where the execution proceedings have not yet concluded or a similar order as discussed above has not been passed, the moratorium under Section 14(1)(a) of the IBC would spring to operation.

Consequently, if the arbitral award holder is left in the residual category of creditors during the CIRP, while also being unable to enforce the award due to the moratorium, they may be deprived of the entitlement granted to them by the award, coupled with a lack of rights under the CIRP as well. This situation would result in an unjust and disproportionate treatment of their rights, as highlighted by the petitioners in *Shubhankar*.

This lack of definitive guidance in *Shubhankar* leaves open the critical question of how decree holders should be classified under the IBC—a matter that requires closer judicial scrutiny. Notably, judgments under different legal contexts, such as the Companies Act and RERA, provide reasoning by the Supreme Court that highlights a constructive path forward.

E. Vishal Chelani v Debasis Nanda

The Supreme Court's judgment in *Vishal Chelani v Debasis Nanda* represents a nuanced interpretation of the IBC's provisions in the context of decree holders, particularly those with claims originating from regulatory frameworks like RERA. The case arose from a dispute where the appellants, home buyers, had secured decrees from the Uttar Pradesh Real Estate Regulatory Authority (UPRERA) due to delays in the completion of their real estate projects.

The primary question before the court was whether decree holders under RERA could be classified as financial creditors, thereby granting them participation rights in the Committee of Creditors (CoC). Addressing this issue, the court began by examining Section 5(8)(f) of the IBC, the court reasoned that the appellants' claims, based on payments made towards the purchase of real estate units, retained their nature as

financial debt even after being crystallized into decrees. It went on to clarify that obtaining a decree through RERA does not alter the fundamental nature of the underlying claim. The classification as financial creditors stemmed from the original financial transactions between the appellants and the developers, not from the procedural pathway through RERA. This approach reinforced the principle that the substance of the claim takes precedence over its form.

The judgment of the supreme court came in the form of perusal of the NCLT Mumbai Bench's decision in *Mr. Natwar Agrawal (HUF) v. Ms. Ssakash Developers & Builders Pvt. Ltd.*, where the NCLT held that creditor status depends on the nature of the underlying transaction rather than its procedural history.

Building on this reasoning, courts seem to have progressively developed a test which evaluates claims on a spectrum, considering their substantive characteristics rather than rigid procedural categorizations. Although the merits of the case revolved around a decree under the UPRERA, the NCLT's order relied in turn on the case of *Kotak Mahindra Bank v. A. Balakrishnan & Anr,*. One of the issues formulated in the judgment of *Kotak* was the validity of the court's previous judgment in *Dena Bank (Now Bank of Baroda) vs. C. Shivakumar Reddy.*[60]

F. Dena Bank (Now Bank of Baroda) v C. Shivakumar Reddy

The judgment in *Dena Bank* is instrumental in clarifying the rights of decree holders under the IBC framework. As far as the merits of the case, the Supreme Court dealt with the interplay between the limitation period for filing applications under Section 7 of the IBC[61] and the acknowledgment of debt as provided under Section 18 of the Limitation Act, 1963.[62]

With regard to the discussion on the rights of decree holders crystallized through said decree, or a recovery certificate, the court observed:

> *"A judgment or decree for money would give rise to a fresh cause of action and be considered as financial debt under the IBC, provided that such a claim satisfies the requirements of the Code."*

60. *Dena Bank (Now Bank of Baroda) v C. Shivakumar Reddy* [2021] SC 349.
61. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 7.
62. The Limitation Act, 1963 (36 of 1963) s 17.

The court clarified that the decree-holder's rights are not extinguished merely because the debt has crystallized into a decree. Instead, the decree serves as evidence of the financial debt, thereby enabling decree holders to invoke the IBC where the corporate debtor defaults in payment.

This reasoning aligns with the broader theme of evaluating claims based on their substantive nature rather than the rigid procedural categorizations, in line with the reasoning in *Sian*. While *Dena Bank* focused on the acknowledgment of debt and limitation, its observations about the treatment of decree holders have laid the groundwork for subsequent cases, such as *Kotak Mahindra Bank v. A. Balakrishnan,* which further explored decree holders' participation in the CIRP.

G. Discussion of Rights in Kotak

Discussing the rights of financial creditors, in *Kotak,* the Supreme Court examined the critical question of whether liabilities arising from Recovery Certificates fall within the ambit of financial debt under Section 5(8) of the Insolvency and Bankruptcy Code (IBC). The Court delved into the statutory language to determine whether such liabilities could be included, providing significant clarification on the rights of financial creditors.

The Court then proceeded to analyze the definition of financial debt in Section 5(8) of the IBC, observing:

> *"44. It will be pertinent to note that in clause (8) of Section 5 of the IBC, i.e., the definition clause of the term 'financial debt,' the words used are 'means a debt along with interest, if any, which is disbursed against the consideration for the time value of money and <u>includes</u>…"* [Emphasis Supplied]

1. *Interpretation of 'includes'*

The Court examined whether liabilities from a Recovery Certificate qualify as "financial debt" under Section 5(8) of the IBC. The court ruled that the term "includes" in interpretation clauses broadens rather than constrict, the scope, making the categories in Section 5(8) illustrative, and not exhaustive. Therefore, it ruled that liabilities arising from Recovery Certificates should be considered financial debt.

The Court also clarified the relationship between claims, debts, and defaults. A "claim", even if not reduced to judgment, constitutes a "debt",

and a default arises from non-payment of such debt. The respondents' argument that a claim converted into a decree falls outside the scope of Section 5(8) was rejected, as it contradicted the IBC's plain meaning.

2. *The Divergence in Reasoning*

The respondents in *Kotak* argued that the decision in *Dena Bank* was rendered *per incuriam*, as it ignored binding precedents set by the Supreme Court. Of the three cases cited to support this contention, two pertained to the limitation period of the petition, which was central to the issue before the Court. The respondents contended that these cases, though directly relevant, were not considered in *Dena Bank*, thus rendering its reasoning incomplete.

The third decision cited by the respondents was *Paramjeet Singh Patheja v. ICDS Ltd.*,[63] [**"Paramjeet"**] a case which dealt with the treatment of arbitral awards under the CIRP and the limited legal fiction accorded to arbitral awards as civil decrees. In this context, the respondents emphasized that *Dena Bank* overlooked the principles laid down in *Paramjeet Singh Patheja* regarding the legal status and enforceability of decrees, thereby failing to consider important precedents that could have shaped the interpretation of financial debt under the IBC.

Although the Supreme Court dealt with the question of limitation to completion in the judgment itself, it did not provide any opinion upon the argument regarding the legal fiction accorded to arbitral awards. The court dismissed the submissions concerning *Patheja*, stating that the same was different in context from the court's analysis, which was concerning provisions of the IBC.

Moreover, the judgment in *Patheja* was held to be *per incuriam* by a division bench of the Supreme Court in the case of *Sabarmati Gas Limited v. Shah Alloys Limited*, [**Sabarmati**] in 2023, the court stated:

> *"11. In the light of the position settled thus, in Paramjeet Singh Patheja's Case (supra), it is relevant to refer to an earlier two-Judge Bench decision of this court in Kailash Nath Agarwal and Ors. v. Pradeshiya Industrial & Investment Corporation of U.P. Ltd. .... It is relevant to note in this context that the decision in Kailash Nath Agarwal's Case (supra) was not brought to*

63. *Paramjeet Singh Patheja v ICDS Ltd* (2006) 13 SCC 322.

the notice of the later bench while deciding Paramjeet Singh Patheja's Case (supra). In other words, the latter case was decided per incuriam." [Emphasis Supplied]

H. The Sliding Scale Test

In conclusion, the Supreme Court's rulings in *Vishal Chelani v. Debasis Nanda* and *Dena Bank v. C. Shivakumar Reddy* have collectively solidified the foundation for understanding the classification of creditors under the Insolvency and Bankruptcy Code (IBC), especially when it comes to decree holders. The court's reasoning, akin to the application of a sliding scale test—evaluating the substance of claims over their procedural histories—has proven instrumental in defining the rights of financial creditors, regardless of whether their claims were crystallized through judicial decrees or other regulatory proceedings like RERA. In essence, the test offers a sophisticated framework that accommodates the complexities of diverse creditor claims.

The sliding scale test prioritizes the underlying nature of the claim, affirming that a debt or liability originating from a financial transaction retains its character as financial debt, even after it is transformed into a decree. The core principle here is that creditors' rights must be determined by the substantive characteristics of the transaction, rather than rigid procedural formalities.

This test has found frequent application in several subsequent rulings by the National Company Law Appellate Tribunal (NCLAT),[64] where the Tribunal has reinforced the Supreme Court's reasoning in evaluating claims. In particular, the NCLAT has consistently emphasized that the substance of the financial relationship between the parties, whether formalized by decree or otherwise, should determine creditor classification under the IBC.[65]

64. Abhishek Saxena, *'Arbitration Awards as 'Debt' for Initiating Corporate Insolvency Proceedings in India'* (September 1, 2021) JGILS Working Paper No. 2/2021 <https://dx.doi.org/10.2139/ssrn.3911862>.
65. *HDFC Ventures Trustee Company Limited v Kakade Estate Developers Private Limited (*2023) NCLT, C.P. (IB) No. 747MB-IV/2022.

IV. CONCLUSION: FORMALIZING AN IMPLICIT SOLUTION

A. The efficacy of the IBC regime

About a year ago, at The conference on Resolution of Stressed Assets and IBC – Future Road Map, organized by the Centre for Advanced Financial Research and Learning (CAFRAL), the then governor of the Reserve Bank of India [**RBI**], Dr. Shaktikanta Das, delivering the keynote address began by stating that the bankruptcy laws globally, serve a common public goal, of providing an avenue for recycling of capital tied up in inefficient firms, concluding this remark, he stated that bankruptcy laws promote entrepreneurship in the country.[66]

Further, sharing statistics reported by the Insolvency and Bankruptcy Board of India [**IBBI**], Dr. Das reported that since the inception of the Insolvency code, a total of 7,058 corporate debtors have been admitted to the CIRP, of which approximately 71.6% of the cases have been concluded. Among these cases, 16% have seen successful resolution plans, and 19% have been resolved through alternative forms of settlement.[67] The Governor emphasized the growing effectiveness of the IBC regime in India, highlighting a steady upward trend in the number of resolutions. This trend has seen an increase from 21% in the financial year ["**FY**"] 2017-18 to 45% in FY 2022-23.

B. The International Arbitration Landscape: Lessons for India

The International Chamber of Commerce [**ICC**], in July of 2024, released its arbitration and ADR statistics for 2023.[68] In its report, the ICC highlighted the registration of 890 new arbitrations, third highest in its history, and fourth highest overall since the year 2020. This year-on-year increase in the number of cases is indicative of the adoption of Arbitration as the preferred mode of dispute resolution, globally.

66. Shaktikanta Das, 'Insolvency and Bankruptcy Code – Towards Achieving Full Potential' (11 January 2024) <https://www.bis.org/review/r240117f.htm> accessed 12 January 2025.
67. ibid.
68. International Chamber of Commerce, 'ICC Dispute Resolution 2023 Statistics' (2024) <https://iccwbo.org/wp-content/uploads/sites/3/2024/06/2023-Statistics_ICC_Dispute-Resolution_991.pdf> accessed 12 January 2025.

In the Indian context, a survey by the law firm Khaitan & Co. revealed that a substantial majority of respondents intend to use domestic arbitration in the future for both small disputes (75% of respondents) and large disputes (85% of respondents).[69]

Moreover, the Draft Arbitration and Conciliation (Amendment) Bill, 2024[70] [**Draft Arbitration Bill**], proposes stricter guidelines for the entirety of the process of arbitration, all the way from commencement,[71] to appeal.[72] The draft bill seeks to promote institutional arbitration, reduce court intervention in arbitration proceedings, and facilitate the timely conclusion of proceedings in India.

The draft arbitration bill is based on the recommendations contained in the Report of the Expert Committee to Examine the Working of the Arbitration Law and Recommend Reforms in the Arbitration and Conciliation Act 1996. [**"Arbitration Act Reforms Committee, Committee"**] Fascinatingly, the committee was chaired by chaired by Dr. T. K. Viswanathan, the same individual who led the BLRC in 2014.

The Arbitration Reforms Committee, in Part 3 of its report, addressed critical challenges under the Arbitration and Conciliation Act, particularly in Recommendation 3.26.6. This recommendation highlighted the difficulties faced by arbitral award winners when insolvency proceedings are initiated after an arbitral award has been passed. The Committee acknowledged that such scenarios create significant legal and procedural hurdles, as the initiation of insolvency often results in a stay or suspension of enforcement actions. Consequently, arbitral award winners may find themselves unable to realize the benefits of their awards, despite having a favorable decision.

Although the recommendation primarily addressed the enforcement challenges, another significant issue emerged concerning their classification under the IBC. As mentioned, arbitral award holders often encounter difficulties when they seek to initiate insolvency proceedings themselves or in their subsequent treatment during the CIRP.

69. Khaitan & Co, 'Current Trends in Domestic Arbitration in India' (2024) <https://www.khaitanco.com/current-trends-in-arbitration-in-india-2024> accessed 12 January 2025.
70. Draft Arbitration and Conciliation (Amendment) Bill, 2024 (18 Oct 2024).
71. Draft Arbitration and Conciliation (Amendment) Bill, 2024 (18 Oct 2024) s 8.
72. Draft Arbitration and Conciliation (Amendment) Bill, 2024 (18 Oct 2024) s 37.

C. Evolving Jurisprudence in Creditor Classification: An unstated standard

To conclude, the interplay between arbitration and insolvency framework warrants the need for a more refined and consistent framework for creditor classification, based not on the proof of debt, but the underlying nature of the same. The NCLAT in the case *of M/s Annapurna Infrastructure Pvt. Ltd. & Anr. v. M/s. SORIL Infra Resources Ltd.* ["**Annapurna**"] recognized arbitral awards as admissible proof of debt to initiate insolvency proceedings.[73]

The dilemma in classification is exemplified in cases such as *Shubhankar,* and reflects the complexity in effectuating a harmonious construction of the two frameworks, and the policy considerations linked with them.

The sliding scale test proposed in this paper offers a viable solution to these challenges. By analyzing the substantive nature of the underlying claim, this approach allows for a more nuanced classification that reflects the economic realities of the transaction. Although not explicitly named, its principles are increasingly evident in judicial reasoning, the Supreme Court's recent decision in *Global Credit Capital Limited v. Sach Marketing Pvt. Ltd,*[74] is an example. Here, the Court emphasized the necessity of examining the real nature of the transaction, focusing on the core correlation between the debt and the service or goods provided to determine its classification.[75]

The evolving jurisprudence is suggestive of an implicit judicial endorsement of the test, providing an equitable creditor classification while maintaining the IBC's foundational objectives. An explicit adoption of the test would aid the harmonious construction of the two frameworks.

73. *M/s Annapurna Infrastructure Pvt Ltd & Anr v M/s SORIL Infra Resources Ltd* [2017] NCLAT 32 at [26].
74. *Global Credit Capital Ltd v Sach Marketing Pvt Ltd* [2024] 5 SCR 215.
75. n 74 para 20.

Decoding the Initial Public Offering Rush: Market Influences, Retail Participation and Global Reflections

—Parth Birla & Sakshi Tiwari[*]

ABSTRACT

The article titled "Decoding the IPO Rush: Market Influence, Retail Participation, and Global Reflections" examines the exceptional surge in the IPO market during 2024, highlighting its unprecedented growth and the factors contributing to this phenomenon. But a closer look at the dynamics in play shows that this boom is being driven by a combination of market, regulatory, and economic factors. The structure of the article includes an introduction to the IPO landscape, a detailed analysis of market trends, comparisons with global activities, and an exploration of key factors driving IPO premiums. It also seeks to explore the hidden risks associated with such momentum and tries to navigate the future outlook of global capital markets.

The authors conclude that the Indian public offer market's success is largely attributed to heightened retail investor enthusiasm, favourable market conditions, and supportive regulatory measures from the SEBI. The novelty of this submission lies in its comprehensive analysis of both domestic and international IPO trends, providing insights into investor behaviour and market dynamics. The piece also contains suggestions that SEBI can undertake in order to curb speculative trading and protect investor interests. The authors stress the significance of comprehending market sentiment and speculative behaviours that impact pricing dynamics, in an effort to present

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a comprehensive perspective on the issue at hand and look to add to the body of knowledge by bridging the gap. It offers practical suggestions for investors navigating this vibrant landscape, thereby enhancing its usefulness for both practitioners and academics interested in capital markets.

Keywords: IPO Market Boom, Retail Investor Participation, Market Sentiment and Speculation, Global IPO Comparisons.

I. INTRODUCTION

The year 2024 can be termed a breakthrough year for the Indian Initial Public Offer (**IPO**) market. The National Stock Exchange (**NSE**) of India dominated the Asian IPO Market with more than 300 listings across the Mainstream and Small and Medium Enterprises (**SME**) sector .[1] In monetary terms, the companies in the Indian market raised close to US$1.8 trillion.[2] In terms of volume of IPOs, Indian stock markets comfortably surpassed their contemporaries such as the National Association of Securities Dealers Automated Quotations (**NASDAQ**), New York Stock Exchange (**NYSE**), Shanghai and Hong Kong Stock Exchanges etc.[3] Inarguably, public offerings have always remained a lucrative way for companies to access public capital, facilitating growth and expansion. By going public, companies not only raise funds but also gain visibility, enhance credibility, and create liquidity for shareholders. While these stats do portray that the Indian IPO market has experienced unprecedented activity in 2024, it is essential to mention that heightened investor

1. ANI, 'The year of IPOs: A record-breaking ₹1.8 lakh crore raised from initial public offerings in 2024' (*The Hindu Business Line,* 21 December 2024) <https://www.thehindubusinessline.com/markets/the-year-of-ipos-a-record-breaking-18-trillion-raised-from-initial-public-offerings-in-2024-says-motilal-oswal report/article69012302.ece#:~:text=The%20Indian%20primary%20market%20witnessed,IPOs%20so%20far%20this%20year> accessed 2 January 2025.
2. Pranati Deva, '2024 Review: Indian IPO market shatters records as 317 issues raise ₹1.8 trillion' (*The Livemint, 23 December,* 2024) <https://www.livemint.com/market/ipo/2024-review-indian-ipo-market-shatters-records-as-317-issues-raise-rs-1-8-trillion-11734930837078.html> accessed 2 January 2025.
3. Hormaz Fatakia, 'NSE helps companies raise $19.5 billion in 2024, higher than every global market' (*CNBC TV18,* 3 January 2025) <https://www.cnbctv18.com/market/nse-helps-companies-raise-19-5-billion-in-2024-higher-than-every-global-market-19534099.htm> accessed 3 January 2025.

enthusiasm for newly listed companies is one of the core reasons for this humongous success.

The remarkable performance of SMEs in the IPO landscape is one of the key highlights of the Indian securities market in 2024. They have set new benchmarks in oversubscription and listing gains.[4] For instance, retail investors oversubscribed HOAC Foods India, an SME IPO, by more than 2,500 times, demonstrating the high demand for these shares.[5] This surge in IPO activity has been accompanied by magnified listing gains due to higher premiums. Further, shares like Vibhor Steel Tubes and BLS E-Services have witnessed impressive listing day gains of 195%[6] and 172%,[7] respectively. In total, as many as 21 mainboard IPOs recorded listing gains of 10% or higher in the first half of last year.[8] The difference between the price at which a company offers its shares during IPO and the price at which those shares trade after being listed on the stock market is known as the IPO premium.[9] It reflects the behaviour of investor demand and market sentiment, driven by factors like the company's growth prospects, financial health, and industry trends. By analysing such premiums, an investor can perceive the investment climate and assess the value of newly listed companies. It becomes more pertinent in the Indian market, where both retail and institutional investors

4. Nikhil Agarwal, 'SME IPOs look like a tale of listing day boom and then gloom' (*The Economic Times,* 4 September 2024) <https://economictimes.indiatimes.com/markets/ipos/fpos/sme-ipos-look-like-a-tale-of-listing-day-boom-and-then-gloom/articleshow/113049414.cms?from=mdr> accessed 3 January 2025.
5. NDTV Profit, 'HOAC Foods India IPO Allotment Is OUT: Follow These Steps To Check Application Status' (*NDTV Profit*, 22 May 2024) <https://www.ndtvprofit.com/ipos/how-to-check-hariom-atta-spices-ipo-allotment-status-online> accessed 3 January 2025.
6. Aseem Thapliyal, 'Vibhor Steel Tubes shares end 195% higher on listing day; should you hold or book profit?' (*Business Today,* 20 February 2024) <https://www.businesstoday.in/markets/company-stock/story/vibhor-steel-tubes-shares-rise-ipo-price-listing-gains-418233-2024-02-20> accessed 3 January 2025.
7. Akash Podishetti, 'BLS E-Services jumps 172% over IPO price after stellar listing. Should investors hold or sell now?' (*The Economic Times,* 6 February 2024). <https://economictimes.indiatimes.com/markets/stocks/news/bls-e-services-jumps-172-over-ipo-price-after-stellar-listing-should-investors-hold-or-sell-now/articleshow/107455193.cms?from=mdr> accessed 3 January 2025.
8. Nishant Kumar, 'What is causing IPO boom in India? Why are experts worried about investor frenzy?' (*The Livemint*, 3 July 2024) <https://www.livemint.com/market/ipo/stock-market-today-what-is-causing-the-ipo-boom-in-india-why-are-experts-worried-about-investor-frenzy-11719923337118.html> accessed 3 January 2025.
9. Groww, 'What is Grey Market?' (*Groww*) <https://groww.in/p/what-is-grey-market> accessed 4 January 2025.

are increasingly participating in IPO-related activities.[10] Strong demand, high growth forecasts, and positive industry trends are sometimes indicated by an overwhelming IPO premium. Inflated premiums, however, can also be a sign of overexuberance in the market or speculative trading, which could cause fluctuation after listing. As seen in certain instances when companies debuted below their issue prices, the volatility connected with IPO premiums can lead to miscalculated risks.[11]

This article seeks to explore the ongoing IPO boom in the Indian market along with its global equivalents. It seeks to delve into the root causes behind these soaring premiums along with the rising participation of retail investors and how several factors such as market sentiment, company fundamentals, industry outlook, and global trends affect it. Comparing cases within India and abroad markets helps to offer insights into how these factors influence pricing dynamics, helping investors navigate the complexities of IPO investments. Additionally, this paper endeavours to identify the recent regulatory measures taken up by the Securities and Exchange Board of India (**SEBI**) to ensure a controlled growth of the public issue market. Ultimately, it strives to conclude the findings in a nutshell along with possible suggestions that may reflect positive outcomes on the future of IPO premiums and ancillary aspects in India.

II. DISCOVERING THE RECENT TRENDS IN THE INDIAN AND GLOBAL IPO MARKET

The rise of the Indian IPO market has been consistent throughout the years, with a total of 91 companies raising ₹1.60 lakh crore through main board IPOs in 2024, marking a significant jump from 2023, when 57 IPOs brought in ₹49,436 crore.[12] This reflects a threefold increase in funds raised, highlighting its growing momentum. The boom has been largely facilitated by user-friendly investment platforms like Zerodha,

10. Veluvali, P., *Retail Participation in IPOs: Trends and Analysis. In: Retail Investor in Focus* (Springer Publication 2019) 105-119.
11. Wang, Z. and others, 'A Review of Research on Factors Influencing IPO Premiums' (2024) Highlights in Business, Economics and Management 1018-1023.
12. Moneycontrol, 'IPO pipeline for 2025 looks staggering, get ready for another record year' (*Moneycontrol*, January 2025) <https://www.moneycontrol.com/news/business/ipo/ipo-pipeline-for-2025-looks-staggering-get-ready-for-another-record-year-12907136.html> accessed 4 January 2025.

Groww, and Upstox.[13] These platforms have made applying for IPOs simpler than ever, offering a hassle-free digital experience, low fees, and resources to help first-time investors navigate the process with confidence. The number of Demat accounts has skyrocketed from ₹4 crore in 2020 to ₹17.5 crore in 2024.[14] Meanwhile, domestic equity investments have surged to ₹128 lakh crore in FY24, highlighting the significant rise in retail investor activity.[15]

It's worth noting that investors are often more drawn to IPOs than regular stock market investments. For a simple reason, if they manage to secure an allotment for a highly sought-after IPO, it augments the chances of making substantial listing gains on the debut day. A listing gain is the profit an investor earns when the price of an IPO stock rises on its first trading day, due to a premium, after being listed on the stock exchange.[16] It's calculated by subtracting the IPO issue price from the share's listing price. For instance, the IPO price band for the shares of Waaree Energies was kept at ₹1,427-1,503.[17] However, the share made its debut in the market at ₹2,585.[18] Thus, it provided an avenue for investors to make a listing gain of up to 70% within one day. Due to such lucrative opportunities, Indian IPOs are witnessing heavy oversubscriptions by investors. The table below would further help us to understand the situation through some factual data of some IPOs:

IPO	Issue Price (₹)	Oversubscription	Listing Price (₹)	Listing Gain
IREDA	32	38.80 times	50	87.5%
DOMS	790	99.34 times	1,400	67.8%

13. Md Salman Ashrafi, 'Groww hits 13 Mn active users in December, Zerodha's growth slows' (*Entracker*, 10 January 2025) <https://entrackr.com/news/groww-hits-13-mn-active-users-in-december-zerodhas-growth-slows-8606740> accessed 14 January 2025.
14. SBI Securities, 'India Demat Story – 17.10 Crore and Still Counting' (*SBI Securities*, 12 September 2024) <https://www.sbisecurities.in/blog/indias-demat-accounts-growth-crossed-17-crore-mark> accessed 4 January 2025.
15. Teji Mandi, 'India's IPO Boom: A Turning Point for Startups & Investors' (*LinkedIn*, 8 November 2024) <https://www.linkedin.com/pulse/indias-ipo-boom-turning-point-startups-investors-tejimandiapp-pnc5f/> accessed 4 January 2025.
16. Upstox, ''What is IPO Listing Gain?' (*Upstox*, 11 October 2022) <https://upstox.com/learning-center/ipo/what-is-ipo-listing-gain/> accessed 4 January 2025.
17. Chhitorgarh, 'Waaree Energies Limited IPO (Waaree Energies IPO) Detail' <https://www.chittorgarh.com/ipo/waaree-energies-ipo/1888/> accessed 4 January 2025.
18. ibid.

IPO	Issue Price (₹)	Oversubscription	Listing Price (₹)	Listing Gain
Motisons Jewellers	55	173.23 times	109	88.3%
Exicom	142	133.56 times	265	58.4%
AU Small Finance Bank	358	53.60 times	677	89.11%

Source: Livemint

However, the dynamics have shifted with every IPO as the oversubscription, market premium, and listing gains are all part and parcel of the market outlook along with other allied factors. It is often seen that some of the biggest IPOs have made market debut with weak openings and meagre oversubscriptions therefore not living up to its initial hype. Some of the notable public issues with such unfortunate outcomes are as follows:

IPO	Issue Size (₹cr)	Issue Price (₹)	Oversubscription	Listing Gain
Hyundai	27,87	1,960	2.4 times	(-)5.8%
Paytm	18,300	2,150	1.89 times	(-)9.3%
LIC	21,000	949	2.9 times	(-)7.7%
SBI Cards	10,341	755	26.5 times	(-)9.5%
Reliance Power	10,123	450	73 times	(-)17.2%

Source: Fortune India

This trend is not novel to the securities market as highly anticipated public offers such as Reliance Power (2008), and SBI Cards and Payment Services (2020) also performed miserably on their opening day on the indexes.[19] Another area that garnered a lot of attention was the SME IPOs. "*In India, the SME platform was introduced to serve as a medium*

19. Chitranjan Kumar, 'From Hyundai to LIC to Paytm: All big IPOs failed on market debut, here's why' (*Fortune India*, 22 October 2024) <https://www.fortuneindia.com/investing/from-hyundai-to-lic-to-paytm-all-big-ipos-failed-on-market-debut-heres-why/118873> accessed 7 January 2025.

of equity financing for small and medium enterprises which are not able to list their issues on the main board of stock exchanges because of the stringent eligibility criteria."[20] Since its inception in 2012, it has been actively serving its rationale. Between April 1 and October 31, 2024, India witnessed a significant surge in IPOs, out of a total of 217 IPOs during this period, an impressive 169—nearly 78%—came from SMEs.[21] However, despite their large share in numbers, SMEs accounted for just 6% of the total funds raised.[22] This highlights the relatively modest capital these companies secure through IPOs, leaving them more vulnerable to potential market manipulation. An example can be the SME IPO of Winsol Engineers Ltd. wherein the share provided a listing gain of 386.67%, with the stock price increasing from ₹75 to ₹365 on the opening day.[23]

A. Global Trend

Correlating the latest trend within the Global IPO market also reveals that the surge in IPOs showed regional variations. *"The global IPO market recorded 1,215 deals, raking in US$121.2b in proceeds for 2024, falling slightly behind 2023 levels. The IPO volumes fell 10%, with proceeds down by 4% year-on-year."*[24] It is already established that India had a fantastic 2024 and it topped the IPO listing in terms of the number of deals, however, the United States (US) remained on top in terms of total proceeds raised from investors in 2024.[25] The surge in the US markets can

20. A. R. Tripathi and others, 'SME IPOs in Indian Capital Market' (2017) SCMS Journal of Indian Management, July - September 2017, 44-53.
21. Pranati Deva, 'SME IPO Frenzy: Opportunity or bubble? 2024 sees record ₹8,200 crore raised by SME firms'(*The Livemint*, 13 November 2024) <https://www.livemint.com/market/ipo/sme-ipos-raise-record-8-200-crore-in-2024-is-it-an-opportunity-or-a-brewing-bubble-11731484777805.html> accessed 7 January 2025.
22. ibid.
23. Moneycontrol, 'Winsol Engineers impresses Street with massive 387% premium on NSE SME' (*Moneycontrol*, 14 May 2024) <https://www.moneycontrol.com/news/business/ipo/winsol-engineers-impresses-street-with-massive-387-premium-on-nse-sme-12721414.html> accessed 7 January 2025.
24. Sophia Mah, '2024 IPO wrapped: Americas and EMEIA recover, Asia-Pacific lags' (*EY*, 3 January 2025) <https://www.ey.com/en_sg/newsroom/2025/01/2024-ipo-wrapped-americas-and-emeia-recover-asia-pacific-lags> accessed 7 January 2025.
25. Louis Goss, 'The U.S. is back at top for money raised in IPOs — but this country had more deals' (*Marketwatch,* 18 December 2024) <https://www.marketwatch.com/story/the-u-s-has-overtaken-china-as-worlds-ipo-capital-even-though-india-had-more-deals-ced1b2ad?ut> accessed 7 January 2025.

be attributed to international listings of companies based in China, Hong Kong, Australia etc. These international listings reached a record high, making up 55% of the total listings with 101 IPOs.[26] The ongoing artificial intelligence rally in the American markets also increased the growth of the market. Furthermore, the Asia-Pacific Region topped the charts in terms of regional IPO listing demonstrating a 21.5% growth in terms of proceeds in comparison to 2023,[27] largely due to India's contribution. China's public offer market plummeted, securing only US$8.9 billion compared to US$45.3 billion in 2023, reflecting structural and cyclical challenges.[28] However, Japan registered a remarkable 275% growth in terms of IPO proceeds for the year 2024 due to high liquidity in the market.[29] While Australia saw its sharpest decline in volume in more than 20 years, the European Union was able to double its public listing proceeds from the previous year rising by €7.4 billion to €14.6 billion.[30] Therefore, the global IPO activities faced a slight decline in 2024; regional disparities highlighted India and the US as key drivers, with Japan and the EU showing remarkable growth despite challenges in markets like China and Australia which are largely influenced due to external factors.

III. KEY FACTORS DRIVING SOARING IPO PREMIUMS

The soaring premiums associated with Indian IPOs can be attributed to a confluence of factors ranging from heightened retail investor enthusiasm to supply-demand imbalances exacerbated by smaller offer sizes,

26. ibid.
27. Abha Raverkar, 'Indian IPO market set for record growth in 2025, dominates Asia Pacific in 2024: Report' (*Upstox*, 29 November 2024) <https://upstox.com/news/business-news/latest-updates/indian-ipo-market-set-for-record-growth-in-2025-dominates-asia-pacific-in-2024-report/article-137477/> accessed 7 January 2025.
28. Deloitte, '2024 Review and 2025 Outlook for Chinese Mainland & HK IPO markets' (*Deloitte*, 18 December 2024) <https://www.deloitte.com/cn/en/pages/audit/articles/2024-review-and-2025-outlook-for-chinese-mainland-and-hk-ipo-markets.html> accessed 7 January 2025.
29. Global Data, 'India dominates APAC IPO market in 2024 with over 200 public issues' <https://www.globaldata.com/media/business-fundamentals/india-dominates-apac-ipo-market-2024-200-public-issues-reveals globaldata/#:~:text=Japan%20saw%20a%20remarkable%20275.1,in%20its%20valuation%20and%20liquidity> accessed 7 January 2025.
30. Alistaire Osborne, 'European IPOs bounce back in contrast to moribund London market' (*The Times*, 31 December 2024) <https://www.thetimes.com/business-money/companies/article/european-ipos-bounce-back-in-contrast-to-moribund-london-market-plw2t78zs?utm_source=chatgpt.com&region=global> accessed 7 January 2025.

declining interest rates etc. As India's capital markets continue evolving amidst global comparisons, understanding these dynamics will be crucial for both investors and companies navigating this vibrant landscape.

One of the leading factors that has created a favourable environment for companies and investors can be said to be the enthusiasm of Indian retail investors.[31] The global markets and the economy have shown resilience and a strong recovery post-Covid-19 while experiencing consistent GDP growth over the past two decades, often surpassing 6%-7% annually.[32] This has instilled confidence in the companies to go public and enhanced liquidity among investors, creating a conducive environment for IPOs. In 2019-20, the average number of retail applications per SME IPO was just 408. Fast forward to the current fiscal year, and this number has surged to 2,13,000 applications per IPO, on average.[33] Further, there has been a shift in the trend of investing patterns of Indian investors, who earlier used to prefer safer asset classes such as gold and real estate over the volatility of the stock markets, which can be credited to increased financial literacy and awareness of market opportunities. This shift in the domestic investors' trend clubbed with a significant increase in foreign investments in Indian IPOs has led to substantial oversubscriptions,[34] pushing premiums higher as demand outstrips supply. According to an EY report, nearly 41% of global IPO proceeds in the first half of 2024 came from private equity and venture capital-backed firms, with India being a key region for these deals as the geopolitical conditions prompted multinational corporations to shift focus from China to India.[35]

31. Dhanendra Kumar, 'Why India is seeing a big, fat IPO boom' (*The Economic Times*, 7 November 2024) <https://economictimes.indiatimes.com/opinion/et-commentary/the-big-fat-ipo-boom/articleshow/115061403.cms> accessed 7 January 2025.
32. ION Analytics, 'Explosive India IPO scene attracts more issuers' (*ION Group*, 20 November 2024) <https://iongroup.com/blog/markets/explosive-india-ipo-scene-attracts-more-issuers/> accessed 7 January 2025.
33. Heena Ojha, 'Retail Investors Sustain SME IPO Frenzy As Subscriptions Cross 1,800 Times' (NDTV Profit, 30 August 2024) <https://www.ndtvprofit.com/markets/hoac-foods-to-magenta-lifecare-retail-investors-sustain-small-ipo-frenzy-as-subscriptions-cross-1800-times#:~:text=A%20key%20driver%20behind%20this,on%20an%20average%22%20said%20Haldea> accessed 10 January 2025.
34. Amit Goel and others, 'Asia's new bubble: Finding value in India's IPO boom' (*Fidelity International*, 11 June 2024) <https://www.fidelityinternational.com/editorial/article/asias-new-bubble-finding-value-in-indias-ipo-boom-6a207f-en5/> accessed on 10 January 2025.
35. George Chan, 'How can you adapt your IPO strategy in a dynamic market?' (*EY*, 26 June 2024) <https://www.ey.com/en_gr/insights/ipo/trends#:~:text=There%20was%20a%20leap%20in,PE%2FVC%2Dbacked%20companies> accessed 10 January 2025.

Apart from increased investor participation, mounting premiums can also be attributed to market sentiment and growing speculation. The Grey Market premium (**GMP**) serves as an unofficial index and an informal indicator of market perception regarding upcoming IPOs. A high GMP often reflects robust investor confidence and a positive outlook regarding future performance.[36] This speculative behaviour thus leads to inflated premiums as investors anticipate significant post-listing gains. During bullish sentiment[37] of the market or when the prices are expected to rise, it boosts investor confidence which tends to raise the GMP, reflecting optimism about potential gains. This sentimental speculation drives more investors to invest in an IPO, further inflating its premium whereas bearish sentiments decrease the GMP. The premium itself can be said to be influenced by a number of factors which include the size of the IPO and its subscription levels. Smaller and oversubscribed offerings often see higher premiums due to scarcity, while larger ones experience lower premiums as supply meets demand.

However, the factors affecting premiums cannot be said to be limited to retail investors only as the Role of Foreign Institutional Investors (**FII**) and Domestic Institutional Investors (**DII**) has also been crucial in driving IPO premiums. The share of DII has reached an all-time high of 16.46%, with a modest increase from 16.25%, with a net inflow of ₹1,03,625 crore during the quarter. Meanwhile, FII also saw a slight increase in their share to 17.55% , up from 17.39%, with a net inflow of ₹97,408 crore, comprising ₹67,059 crore in the secondary market and ₹30,349 crore in the primary market.[38] This institutional investment support has complemented the growing retail investments, which can be influenced by several

36. India IPO, 'SME IPO Grey Market Premiums Soar, But Experts Recommend Caution' (India IPO, 28 August 2024) <https://indiaipo.in/grey-market-premiums-skyrocket-for-upcoming-sme-ipos-even-as-experts-advise-caution> accessed 10 January 2025.
37. Anushka Sharma, 'ETMarkets Explainer: All you need to know about the grey market and what's at stake' (*The Economic Times,* 3 December 2023) <https://economictimes.indiatimes.com/markets/stocks/news/etmarkets-explainer-all-you-need-to-know-about-the-grey-market-and-whats-at-stake/can-grey-market-premiums-be-manipulated/slideshow/105693246.cms> accessed on 10 January 2025.
38. Sunaina Chadha, 'Domestic investors lead as mutual fund inflows push DII share to new height' (*Business Standard,* 7 November 2024) <https://www.business-standard.com/finance/personal-finance/domestic-investors-lead-as-mutual-fund-inflows-push-dii-share-to-new-height-124110700555_1.html> accessed 10 January 2025.

factors, as witnessed in the US markets with platforms like Robinhood.[39] This combination adds to the dynamic environment and propels the overall growth of the Indian stock market. Another factor contributing to the same is the underpricing strategy. It is basically a scheme used to create an artificial surge in the IPO demand by issuing shares below their real value in the market.[40] The low prices not only attract retail investors but also provide a better opportunity for existing shareholders to liquidate their holdings and exit the investment. Nevertheless, underpricing is not always deliberate and can conversely be accidental in some cases if the underwriters underestimate the demand for the stocks or if there is a miscalculation of the factors affecting the IPO pricing.

India's focus on promoting entrepreneurship and facilitating easier access to capital markets along with favourable market conditions such as low interest rates on traditional savings instruments, has also played an important role in motivating investors to look for higher returns through equities. The government initiatives such as streamlined regulatory processes by the SEBI have also made it easier for companies to launch IPOs quickly and efficiently.[41] Further, India's booming digital sector has its fair contribution to a strong public market. In the first nine months of 2024, six new startups achieved unicorn status, solidifying India's leading role in the global tech startup ecosystem. Additionally, 29 tech companies successfully conducted IPOs, capitalising on the flourishing startup landscape.[42] Government initiatives, such as incentive programs linked to production and Self-reliant India also had a role to play in strengthening investor confidence by developing the country's manufacturing sector by laying a strong foundation for the economy.

39. Zheyu (Jasper) Li1 and Sujata Bhatia, 'The Impact of Robinhood's Retail Investing App on Investor Psychology and Financial Markets' (2023) 12(3) Journal of Student Reserach.
40. Neghab and others, 'Identifying the Factors Influencing IPO Underpricing using Explainable Machine Learning Techniques', Proceedings of the Canadian Conference on Artificial Intelligence <www.researchgate.net/publication/371356134_Identifying_the_Factors_Influencing_IPO_Underpricing_using_Explainable_Machine_Learning_Techniques> accessed 10 January 2025.
41. Dhanendra Kumar, 'Why India is seeing a big, fat IPO boom' (*Economic Times,* 7 November 2024) <https://economictimes.indiatimes.com/opinion/et-commentary/the-big-fat-ipo-boom/articleshow/115061403.cms> accessed on 9 January 2025.
42. Mandeep Mehta, 'IPO Boom and the Digital Economy: A New Growth Path for Indian Startups' (*Economic Times,* 26 Oct 2024)<https://cfo.economictimes.indiatimes.com/blog/ipo-boom-and-the-digital-economy-a-new-growth-path-for-indian-startups/114609488#:~:text=Strong%20Domestic%20Demand,maintaining%20momentum%20in%20public%20offerings .> accessed on 10 January 2025.

IV. CASE STUDIES

It is essential to understand that an IPO just marks the commencement of the journey of a share in the stock market, and the long-term success of a share is the actual parameter used to review its performance. Recently, a study carried out by Capitalmind suggests that among the top 30 IPOs by valuation, 18 have underperformed relative to the returns generated by the Nifty 500 index.[43] Therefore, in order to decipher the issue to the core, it is necessary to delve into certain case studies by comparing cases within India and abroad as it helps investors navigate the complexities of IPO investments:

A. Zomato

Zomato's IPO debut in July 2021 can be considered a watershed moment in India's tech-driven stock market history. It is to be noted that the company's shares were listed at a premium of over 50% to its issue price[44], which indicated the positive outlook of investors and their confidence in the brand. The high listing gain on the opening day paved the way for optimism about Zomato's business model (*1st online food delivery platform*) and its position as a leader in the saturated online food delivery market. Strong company fundamentals, along with a growing customer base,[45]a well-established delivery network, and a focus on technology and innovation, further fortified hype.

Despite operating losses at the time of the IPO due to Covid-19, Zomato's long-term growth potential in an expanding digital economy attracted institutional investors as well as retail investors. The company's ability to scale rapidly and diversify into adjacent markets like grocery markets and strategic acquisitions (**Blinkit & UberEats**), and its ability to stay ahead of both global and local competitors made it even more attractive to investors. Due to these factors, the growth story continues,

43. Sunainaa Chadha, 'Coal India to RPower: 18 of biggest 30 IPOs fail to generate excess returns (*Business Standard,* 16 October 2024) <https://www.business-standard.com/finance/personal-finance/coal-india-to-zomato-18-of-biggest-30-ipos-fail-to-generate-excess-returns-124101600521_1.html> accessed on 10 January 2025.
44. News18, 'Zomato Lists at over 50% Premium on Issue Price on BSE, NSE.' (*News18*, 23 July 2021) <https://www.news18.com/news/business/zomato-lists-at-over-50-premium-on-issue-price-on-bse-nse-check-stock-price-details-3995972.html> accessed on 11 January 2025.
45. ibid.

even amid regulatory challenges[46] and cost pressures. The numbers also emphasise the same, with its share touching the ₹300 mark in December 2024, almost three times its opening price.[47] Its strong debut and subsequent trajectory highlight the confidence placed in its ability to deliver long-term efficient results.

Source: Economic Times

Another notable example is Limbach Holdings Inc. which is listed on NASDAQ. It was publicly listed in July 2016, pricing its shares at $10.00 each.[48] The stock's journey from its initial listing to its current levels, soaring to $94.46 as of January 2025[49] represents a remarkable transformation driven by solid financials and investor optimism. At the time of listing, the company gained attention for its specialised services in the building infrastructure industry, appealing to investors looking for exposure to the growing construction and retrofit markets. Although the company's initial listing gain was modest, its emphasis on building recurring revenue through maintenance contracts and delivering project-based work provided a strong foundation for steady valuation growth.

46. TOI, 'Zomato ordered to pay Rs. 800 cr in GST and fines by tax autohrities' *(Times of India,* 12 December 2024)<https://timesofindia.indiatimes.com/technology/tech-news/zomato-ordered-to-pay-rs-800-crore-in-gst-and-fines-by-tax-authorities-report/articleshow/116262479.cms#:~:text=According%20to%20Zomato's%20regulatory%20filing,Penalty%3A%20Rs%20401.7%20crore> accessed on 11 January 2025.
47. Upstox, 'Zomato shares hit record high; scrip crosses ₹300 mark for first time; check key updates' (*Upstox*, 5 December 2024) <https://upstox.com/news/market-news/stocks/zomato-shares-hit-record-high-stock-has-given-over-130-returns-so-far-in-2024/article-133463/> accessed on 12 January 2025.
48. Shrabana Mukherjee, 'Limbach Stock Hits 52-Week High: Here's Why It's Still a Strong Buy' (*Nasdaq*, 25 November 2024) <https://www.nasdaq.com/articles/limbach-stock-hits-52-week-high-heres-why-its-still-strong-buy> accessed on 12 January 2025.
49. ibid.

Zomato's and Limbach Holdings' performance punctuates the importance of strong company fundamentals, a clear strategic vision, and alignment with emerging market trends. The sustained growth of their shares (*due to differentiating factors*) reflects investor recognition of the company's leadership in its niche, resilience in navigating market challenges, and consistent delivery of shareholder value.

B. Paytm

Paytm's stock market journey on the other hand has been marked by significant volatility and investor skepticism. In November 2021, Paytm's parent company, One97 Communications, launched India's largest-ever IPO of its time, aiming to raise over ₹18,000 crores.[50] Despite the initial enthusiasm, the shares opened for trading at ₹1,950 on the NSE, marking a 9.3% discount.[51] By the end of the trading day, the stock nosedived over 27% to ₹1,560, reflecting the steepest first-day decline in Indian IPO history.[52]

This insipid debut was primarily attributed to concerns over its overvaluation and unclear profitability prospects. The investors' primary concerns were the company's intricate business plan and aggressive pricing strategy, which made them doubt its capacity to provide long-term rewards. In March 2022, the Reserve Bank of India (**RBI**) barred Paytm Payments Bank from onboarding new customers due to supervisory concerns,[53] and also alleged company for sharing data with China-based entities.[54] These regulatory setbacks intensified scrutiny over Paytm's governance and operational practices.

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50. Reuters, 'India's 10 biggest ever IPOs, led by Paytm', (*BusinessLine,* 10 November 2021) <https://www.thehindubusinessline.com/markets/stock-markets/indias-10-biggest-ever-ipos-led-by-paytm/article37411351.ece> accessed on 13 January 2025.
51. ENS Economic Bureau, 'Paytm lists at discount, trades at over 20% discount', (*Indian Express,* 18 November 2021) <https://indianexpress.com/article/business/market/paytm-debut-stock-market-7628971/> accessed on 13 January 2025.
52. ibid.
53. Chitranjan Kumar, 'RBI Bans Paytm Payments bank from onborading new customers' (*Fortune India,* 31 January 2024)<https://www.fortuneindia.com/enterprise/rbi-bans-paytm-payments-bank-from-onboarding-new-customers/115562> accessed on 14 January 2025.
54. Anoop Roy, Saritha Rai, 'Paytm Bank Punished for Sharing Data Abroad, Verification Lapses' (*Bloomberg,* 14 March 2022) <https://www.bloomberg.com/news/articles/2022-03-14/india-said-to-punish-paytm-bank-for-data-leaks-to-chinese-firms> accessed on 14 January 2025.

Finally, in October 2024, the National Payments Corporation of India permitted the company to onboard new users for its Unified Payments Interface (**UPI**) services, in order to redeem itself from regulatory surveillance. As of January 2025, Paytm's share is still trading below half of its IPO price, indicating persistent market scepticism about the company's value and potential for success. The company's experience emphasizes how crucial it is to match IPO estimates with realistic factors and uphold, transparent operational procedures in order to keep investor support.

The same story has been observed in stock exchanges all over the world, wherein *"Deliveroo, which is backed by Amazon, had a nightmare on its first day of trading on the London Stock Exchange. Soon after the markets opened, its shares fell from the issue price of £3.90 to around £2.73—a 30% drop—before recovering to £2.87 by the end of the day—a 26% drop."*[55] A similar fall has been registered in Rivian Automotive's stock which opened at $78 per share, however, currently, it is trading at $14.21 per share.[56]

These case studies exhibit how a company's financial position, external factors, and strategic positioning all substantially impact IPO premiums and post-listing results. It can be understood that there lies a critical relation among valuations, driven by premium levels, and the long-term performance of the share in the market. Initial hype, in the form of high premium levels or investor anticipation, does not guarantee sustained success. To appreciate the interaction between the possibility of steady, long-term returns and short-term listing profits, investors should practise due diligence at a personal level before making any substantial investment. In a similar vein, corporations may increase the chances of a successful IPO and maintain market trust by implementing an efficient pricing plan that complements its foundations.

55. Zaheer, 'IPOs that crashed and burned', (*Economic Times*, 20 November 2021) <https://economictimes.indiatimes.com/tech/newsletters/ettech-unwrapped/ipos-that-crashed-and-burned/articleshow/87810945.cms?from=mdr> accessed 14 January 2025.
56. Al Root, 'Rivian Stock Is Falling. Why This Analyst Downgraded the Shares' (*Barron's*, 18 December 2024) <https://www.barrons.com/articles/rivian-stock-trump-ev-downgrade-de24febe> accessed 15 January 2025.

V. CHARTING THE CROSSROADS OF RISKS AND CHALLENGES

It's intriguing to note that, while soaring IPO premiums often appeal to investors seeking high potential returns, they also bring along a range of risks and challenges that require careful consideration to mitigate them. Notable cases such as Swiggy,[57]Hyundai[58] and Cartrade,[59] highlight the dangers of inflated stock prices driven by speculative trading, making overvaluation a major concern. Further, the possibility of a market Bubble creates major hurdles, echoing similar patterns observed in global markets like the US and China.[60] Hence understanding the differing behaviours between those seeking immediate returns and long-term investors is crucial.[61]

The IPOs tend to be valued through a process which takes into consideration factors such as demand for shares, growth prospects, industry trends etc. Thus, when an IPO is undervalued, it gives an opportunity to the investors to book profits when the market gets corrected post-listing and the prices match up with its actual value. Conversely, when an IPO is overvalued mainly due to industry trends or hype for a particular company or brand, the market gets corrected post-listing and the investors (*especially retail investors*) suffer major losses resulting in wealth erosion.[62] The recent Hyundai IPO can be taken as an example to understand the same. The stock was issued at Rs.1960, got listed at

57. Chitranjan Kumar, 'Loss-making swiggy's 11,327 cr IPO overvalued' (*Fortune India*, 5 November 2024) <https://www.fortuneindia.com/investing/loss-making-swiggys-11327-cr-ipo-overvalued-brokerages/11899> accessed 15 January 2025.
58. Dhanya Nagasundaram, 'Hyundai Motor IPO sees slow pick up as analysts raise high valuation' (*The Livemint*, 15 October 2024) <https://www.livemint.com/market/ipo/hyundai-motor-india-ipo-sees-slow-pick-up-as-analysts-raise-high-valuation-concern-11728986210428.html> accessed 16 January 2025.
59. Alphaspread, 'Cartrade Company Fundamentals' <https://www.alphaspread.com/security/nse/cartrade/summary#:~:text=The%20intrinsic%20value%20of%20one,Ltd%20is%20Overvalued%20by%2050%25.> accessed 15 January 2025.
60. Ruchir Sharma, 'US markets staring at a 'dotcom bubble' like burst? Ruchir Sharma paints a scary picture of world's largest economy, (*Economic Times,* 13 December 2024) <https://economictimes.indiatimes.com/news/international/global-trends/us-markets-staring-at-a-dotcom-bubble-like-burst-ruchir-sharma-paints-a-scary-picture-of-worlds-largest-economy/articleshow/116274278.cms?from=mdr> accessed 16 January 2025.
61. Geoff Warren, 'Long-Term Investing: What Determines Investment Horizon?' (2014) Centre for International Finance and Regulation<https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2442631> accessed 16 January 2025.
62. AngelOne, 'What are the risks of investing in IPOs' <https://www.angelone.in/knowledge-center/ipo/risk-of-investing-in-ipo> accessed 16 January 2025.

Rs. 1,934, hit a high of Rs. 1,955 and fell as much as 7.6% before closing at 1,818.60.[63] The enterprise entered the market with significant market hype and was labelled as the largest IPO in India's history. This increased investor expectations leading to the overvaluation of the stock's price. The IPO valued Hyundai at 26 times its earnings for the fiscal year ended March 2024.[64] This simply means that investors were willing to pay ₹26 for every ₹1 of earnings generated by Hyundai during that Fiscal year. This highlights both, its strong market position as India's second largest car manufacturer[65] and reflects investor belief despite broader economic concerns.

On 3 November 2021[66] the US Reserve Bank announced its intention to lower interest rates and sell government bonds, although this announcement did not elicit an immediate reaction, it was realised that it was time to gradually withdraw from high-risk assets. The Hyundai IPO was only 2.37 times subscribed on its first day, out of which retail investors subscribed at a rate of 0.5%, while Qualified Institutional buyers (**QIBs**) and Non-Institutional Investors (**NIIs**) subscribed at just 6.97% and 0.6%, respectively. Hence, it can be concluded that it experienced varied subscription levels.[67] In a nutshell, in the retail category, the subscription rate was 0.5 meaning that for every 100 shares available, investors bid for 50 shares, while NIIs, primarily High- Net -Worth Individuals (**HNIs**) had a rate of only 0.6, meaning they bid just for 60 shares for every 100 offered. In contrast, the QIB category saw a subscription rate of 6.97, reflecting strong institutional interest. Investors typically expect to sell their allo-

63. Nandan Mandayam, Dhwani Pandya,'Hyundai Motor India drops 7% on debut after country's biggest IPO' (Reuters, 22 October 2024) <https://www.reuters.com/business/autos-transportation/hyundai-indias-shares-fall-13-debut-trade-after-record-33-bln-ipo-2024-10-22/> accessed 16 January 2025.
64. ibid.
65. India Today, 'Hyundai comfortably beats Tata to remain second largest carmaker in India in FY24', (*India Today,* 3 April 2024) <https://www.indiatoday.in/auto/latest-auto-news/story/hyundai-comfortably-beats-tata-to-remain-second-largest-carmaker-in-india-in-fy24-2522566-2024-04-03> accessed 16 January 2025.
66. Maarg Vaidya, Marketfeed, 'Why Was The PayTM IPO a Flop Show?' (*Marketfeed*, 22 November 2021) <https://www.marketfeed.com/read/en/why-was-the-paytm-ipo-a-flop-show> accessed 16 January 2025.
67. Economic Times, 'Hyundai IPO subscribed 237% on Day 3; check GMP and listing details' (*Economic Times*, 17 October 2024) <https://economictimes.indiatimes.com/markets/stocks/live-blog/hyundai-motor-india-ipo-live-updates-today-check-gmp-price-subscription-status-share-listing-date-time-ipo-news-15-oct-2024/liveblog/114232918.cms> accessed 16 January 2025.

cated shares on listing day for profit as in case of significant oversubscription those who missed allocations often seek to purchase shares, ultimately hiking the prices. However, in this case, lack of interest and tepid response from retail and non-institutional investors led to insufficient buyers for those looking to sell on listing day.

Additionally, such a hyperactive stock market also indicates the possibility of a market bubble as the experts caution that unsustainable growth may lead to a sharp correction. An economic bubble occurs when the prices of assets rise significantly above their intrinsic value and remain a common phenomenon in classes of assets such as stocks and real estate.[68] Bubbles often form during periods of economic expansion when liquidity is abundant and borrowing costs are low, leading to increased investment and inflated asset prices. With 230 % growth[69] in SME listings since 2020, valuations have increased in contrast with the company fundamentals which has helped fuel fears of an imminent bubble burst. The Market Capitalization to GDP ratio, commonly known as the Buffett indicator, is an important metric for assessing market valuation. At present, India's ratio is around 115%, which means the value of the stock market surpasses the nation's GDP. This situation raises concerns for an emerging economy as it is suggestive of excessive investment relative to economic activity.[70]

The Greenshoe option can further aggravate these concerns by contributing to inflated IPO premiums and market volatility. This mechanism allows underwriters to sell additional shares of up to 15% beyond the initial offer, in case demand exceeds expectations.[71] While this helps in stabilizing share prices by providing liquidity, it also risks creating artificial price fluctuations that may mislead investors about the true

68. Martin B. Tarlie, Georgios Sakaulis, Roy Kenriksson 'Stock market bubbles and anti-bubbles' (2022) 81 International Review of Financial Analysis 1057.
69. Abhishek Sharma, Satyam Mishra, 'India's SME IPOs: A Bubble Ready To Burst?' (*BusinessWorld*, 9 October 2024) <https://www.businessworld.in/article/indias-sme-ipos-a-bubble-ready-to-burst-535653> accessed 17 January 2025.
70. Ithought, 'Is the Indian Stock Market Turning Into A Big Bubble?' <https://ithought.co.in/is-the-indian-stock-market-turning-into-a-big-bubble/#:~:text=Recent%20Trends%20and%20IPO%20Mania,reminiscent%20of%20past%20bubble%20periods> accessed 17 January 2025.
71. P Saravanan, 'IPOs: From what is greenshoe option to how it helps investors, take a brief look at critical points' (*Financial Express*, 28 August 2017) <https://www.financialexpress.com/market/ipos-from-what-is-greenshoe-option-to-how-it-helps-investors-take-a-brief-look-at-critical-points-828323/> accessed 17 January 2025.

value of the share. Temporarily supporting or boosting the stock price can reinforce investor perceptions of high demand, attracting more speculative activity. It also leads to dilution of ownership for existing shareholders when additional shares are issued. Thus, if underwriters prioritise short-term gains over long-term stability, it can lead to differences in priorities that ultimately harm both the issuers and investors. The increased activity showcases both the enthusiasm of investors and the vitality of the Indian Economy. However, investors must remain cautious and beware of the potential risks that come with a thriving IPO landscape.[72] This is also a crucial time for investors to conduct thorough due diligence before investing in any IPO or stock. Whether this surge is a bubble poised to burst or a strategic chance for a market entry largely depends on the strategies adopted by the investors.

VI. REGULATORY AND POLICY IMPLICATIONS

Evidently, the emerging premium scenario has made the regulatory and policy landscape surrounding IPOs and the stock market in India pivotal in ensuring market integrity. SEBI has a crucial role to play[73] in the regulatory framework as it serves as the principal regulator, particularly overseeing IPOs. However, the present framework adopted by it is proving to be inadequate in addressing the challenges with respect to rising IPO premiums in India, especially in the SME sector. The crucial reason for such failure is due to the reactive approach of the regulator rather than adopting proactive means. While the board has recently rolled out amendments aimed at tightening regulations such as increasing minimum application sizes and enhancing eligibility criteria[74], these measures are not sufficient to mitigate the risks associated with inflated valuations and possible misuse of funds. The growth in SME IPOs has been significant,

72. Rahul Ghose, 'IPO Frenzy a bubble or the right strategy to enter a booming market' (*The Livemint*, 7 October 2024) <https://www.livemint.com/market/stock-market-news/ipo-frenzy-a-bubble-or-the-right-strategy-to-enter-a-booming-market-11728302286303.html> accessed 17 January 2025.
73. Bajaj Finserv, 'What is SEBI' <https://www.bajajfinserv.in/what-is-sebi#:~:text=SEBI plays a crucial role in the Indian financial system,intermediaries in the securities market> accessed 3 February 2025.
74. PTI, 'Sebi eases eligibility criteria related to superior voting rights shares' (*Economic Times*, 27 October, 2021) <https://economictimes.indiatimes.com/markets/stocks/news/sebi-eases-eligibility-criteria-related-to-superior-voting-rights-shares/articleshow/87311166.cms?from=mdr> accessed on 16 January 2025.

with a record 196 offerings generating over ₹6000 Cr. in FY23-24[75]. This growth has sparked concerns regarding governance and the protection of investors. SEBI's new proposals which include requiring companies to prove profitability[76] and enhancing oversight of fund utilisation[77] reflect an acknowledgement of these issues but do not curb the speculative bidding behaviour of institutional investors and high-net-worth individuals who use leveraged funds to drive oversubscription, leading to inflated listing premiums and subsequent price crashes.

In the past few years, SEBI has made efforts to address malpractices in the financial sector by introducing regulations aimed at enhancing transparency and avoiding irregularities. The measures include tightened mechanisms for SMEs, such as new limitations have been imposed on how much existing shareholders can sell in an IPO through an Offer for Sale (**OFS**) according to which large shareholders (those holding over 20% of pre-IPO shares) can now only sell up to 50% of the holdings, while for those who hold less than 20% the threshold remains 10%[78]. Additionally, it has also reinforced pricing rules by mandating a minimum price band of at least 5%[79] along with revising the call auction session during the pre-open period on stock exchanges, effective 90 days after its circular dated June 20, 2024. These measures fail to address the structural gaps in price discovery, investor protection, and post-listing stability.

Further, the dependence on companies to voluntarily disclose their pricing strategies and how they utilize IPO Proceeds has also been a significant issue. While SEBI has required companies to explain significant

75. George Mathew, 'Why are SME IPOs flourishing amid regulator's concerns over misconduct?' (*Indian Express,* 8 December 2024)<https://indianexpress.com/article/explained/explained-economics/sme-ipos-regulator-9706577/> accessed 16 January 2025.
76. Nikhil Agarwal, 'Sebi cracks the whip on finfluencers trying to manipulate IPO' (*Economic Times,* 24 May 2024) <https://economictimes.indiatimes.com/markets/stocks/news/sebi-introduces-audio-visual-representation-of-disclosures-in-offer-documents-for-public-issues/articleshow/110400952.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 17 January 2025.
77. ibid.
78. ET Bureau, 'SEBI tightens SME IPO Rules', (*Economic Times,* 19 December 2024) <https://economictimes.indiatimes.com/markets/stocks/news/sebi-tightens-sme-ipo-rules-limits-promoter-ofs-to-20/articleshow/116453598.cms?from=mdr> accessed 17 January 2025
79. Securities and Exchange Board of India, 'Enhancement of Dynamic Price Bands for scrips in the Derivatives segment'(2024) <https://www.sebi.gov.in/legal/circulars/may-2024/enhancement-of-dynamic-price-bands-for-scrips-in-the-derivatives-segment_83574.html> accessed 17 January 2025.

price differences between pre-IPO and IPO offerings, this requirement lacks enforceability and does not prevent companies from establishing inflated prices driven by artificial demand rather than its actual or intrinsic value. Consequently, investors may continue to face misleading valuations, particularly with New Age Technology Companies (**NATC**) where volatility is high along with lack of transparency[80]. Moreover, SEBI's attempt to increase the lock-in period for anchor investors and impose stricter regulations on high-net-worth individuals (**HNI**)[81] had only a marginal impact as alternative options to speculate continue to thrive. The proposed measures reflect an acknowledgement of the concerns however, are not enough to effectively control speculative behaviour in the market.

Concrete examples demonstrate how regulatory measures have failed to mitigate speculative trading. For instance, the IPO of HOAC Foods[82] experienced individual investors placing orders for over 2,000 times the available number of shares, resulting in oversubscription that created a facade of high demand. Similarly, several major IPOs, including those from prominent companies like Nykaa, CarTrade tech etc. faced significant losses after listing, despite its initial hype and high premiums as explained above. In fact, among eight mega IPOs exceeding ₹10,000 crores, seven began trading at a discount on exchanges, indicating a disconnect between pre-IPO valuations and actual market performance.[83]

SEBI has also failed to address the growing issue of Finfluencers in the market. While it has rolled out measures it has not been dealt with in an amicable manner, magnifying the concerns related to investor

80. Akash Podishetti, 'New-age tech companies face an unforgiving market after grand IPOs. What lies ahead for Swiggy?' (*Economic Times,* 5 November 2024) <https://economictimes.indiatimes.com/markets/ipos/fpos/new-age-tech-companies-face-an-unforgiving-market-after-grand-ipos-what-lies-ahead-for-swiggy/articleshow/114965957.cms?from=mdr> accessed 17 January 2025.
81. The Livemint, 'IPOs: Sebi extends lock-in period for anchor investors to 90 days' (*The Livemint*, 28 December 2021) <https://www.livemint.com/market/stock-market-news/ipos-sebi-extends-lock-in-period-for-anchor-investors-to-90-days-11640697370859.html> accessed 03 February 2025.
82. ibid.
83. Akash Podishetti, 'India's Rs 10,000 cr-plus IPOs faced losses even after 1 month and a year. Will Swiggy buck the trend?'(*Economic Times,* 13 November 2024) <https://economictimes.indiatimes.com/markets/ipos/fpos/indias-rs-10000-cr-plus-ipos-faced-losses-even-after-1-month-and-a-year-will-swiggy-buck-the-trend/articleshow/115251851.cms?from=mdr> accessed 17 January 2025.

protection and higher chances of manipulation in the IPO market. These Finfluencers provide biased IPO reviews and investment strategies, as they receive undisclosed incentives from companies or large investors to promote IPOs positively, regardless of the company's actual fundamentals. This new social-media driven speculation further adds to the illusion of strong demand in the market. The non-regulation of unregistered Finfluencers and the ineffectiveness of SEBI's warnings and guidelines[84] on social media endorsements have led to its growth. These instances highlight the inadequacy of current regulations in effectively managing speculative behaviour prior to listings.

To effectively tackle these persistent issues, SEBI shall undertake a series of well-targeted policy amendments and introductions. Firstly, it must look at a stricter price discovery mechanism to ensure IPO valuations reflect actual financial health and industry benchmarks rather than being driven solely by demand. This can help align IPO prices with market realities, reducing the likelihood of inflated valuations. Secondly, increased scrutiny on the use of IPO Proceeds by mandating companies to submit a utilization roadmap during the IPO approval process is essential . This can help to promote accountability and transparency regarding how companies utilize capital raised through public offerings. Thirdly, implementing higher capital adequacy norms for institutional investors participating in IPOs will help curb speculative bids and mitigate artificial demand. SEBI can also mandate third-party forensic audits of financial statements for companies planning to go public to ensure better transparency. Lastly, to particularly manage the risks associated with Finfluencers, stricter disclosure requirements must be introduced by SEBI and all online financial advisors must register as regulated entities. Influencer-hosting platforms should be required to uphold compliance by assuring disclosure about sponsorships and financial ties. Additionally, SEBI needs to work with tech companies to create AI-powered monitoring systems that can instantly identify deceptive financial marketing.

VII. FUTURE OUTLOOK

The Indian IPO market has witnessed a significant boom in recent years and will continue for the next few years. According to a report, over

84. ibid.

100 companies including some big players such as Zepto, Flipkart, JSW cement etc. are expected to collectively raise more than ₹2 lakh crore through IPOs in 2025.[85] "*The pipeline for 2025 promises even bigger fireworks, fueled by skyrocketing retail participation, hefty domestic inflows, and FPIs flexing their muscles despite being net sellers in the secondary market.*"[86] Technology, healthcare, financial services, and manufacturing sectors are anticipated to dominate the IPO landscape. It must be kept in mind that rising interest rates in the market could mitigate investors' enthusiasm by increasing the cost of capital.[87] However, companies with excellent fundamentals and transparent business models will continue to attract higher demand in the grey market ultimately signaling towards higher premiums. With several major IPOs scheduled for the coming year, it will be intriguing to observe how the market responds to them. Government initiatives to bolster infrastructure and capital expenditure, coupled with SEBI's enhanced disclosure norms, are expected to sustain market confidence and liquidity. Nevertheless, the recent market volatility remains a major concern in the upcoming times due to changing geopolitical relations among the major nations of the world. The Indian VIX Index, also known as the 'Fear Index', is a parameter for measuring the short-term volatility in the market has reached a six-month high, which indicates bearish sentiments among investors.[88]

With respect to worldwide projections, it is important to note that the last few years have been deeply impacted by growing geopolitical tensions and rising interest rates.[89] The global IPO market is anticipated to expe-

85. Chitranjan Kumar, 'India's IPO Boom: 2 Lakh Crore fundraising expected in 2025' (*FortuneIndia*, 10 January 2025)<https://www.fortuneindia.com/investing/indias-ipo-boom-2-lakh-crore-fundraising-expected-in-2025/119918> accessed 18 January 2025.
86. ANI, 'India's IPO market set for record growth in 2025 too: Report' (*The Economic Times*, 28 December 2024) <https://economictimes.indiatimes.com/markets/ipos/fpos/indias-ipo-market-set-for-record-growth-in-2025-too-report/articleshow/116731453.cms?from=mdr> accessed 18 January 2025.
87. Jovanovic Boyan and Rousseau Peter L., 'Interest Rates and Initial Public Offerings' (NBER Working Paper No. w10298, SSRN Papers February 2004) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=502884> accessed 18 January 2025.
88. Ravindra Sonavane, 'India VIX, the fear index, hits near six month high as experts caution over near-term nervousness' (*Moneycontrol*, January 2025) <https://www.moneycontrol.com/news/business/markets/india-vix-the-fear-index-hits-six-month-high-as-experts-caution-over-near-term-nervousness-12915686.html> accessed 18 January 2025.
89. KPMG, 'IPOs in India-IPO Performance and Capital Market Highlists -FY24' <https://assets.kpmg.com/content/dam/kpmgsites/in/pdf/2024/07/ipos-in-india-fy24.pdf.coredownload.inline.pdf> accessed 18 January 2025.

rience a notable resurgence in 2025, with several reports and industry experts forecasting increased activity and higher IPO premiums across various regions.[90] The US, which is one of the key markets, is expected to see a blowout in 2025 due to the marked return of Donald Trump as President. *"Declining interest rates and a renewed risk-on sentiment in equity markets"*[91] will be the major factors for such an active market. Further, Europe is also expected to see a rebound in IPO activity in the upcoming year with slowing inflation, interest rate cuts and easing market volatility as driving factors.[92] China's projections seem uncertain due to the regulatory tightening and continued fall in IPO-related activities, however, the stimulus packages announced by the government in order to revive economic activity come as a potential hope.[93] Therefore, it can be construed that a positive and favourable year for the Indian and Global IPO market is waiting in the queue majorly attributable to reasons such as favourable economic conditions, potential regulatory easing, and a strong pipeline of companies across various sectors.

VIII. CONCLUSION

It is beyond doubt that India's IPO market is a breeding ground for companies in terms of innovation and growth, which can also be highlighted by the fact that this momentum is luring companies to return home. This trend of companies shifting their headquarters back to home soil (*reverse-flipping*) is exacerbated due to better valuation in Indian markets, extensive support from the Indian Government, simplified

90. Marlize Van Romburgh, CrunchBase News, 'Forecast Digest: IPO, M&A And Venture Markets Expected To Gain In 2025' (*Crunchbase News*, 10 January 2025) <https://news.crunchbase.com/venture/forecast-digest-ipo-ma-ai-venture-markets-gain-2025/> accessed 18 January 2025.
91. Reuters, 'IPO market comeback: How recent major US listings fared' (*Reuters,* 24 January 2025) <https://www.reuters.com/markets/us/ipo-market-comeback-how-recent-major-us-listings-fared-2025-01-24/> accessed 24 January 2025.
92. Vamya Damyanova ,Umer Khan, S&P Global, 'European IPO 2025 market outlook brightens amid signs of recovery' (*S&P Global*, 16 January 2025) <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/european-ipo-2025-market-outlook-brightens-amid-signs-of-recovery-87044162?utm_source=chatgpt.com> accessed 19 January 2025.
93. Deutche Bank India, 'China: stimulus provides temporary boost; more expected' <https://www.deutschebank.co.in/en/investment/china-stimulus-provides-temporary-boost.html> accessed 19 January 2025.

regulatory compliances and easy access to capital.[94] Thus, the country's stock market's resilience and growth, are offering a practical exit strategy for investors aiming to realize their returns. This growth has been majorly outlined by heavy oversubscription, higher grey market premiums and massive listing gains, which were the key drivers of attracting investors, especially the retail ones. However, the factors driving these rising premiums and the disappointing performance of IPOs post-listing serve as a wake-up call for all stakeholders involved in the process. While the global competitors experienced varied growth, due to factors such as geopolitical tensions and mounting interest rates etc., the future prospects look promising with improving market dynamics.

This market boom, driven by diverse factors such as heightened investor participation, especially among SMEs, reflects a shift in investment behaviour towards equity and favourable economic conditions. While it indicates strong investor demand, it also raises concerns regarding potential volatility and speculative trading, underscoring the importance of careful and cautious investment by investors within this landscape. To curb speculative trading and reduce investment risks, SEBI has taken a multitude of measures to regulate the public issue market effectively. Further, it is suggested to implement tighter intraday price bands for IPOs during the initial listing period (e.g., the first 5 trading days). This would limit extreme price movements caused by speculative activities while still allowing natural price discovery over time. Additionally, a stabilization fund may be introduced which shall constitute a portion of IPO proceeds ultimately aiming to combat market volatility thereby supporting the stock price at a reasonable level. While it is in the process of introducing a range of sundry reforms to enhance investor security by protecting them from unregulated activities,[95] it is also suggested to focus on improving investor education as many retail investors lack the required technical skills and expertise to assess these IPOs and the inherent risks involved. It can organise regular awareness campaigns, in collaboration

94. Trilegal, 'Reverse Flipping: A New Trend in Indian Business' (*Trilegal*, 16 October 2024) <https://trilegal.com/knowledge_repository/reverse-flipping-a-new-trend-in-indian-business/> accessed 19 January 2025.

95. Business Standard, 'SEBI plans to introduce pre-listing trading for IPO shares' (*Business Standard*, 23 January 2025) <https://www.business-standard.com/markets/capital-market-news/sebi-plans-to-introduce-pre-listing-trading-for-ipo-shares-125012300748_1.html> accessed 23 January 2025.

with market participants, to empower investors to make informed decisions. "*More than the amount spent on investor education, we need to see if the spends have the desired impact. SEBI must make better use of the NISM infrastructure to create a digital platform for investor education, especially in today's speculative climate.*"[96] Hence, balancing these factors will be crucial for maintaining investor confidence and solidifying India's position as a significant player in the global capital markets.

96. Sindhu Hariharan, 'SEBI spends less than 5% of corpus on investor education', (*The Hindu Business Line*, 26 August 2024) <https://www.thehindubusinessline.com/data-stories/data-focus/sebis-expenditure-on-investor-protection-and-education-at-10-year-low-in-fy24/article68558995.ece> accessed 23 January 2025.

Un(Equal) Treatment Clauses in Companies with Dual Class Shares: Positioning to Stake a Claim in Change of Control

—*Shubhankar Sharan and Anubhuti Raje*[*]

ABSTRACT

The Dual Class Share ("DCS") structure enables companies to issue different classes of shares with varied voting rights or dividend payouts. It helps promoters and founders retain significant control of the company and realise their idiosyncratic vision. By doing so, the controlling shareholders are positioned to render other shareholder's voices negligible. Consequently, situations of unevenness and discrimination may crop up in key matters of corporate governance. Several countries, including India, have fared well in protecting the rights of ordinary shareholders. However, contestation remains over matters like the substantial acquisition of shares and controlling premiums extracted by the shareholders with superior voting rights ("SR") during takeover bids. Several scholars and institutions have debated over the interplay of DCS and the principle of equality and suggested regulatory mechanisms like sunset clauses and coat-tail provisions. However, there have been modest considerations for equal treatment clauses in a corporate charter. Equal treatment clauses require equal treatment of different classes of shareholders, either generally or in specific transactions.

As India dawns upon the era of DCS-based companies, its nascency invites multiple options for tracing the most suitable mechanism in the event of a takeover. In such consideration, this article firstly, explains the essentials of the DCS structure.

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Secondly, it highlights the characteristics of DCS that popularise its adoption, along with its advantages and disadvantages. Thirdly, this article elucidates on the Indian framework of DCS (popularly regarded as Differential Voting Rights ("DVR") in India). Fourthly, this article evaluates the viability of equal treatment clauses and the relevance of contractarianism, contextualising the Indian position and the global position. Fifthly, it explores the alternative approaches for ensuring equality amongst different classes of shareholders. Finally, this article proposes a complementary framework in the form of unequal treatment clauses, to balance equality and fairness in consideration.

Keywords: Dual Class Share Structure, Differential Voting Rights, Equal Treatment Clauses, Takeovers and Control Premiums.

I. INTRODUCTION

The DCS structure allows companies to raise capital without diluting the voting interests of the promoters, making it attractive to technology startups and capital-intensive companies. A DCS arrangement typically divides a company's shares into two or more classes, with significant differences in voting rights. Founders and core executives generally hold shares with superior voting power, while public investors receive shares with reduced or no voting rights. Owing to this, founders gain complete authority over the company's decisions to realise their idiosyncratic vision or initial goals without shareholder pressurisation.

For instance, when Facebook went public in 2012, Mark Zuckerberg held Class B, bearing ten votes per share, while Class A shares, offered to the public, had only one vote per share. Through this arrangement, the promoters ensured that the company would focus on long-term issues, such as building up intelligence and virtual reality, in the formative years. Hence, DCS has gained popularity amongst startups

DCS structure is multifaceted, since it has various advantages as well as disadvantages. Several scholars have highlighted that DCS precludes the possibility of a hostile takeover due to the concentration of control within a particular group. On the contrary, studies have shown that the

perpetual existence of DCS decreases the valuation of the company as non-controlling shareholders assume discrimination at the hands of controlling shareholders.

In India, the adoption of DCS structures has been slow and cautious, reflecting the country's strong emphasis on transparency and investor protection. Historically, Indian regulations favoured the 'One Share One Vote' ("OSOV") principle, ensuring that shareholder rights were evenly distributed. However, in recent years, the Securities and Exchange Board of India ("SEBI") has introduced measures to facilitate the use of DCS structures for startups and industries requiring significant capital investment.[1]

The Indian framework's nascency allows regulators to experiment with mechanisms to find a proper balance between the principle of equality and the characteristics of DCS. In this regard, equal treatment clauses can play an important role. Specifically with respect to takeovers of DCS-based companies, equal treatment clauses protect the interests of low-voting shareholders by mandating equal participation in the open offer and equal consideration for the shares. Additionally, controlling shareholders also derive a controlling premium from such transactions. Equal treatment clauses also mandate proportionate payment of such premium to low-vote shareholders.

This article predicates equal treatment on contractual clauses rather than regulations since corporate charters are well-equipped to take stock of the company's dynamics. In doing so, it derives instances from the USA and Articles of Association ("AoA") of Indian companies with DCS. Further, this article provides suggestive improvements to the Indian framework on DVRs based on the learnings from other jurisdictions such as Hong Kong, Singapore, and China. Finally, it elaborates on unequal treatment clauses, complementing the significance of equal treatment clauses.

1. Securities and Exchange Board of India, 'Framework for Differential Voting Rights (DVRs) in India' (January 2019) <https://www.sebi.gov.in/sebi_data/meetingfiles/aug-2019/1565346231044_1.pdf> accessed 11 January 2025.

II. RUDIMENTS OF DUAL CLASS SHARES

The DCS structure is key to corporate governance, particularly for balancing market forces with the entrepreneurial ambitions of management while ensuring adequate financing and investment.[2] However, the DCS structure has become increasingly common in recent years, especially with tech companies. Such prevalence indicates positive performance, as many founders want to keep control over their companies, especially when they can provide multi-generational goals.[3]

Fundamentally, DCS structures emerge when a corporation issues multiple classes of common stock, each conferring disparate voting rights upon its holders.[4] For example, the insiders' founders and top executives typically get one class with more votes per share (10:1, 100:1, or more), and the public investors are allotted the other class of shares, either with one vote per share or no voting rights at all. This necessitates that the company engage public investors to generate shareholder equity.

At the same time, it ensures that an elite few will always control the company's destiny. These arrangements are predominantly observed during the initial public offering ("IPO") process. Founders endeavour to institute such structures to shield themselves from the exigencies of market dynamics. In 2004, Google was a budding technology startup, and in 2012,[5] Facebook was in the middle of its multibillion-dollar IPO spectacle.[6] Yet in that same year, Google wanted to implement its industry-leading DCS as the preferred vehicle, and Facebook wanted to do the same. Regarding such arrangements, Larry Page and Sergey Brin made it clear

2. Securities and Exchange Board of India, 'Consultation Paper on Issuance of Differential Voting Rights Shares' (*SEBI*, 19 March 2019) <https://www.sebi.gov.in> accessed 18 January 2025.
3. Arka Saha and Deekshitha Srikant, 'Revisiting the Dual Class Share Structure Debate in India Post the Alibaba IPO: Attempting to Tread the Middle Ground' (2015)1(1) NLSBLR <https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1029&context=nlsblr> accessed 11 January 2025.
4. Marco Ventoruzzo, 'Empowering Shareholders in Corporate Governance: Lessons from Italy and the United States' (2010) 4 (1) ECFR 105.
5. Google Inc, 'Prospectus Filed Pursuant to Rule 424(b)(4)' (US SEC, 18 August 2004) <https://www.sec.gov/Archives/edgar/data/1288776/000119312504143377/d424b4.htm> accessed 11 January 2025.
6. Facebook Inc, 'Amendment No. 7 to Form S-1 Registration Statement' (US SEC, 16 May 2012) <https://www.sec.gov/Archives/edgar/data/1326801/000119312512240111/d287954ds1a.htm> accessed 11 January 2025.

that their DCS structure would effectively allow them to control without impediments such as the shortsighted needs of existing shareholders.

Internationally, the regulatory response to DCS has been heterogeneous.[7] In the United States, for example, the regulators of the major stock exchanges Nasdaq and New York Stock Exchange ("NYSE") allow DCS-based companies as they align with the purposes of the large technology companies.[8] Yet Europe has been more sensitive to DCS and favours OSOV. Ironically, however, France and Italy have considered loyalty shares as one of the mechanisms for bestowing greater voting rights. Loyalty shares give shareholders greater voting rights when they hold shares for a certain period of time.[9] For instance, in Italy,[10] loyalty shares allow the listed companies to offer double votes to shareholders continuously holding shares of the company for over two years.[11] Similarly, the French Commercial Code allows loyalty shares to be used as a long-term measure.[12] Under this framework, shareholders holding stocks for at least two years are granted double voting rights, reinforcing long-term corporate governance. It assures to maintain control and accountability and hence is suitable for any market.[13] This reduces volatility and attracts markets like India where investors and shareholders tend to buy and sell rapidly based on speculation.[14]

7. OECD, 'Corporate Governance Factbook' (2021) <https://www.oecd.org> accessed 18 January 2025.
8. The New York Stock Exchange Listed Company Manual, s 313.
9. European Commission, 'Report on Proportionality between Ownership and Control in EU Listed Companies' (2007) <https://ec.europa.eu/commission/presscorner/detail/en/ip_07_751> accessed 22 January 2025.
10. Decreto-Legge 24 Giugno, 2014 (58 of 1998) n. 91 art 20 (Italy).
11. Arnaud Dubois, 'Introduction of Loyalty Shares in the Belgian Listed Companies, a Real Game Changer?' (2019) Louvain School of Management, Université Catholique de Louvain <http://hdl.handle.net/2078.1/thesis:20981> accessed 11 January 2025.
12. French Commercial Code (Code de Commerce), 2020 (1142 of 2020) art L225-123 (France).
13. ibid.
14. Arka Saha and Deekshitha Srikant, 'Revisiting the Dual Class Share Structure Debate in India Post the Alibaba IPO: Attempting to Tread the Middle Ground' (2015) 1(1) NLSBLR <https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1029&context=nlsblr> accessed 11 January 2025.

III. POPULARITY OF DUAL-CLASS SHARES- EXAMPLES OF FACEBOOK, SNAPCHAT, AND ALIBABA

The DCS structure is a popular mechanism among sizable contemporary technology giants. The most high-profile cases include Facebook, Snapchat, and Alibaba. Each analysis offers a distinct perspective on how the DCS structure may confer advantages or pose challenges within the competitive corporate landscape.

Perhaps the most notable example of a DCS structure was the IPO of Facebook in 2012.[15] When the company went public, founder Mark Zuckerberg still had much control. Mr. Zuckerberg's Class B shares were 10 votes per share, while the public Class A shares were 1 vote per share. He wanted to maintain control of his company's stock for as long as possible, even after going public, when external scrutiny and shareholders' perspectives would be greater and different.[16] Importantly, the structure allowed him to undertake projects involving artificial intelligence and virtual reality.

In addition to that, Snap Inc. chose the alternative path and decided to offer non-voting shares in its IPO in 2017.[17] Most of the public investors of Snap Inc. did not have the influence to shape the company's future. While the approach was seen as anti-shareholder, it benefited the company by maintaining a divide between investors, motivating them to focus on company goals over investor preferences.[18] Besides that, a closer look at Alibaba's story highlights DCS's global impact. Alibaba's DCS was listed on the NYSE after getting rejected by the Hong Kong Exchanges and Clearing Ltd. ("HKEX").[19] To prevent any further loss of IPOs, the

15. International Corporate Governance Network, 'ICGN Guidance on Anti-Takeover Devices' (2013) <https://www.icgn.org> accessed 11 January 2025.
16. Council of Institutional Investors, 'Dual-Class Stock: The Good, the Bad, and the Ugly' (2018) <https://www.cii.org> accessed 11 January 2025.
17. Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) J. finance Econ <https://www.sciencedirect.com/science/article/pii/0304405X7690026X> accessed 22 January 2025.
18. Lucian Bebchuk and Kobi Kastiel, 'Snap and the Rise of No-Vote Common Shares' (*Harvard Law School Forum on Corporate Governance*, 26 May 2017) <https://corpgov.law.harvard.edu/2017/05/26/snap-and-the-rise-of-no-vote-common-shares/> accessed 22 January 2025.
19. 'Alibaba set to price shares as investors gear up for flotation' (*BBC News*, 18 September 2014) <https://www.bbc.com/news/business-29249847> accessed 18 January 2025.

HKEX amended its rules and allowed the listing of DCS in 2018.[20] This suggests that the stock exchanges and their countries' relative positioning reflect investors' needs and unintentionally initiate the race to the top.[21]

IV. BENEFITS OF DCS: A RUNDOWN

Proponents of DCS suggest in favour of retention of control by the founders. They argue that the general populace is often unaware of the founder's strategic vision and may undermine it with superficial remedies.[22] The tech sphere keeps growing; for many, achieving long-term objectives requires an extended timeframe. Moreover, in certain jurisdictions, DCS structures may ease the pressure of quarterly earnings reports, allowing companies to focus on long-term strategies without the constant scrutiny of short-term performance.[23] Thus, there is an assertion that companies with founder-based ownership are more creative and more stable.

The advantages of DCS predominantly accrue to company founders, particularly in terms of ensuring stable ownership and fostering long-term managerial incentives. For instance, DCS protects against hostile takeovers and understates short-term gains that would impede a company's ability to properly manage a long-term plan.[24] DCS allows promoters to retain SR shares despite holding less equity. This protects the companies from hostile takeovers whereby other entities would want to gain control without necessarily subscribing to the strategic long-term goals of the company.

DCS ensures stable governance, enabling management to focus on priorities like research or expansion without short-term shareholder

20. Hong Kong Exchanges and Clearing Ltd, 'Listing Regime Reforms for Dual-Class Share Structure and Biotech Industry – Summary' (April 2018) <http://www.hkex.com.hk/News/Market-Consultations/2016-to-Present/February-2018-Emerging-and-Innovative-Sectors?sc_lang=en> accessed 22 January 2025.
21. Alessandro Dubois, 'Introduction of Loyalty Shares in the Belgian Listed Companies: A Real Game Changer?' (2019) Louvain School of Management <http://hdl.handle.net/2078.1/thesis:20981> accessed 11 January 2025.
22. Lucian Bebchuk and Kobi Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock' (2017) 103 Va. L. Rev. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954630> accessed 22 January 2025.
23. Umakanth Varottil, 'Theory, Evidence, and Policy on Dual-Class Shares' (2015) *Singapore Management University Research Collection* <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5881&context=sol_research> accessed 11 January 2025.
24. Guhan Subramanian, 'Corporate Governance 2.0' (2015) 93(3) HARV. BUS. REV. <https://hbr.org/2015/03/corporate-governance-2-0> accessed 22 January 2025.

pressure.[25] This is true primarily in the technology and media sectors, where prolonged research and development, new products and ideas, and the time to market take years, and profit margins are indefinite.[26] In addition, if the company is family-run or founder-driven, DCS creates guaranteed stable management.[27] A DCS structure ensures that the original promoters can continue to drive the business in the direction it was intended.

By wisely investing money for short and long-term periods, companies create shareholder stability through steady returns and protect against volatile market conditions.[28] This is more important in a widespread marketplace when the promoter's percentages are low and foreign firms receive unmediated tender offers.[29] Therefore, a DCS structure allows promoters with- an interest to assess their relative position to either accept the tender offer or refuse the coercive tender offers. In the Indian context, the takeover of Mindtree by L&T Infotech[30] has been much discussed, wherein it is popularly hailed that the adoption of DCS would have prevented such occurrence.[31]

Ultimately, in terms of market composition, DCS makes firms more appealing to foreign investors. The DCS system allows business holders to retain control over their company while pursuing public funding, thereby attracting foreign investors seeking stable and growing businesses.[32] As

25. Lucian Bebchuk and Kobi Kastiel, 'The Untenable Case for Perpetual Dual-Class Stock' (2017) 103 Va. L. Rev. <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2954630> accessed 22 January 2025.
26. Delaware Chancery Court, 'C. A. No. 2019-0919-JTL: Voigt v Metcalf' (2021) <https://courts.delaware.gov/Opinions> accessed 11 January 2025.
27. Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) J. finance. Econ <https://www.sciencedirect.com/science/article/pii/0304405X7690026X> accessed 22 January 2025.
28. Investor Stewardship Group, 'Corporate Governance Principles for US Listed Companies' (2020) <https://isgframework.org/corporate-governance-principles/> accessed 11 January 2025.
29. California Public Employees' Retirement Law (2025 Edn.) <https://www.calpers.ca.gov/docs/forms-publications/california-public-employees-retirement-law.pdf> accessed 11 January 2025.
30. Mondaq, 'Mindtree & L&T: India's 1st Ever Hostile Takeover - An Overview' (*Mondaq*, 2 May 2019) <https://www.mondaq.com/india/corporate-and-company-law/807930/mindtree-lt-indias-1st-ever-hostile-takeover-an-overview> accessed 11 January 2025.
31. Investor Coalition for Equal Votes, 'Report on Voting Disparities in Public Companies' (2021) <https://www.ipe.com/news/investor-coalition-launches-report-on-unequal-voting-rights sanctions/10126428.article> accessed 11 January 2025.
32. Dorothy Lund, 'Nonvoting Shares and Efficient Corporate Governance' (2019) 71 STAN L. REV. <https://www.law.nyu.edu/sites/default/files/Dorothy%20Lund%20

such, this structure acts in the interest of preserving promoter control while acquiring capital to attract and appeal to foreign investors, relying on low-risk and long-term strategic planning. This notion of valuing long-term directly relates to countries aspiring to be international hubs of innovation and entrepreneurial endeavours, as DCS facilitates sustained control and strategic decision-making necessary for nurturing breakthrough technologies and ventures that require extended growth periods. Therefore, a country with a governing ideology of long-term value creation would embrace the DCS structure that cultivates innovative technologies and operations that require a longer period of growth.

V. OTHER SIDE OF THE DCS COIN

The DCS structure is marred with perils too. various organisations have ideated against adoption of DCS and adherence to OSOV. The International Corporate Governance Network's Principle 9 posits OSOV.[33] Further, the Council of Institutional Investors in the USA had implored the indices, such as the S&P Dow Jones Indices, to follow OSOV and refuse recognition to DCS-based companies.[34] Besides, popular organisations like Investor Stewardship Group and the California Public Employees' Retirement System have strengthened the bulwark against the adoption of DCS through adverse policies.[35] Lastly, the Investor Coalition for Equal Votes report evaluated cases of major DCS companies, including Google and Facebook. In the end, it asserted equal voting rights and indicated that the DCS structure weakens shareholders' influence over corporate governance.[36]

Nonvoting%20Shares%20%26%20Efficient%20Corporate%20Governance.pdf> accessed 11 January 2025.

33. International Corporate Governance Network, 'Global Governance Principles' (2021) <https://www.icgn.org/global-governance-principles> accessed 19 January 2025.
34. 'Letter from the Council of Institutional Investors to NASDAQ' (2 October 2012) <http://www.cii.org/files/issues_and_advocacy/correspondence/2012/10_02_12_cii_letter_to_nasda q_dual_class_stock.pdf.> accessed 22 January 2025.
35. Shanny Basar, 'CalPERS Sets Sights on Dual-Class Stock Structures' (*Wall Street Journal*, 20 August 2012) <https://www.wsj.com/articles/SB10000872396390443855804577601271252759472.> accessed 22 January 2025; Investor Stewardship Group, 'Corporate Governance and Stewardship Principles' (*Harvard Law School Forum for Corporate Governance and Financial Regulation*, 7 February, 2017) <https://corpgov.law.harvard.edu/2017/02/07/corporate-governance-and-stewardship-principles/> accessed 22 January 2025.
36. Financial Conduct Authority, 'Policy Statement PS24/6' (June 2024) <https://www.fca.org.uk/publication/policy/ps24-6.pdf> accessed 19 January 2025.

Nevertheless, the critics raise concerns about the potential downsides of this governance model. The separation of voting rights from economic ownership increases agency costs, as controlling insiders' interests may diverge from those of minority shareholders, leading to potential governance challenges.[37] For example, there are documented abuses, self-overpayment, and mergers that decrease shareholder value, which hurt public investors. Several studies have posited decreasing valuation with an increasing wedge between voting rights and economic rights.[38] Further, the extra-merger hypothesis assumes that during a takeover bid, higher prices can be demanded for SR shares according to the demand of the controllers.[39] This excludes low-voting shareholders from the scope of receiving additional premium amounts.[40]

In addition, perpetual DCS faces criticism as control often passes to less motivated future generations of founders. This raises concerns since it indicates that the company will be controlled by a small group of people, who may or may not have identical interests or equal motivation.[41] Various empirical studies have concluded that a perpetual DCS structure is detrimental to the valuation of the company.[42] Additionally, while the benefits of DCS may exceed the costs in the initial years, those benefits diminish with time, and the valuation plunges.[43] To prevent that, sunset

37. Goshen Zohar and Richard Squire, 'Principal Costs: A New Theory for Corporate Law and Governance' (2017) 117 *Columbia Law Review* 767.
38. Dorothy S Lund, 'Nonvoting Shares and Efficient Corporate Governance' (2018) 71 *Stanford Law Review* 687, Michigan Business & Entrepreneurial Law Review Repository <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1038&context=mbelr> accessed 19 January 2025.
39. Brian F. Smith and Ben-Amoako-Adu, 'Relative Prices of Dual Class Shares' (1995) 30(2) J. FINANC. QUANT. ANAL <https://doi.org/10.2307/2331118> accessed 22 January 2025.
40. W.L. Megginson, 'Restricted Voting Stock Acquisitions Premiums and the Market Value of Corporate Control.' (1990) 25 FIN. REV.<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1540-6288.1990.tb00791.x> accessed 22 January 2025.
41. Commissioner Robert J. Jackson Jr., 'Perpetual Dual-Class Stock: The Case Against Corporate Royalty'(*SEC*, 15 February 2018) <https://www.sec.gov/newsroom/speeches-statements/perpetual-dual-class-stock-case-against-corporate-royalty> accessed 19 January 2025.
42. Securities and Exchange Board of India, 'Consultation Paper on Issuance of Shares with Differential Voting Rights' (March 2019) <https://www.sebi.gov.in/reports/reports/mar-2019/consultation-paper-on-issuance-of-shares-with-differential-voting-rights_42432.html> accessed 11 January 2025.
43. Alessandro Dubois, 'Introduction of Loyalty Shares in the Belgian Listed Companies: A Real Game Changer?' (2019) Louvain School of Management <http://hdl.handle.net/2078.1/thesis:20981> accessed 11 January 2025; Martin Cremers et. al., 'The

clauses are suggested and incorporated in charters and provisions. Such clauses automatically convert DCS to ordinary shares in terms of voting rights, after the expiry of a pre-decided time period.[44]

Notwithstanding, a general apprehension of misuse of power lingers amongst the investors. The Delaware Chancery Court echoed this sentiment in concluding that non-traditional share structures can enable promoters to misuse loopholes and engage in related party transactions, thereby causing no pro-rata transfers.[45] Similar findings were also reported by Michael Jensen and William Meckling, who showed concerns regarding greater access to insider information and resulting actions based on self-interest.[46] If the companies fail to protect minority investors, it will lead to pessimism amongst shareholders and, consequently, abandonment of the capital market.

VI. INDIAN FRAMEWORK ON DUAL CLASS SHARES

In recent years, the practice of DCS has gained global prominence, enabling companies to raise capital in international markets while retaining control over management decisions.[47] This governance structure exists primarily in non-volatile developed countries worldwide.[48] Given the startup boom in India, the DCS structure will become more prominent in the corporate landscape, requiring contextual analysis of the framework.[49] For clarity, the SEBI has permitted the use of DVR, which is the contemporary parallel of DCS.

Life-Cycle of Dual Class Firm Valuation' (2022) European Corporate Governance – Finance Working Paper No. 550/2018 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062895> accessed 22 January 2025.

44. French Commercial Code (Code de Commerce), 2020 (1142 of 2020) art L225-123.
45. *Re Ezcorp Inc Consulting Agreement Derivative Litigation* (2016) 130 A3d 934 (Del Ch).
46. Michael C Jensen and William H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3 *Journal of Financial Economics* 305.
47. Luca Enriques et al., 'The Basic Governance Structure: The Interests of Managers and Shareholders and their Alignment' ECGI Working Paper No. 390/2018 <https://www.ecgi.global/sites/default/files/working_papers/documents/dualclassstock_0.pdf> accessed 11 January 2025.
48. Securities and Exchange Board of India, 'Framework for Differential Voting Rights (DVRs) in India' (January 2019) <https://www.sebi.gov.in/sebi_data/meetingfiles/aug-2019/1565346231044_1.pdf> accessed 11 January 2025.
49. Cyril Amarchand Mangaldas, 'Shares with Differential Voting Rights: SEBI Proposes a Balanced Framework' (*Cyril Amarchand Mangaldas Blog*, 13 May 2019) <https://corporate.cyrilamarchandblogs.com/2019/05/shares-with-differential-voting-rights-sebi/> accessed 11 January 2025; ETech, 'National Startup Day 2025: Mapping India's unicorn

A. Absence of Dual-Class Shares In India

Indian companies' response to the adopted framework has been underwhelming when compared with the demand for a framework.[50] Currently, only a limited number of Indian companies, namely Pantaloon Retail India, Gujarat NRE Coke, and Jain Irrigation, have issued shares with DVRs.[51] Conventionally, India's domestic regulatory framework upholds the OSOV principle, ensuring parity in voting rights among shareholders.[52]

The Companies Bills of 1993 and 1997 proposed to permit DVRs in India – with the proviso that the issues could not exceed 25% of the total issued capital. This proposal was implemented by the Companies (Amendment) Act, 2000, which amended section 86 of the Companies Act, 1956.[53] existing equity shares were changed through the amendment to include equity shares with differential voting rights.[54] Further, for the purpose of the amended Section 86, Section 2(46A) was inserted to define 'shares with differential rights.'[55] Simultaneously, Section 88 of the Companies Act, 1956 was repealed.[56]

In order to encourage the companies to issue DVRs, the Department of Corporate Affairs issued the Companies (Issue of Share Capital with Differential Voting Rights) Rules, 2001.[57] These rules laid down the requirements with respect to the issuance of DVRs. Importantly, the Company Law Board ("CLB") also impliedly recognised the idea behind

journey over the decade' (*Economic Times*, 16 January 2025) <https://economictimes.indiatimes.com/tech/startups/national-startup-day-2025-mapping-indias-unicorn-journey-over-the-decade/articleshow/117298275.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 22 January 2025.

50. Yuvraj Malik, 'Will Superior Voting Rights Boost Domestic Listing of Tech Startups' (*Business Standard*, 30 September 2021) <https://www.business-standard.com/podcast/companies/will-superior-voting-rights-boost-domestic-listing-of-tech-startups-121093000333_1.html> accessed 22 January 2025.
51. Securities and Exchange Board of India, '*Consultation Paper on Issuance of Shares with Differential Voting Rights*' (March 2019) <https://www.sebi.gov.in/reports/reports/mar-2019/consultation-paper-on-issuance-of-shares-with-differential-voting-rights_42432.html> accessed 11 January 2025.
52. Umakanth Varottil, 'Theory, Evidence, and Policy on Dual-Class Shares' (2015) *Singapore Management University Research Collection* https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5881&context=sol_research accessed 11 January 2025.
53. Companies (Amendment) Act, 2000 (29 of 2020).
54. Companies (Amendment) Act, 2000 (29 of 2020) s 86.
55. Companies (Amendment) Act, 2000 (29 of 2020) s 2 (46A).
56. Companies (Amendment) Act, 2000 (29 of 2020) s 88.
57. Companies (Issue of Share Capital with Differential Voting Rights) Rules 2001.

DVRs in *Anand Pershad Jaiswal v. Jagatjit Industries Ltd.*[58] However, immediately after that, the SEBI amended the Listing Requirements and included clauses (Clause 28A) prohibiting the issuance of DVR shares.[59] Despite the setback, Section 43(a)(ii) of the Companies Act 2013 carried over the recognition of DVR shares.

India could not implement a DVR system universally because the Indian regulatory bodies were averse to control risks.[60] The primary concern was that granting DVRs to certain shareholders could result in the oppression of minority shareholders and diminish positive investor sentiment,[61] while historically, Indian corporate governance has prioritized accountability and equality.[62] Amidst these concerns, there was a growing awareness that companies, particularly startups and capital-intensive businesses, were bereft of the advantages of DVR.[63] The absence of approval was profound for Indian startups and legacy companies in capital-intensive sectors, such as IT.[64] Hence, the SEBI promulgated a new DVR framework in light of several requests from technological companies and startups.

B. DVR Framework- SEBI Consultation Paper and Proposed Amendments

In January 2019, SEBI released its consultation paper outlining reforms to the regulator's existing structure of DVRs.[65] In its consultation paper,

58. *Anand Pershad* Jaiswal *v Jagatjit Industries Ltd.*, (2010) 1 Comp LJ 509.
59. Umakanth Varottil, 'Interpretive Guidance: Differential Rights on Shares' (*IndiaCorpLaw*, 25 May 2010) <https://indiacorplaw.in/2010/05/interpretive-guidance-differentia.html> accessed 22 January 2025.
60. Securities and Exchange Board of India (SEBI), 'Consultation Paper on Differential Voting Rights Framework' (January 2019) <https://www.sebi.gov.in/reports/reports/jan-2019/consultation-paper-on-differential-voting-rights-framework_41946.html> accessed 11 January 2025.
61. Gaurav Gupte, 'DVRs Are Dead, Long Live DVR!' (*Mondaq*, 8 July 2019) <https://www.mondaq.com/india/shareholders/825844/dvrs-are-dead-long-live-dvr> accessed 22 January 2025.
62. Securities and Exchange Board of India, 'Framework for Differential Voting Rights (DVRs) in India' (January 2019) <https://www.sebi.gov.in/sebi_data/meetingfiles/aug-2019/1565346231044_1.pdf> accessed 11 January 2025.
63. Securities and Exchange Board of India, 'Consultation Paper on Issuance of Shares with Differential Voting Rights' (March 2019) <https://www.sebi.gov.in/reports/reports/mar-2019/consultation-paper-on-issuance-of-shares-with-differential-voting-rights_42432.html> accessed 11 January 2025.
64. ibid.
65. ibid.

SEBI suggested a two-pronged approach: aiming at promoting market innovation and concomitantly protecting the shareholders' interest. It proposed a structure based on three key determinants: voting differential, sunset clause, and disclosures. Voting differentials enable variations in voting rights. It stipulates a limit for voting differential, for instance 10:1, to prevent excessive retention of control by promoters. Additionally, sunset clauses mandate automatic conversion of DVRs into ordinary equity shares either after a specified time period or upon the occurrence of triggering events like the resignation or transfer of shares by the promoter. Sunset clauses assuage the fear of perpetual control and redirect to the principle of OSOV. Notwithstanding its importance, it is a separate issue if an event-based or time-based sunset clause is appropriate for the company.

Lastly, disclosure requirements were underscored, wherein companies are obligated to render exhaustive details on DVRs and their specifications, such as voting ratios, dividend entitlements, and associated rights. Disclosures facilitate investors in understanding the implications of the decisions and their corresponding rights. These adjustments signify and incorporate universal expectations. Altogether, these measures were later adopted into a separate framework for the issuance of DVRs. The DVR Framework also specifies Regulation-specific amendments to legitimise the adoption of a DVR-based structure.

C. SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015

The SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("LODR") elucidate the obligations of listed companies to ensure the timely disclosure of material information to protect investors' interests.[66] As per the DVR framework, corresponding amendments in the LODR framework were necessary to adapt with the niceties of DVR-based companies. Some of the Regulations highlighted are Regulations 17, 18, 41 et al. Interestingly, the LODR Regulations do not define DVRs or mention them in the necessary regulations. Instead, the use of SR equity shares is predominant, consequently restricting the scope of

66. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015.

DVRs. The LODR Regulations ensure equal treatment of ordinary shareholders and SR equity shareholders in key aspects of corporate governance. Regulation 41A[67] provides a list of circumstances wherein the votes of SR equity shareholders are equal in terms of value as compared with shares of ordinary shareholders. Besides, it bestows SEBI with the power to notify additional provisions under the regulation from time to time.[68]

D. SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 ("Takeover Code"), was amended to create a DVR-compliant system.[69] Interestingly, the DVR Framework proposed to amend only Regulation 2 of the Takeover Code.[70] Despite that, the Takeover Code does not define DVRs, nor any variants of it. Besides that, regulation 8(14) of the Takeover Code delineates principles for determining the offer price of DVRs in the event of an open offer for acquiring shares.[71] An acquirer shall not attribute value to DVRs less than the value attributed to the equity of common, full-voting shares. Such value is determined by the volume-weighted average market price of the equity over the prior sixty trading days. This prevents prejudicing the interests of the DVR-based equity shareholders in the takeover process. The Takeover Code's emphasis on fairness aligns with the SEBI's responsibility to protect the market and minority shareholders.

E. SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018

The SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 ("ICDR"), provides a comprehensive framework for the issuance

67. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations 2015, reg 41A.
68. ibid.
69. SEBI, 'Framework for Issuance of Shares with Differential Voting Rights' (Circular SEBI/CFD/DIL/LA/2/2009/21/7 dated July 21, 2009).
70. Hong Kong Stock Exchange, 'HKEX Listing Rules on Weighted Voting Rights' (April 2018) <https://www.hkex.com.hk/Listing/Rules-and-Guidance/Main-Board-Listing-Rules/Appendix?sc_lang=en> accessed 11 January 2025.
71. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations 2011, reg 8(14).

of DVRs in India. Like the LODR Regulations, the ICDR Regulations are also restricted to SR and no other variants of DVRs. The nature of the regulations surrounding DVRs posits stringent requirements to ensure only well-capitalized, solvent, and precise governance-structured companies are permitted to issue.[72] For example, Regulation 6(3) of the ICDR Regulations stipulates conditions for companies that have already issued SRs, for undertaking an IPO.[73] Some of the criteria are the technological prowess of the company, net worth of the SR shareholder, voting rights ratio between SR shares and ordinary shares, and equality of shares across all aspects, except voting rights. In addition to that, Regulation 282 and Regulation 283 explains about Innovators Growth Platform ("Platform") and outlines the eligibility criteria for listing on the Platform.[74] Furthermore, Regulation 6(3) of the ICDR stipulates that all rights granted with SRs, whether dividend rights or voting rights, must be disclosed as investors have a right to know.[75]

VII. EQUAL TREATMENT CLAUSES IN CORPORATE CHARTERS

As seen above, DCS creates varied voting rights amongst shareholders. Traditionally, corporate practice has involved OSOV, wherein all the shareholders get voting rights equal to the number of shares. The distinction created by DCS raises issues concerning the treatment of shareholders in a publicly traded corporation. The shareholders with greater voting rights are oriented to have a greater say in the decision-making process, while the low-voting shareholders are fettered due to comparatively lesser voting rights. In such a circumstance, the shareholders must have viable options to counter controlling-centric decisions.

In addition to the previously discussed mechanisms, equal treatment clauses or the principle of equal treatment further precludes misuse of

72. Gaurav Gupte, 'DVRs Are Dead, Long Live DVR!' (*Mondaq,* 8 July 2019) <https://www.mondaq.com/india/shareholders/825844/dvrs-are-dead-long-live-dvr> accessed 22 January 2025.
73. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018, reg 6(3).
74. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations 2018 (India), regs 282-283.
75. Organisation for Economic Co-operation and Development, Corporate Governance Principles (2015) <https://www.oecd.org/corporate/corporate-governance-principles.htm> accessed 11 January 2025.

power by the minority shareholders. Equal treatment clauses provide for equal treatment of ordinary shareholders and shareholders with differential rights in matters of corporate governance. They are divisible into general equal treatment clauses and specific equal treatment clauses.[76] General equal treatment clauses are all-encompassing provisions requiring equal treatment of shareholders across classes irrespective of the event or transaction. For instance, Article 4 of the Restated Certificate of Incorporation of **A.O. Smith Corporation** blurs any distinction between Class A Common Stock and the Common Stock. The provision reads as, "*Except as provided in this Article 4, the Class A Common Stock and the Common Stock shall have the same rights and privileges and shall rank equally, share rateably and be identical in all respects as to all matters.*"[77]

On the contrary, specific equal treatment agreements mandate equal treatment of shareholders contingent on a transaction or an event. Such equality becomes paramount in times of substantial acquisition of shares to preclude high-vote shareholders from extracting excessive premiums in the event of takeovers or mergers. Illustratively, Article IV.2(c) of the Restated Certificate of Incorporation of **Thredup Inc.** instructs for equal treatment of Class A common stock and Class B common stock as a consequence of any merger or change of control. The clause reads as, "*In connection with any Change of Control Transaction, shares of Class A Common Stock and Class B Common Stock shall be treated equally, identically and ratably, on a per share basis, with respect to any consideration into which such shares are converted or any consideration paid or otherwise distributed to stockholders of the Corporation, unless different treatment of the shares of each such class is approved by the affirmative vote of the holders of a majority of the outstanding shares of Class A Common Stock and by the affirmative vote of the holders of*

76. Caley Petruci, 'Equal Treatment Agreements: Theory, Evidence & Policy.' (2023) 40(2) JREG <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18299/Caley%20Petrucci%20Equal%20Treatment%20Agreements%20Theory%20Evidence%20%20Policy.pdf> accessed 22 January 2025.
77. A.O. Smith Corporation, 'Amended and Restated Certificate of Incorporation of A.O. Smith' (*US SEC*) <https://www.sec.gov/Archives/edgar/data/91142/000119312509085514/dex31.htm> accessed 22 January 2025.

a majority of the outstanding shares of Class B Common Stock, each voting separately as a class."[78]

On a comparison of both types of clauses, general equal treatment encompasses all the events and transactions unless expressly excluded, while the specific equal treatment clauses can explicitly or implicitly exclude transactions from the scope of applicability.[79] However, specific equal treatment clauses shall expressly specify and elaborate the event under its scope. For the purpose of this article, specific equal treatment clauses with respect to mergers and substantial acquisition of shares will be addressed.

In transactions involving change of control, the shares are more often than not valued higher than the price at which the buyer would ordinarily want to purchase. Such difference stems from the controller's idiosyncratic value associated with the company, owing to his contribution through the control exercised, and is considered as the 'control premium'.[80] This chain of events, also described as the 'endowment effect',[81] propels buyers to drive up prices for the shares.[82] Hence, if the controller derives a premium, an equal treatment clause would require equal distribution of the amount across all classes of a DCS-based company.

Equal treatment clauses are generously incorporated in the charters of American companies. For instance, Most of the companies are allured by the prospects of incorporating in the state of Delaware, primarily because of corporate-friendly practices.[83] As a consequence, Delaware courts are more often than not busy with adjudicating disputes and developing

78. Thredup Inc., 'Amended and Restated Certificate of Incorporation of Thredup Inc.' (*US SEC*) <https://www.sec.gov/Archives/edgar/data/1484778/000162828021003857/exhibit32-sx1.htm> accessed 22 January 2025.
79. Caley Petruci, 'Equal Treatment Agreements: Theory, Evidence & Policy.' (2023) 40(2) JREG <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18299/Caley%20Petrucci%20Equal%20Treatment%20Agreements%20Theory%20Evidence%20%20Policy.pdf> accessed 22 January 2025.
80. Gladriel Shobe and Jarrod Shobe, 'The Dual-Class Spectrum' (2022) 39(3) JREG <http://hdl.handle.net/20.500.13051/18225> accessed 22 January 2025.
81. Thomas M. Zellweger and Joseph H. Astrachan, 'On the Emotional Value of Owning a Firm', (2008) 21(4) FAM. BUS. REV <https://journals.sagepub.com/doi/10.1177/0894486508021004010 6> accessed 22 January 2025.
82. W.L. Megginson, 'Restricted Voting Stocks, Acquisition Premiums, and the Market Value of Corporate Control'(1990) 25(2) Fin. Rev. <https://doi.org/10.1111/j.1540-6288.1990.tb00791.x> accessed 22 January 2025.
83. Lewis S. Black, Jr., 'Why Corporations Choose Delaware' <https://corpfiles.delaware.gov/pdfs/whycorporations_english.pdf> accessed 22 January 2025.

principles pertaining to equal treatment clauses.[84] Aside from that, equal treatment clauses are prevalent due to no obligation on the controller of the company to share the premium with lower-vote shareholders.[85] Further, the American practice asserts change-of-control transactions as private transactions, thereby preventing non-contracting parties from participating.[86] Thus, equal treatment clauses are ubiquitous in American corporate charters.

VIII. INCOMPLETE NOTIONS OF EQUALITY IN INDIA

India is a newcomer in the jurisprudence of DCS. As late as 2019, the SEBI proposed a framework enabling the adoption of DVRs in the capital structure.[87] Intriguingly, the response to the freeway remained bleak. Only a few companies have issued DVR-based shares, namely TATA Motors, Jain Irrigation Systems Ltd., Future Enterprises Ltd., and GACM Technologies.[88] However, TATA Motors abandoned the DVR-based structure and reverted to ordinary shares.[89] Some of the reasons recorded for reversion were better market capitalization prospects and fulfilment of potential demerger into two separate listed entities.[90] Abandonment of

84. *Brokerage Jamie Goldenberg Komen Rev Tru v Breyer*, C.A. No. 2018-0773-AGB.
85. Guhan Subramanian, 'A New Takeover Defense Mechanism: Using an Equal Treatment Agreement as an Alternative to the Poison Pill' (1998) 23(2) DEL. J. CORP. LAW <https://www.hbs.edu/faculty/Pages/item.aspx?num=4098> accessed 22 January 2025; *Abraham v Emerson Radio Corp.*, 901 A.2d 751, 753 (Del. Ch. 2006).
86. Jorge Brito Pereira, 'An Ocean Apart: The Mandatory Takeover Rule in Brazil and in Europe' (2022) CGSL Working Papers No. 4/2022 <https://catolicalaw.fd.lisboa.ucp.pt/asset/2456/file> accessed 22 January 2025.
87. Securities and Exchange Board of India Framework for Issuance of Differential Voting Rights (DVR) Shares.
88. 'Introducing Differential Voting Rights' (*Argus Partners*, 19 September 2019) <https://www.argus-p.com/papers-publications/thought-paper/introducing-differential-voting-rights/> accessed 22 January 2025.
89. TATA Motors, 'Intimation under Regulation 30 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015' <https://www.tatamotors.com/wp-content/uploads/2024/09/Reg30IntimationofEffectivenessoftheScheme01092024.pdf> accessed 22 January 2025.; Amit Mudgill, 'Tata Motors DVR shares suspended; what's next?' (*Business Today*, 30 August 2024) <https://www.businesstoday.in/markets/stocks/story/tata-motors-dvr-shares-suspended-whats-next-443637-2024-08-30> accessed 22 January 2025.
90. TATA Motors, 'Intimation under Regulation 30 of the Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015' <https://www.tatamotors.com/scheme-of-arrangement-between-tml-and-its-shareholders-and-creditors/>; Samie Modak, 'Tata Motors' DVR conversion plan gets shareholders' nod with 99.8% votes' (*Business Standard*, 4 May 2024) <https://www.business-standard.

the evolving framework by a major company potentially risks the viability of the DVR shares in the country.

Out of the companies adopting DVR-based structure, only Future Enterprises Ltd. has an equal treatment clause, which reads as, "*Where an offer is made to purchase the outstanding Equity Shares or voting rights or equity capital or share capital or voting capital of the Company in accordance with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 and other applicable laws, the applicability of such regulation on Class B Shares will result in an offer also being made to purchase Class B Shares in the same proportion as the offer to purchase Equity Shares*" followed by an illustration.[91] Hence, in addition to the characteristics stated in the previous section, Indian jurisprudence is underdeveloped vis-à-vis equal treatment clauses, to say the least.

Despite the uncommonness of equal treatment clauses, it is premature to assume that the Indian regulatory regime is indistinct in advocating the principle of equal treatment. In the judicial sphere, the Securities Appellate Tribunal ("SAT") in *Ashwin K. Doshi v. SEBI*,[92] prior to SEBI banning the issuance of shares with DVR,[93] delineated certain principles of equality. The matter concerned consolidation of control without executing a public offer, to which the SAT approved and appended two factors before such transfers: 1. Equality of treatment, and 2. Opportunity to all shareholders. The SAT ascribed generality to the principles and considered them to be the primary objectives of the Regulations. In a similar vein, later the Supreme Court in *Nirma Industries Ltd. & Anr vs Securities & Exchange Board of India*,[94] re-emphasized the importance of the principle of fair and equal treatment vis-à-vis substantial acquisition of shares and takeovers.

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com/companies/news/tata-motors-dvr-conversion-plan-gets-shareholders-nod-with-99-votes-124050400100_1.html> accessed 22 January 2025.

91. Future Enterprises Ltd., 'Articles of Association' <https://www.fmn.co.in/pdf/FEL-MOA-AOA.pdf> accessed 22 January 2025.
92. *Ashwin K. Doshi v Securities and Exchange Board of India* 2002 SCC OnLine SAT 30 158.
93. CA Jayant Thakur, 'SEBI Prohibits Issue of Shares with "Superior" Rights' (*IndiaCorpLaw,* 22 July 2009) <https://indiacorplaw.in/2009/07/sebi-prohibits-issue-of-shares-wi.html> accessed 22 January 2025.
94. *Nirma Industries Ltd. & Anr v Securities & Exchange Board of India*, AIR 2013 SC 2360, 40.

On the regulatory front, Regulation 41A of the LODR Regulations emulates the coat-tail provisions outlined in the DVR Framework.[95] Under the listed circumstances, SR will have the same value as ordinary shares. As per Regulation 2(eeea) of the ICDR Regulations, an SR Equity Share Refers Only To The Equity Shares Carrying Superior Voting Rights As Compared To All other equity shares.[96] The incompleteness in the notions of equality stems from certain peculiarities. For example, the LODR Regulations specify SR instead of DVRs, effectively excluding Fractional Rights shares ("FR") or non-voting shares from equal treatment. It leaves scope for discriminatory treatment and ensuing uneven playing field.[97] Illustratively, Article 7A of the Articles of Association of TATA Motors authorized the company to issue non-voting rights shares. Owing to the exclusion, non-voting shareholders would have been refused equal treatment due to regulatory shortcomings.

Apart from that, regulation 7(6) of the Takeover Code[98] requires an open offer to be made to all shareholders of the target company. Conventionally, such mandatory bid presumes the existence of a single class of shareholders, the treatment of whom shall be equal. However, a combined interpretation of Regulation 7(6) and Regulation 8(14) of the Takeover Code extends the principle of equal treatment to DVR-structured companies. Even though the phraseology of Regulation 7(6) does not include "any class of shares", signifying a lack of stratification of equity shares, Regulation 8(14) of the Takeover Code elucidates how the offer price for equity shares with DVRs must be calculated.[99] Illustratively, the equal treatment clause in the Articles of Association of Future Enterprises Ltd. premises treatment of DVRs on the combined reading of Regulation 7(6) and Regulation 8(14) under the Takeover Code.[100] The Indian framework focuses predominantly on a regulatory

95. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, reg. 41A.
96. Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, reg. 2(eeea).
97. Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, reg. 41A.
98. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 7(6).
99. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 8(14).
100. Future Enterprises Ltd., 'Articles of Association' <https://www.fmn.co.in/pdf/FEL-MOA-AOA.pdf> accessed 22 January 2025.

approach to ensure equal treatment. On parsing the AoAs of DVR-based companies, only Future Enterprises included a contractual provision to ascribe equal treatment during the substantial acquisition of shares.[101] It exhibits how adopting contractual provisions can assist in covering regulatory gaps, especially when the Indian framework is in its nascent stages.

IX. TAPPING INTO CONTRACTARIANISM

Contractarianism propounds the idea that a corporation is a result of the "nexus of contracts", governing the relationships between the stakeholders of the company.[102] Primarily, the contractarian approach signifies that a contract is only executed if it maximises the interests of the contracting parties. Such value-maximisation can be deemed harmful by regulations. This underscores the necessity to evaluate the interplay of regulations and contractual freedom.

A. Juxtaposing Regulations with Contractual Freedom

Sole reliance on a regulatory approach potentially hampers value-maximising transactions, since Regulations suffer from the inability to distinguish between value-maximising and value-decreasing transactions.[103] Civil jurisdictions are pervaded with Regulations and legislative guidance about change of control transactions.[104] However, there still remain indications that the minority shareholders' interests are not better protected in such jurisdictions.[105] Numerous factors are involved in optimizing minority shareholders protection (in DCS-based companies, low-vote

101. ibid.
102. David Gibbs-Kneller et. al., 'Not by Contract Alone: The Contractarian Theory of the Corporation and the Paradox of Implied Terms' (2022) 23 EBOR <https://link.springer.com/article/10.1007/s40804-022-00241-7#:~:text=The%20'contractarian'%20or%20'contractual'%20theory%20of%20the,shareholders%2C%20employees%2C%20suppliers%2C%20customers%20and%20other%20parties.&text=While%20the%20imperative%20to%20hold%20parties%20to,the%20imperative%20to%20refuse%20to%20imply%20terms.> accessed 22 January 2025.
103. Luca Enriques, 'European Takeover Law: The Case for a Neutral Approach' (2010) FEEM Working Paper No. 45.2010 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1601288> accessed 22 January 2025.
104. Luca Enriques et al. 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies' in Reinier Kraakman et al., *The Anatomy of Corporate Law: A Comparative and Functional Approach* (Oxford University Press 2017).
105. ibid.

shareholders), including the general nature of the business.[106] Regulations are overtly general and unsuitable for specific business interests.[107]

On the other hand, contractual arrangements are structured with the aim of maximizing shareholders' value, as the inclusion of a provision would depend upon the popular acceptance of the provision. If the provision is detrimental to the interests of the low-vote shareholders, the class of shares would largely remain unsubscribed.[108] The architects of the AoA's are ideal to assess the peculiarities of their business conditions and incorporate relevant clauses.

B. Deducing Principles from Global Experiences

Since the jurisprudence on DVRs is currently immature, a series of innovations through contractual arrangements can create learning externalities for prospective users.[109] Learning externalities create value for the prospective users of the 'clause', as the associated outcomes would aid the company in refining its own clauses.[110] It is a ripe time for various sectors to experiment with equal treatment clauses, as the transaction cost of adopting a new standard is minimal due to no pre-existing standards.[111] Private ordering will allow the company to coalesce sector-specific attributes and general principles into an optimal equal treatment clause.[112]

106. Alexander Dyck and Luigi Zingales, 'Private Benefits of Control: An International Comparison' (2004) 59 J. Financ. <https://doi.org/10.1111/j.1540-6261.2004.00642.x> accessed 22 January 2025.
107. Christophe Clerc et al., 'A Legal and Economic Assessment of European Takeover Regulation' Centre for European Policy Studies: European Capital Markets Institute <https://aei.pitt.edu/47685/1/Takeover_Bids_Directive_book_-_Final.pdf> accessed 22 January 2025.
108. Robert Anderson, 'A Property Theory of Corporate Law' (2020) 2020(1) COLUM. BUS. L. REV. <https://law-economic-studies.law.columbia.edu/sites/default/files/content/Tallarita.%20Dual%20Class%20Contracting.pdf> accessed 22 January 2025.
109. Michael Klausner, 'Corporations, Corporate Law, and Networks of Contracts' (1995) 81 VA. L. REV. <https://law.stanford.edu/publications/corporations-corporate-law-and-networks-of-contracts/> accessed 22 January 2025.
110. Marcel Kahan and Michael Klausner, 'Standardisation and Innovation in Corporate Contracting (or "The Economics of Boilerplate") (1997) 83(4) <kahan -standardization_F61CBF38-1B21-6206-60B5E8AEAA4AF5E1.pdf> accessed 22 January 2025.
111. Michael Klausner, 'The Contractarian Theory of Corporate Law: A Generation Later' (2007) Stanford Law and Economics Olin Working Paper No. 334 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=957501#:~:text=Michael%20Klausner,Stanford%20Law%20School&text=First%2C%20corporate%20contracts%20exhibit%20a,binding%20commitments%20to%20maintain%20them> accessed 22 January 2025.
112. Albert H. Choi and Geeyoung Min, 'Contractarian Theory and Unilateral Bylaw Amendments' (2018) 104(1) IOWA LAW REV. <https://ilr.law.uiowa.edu/print/

Ensuing litigation and outcomes will generate the necessary learning externality and help in standardizing conduct. As popularly perceived, "innovations take the form of private ordering".[113]

C. Delaware And Toronto Stock Exchange

The foregoing principles are exemplified in Delaware, where most of the American companies are incorporated for the reasons mentioned above. For instance, in the *Boilermakers* decision of the Delaware court,[114] The uncertain position surrounding creative charter provisions governing multi-forum litigation of merger transactions was settled. Following the decision, companies increased the rate of adoption of such clauses and delved into novel governance provisions.[115] Further, there have been occasions wherein the model clause in a corporate charter even had been adopted by the regulatory authorities for devising efficient practices.[116] Illustratively, in *CA Inc. v. AFSCME*, the Delaware Supreme Court invalidated a proxy reimbursement by-law on the grounds of interference with the board's authority on determining the money-spending activities.

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volume-103-issue-6/contractarian-theory-and-unilateral-bylawamendments#:~:text=This%20Article%20examines%20the%20contractarian%20theory%20by%20drawing,bylaws%20with%20the%20right%20to%20unilaterally%20modify%20contracts.> accessed 22 January 2025; Min Yan, 'Permitting Dual Class Shares in the UK Premium Listing Regime – a Path to Enhance rather than Compromise Investor Protection' (2021) 42 Legal Studies <https://www.cambridge.org/core/journals/legal-studies/article/permitting-dual-class-shares-in-the-uk-premium-listing-regime-a-path-to-enhance-rather-than-compromise-investor-protection/D29C37B47FD09BD0360352CB70F3FC7C> accessed 22 January 2025.

113. Jill E. Fisch, 'The New Governance and the Challenge of Litigation Bylaws' (2016) 81(4) BROOK. L. REV. <https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=2617&context=faculty_scholarship> accessed 22 January 2025.
114. *Boilermakers Local 154 Ret. Fund v Chevron Corp.* 73 A.3d 934 (Del. Ch. 2013).
115. Jill E. Fisch, 'Stealth Governance: Shareholder Agreements and Private Ordering' (2021) 99 WASH. U. L. REV. <https://wustllawreview.org/wp-content/uploads/2022/02/Fisch-Stealth-Governance.pdf> accessed 22 January 2025; Anne M, Tucker 'The Short Road Home to Delaware: Boilermakers Local 154 Retirement Fund v. Chevron' (2014) 7(2) JBEL <https://digitalcommons.pepperdine.edu/jbel/vol7/iss2/8/> accessed 22 January 2025; Roberta Romano & Sarath Sanga, 'The Private Ordering Solution to Multiforum Shareholder Litigation' (2024) NBER Working Paper No. w21362 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2633318> accessed 22 January 2025.
116. Roberto Tallarita, 'Dual-Class Contracting' (2024) 49(5) J. CORP. LAW <https://jcl.law.uiowa.edu/sites/jcl.law.uiowa.edu/files/2024-09/Tallarita_Final.pdf> accessed 22 January 2025.

Subsequently, the legislature overturned and incorporated the said bye-law as a statutory provision.[117]

The Toronto Stock Exchange ("TSX") mandates for the companies to include coat-tail provisions in the constitutive documents.[118] Essentially, the corporations have been given ample freedom to draft the clauses by themselves. However, inclusion would be subject to the screening of the TSX.[119] Such contractual freedom has the potential to trigger innovative equal treatment clauses, under the close oversight of the TSX. Appropriate decision-making space within the overarching regulation can help evolve equal treatment standards as per the sector-specific needs,[120] since equal treatment of shareholders is a "part of the received learning about publicly held corporations".[121]

It is well settled that an AoA is pegged as a contract between the company and its shareholders, governing the management of the company.[122] The inclusion of an equal treatment clause in the AoA would empower the shareholders to pursue an additional course of action against the company or its directors.[123] Further, if a provision similar to the coat-tail provision of TSX is amenable to contractual incorporation in India, equal treatment would be further strengthened.

X. COMPLEMENTARY VANTAGE POINTS FOR EQUAL TREATMENT: PERSPECTIVES FROM GLOBAL GOVERNANCE NORMS

As mentioned previously, Indian framework needs recalibration for smooth operation of DVR-based companies. To ensure that, pivotal

117. *CA, Inc. v AFSCME Emples. Pension Plan*, 953 A.2d 227, Fed. Sec. L. Rep. (CCH) P94,784 (Del. July 17, 2008).
118. 'Toronto Stock Exchange Company Manual' <https://www.tsx.com/en/listings/tsx-and-tsxv-issuer-resources/tsx-issuer-resources> s. 624.
119. ibid.
120. Hubert De La Bruslerie, 'Multiple class shares and double voting rights: Literature review and research prospects' (2023) 26(3) FCS <https://journals.openedition.org/fcs/11185#tocto2n17> accessed 22 January 2025.
121. Victor Brudney, 'Equal Treatment of Shareholders in Corporate Distributions and Reorganizations' (1983) 71 CAL. L. REV. <https://www.jstor.org/stable/pdf/3480195.pdf> accessed 22 January 2025.
122. *H.P. Gupta v Hiralal* (1970) 1 SCC 437; *Claude-Lila Parulekar v Sakal Papers (P) Ltd.* (2005) 11 SCC 73.
123. Hui Robin Huang et al., 'The (Re)introduction of Dual-Class Share Structures in Hong Kong: A Historical and Comparative Analysis' (2019) 20(1) J. CORP. LAW STUD. <DOI: 10.1080/14735970.2019.1638004> accessed 22 January 2025.

developments from across the world can be drawn and transplanted in the Indian system. This section will outline the Indian framework and suggest cooperative international norms for better functioning of the system.

A. Singapore And TSX

Besides contractual extension of regulations, several other elements can be factored in to enable equal treatment of shareholders in DCS-based companies. DCS-based companies must not be regulated by traditional regulations, since there is a potential dichotomy between the voting power and the economic benefits that a controller may derive.[124] Further, Regulation 7(6) has not been amended in light of the 2019 DVR Framework, nor does the latter provide for open offer guidelines for DVR-based companies.[125] Hence, the language across SEBI Regulations, particularly the Takeover Code, must be reworded to accommodate DVR-based companies' issues. To begin with, incorporation of the phrase "any class" in necessary regulations can extend the scope to DVR-based companies.

The Singapore Takeover Code was also coincidentally amended in 2019, whereby it adopted a similar provision in terms of pricing of offers. Rule 14.1 of the Singapore Takeover Code uses the phrase "any class" with reference to mandatory bids.[126] Similar ideation can also be traced in the coat-tail provisions prescribed by the TSX.[127] The TSX Coattail provision provides for equal participation of restricted votes-shareholders when an offer is made to all holders of common securities, unless an identical offer is made to the holders of restricted securities. The coat-tail provision has helped Canadian companies, dominated by family owners,

124. Anurag Gupta and Sushma Reddy, 'SEBI's Brightline Test: The Right Way to Move Forward?' (2017) 2(2) JCLG <https://jclg.in/wp-content/uploads/2024/03/Volume-2-Issue-2-2017.pdf> accessed 22 January 2025.
125. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 7(6).
126. Chuanman You, 'Equal Treatment of Shareholders under the Dual Class Share Structure: Recent Development of Takeover Rules in Singapore' (2020) 41 The Company Lawyer <https://ink.library.smu.edu.sg/cgi/viewcontent.cgi?article=5436&context=sol_research> accessed 22 January 2025.
127. 'Toronto Stock Exchange Company Manual' Toronto Stock Exchange Company Manual' <https://www.tsx.com/en/listings/tsx-and-tsxv-issuer-resources/tsx-issuer-resources> s. 624; s 3.5, cl. 6.

align interests with minority interests.[128] Interestingly, Indian corporations are also marked by concentration of control due to the stronghold of families.[129] Hence, emulating the language incorporated in the coat-tail provision and the Singapore Takeover Code can be beneficial for Indian jurisprudence.

B. Hong Kong (China)

Additionally, the ambit of Stakeholder Relations Committee can be expanded to oversee the implementation of equal treatment clauses by the controlling shareholders in DVR-based companies.[130] The primary role of redressing grievances is to enable low-vote shareholders to opt for an internal dispute resolution mechanism and prevent litigation costs due to contract enforcement proceedings, et al. Disparate treatment by the company can be met with punitive damages as per Section 178(8), hence ensuring compliance.[131] To strengthen representation of the low-vote shareholders, a certain sliver of the composition must be ascribed to low-vote shareholders.[132] A similar instance can be traced to the Hong Kong Exchanges and Clearing Limited Listing Rules ("HKEX Rules").[133] The Rules require companies based on a Weighted Voting Rights ("WVR") structure to adopt a Corporate Governance Committee for safeguarding and enhancing shareholders' interests.[134] In a similar vein, the Chinese companies adopting the DCS structure are required to solicit the opinion of the Supervisory Board on mechanisms for shareholder protection, and

128. Yvan Allaire, 'The Case for Dual-Class of Shares', Institute for Governance of Private and Public Organisations (SSRN, 20 December 2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3318447> accessed 22 January 2025.
129. Arka Saha and Deekshitha Srikant, 'Revisiting the Dual Class Share Structure Debate in India Post the Alibaba IPO: Attempting to Tread the Middle Ground' (2015) 1(1) NLSBLR <https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1029&context=nls-blr> accessed 22 January 2025.
130. Companies Act, 2013 (18 of 2013), s. 178; Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015, reg. 20.
131. Companies Act, 2013, (18 of 2013) s. 178(8).
132. Kirby Smith, 'The Agency Costs of Equal Treatment Clauses' (2017) 127 YALE L.J.F. <https://www.yalelawjournal.org/forum/the-agency-costs-of-equal-treatment-clauses> accessed 22 January 2025.
133. Hong Kong Exchanges and Clearing Limited Listing Rules, rule 8A.31 at part 8A-11.
134. Ravencroft & Schmierer, 'HKEX's Proposal on Corporate Weighted Voting Rights' (*Lexology*, 26 January 2021) <https://www.lexology.com/library/detail.aspx?g=e2b37f92-e006-40c7-b8c1-75de1a4940d3> accessed 22 January 2025.

the same is necessary to be published in the annual statements of the company.[135]

C. China and the USA

Ex-ante preventive mechanisms must be supplemented with robust ex-post mechanisms for enforcement of the equal treatment clauses. Interestingly, India empowers the shareholders in undertaking class action suits against the company or its directors.[136] However, it remains underutilised owing to stringent requirements, difficulties in formation of class, and lack of awareness.[137] Across the pond, the American jurisprudence has pioneered securities class-action suits even with respect to equal treatment clauses, and led to creation of consistent principles.[138] Class action suits in the USA have benefitted in reducing collective action problems and produced economies of scale.[139]

To further strengthen the Indian framework, possible insights can be drawn from the Chinese experience. Article 95 of the revised Securities Law allows the investors to initiate civil litigation.[140] For prompt representation of the minority, the China Securities Regulatory Commission ("CSRC") has authorised a self-created China Securities Investor Services Centre to hold shares on behalf of the minority and represent them in court.[141] A similar structure is possible in India as well, as Section 245(10)

135. Min Yan, 'Differentiated voting rights arrangement under dual-class share structures in China: expectation, reality, and future' (2021) 28(2) APLR <https://www.tandfonline.com/doi/full/10.1080/10192557.2020.1855794#d1e705> accessed 22 January 2025.
136. The Companies Act, 2013 (18 of 2013) s. 245.
137. 'Are Current Class Action Suit Provisions in India Sufficient for ESG Related Disputes' (*Nishith Desai Associates,* 22 August 2024) <https://www.nishithdesai.com/NewsDetails/15099> accessed 22 January 2025.
138. *In re Delphi Fin. Grp. S'holder Litig.*, C.A. No. 7144-VCG (Del. Ch. Mar. 6, 2012); Caley Petruci, 'Equal Treatment Agreements: Theory, Evidence & Policy.' (2023) 40(2) JREG <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18299/Caley%20Petrucci%20Equal%20Treatment%20Agreements%20Theory%20Evidence%20%20Policy.pdf> accessed 22 January 2025.
139. Albert H. Choi, Stephen J. Choi and A.C. Pritchard, 'Just Say No? Shareholder Voting on Securities Class Actions' (2022) 1(1) UChiBLR <https://businesslawreview.uchicago.edu/print-archive/just-say-no-shareholder-voting-securities-class-actions#:~:text=The%20U.S.%20securities%20laws%20allow,and%20also%20encouraging%20nuisance%20suits.> accessed 22 January 2025.
140. Securities Law of The People's Republic of China, art 95.
141. International Monetary Fund, 'People's Republic of China: Financial Sector Assessment Program' IMF Country Report No. 17/404 (*IMF*, December 2017) <https://www.imf.org/~/media/Files/Publications/CR/2017/cr17404.pdf> accessed 22 January 2025.

allows for the association of persons to represent shareholders before the court.[142] Class action is a viable ex-post mechanism since the disparate treatment may be meted out against the low-vote shareholders class in totality, rather than singularly.

XI. UNEQUAL BUT FAIR TREATMENT: A POSSIBLE OUTLOOK

Equal treatment clauses are vital in safeguarding the interests of low-vote shareholders. Yet, not often does adherence to strict equality ensure just distribution of the premium. Equal treatment of various classes does not always result in fair treatment, as the shareholders bringing additional value are not adequately compensated for their loyalty and efforts for the corporation.[143] Accordingly, another layer of protection can be added in the form of an unequal yet fair treatment clause. In the Indian context, the Bhagwati Committee Report on Takeovers, 1997,[144] and the Takeover Regulations Advisory Committee, 2010,[145] highlight fair and equal treatment and fair treatment of shareholders, respectively. Further, the Takeover Code envisages equitable treatment of shareholders in terms of payment of premiums in open offers.[146] Illustratively, in the USA, the Massachusetts Supreme Judicial Court in *Wilkes v. Springside Nursing Home, Inc.* juxtaposed legitimate business interests with the practicality of alternatives for achieving the purpose of assessing if the minority's rights were being overlooked.[147]

It might be prudent to converge the essence of a contract with the quality of fairness. Importantly, fairness can be attained through the constitutive

142. The Companies Act, 2013 (18 of 2013) s. 245 (10).
143. James D. Cox, 'Equal Treatment for Shareholders: An Essay' (1997) 19 CARDOZO LAW REV. <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1573&context=faculty_scholarship#:~:text=The%20final%20por%2D%20tion%20of,other%20types%20of%20unequal%20treatment.> accessed 22 January 2025.
144. Justice PN Bhagwati Committee, Report on Takeovers (SEBI 1997).
145. Report of the Takeover Regulations Advisory Committee under the Chairmanship of Mr. C. Achuthan (SEBI, 2010) <https://www.sebi.gov.in/reports/reports/jul-2010/report-of-the-takeover-regulations-advisory-committee_717.html> accessed 22 January 2025.
146. FREQUENTLY ASKED QUESTIONS ON SEBI (SUBSTANTIAL ACQUISITION OF SHARES AND TAKEOVERS) REGULATIONS, 2011 Q.33 <https://www.sebi.gov.in/sebi_data/faqfiles/mar-2022/1648620806406.pdf> accessed 22 January 2025.
147. *Wilkes v Springside Nursing Home, Inc.*, 370 Mass. 842, 353 N.E.2d 657.

documents of the company. As elucidated, perhaps the express inclusion of a control premium in the AoA and an equal treatment clause providing for proportionate sharing of the same would ensure equitable sharing of the premium and balancing the interests of the classes of shareholders.[148] Regulation 8(14) of the Takeover Code can enable the calculation of premium.[149] Such proportionate sharing can ensure equitable and fair treatment of shareholders across classes. An example of such clause can be traced to the Certificate of Incorporation of Biglari Holdings, reading as: "*[I]n the event of a merger, consolidation or other business combination . . . the holders of the [nonvoting] Class B Common Stock shall receive the same form of consideration and one-fifth (1/5) of the amount, on a per share basis, as the consideration, if any, received by holders of the [voting] Class A Common Stock in connection with such merger, consolidation or combination.*"[150] Thus, equitable and fair treatment of shareholders in DVR-based companies must be promoted along with equal treatment of shareholders.

XII. CONCLUSION

The DCS structure fosters a creative balance between the capital-raising needs of the company and the retention of control by the promoters. Similar to other corporate structuring mechanisms, DCS is a dual-edged sword. Besides being hailed by startups and tech companies, several institutions and regulators have expressed their apprehension and advocated for equal treatment of shareholders. The balancing act has necessitated devising new methods to counter-balance the controlling shareholders' freedom to pursue their goals, with the equality of low-voting shareholders in key matters. Equal treatment clauses appear as a pivotal tool for ensuring this balance. These clauses mandate the controlling majority to allow equal access to open offer opportunities and equal consideration in terms of premiums, thereby safeguarding the interests of low-voting

148. Kirby Smith, 'The Agency Costs of Equal Treatment Clauses' (2017) 127 YALE L.J.F. <https://www.yalelawjournal.org/forum/the-agency-costs-of-equal-treatment-clauses> accessed 22 January 2025.

149. Securities and Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, reg. 8(14).

150. Caley Petruci, 'Equal Treatment Agreements: Theory, Evidence & Policy.' (2023) 40(2) JREG <https://openyls.law.yale.edu/bitstream/handle/20.500.13051/18299/Caley%20Petrucci%20Equal%20Treatment%20Agreements%20Theory%20Evidence%20%20Policy.pdf> accessed 22 January 2025.

shareholders. However, sole reliance on equal treatment is not advisable. Equal but fair treatment complements the equal-treatment approach as it rewards the controlling majority for their contributions to the company. Regulation-imposed equality often does not help in maintaining such balance as regulations are generic in nature. Adopting a contract-based approach advances company-specific interests and signifies mutual acceptance of terms by the controlling majority and the low-voting shareholders. Giving ample freedom to contract within the overarching regulatory framework permits companies to adopt tailored clauses. To facilitate this, numerous changes are needed in the current Indian regulatory framework, especially with respect to takeovers. As suggested above, several insights can be drawn from the regulatory framework of China, Singapore, and Hong Kong to embolden the foundation. India's budding regulatory framework and prospective increase in the adoption of DCS by startups provides a valuable opportunity to experiment with innovative methods.

Navigating the Murky Waters at the Confluence of Arbitration and Insolvency: Why India Urgently Needs a Framework to Augment Certainty in Cases of Domestic Cross-Border Insolvency

*—Tejbeer Singh and Ankit Singh**

ABSTRACT

The interplay between arbitration and insolvency law presents significant challenges, especially in the context of cross-border insolvency, where conflicting principles of collective creditor resolution and contractual autonomy converge. This paper explores the urgent need for India to adopt a structured framework addressing the treatment of arbitration proceedings during insolvency, particularly in light of the evolving jurisprudence under the Insolvency and Bankruptcy Code, 2016 (IBC).

The paper critically examines the gaps in India's existing insolvency framework, emphasizing the limitations of Section 14 of the IBC in dealing with pending arbitrations. It highlights how a blanket moratorium often undermines the rights of creditors with contingent claims, creating uncertainty and delays. Drawing on recent Indian Supreme Court judgments such as Adani Power v. Shapoorji Pallonji, the analysis underscores a jurisprudential shift that recognizes arbitration's complementary role in insolvency, allowing proceedings to continue under specific conditions.

Further, the paper studies approaches from arbitration-friendly jurisdictions like the UK and Singapore, where courts have permitted arbitration during insolvency by balancing

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procedural efficiency, creditor rights, and insolvency objectives. Drawing from these models, it proposes guiding principles for Indian courts to permit arbitration in cases involving multi-jurisdictional disputes, contingent claims, or creditor security interests.

Ultimately, the paper advocates for targeted amendments to the IBC and partial adoption of the UNCITRAL Model Law to ensure a cohesive approach to arbitration and insolvency. Such reforms would enhance legal certainty for creditors and businesses operating across jurisdictions, reinforcing India's standing as an arbitration-friendly jurisdiction while supporting efficient cross-border insolvency resolution.

Keywords: Cross-Border Insolvency, UNCITRAL Model Law, Moratorium and Creditor Rights, Arbitration and Insolvency Law.

I. INTRODUCTION

Arbitration as a mode of dispute resolution is not in line with the underlying goals of insolvency law around the world. The inevitable intersection of both, due to cross-jurisdictional business operations in contemporary times, along with the judicial approach across multiple jurisdictions to widen the scope of arbitrable disputes, has led arbitration to make inroads into cases where one of the parties to the dispute is insolvent. As observed by the US courts, domestic considerations pertaining to the non-arbitrability of specific claims cannot be given precedence over the international policy of promoting arbitration unless there is a grave conflict with the public policy of the state. Public policy requirements concerning non-arbitrability in cases where one of the parties to the agreement is insolvent have been interpreted in a liberal manner by courts across multiple jurisdictions.

A recent analysis of several Supreme Court judgments reveals that the Court has allowed arbitration to proceed under certain circumstances within the existing framework of the IBC, particularly in the recent case of *Adani Power v Shapporji Pollonji*.[1] Specific amendments to the IBC

1. *Adani Power Limited v Shapoorji Pallonji and Co Pvt Ltd* Civil Appeal No 1741 of 2023.

are required not only to allow arbitration during the pendency of the Corporate Insolvency Resolution Process (hereinafter "CIRP") under Section 14 of the Insolvency and Bankruptcy Code, 2016[2] (hereinafter "IBC") in cases of domestic arbitration but also to address cases involving foreign companies that may have assets in Indian jurisdiction or may be undertakings of foreign companies with assets abroad.

Globalization coupled with increasing foreign investments in India and around the globe has compounded the risk of companies facing insolvency proceedings. Due to complex inter-related business operations in the modern markets these proceedings tend to have a spill-over effect in the other jurisdictions where the company is operating. This essentially leads to a prejudicial position for the creditors of these entities facing insolvency because most of the insolvency laws tend to impose a specific moratorium on continuance or commencement of proceedings against these entities. In most cases these moratoriums are sought to be recognized in these jurisdictions where the arbitration in pending. The Indian law does not provide for specific effects of recognition of a foreign insolvency proceeding on arbitrations pending in India. Sections 234[3] and 235[4] of the IBC allow the Government of India to enter into reciprocal arrangements with other nations for coordination of cross-border insolvencies but these provisions prove to be highly redundant in the context of the modern Indian Market that hosts multiple foreign companies operating across jurisdictions carrying business in India. Arguing for adoption of UNCITRAL Model Law on Cross Border Insolvency[5] (Hereinafter "UNMLCBI") is not the focus of this paper. Rather this paper aims to submit that India should consider incorporating specific aspects of model law under the Insolvency law framework so as to provide a principled treatment to pending arbitration matters in light of the jurisprudential shift post the *Vidya Drolia judgment*.[6]

2. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 14.
3. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 234.
4. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 235.
5. United Nations Commission on International Trade Law (UNCITRAL), *Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (adopted 30 May 1997, UN 2013) <https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency> accessed 20 December 2024.
6. *Vidya Drolia and Others v Durga Trading Corporation* (2020) 2 SCC 1.

Firstly, the paper aims to address a pertinent gap under the current insolvency framework with respect to pending matters before arbitral tribunals and the treatment of such contingent claims. The paper argues that instead of adopting a blanket stay on arbitration in light of Section 14,[7] the discretion under Section 14 must be exercised, in light of certain factors which permit arbitration proceedings to continue so as to protect the rights of creditors having contingent claims at the initiation of CIRP. The potential benefits to the multi-jurisdictional entities carrying business in India and the domestic creditors if arbitration is permitted to continue during CIRP are also highlighted. *Secondly*, the paper aims to consolidate some guiding principles that could form the basis on which the pending arbitration proceeding seated in India should be permitted to continue by the Indian courts and tribunals in light of an insolvency process that might be initiated against a party in a foreign jurisdiction. The principles would be analyzed by studying the basis on which arbitrations seated in the UK and Singapore have been allowed to continue even in cases where an insolvency proceeding has been initiated against one of the parties to the arbitration agreement in a foreign jurisdiction. *Lastly*, the paper studies the potential benefits of permitting international arbitration to continue despite a foreign insolvency proceeding and concludes thereafter.

II. UNDERSTANDING THE PERMISSIBILITY OF ARBITRATION WITHIN THE EXISTING FRAMEWORK UNDER IBC

A. The Problematic Treatment of Contingent Claims

The Supreme Court in the case of *Essar Steel Limited v Satish Kumar Gupta*[8] held that once resolution plan has been approved by the adjudicating authority, the Resolution Professional cannot be saddled with new claims that were not a part of the resolution plan. The Supreme Court clearly held that once the Resolution Plan has been approved by the Adjudicating Authority, then its Corporate Debtor (hereinafter "CD") operates as a clean slate with no pending claims.[9] The aforementioned

7. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 14.
8. *Essar Steel Limited v Satish Kumar Gupta* [2019] 16 S.C.R. 275.
9. ibid.

ratio reflected that the admittance of the application of CIRP under section 14 pursuant to application of default would stay the arbitration proceedings for undecided claims pending against the CD. This would have caused a great prejudice to the creditors whose undecided claims were still pending. The operational creditors are at a greater prejudice in such cases though financial creditors might also be prejudiced in cases where the existence of debt is itself disputed by the CD.

The treatment of contingent claims under IBC is not primary focus of this paper. However, the study of their treatment becomes relevant in light of the moratorium that might be imposed on such claims by virtue of section 14. The treatment of contingent claims in India is mired in uncertainty owing to the fact that resolution professionals are supposed to have administrative powers compared to the quasi-judicial powers of liquidators that provide for a summary procedure to admit the approximate value of contingent claims.[10] The result of such confusion has been that there has been a tendency to admit claims to the notional value of rs.1 that are practically worthless owing to the clean slate theory.[11]

B. Shift in the Approach of SC in Cases of Pending Arbitrations: A Far-Reaching Consequence

The aforementioned stance was altered by the Supreme Court in *Fourth Dimensions Solutions* where the court allowed the arbitration to proceed even after the formulation of CIRP.[12] Further, the SC in *Adani Power v Shaproonji Pallonji*[13] permitted the arbitration proceedings against the debtor to proceed even after the formulation of resolution plan and its approval by the Committee of Creditors (hereinafter "COC"). In the context of operational creditors, it was observed that the outcome would not bind the debtor but the proceedings could be permitted to continue. This

10. Gyanendra Kumar, Shreya Som, Soumya Dasgupta & Shivam Tiwari, 'Quasi-judicial Role of Liquidators in Treating Disputed Claims under the IBC' (*Cyril Amarchand Mangaldas Dispute Resolution Blog*, 18 January 2024) <https://disputeresolution.cyrilamarchand-blogs.com/2024/01/quasi-judicial-role-of-liquidators-in-treating-disputed-claims-under-the-ibc/ >accessed 23 December 2024.
11. *Reliance Commercial Finance Ltd* v *Texmills Pvt Ltd* [2021] 12 SCC 199.
12. *Fourth Dimension Solutions Ltd v Ricoh India Ltd & Ors* (2022) Civil Appeal No 5908/2021.
13. *Adani Power Limited v Shapoorji Pallonji and Co. Pvt. Ltd.* Civil Appeal no. 1741 of 2023.

observation could have far reaching implications particularly in cases where the debtor has operations across multiple jurisdictions.

The above reading of SC in the Adani Power case has the effect of harmonizing the holding of SC in the *Essar steel case* with the pro-arbitration approach that is in line with the tenor of section 14. It is pertinent to note that section 14 does not envisage an absolute bar on the continuance of legal proceedings against the debtor but makes the continuance of such proceedings subject to the order of Adjudicating Authority. The Adjudicating Authority has been given the requisite discretion that can be exercised in light of the aforementioned reading of the *Adani Power case*.

Also, the operational creditors generally have debt owing to claims pertaining to goods or services, as these claims are capable of being settle conveniently by tribunals in a timely manner and are not likely to involve issues generally that violate the public policy concerns relating to issues of non-arbitrability the courts are likely to not to interfere with the awards on ground of violating public policy. Also, in light with the recent shift in the approach of the SC highlighted in *Adani Power v Shapoorji Pallonji*, the grounds for challenging the awards on basis of violation of public policy and mandatory stay provisions under IBC is not likely to succeed. Unnecessarily delaying the resolution process for the operational creditors is likely to affect the ease of doing business in India as marred by such uncertainty the creditors cannot have sense of security with respect to the resolution of their claims.

C. The Practical Viability of Permitting Arbitration to Continue

Supposedly, the CIRP succeeds, owing to the clean slate theory, the amount cannot be claimed against the creditor, leading to continuance of the pending claim against the debtor. Though this claim would not be binding on the debtor as held by SC in the *Shapoorji Pallonji case*, the resolution of the claim gets unnecessarily delayed. This is evidenced by the average completion of CIRP taking around 600-650 days,[14] while an award has to be rendered within 12 months from the date when pleadings

14. Indian Institute of Insolvency Professionals of ICAI (IIIPI), *Research Report on Timely Turnaround: Bottlenecks in CIRP and Liquidation Under IBC - Case Studies (2024)*, <https://www.iiipicai.in/wp-content/uploads/2024/08/TIMELY-TURNAROUND-BOTTLENECK-IN-CIRP-AND-LIQUIDATION-UNDER-IBC.pdf> accessed on 23 December 2024.

are closed,[15] highlighting the comparatively faster mode of dispute resolution through arbitration. For instance, a fast-track arbitration procedure only takes 6 months to result in an award as per the Delhi International Arbitration Centre rules[16] (Hereinafter "DIAC rules"). Additionally, the government has also proposed revised timelines under the Arbitration & Conciliation Act (Hereinafter "A&C Act") to streamline the arbitration procedure in India.[17] In a number of cases, the arbitration can be completed and settled within such time frame, resulting in a grant of the award, and it is unlikely that it would be interfered by the courts.

Also, there are considerable chances that a resolution plan fails and the corporate debtor is liquidated. Till March 2024, the total CIRPs ending in liquidation were 2,476.[18] This highlights that 37% of the insolvencies tend to move to liquidation, which is a considerable number. If one refers to the IBBI liquidation process regulation it clearly provides that the updation of claims is permissible after the appointment of a liquidator.[19] This points out the practical utility of allowing the pending arbitration proceedings to continue, as the resolution professional is entitled to pursue the legitimate claim on behalf of the corporate debtor. Further, an additional benefit of having an arbitral award in favor of a party would allow a principled determination by the liquidator. This is because liquidators act in a quasi-judicial capacity[20] under the Indian Law while determining the amount at the liquidation stage even if the award is challenged under section 34 of the A&C act.[21] Mere fact that a claim is sub-judice, in case an award is subject to challenge, cannot be the basis

15. The Arbitration and Conciliation Act, 1996 (26 of 1996) s 29A.
16. The Delhi International Arbitration Centre (Arbitration Proceedings) Rules, 2023, r 13.2.
17. The Arbitration and Conciliation (Amendment) Bill, 2024.
18. Priyansh Verma, '*Debt Worth Rs 13.9 Trillion Resolved Under IBC Since Start' Financial Express*' (Financial Express, 22 January 2024) <https://www.financialexpress.com/business/banking-finance-debt-worth-rs-13-9-trillion-resolved-under-ibc-since-start-3561324/> accessed 23 December 2024.
19. Insolvency and Bankruptcy Board of India (IBBI), Regulations Governing Liquidation Process under the Insolvency and Bankruptcy Code (2016) reg 12.
20. Gyanendra Kumar, Shreya Som, Soumya Dasgupta & Shivam Tiwari, 'Quasi-judicial Role of Liquidators in Treating Disputed Claims under the IBC' (*Cyril Amarchand Mangaldas Dispute Resolution Blog*, 18 January 2024) <https://disputeresolution.cyrilamarchand-blogs.com/2024/01/quasi-judicial-role-of-liquidators-in-treating-disputed-claims-under-the-ibc/>accessed 23 December 2024.
21. The Arbitration and Conciliation Act, 1996 (26 of 1996) s 34.

of non-determination of a claim by the liquidator on a principled basis.[22] This is also substantiated by the Insolvency Bankruptcy Board of India (IBBI) liquidation process regulation that provides that the liquidator has to do the best estimate of the claim under consideration on the basis of relevant information and material.[23] This process facilitates determination of claims because liquidators tend to adopt a summary procedure for determination of claim amount, which could be determined comprehensively through an arbitration proceeding.

Another aspect to note is that the resolution professional cannot discharge the security interests of third parties in the debtor's property as a part of the resolution plan,[24] thereby indicating that disputes of such nature relating to proprietary rights or security interests of third parties in the debtor's property could be permitted to continue. This aspect also assumes significance in light of the endorsement of the group companies' doctrine by the SC in the case of *Cox and Kings v SAP India*[25], as the proceedings relating to the enforcement of security interests might involve the corporate debtor as a party which could be hit by operation of wide wordings of section 14 of IBC.

The aspect relating to the enforcement of the award in a foreign jurisdiction becomes crucial because the insolvency process once recognized in a foreign jurisdiction against the Indian Debtor would mean that Indian creditors having multi-jurisdictional operations and high value of pending claims might have an option of representation in a foreign jurisdiction. For instance, in Singapore, liquidation of a foreign company would require the appointed liquidator under Section 250 of the Insolvency, Restructuring, and Dissolution Act (Hereinafter "IRDA") to invite claims from creditors of all jurisdictions where the liquidator has not been appointed, thereby making it possible for a creditor claiming against such Indian entity to seek recourse even in Singapore, subject to principle of equal treatment of creditors under Singapore law.[26]

22. *International Asset Reconstruction Company of India Ltd v The Official Liquidator of Aldrich Pharmaceuticals Ltd* (2017) 16 SCC 137.
23. Insolvency and Bankruptcy Board of India (IBBI), Regulations Governing Liquidation Process under the Insolvency and Bankruptcy Code (2016) reg 25.
24. *Jaypee Kensington Boulevard Apartments Welfare Association & Ors v NBCC (India) Ltd & Ors* (2021) 12 SCR 603.
25. *Cox and Kings Ltd v SAP India Pvt Ltd & Anr* (2023) INSC 1051.
26. Insolvency, Restructuring and Dissolution Act 2018 (Singapore), s 250.

Another example could be the protection offered by the Law of the UK under Cross-Border Insolvency Regulations, 2006 (hereinafter "CBIR") to foreign creditors. The CBIR protects the claim of secured creditors under Article 20(3)(a)[27], allowing secured creditors to enforce security claims in the UK. This essentially implies that considering the long time taken to approve a resolution plan, which would then be sought to recognized and enforced in UK pursuant to requisite insolvency procedures, the creditor might obtain arbitral awards related to a security interest, in his favor, which could be validly enforced in accordance with UK law. Further article 32 of CBIR highlights that multiple claims can be filed by a creditor with the caveat that the amount payable would be proportionately reduced.[28]

Thereby, the aforementioned analysis puts forth that moratorium should not affect the pending claims and that arbitration should be allowed to go forth, particularly in light of according a certain sense of those Creditors that have multi-jurisdictional operations and could seek a valid enforcement of awards tendered in other jurisdictions, subject to the insolvency procedure adopted in that jurisdiction. Also, the domestic creditors might have a benefit under the arbitral award if the CIRP fails and the debtor is liquidated, as highlighted.

Considering prolonged to complete arbitration proceedings in India, the courts can undertake a nuanced approach to permit arbitration to continue in light of the factors like the stage at which arbitration proceeding has reached, the value of the claim, the time expected to conclude the arbitration proceedings and other ancillary rights that a creditor might have under the arbitration agreement, for instance a security interest over the assets of the debtor is under question.

III. FATE OF THE FOREIGN COMPANIES CONDUCTING BUSINESS IN INDIA GOING BANKRUPT: UNATTENDED QUAGMIRE

The companies going bankrupt in a foreign jurisdiction having business and assets in India need peculiar attention, particularly in light of the interest of domestic Indian creditors that might be at stake. The idea

27. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 20(3)(a).
28. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 32.

originates in the recognition of limited territorial effects of the national insolvency laws only on the assets that are situated in the jurisdiction where the relevant insolvency proceedings have been initiated. Sadly, there is no statutory framework in India that deals with the aforementioned scenario. Sections 234 and 235 of IBC[29] are based on bilateral cooperation that is backed by treaties and are not exhaustive in the current economic landscape of the country that houses entities having multi-jurisdictional operations. The paper aims to put forth a study of relevant principles that should form the basis for the exercise of jurisdiction by the relevant courts and tribunals to permit pending arbitration proceedings seated in India to continue in light of an insolvency proceeding that might be initiated against one of the parties to the dispute in a foreign jurisdiction.

The underlying principle behind an insolvency process essentially conflicts with the arbitration proceeding. The practical reality is that the tribunals and the awards rendered by them draw their legal enforceability under the relevant national legal systems. When viewed with this perspective a pertinent point to note would be that the award might be sought to be enforced in a third country where the insolvency proceedings have not been recognized. The issue in this approach can be highlighted by referring to the *Victrix Steamship*[30] where the awards was sought to be enforced in the United States ("US") against the assets of the award debtor while bankruptcy proceedings were pending against the award debtor in Sweden. The US court denied the enforcement in light of the fact that rights of the creditors would be prejudiced and that would violate the US public policy.

This naturally gives rise to a question of whether the adjudicating authorities in India when faced with an application to permit arbitration to continue in the event of recognition of a foreign main proceeding should refuse the arbitration to continue in light of the underlying policy of the international insolvency regime or should permit the pending arbitration to continue in order to give commercial certainty to the transaction consummated in India that seek to arbitrate their disputes in Indian jurisdiction.[31]

29. The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 234 & 235.
30. *Victrix Steamship Co SA v Salen Dry Cargo AB* 825 F 2d 709 (2nd Cir 1987).
31. *Fotochrome, Inc. v Copal Company Limited* 517 F.2d 512 (2d Cir 1975).

Article 20 of UNMLCBI[32] provides for a stay on all pending proceedings against the debtor's assets, rights and liabilities if the foreign insolvency proceeding is recognized by the courts of recognizing state as a foreign main proceeding. Foreign main proceeding essentially means that the jurisdiction where insolvency was initiated is the Centre of main interest of its business operations.

The focus of this paper is not to highlight the principles governing the determination of Centre of Main Interest ("COMI"), rather the paper focuses on the effects such recognition of a foreign main proceeding has on pending arbitration proceedings seated in India. In light of the recent discussion paper of the working group of Model Law and the approach adopted by arbitration-friendly jurisdictions like UK and Singapore, it can be seen that international arbitrations are not stayed merely on recognition of an insolvency proceeding under Article 20 and that the courts in these jurisdictions are willing to allow the arbitrations to proceed in light of application made before them pursuant to requisite procedure.

As highlighted before, in the absence of the existence of any specific approach under Indian jurisprudence on this highlighted issue, the paper studies the approach adopted by arbitration-friendly jurisdictions to highlight the relevant principles that should form the basis of the exercise of discretion by the courts and tribunals in India to permit arbitration to continue in light of a foreign insolvency initiated against one of the parties to the agreement.

A. The Recent Report of Working Group on UMLCBI also Reflects the Same Approach

The report highlights the growing recognition of arbitration's role in complementing insolvency processes while respecting the procedural safeguards necessary for cross-border insolvency coordination.[33] The working group emphasizes the lex fori concursus—the law of the state where insolvency proceedings are initiated—as the primary governing framework for determining the effects of insolvency, including stays on

32. UNCITRAL Model Law on Cross-Border Insolvency, art 20.
33. Manuel Penades, 'The Law Applicable to the Effects of Insolvency in Arbitration: UNCITRAL's Work in Progress' (*Kluwer Arbitration Blog*, 13 December 2023) <https://arbitrationblog.kluwerarbitration.com/2023/12/13/the-law-applicable-to-the-effects-of-insolvency-in-arbitration-uncitrals-work-in-progress/> accessed on 28 December 2024.

proceedings. However, it recognizes a crucial carve-out: for arbitrations already pending at the time insolvency proceedings commence, the impact of insolvency must be determined under the *lex arbitri* (law of the arbitration's seat). This nuanced treatment aligns with arbitration-friendly jurisdictions, such as Singapore and the UK, where courts have permitted arbitrations to continue if the underlying disputes are better suited for resolution in arbitral forums, particularly when involving complex contractual claims or security interests. Such an approach not only upholds party autonomy but also ensures efficient adjudication without disproportionately burdening the insolvency estate.

That said, the working group's reliance on the *lex fori concursus* poses potential conflicts with Article 20 of the UMLCBI, which mandates an automatic stay on proceedings upon recognition of a foreign main proceeding.[34] The automatic stay, central to the model law, seeks to preserve the integrity of the insolvency estate and ensure equitable treatment of creditors. However, this mandatory provision often clashes with the procedural independence of arbitration. The report explores potential solutions, including leveraging coordination mechanisms and discretionary relief to navigate this tension. Such mechanisms, if thoughtfully integrated, could prevent arbitrary disruptions to pending arbitrations while reinforcing the broader goals of insolvency proceedings. For India, adopting these principles into its insolvency framework would provide a much-needed balance between safeguarding creditor rights and fostering an arbitration-friendly regime that attracts multinational entities and supports cross-border commercial certainty.

1. *The Approach Under UK Law*

The CBIR adopted by the UK in 2006, is based on the UNMLCBI.[35] The relevant principles for consideration are contained under chapter III of the CBIR, which is headed as, 'Recognition of a Foreign Proceeding and Relief'.[36] Article 15.1 provides that a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.[37] Article 20 provides that the

34. UNCITRAL Model Law on Cross-Border Insolvency, art 20.
35. Cross-Border Insolvency Regulations 2006, SI 2006/1030.
36. Cross-Border Insolvency Regulations 2006, SI 2006/1030, ch III.
37. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 15.1.

commencement or continuation of individual proceedings concerning the debtor's assets, rights, obligations or liabilities shall be stayed and execution against debtor's assets is also stayed.[38] Para 3 of article 20 contains certain instances where some actions concerning the property of the debtor would be permissible, particularly in those cases where any step is taken to enforce security over the debtor's property.[39] Para 6 of article 20 also provides that the court may on application by a person affected by such stay allow proceedings to continue on terms and conditions deemed fit by the court.[40] Article 22 provides that the court would ensure that the interests of creditors and other interested persons would be adequately protected when any discretionary relief as asked under aforementioned articles is granted.[41]

The above provisions came for consideration before the England and Wales High Court in the case of *Cosco Bulk Carrier Co Ltd v Armada Shipping SA & Anor.*[42] In this case the primary question before the court was whether the arbitration proceedings should be stayed in lieu of a recognition order issued under article 17 of CBIR[43] read with article 20 of CBIR[44] that imposed automatic stay on commencement or continuation of individual proceedings against debtor's assets. The underlying question in the arbitration agreement related to the right of lien over the amounts due from a sub-charterer and that what was the nature of such lien. The reasons given by the court provide a guidance on which principles would be relevant for allowing the arbitration seated in England to continue even after the recognition of a foreign insolvency proceeding as a foreign main proceeding under CBIR. The principles are summarized as follows:

- That where the questions between the parties pertain to English law in relation to which arbitrators have been appointed in London who are experienced and qualified arbitration can serve as a complementary media of dispute resolution as summary determination of the claim by a bankruptcy court would anyway require assistance of an English Law expert.

38. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 20.
39. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 20 para 3.
40. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 20 para 6.
41. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 22.
42. *Cosco Bulk Carrier Co Ltd v Armada Shipping SA & Anor* [2011] EWHC 216 (Ch).
43. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 17.
44. Cross-Border Insolvency Regulations 2006, SI 2006/1030, art 20.

- That the court has wide discretion to do what is right and fair according to the circumstances of the case in order to adequately secure the interests of creditors and other secured persons.
- That the liquidators appointed in a foreign proceeding might be bound up in a long dispute if the arbitration is stayed, the courts should exercise caution in referring complex factual disputes to liquidators in such pending claims.

  This would also require the courts to take into consideration the requisite provisions of the relevant jurisdiction, the nature of powers exercised by the bankruptcy official and the expected time duration of the pending arbitration proceeding. For instance, the Swiss Supreme Court recently held that the awards rendered pursuant to pending international arbitrations seated outside Switzerland would be admissible under the Swiss bankruptcy law.[45]
- Enforcement of a security over debtor's property is not affected by stay under Article 20 of CBIR. Therefore, the matters where the question under arbitration proceeding is related to existence of such security interest on the debtor's property, the dispute relates to an arguable claim to a beneficial interest that must be protected under article 22 of CBIR and Model law.
- The nature of asset could also be material in relation to above point as that would necessitate a timely dispute resolution which cannot be done in an efficient way by a foreign court. For e.g., assets can be intangible also, like choose in action in the above case or could be supply agreements that are assigned for instance.[46]
- That the court might require the arbitration to be conducted in a particular manner and can also provide that the enforcement of the rendered award would be subject to the relevant bankruptcy law procedure in jurisdiction of seat of arbitration where such foreign insolvency is recognized. For e.g., the court can consider enjoining a third party to an arbitration in connected arbitrations so that the rights of the insolvent party are effectively adjudicated.

45. Swiss Federal Supreme Court, Decision 4A_386/2015 (ATF 142 III 521).
46. Boolchandani J, 'Cross-border Insolvency: Present Framework, Model Law & Emerging Issues from Banking Perspective' (*Indian Institute of Banking & Finance*, May 2023) <https://iibf.org.in/documents/Cross%20border%20insolvency%20report.pdf > accessed on 24 December 2024.

2. *The Singapore Approach*

The Insolvency, Restructuring, and Dissolution Act of 2018 (IRDA) directly incorporates the UNMLCBI in the jurisdiction of Singapore. Article 20(1) of the model law imposes a moratorium on continuation of any proceedings against the debtor's assets rights, obligations or liabilities. However, article 20(2) of the model law provides that the stay may be modified in accordance with the laws of the enacting state. The automatic moratorium that arises upon recognition of a foreign proceeding as a foreign main proceeding is of the same scope and effect as a winding-up order under the IRDA. In this connection, Section 133(1) of the IRDA provides that, upon the making of a winding-up order, an automatic stay of proceedings against the company arises such that, henceforth, no "action or proceeding may be proceeded with or commenced against the company" except (a) with the court's permission; and (b) in accordance with such terms as the court may impose.[47]

Section 133(1) of the IRDA does not contain any express benchmarks or criteria against which the court is to weigh the exercise of its discretion. The Singapore High Court's decision in *Wang Aifeng v Sunmax Global Capital 1 Fund Pte Ltd and another*[48] provides a useful restatement of the applicable principles to applications for leave to commence proceedings against a bankrupt under Section 327(1)(c) of the IRDA.[49] The applicability of *Wang Aifeng* to the context of cross-border corporate insolvency (under Article 20 of the Model Law) has since been affirmed by the Court of Appeal in its recent decision in *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd*.[50]

The Singapore High Court in the case of *Re Sapura Fabrication Sdn Bhd and another matter*,[51] has referred to the aforementioned principles in light of a carve-out application that was preferred to continue the pending arbitration related to a claim for compensation of damages under a contract of construction that was entered into between the applicant and the insolvent party. The court referred to the aforementioned

47. Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 133(1).
48. *Wang Aifeng v Sunmax Global Capital 1 Fund Pte Ltd and another* [2023] 3 SLR 1604.
49. Insolvency, Restructuring and Dissolution Act 2018 (Singapore) s 327(1)(c).
50. *Ascentra Holdings, Inc (in official liquidation) and others v SPGK Pte Ltd* [2024] 1 SLR 130.
51. *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241.

analysis and referred to following factors identified by Goh Yihan JC in *Wang Aifeng* for determining whether a carve-out from an insolvency law moratorium should be granted:

"*(a) the timing of the application for permission;*

(b) the nature of the claim;

(c) the existing remedies;

(d) the merits of the claim;

(e) the existence of prejudice to the creditors or to the orderly administration of the liquidation; and

(f) other miscellaneous factors such as the potential of an avalanche of litigation being unleashed by the grant of permission, the proportionality of the cost of the proceeding to the debtor's resources, and the views of the majority creditors."

With respect to the nature of claim following factors assume importance:

- Degree of complexity of the legal and factual issues involved, and
- Whether it may be preferable for those issues to be resolved through a proper hearing rather than in proof of debt.[52]
- As a general rule, the greater the complexity of the claim, the less suitable it would be for summary determination through the proof of debt process.[53]
- A source of potential legal complexity is the fact that the Contracts are governed by law, which is different from the jurisdiction where foreign main proceedings have been initiated and that specialist arbitrators were already appointed to hear the dispute.[54]
- That the insolvent party intends to assert a set off against the claims of the other party.[55]

With respect to the existing remedies, the pertinent point to note is that the proof of debt framework might adopt a summary procedure regardless of the nature of personalities. While the proof of debt framework

52. *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 271.
53. *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241.
54. *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 (Ch).
55. *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241.

does vest the adjudicator with a discretion to adopt procedures including written submissions and oral hearings, this is left to the discretion of the adjudicator, and thus there is no actual requirement that there be a hearing, as well as weighing and determination of evidence, unlike in arbitration. Mere fact that there might be a chance of achieving a similar degree of robustness if the adjudicator decides to adopt such processes is not enough.

With respect to the merits of the claim, the examination is not of any substantive consideration; it is simply to determine whether the claim is clearly unsustainable. The Constitution of a tribunal and pending proceedings would themselves highlight that the claim was not wholly unmeritorious. This will have to be seen in light of the stage of the arbitration proceeding, as the closer the proceeding is to closing the lesser is the inference that the claim did not warrant consideration and lacked substance.

With respect to the existence of prejudice, the balance of prejudice as between the applicant for the carve-out and the general body of creditors on the other side must be examined.[56] Determination of dispute through arbitration would not itself result in prejudice to the rights of the creditors. Unfair advantage, if any, result would come from enforcement of a favourable result ahead of other creditors who have not been able to pursue their claims.[57] A clear determination of the liabilities, if any, would be in the interests of both the insolvent entities as well as their creditors, as creditor could then rely on the award to lodge its proof of debt in the restructuring, which would be open to acceptance without much fuss.[58] If the arbitration process would not substantially the restructuring efforts and that the subject matter of dispute is not a substantial portion of the total debt, the arbitration can be permitted to continue.[59]

The court can impose a condition that there should be no enforcement of the award anywhere, whether of the claims proper or of costs, without leave of this court, pursuant to Article 20(6) of the Model Law. This

56. *Wang Aifeng v Sunmax Global Capital Fund 1 Pte Ltd* [2022] SGHC 271, para 43.
57. Stichting Shell Pensioenfonds v Krys and another [2015] AC 616.
58. American Energy Group Ltd v Hycarbex Asia Pte Ltd (in liquidation) [2014] EWHC 1091 (Ch) para 56.
59. *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241, para 55.

condition allows the court the opportunity to consider and weigh the overall impact that enforcement may have at the appropriate juncture.[60]

A combined reading of aforementioned approach adopted by Singapore and UK courts reflects consolidation of certain principles that should form the basis of exercise of jurisdiction by the Indian courts and tribunals to permit international arbitration to continue in even of a foreign insolvency proceeding. The principles highlighted above reflect a principled approach to the potential issues and have the potential to complement the international insolvency process while balancing the rights of creditors that consummate commercial transactions in India. These principles provide the much-needed clarity to multi-jurisdictional entities and has potential benefits for them highlighted below.

IV. BENEFITS OF THE AFOREMENTIONED APPROACH

As discussed above, the arbitration can be permitted to continue subject to a proviso that individual enforcement actions against the debtor's assets that tend to stifle the rights of other creditors in a third jurisdiction might not be permissible. However, this does not imply that the practical viability of the awards is prejudiced. This part of the paper highlights that the arbitral awards can complement cross-border insolvency and can provide a practical and cost-effective recourse to the creditors to realize their debts without prejudicing the principle of *pari passu* and interests of the corporate debtor.

A. Cost and Time Advantages

In cases of cross-border insolvencies, creditors with multi-jurisdictional operations would want to maximize the value of their claims by filling claims across multiple jurisdictions as filling of a claim in the center of main interests might not be sufficient due to the less value of underlying assets and large number of local creditors, this would mean that the proceedings could be time consuming and might not involve a detailed assessment of underlying dispute which might require an expert assessment by the bankruptcy official under a summary procedure or might have a bearing on other rights associated with the dispute for e.g., the

60. *Re Sapura Fabrication Sdn Bhd and another matter (GAS, non-party)* [2024] SGHC 241, para 56.

determination of nature of lien in Cosco Ship case referred to above had a bearing on whether the creditor had an underlying charge on the property which had a bearing on security interests of the creditor and also impacted the position of creditor in the priority. These aspects become very crucial when viewed in a broader perspective as the insolvency laws of certain jurisdictions provide for accommodation of arbitration disputes in ongoing insolvency proceedings.[61]

Admittedly, cost of legal representation accounts for the major portion of total costs involved, therefore, if instead of contesting in multiple courts situated in different jurisdictions, parties are allowed to settle certain disputes in one international forum i.e., an international arbitral platform, costs incurred for legal representation would considerably reduce.[62]

B. Centralized Proceedings in One Forum

UMLCBI as well as the European Union Insolvency Regulation do not address the difficulty of cooperation amongst courts and courts-administrators in all aspects. For example, in the case of affiliates, each individual affiliate or subsidiary would have its own headquarters or place of registration and therefore its own center of main interest, irrespective of a parent company. The criterions of 'main' and 'non-main' proceedings for determining the overriding authority of the proceedings and law of one jurisdiction over the other is anyway subjected to distinct interpretations by different courts.[63]

International arbitration if opted for, would provide the parties, one international forum with independent neutral decision-makers and one applicable substantive law to govern the contractual relationship, either chosen by the parties or chosen for them. This would ensure much

61. Scott Atkins, 'The role and potential for arbitration in cross-border insolvency disputes' (*Norton Rose Fulbright*, February 2024) <https://www.nortonrosefulbright.com/-/media/files/nrf/nrfweb/publications/glo-iar-24-pdf.pdf?revision=a9948e3e-f89c-4dff-826b-ba85317a2553&revision=525024116949738790 4> accessed on 27 December 2024.
62. Velislava Hristova and Andrés Eduardo Alvarado Garzón, 'International Arbitration and Cross-Border Insolvency—Friends or Foes? Revisiting the Role of Arbitration in Resolving Cross-border Insolvency-Related Disputes' (2021) 12(4) Journal of International Dispute Settlement 693, 705.
63. ibid.

more certainty to parties as conflicting judgments arising out of varying national laws from courts of different jurisdictions would be avoided.[64]

C. Enforcement of Award

UMLCBI which is merely an instrument for harmonizing cross-border insolvency proceedings and preventing asset-value deprivation, has been adopted with or without modifications by 51 countries only. The New York Convention 1958 on the other hand has 172 signatories making it one of the most successful instruments of all times.[65]

This seemingly simple fact has an enormous bearing on the rights of the creditors in cases of pending insolvency in Jurisdictions like US. In *Re Fotochrome, Inc.*,[66] the US court permitted filing of arbitral award as a valid proof of debt in the bankruptcy process despite the fact that when the chapter 11 application was filed by the creditor in US pursuant to which mandatory stay was on all the actions against corporate debtor and that the arbitration proceeding which was pending in Japan concluded after the stay was imposed. The US District Court referred to the Supremacy clause of the constitution of US Constitution to hold that the awards rendered pursuant to international arbitration seated in a foreign jurisdiction. The court remarked:

> *"Given the hazards of international trades such as currency fluctuations and governmental shifts, some stability of expectation in the resolution of disputes through arbitration to protect against the uncertainties of foreign litigation seems desirable."*[67]

Further, Russian courts have also not seen any problem per se with the recognition and enforcement of an arbitral award rendered despite the respondent having been declared insolvent abroad. In *Indosuez International Finance B.V. v. OAO AB Inkombank*,[68] whilst a lower instance Moscow court refused recognition and enforcement of an award obtained by the creditor in UNCITRAL proceedings seated in London

64. Rachel Chiu and Li Hsien, 'A World Without Borders; A New World Order: Navigating Cross-Border Insolvencies Through Arbitration' (2018) *Asian International Arbitration Journal* 117, 141.
65. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958, 7 June 1959) (1958) 330 UNTS 38 (New York Convention).
66. *Re Fotochrome, Inc.*, 377 F. Supp. 26 (E.D.N.Y. 1974).
67. ibid.
68. *Indosuez International Finance B.V. v National Reserve Bank* (2002) 98 N.Y.2d 238.

on grounds of violation of public policy as the respondent was in liquidation in Russia, the second instance court overturned this decision. According to the second instance court, the (factual) impossibility to enforce the award due to the liquidation of the estate (as no assets were left at that point) could not bar recognition of the existence of the award per se. Also, the creditor had already submitted its claim to be included in the list of creditors for distribution of estate proceeds.

In Singapore law too, the IRDA provides under Section 250[69] that in the event of a foreign company carrying business in Singapore going bankrupt, a liquidator would be appointed by the court who would be responsible for inviting all creditors from the countries where the company had been carrying a business prior to liquidation and where the liquidator has not been appointed, to make a claim against the company prior to distribution of assets located in jurisdiction. This section provides an opportunity to foreign creditors to make claims against the debtor pursuant to an award that was given in their favour, considering the robust mechanism in Singapore. Though the satisfaction is contingent on other provisions of IRDA, the creditors have an option to utilize the award as a valid proof of debt in circumstances where the insolvency might not have been recognized in their jurisdiction due to differing interpretation of the 'foreign main proceeding' under provisions of Model law or the respective rules of judicial comity that might have differing implications on recognition of these proceedings or might take substantial time and cost at the stage of recognition itself.

In UK too, the Creditor is required to obtain the permission of the court to continue arbitration proceedings, this is because CBIR explicitly states that the stay under CBIR would be equivalent to an insolvency order under Section 130 of the Insolvency Act, 1986.[70] A court may be more willing to allow arbitration to continue to resolve a dispute where the proceedings are well advanced, where the claim involves a proprietary right, or where the arbitration is otherwise an effective and efficient method of resolving the dispute or proving the debt.[71] The court is empowered to give broader directions as to how claim would be treated

69. Insolvency, Restructuring and Dissolution Act 2018 (Singapore), s 250.
70. Insolvency Act 1986, s 130.
71. Patrick Taylor and Gavin Chesney, 'IBA Toolkit on Insolvency and Arbitration: Questionnaire National Report of England and Wales' (January 2021) https://www.

in insolvency process. This is essentially important in cases like *Cosco Amada Shipping* where the underlying dispute relates to a proprietary interest or security interest. Therefore, the arbitral award rendered in this scenario would not only be a cost-effective method to settle the dispute but would also help in securing other ancillary rights of creditors in insolvency process.

The analysis of the enforcement of the award in multiple jurisdictions is not exhaustive in nature and is meant to provide a general overview to dispel the supposed notion that the awards rendered in cases of pending insolvency proceedings against a foreign entity would be non-enforceable. The cost effective and centralized dispute resolution offered by arbitration as discussed complements the intended goal of model law to impart efficiency and certainty to cross border insolvencies.

V. CONCLUSION

The aim of the paper was to highlight that the Indian Law needs to bring more legal clarity regarding the effects of insolvency on pending arbitration agreements. With respect to the IBC, the moratorium imposed at the beginning of CIRP frustrates timely resolution of pending claims of the parties that are pending before arbitration. The SC has hinted through its recent decisions that the pending arbitration can be continued even after initiation of CIRP. This protection is particularly important in current situation because the operational creditors who have pending matters bear the brunt of this moratorium. As a large number of CIRPs inevitably move to the stage of liquidation after a substantial period of time, the courts should adopt a nuanced approach to permitting the arbitrations should continue in light of facts and circumstances of each case. The award rendered might be extremely helpful in claiming relief at the stage of liquidation when the claims can be updated as given under liquidation process regulations or might be instrumental in settling the ancillary disputes between the parties as highlighted in the first part of the paper. The broader effects of such this approach can bring a lot of relief to the creditors under Indian law.

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ibanet.org/MediaHandler?id=FC0D06DA-7D96-49AE-AC90-D13027976B80 accessed 30 December 2024.

Further, in absence of any specific law on recognition of the effects of cross border insolvency on pending arbitrations, the paper argues that the approach and principles adopted by the English courts and the Singapore courts can be a valid basis to allow the arbitrations to continue. This would provide a great sense of certainty and security to the multinational entities transacting business in India and seeking to arbitrate disputes under Indian law due to convenience and operational purposes. As highlighted, a nuanced approach needs to be adopted guided by the highlighted principles so as to balance the rights of creditors as a class and the creditors who are subject to pending insolvencies. The enforceability of the awards is not prejudiced, as highlighted by the examination of relevant jurisdictions, as the pre-requisite to initiation of effects of insolvency in a jurisdiction is the recognition of a foreign insolvency proceeding as the main proceeding, which might permit the creditors to seek appropriate relief depending on the place and time of arbitral proceedings. Further, the awards serve as a valid proof of debt that enable recognition of the debts by the courts of the nation where main proceedings were initiated allowing parties to save time and costs considering the flexible process of arbitration. The Indian jurisprudence needs to adapt to recognize the existence and permissibility of arbitration within the framework of international insolvencies to promote certainty and efficiency in debt resolution process that safeguard the rights of creditors having contingent claims.

Breaking the Data Silos: A Case for In-Situ Data Sharing as a Remedy for Data Monopolies Under the Draft Digital Competition Bill 2024

—*Yatharth Chugh and Aditi Sawant*[*]

ABSTRACT

As India's digital economy scales unprecedented heights, the centrality of data has become both a driver of innovation and a catalyst for competitive imbalance. Dominant digital platforms, leveraging vast data reserves, create significant barriers for smaller players and new entrants. While the Draft Digital Competition Bill (DCB) seeks to address these challenges, its existing approach, such as the prohibition on data usage, falls short of resolving the core issue of data asymmetry.

This article critically examines the provisions of the proposed DCB, particularly Section 12, which regulates data usage, and portability among Systemically Significant Digital Enterprises (SSDEs). Part I analyzes the parallels and divergences between the DCB and similar global frameworks like the DMA and the Data Act. Part II highlights the limitations of existing remedies, such as data portability, in addressing data asymmetry. Part III proposes an innovative "In-Situ Data Sharing Framework" to facilitate equitable access to observed data within the platform while preserving privacy and fostering competition.

The article posits that such an approach not only levels the playing field for competitors but also fosters innovation by shifting the competitive focus from data collection to algorithmic processing. The article extends beyond the existing available

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literature on Data-sharing solutions, by advancing actionable recommendations for integrating such a framework into India's emerging digital competition and personal data protection regulatory landscape, ensuring a fairer, more inclusive digital economy.

Keywords: Data Asymmetry, Digital Competition Bill, Systemically Significant Digital Enterprises, In-Situ Data Sharing Framework, Data Portability.

I. INTRODUCTION

India's burgeoning digital economy is garnering global recognition, propelled by several key factors, including widespread smartphone adoption, reasonably priced access to internet, a growing youth demographic, and the strong national digital public infrastructure.[1] Over the years, Big Tech entities such as Google, Amazon, Meta, have not only played a significant role in driving India's digital transformation but have also reaped substantial benefits from the country's rapid growth and innovation-centric environment.

As digital media became widespread in terms of goods and service offerings, certain prominent issues emerged in digital markets, including but not limited to preferential pricing, deep discounting, anti-steering, bundling, big data usage, network effects, exclusive tie-ups, and restrictive advertising policies.[2] Moreover, the concentration of data and network effects provides Big Techs with a significant competitive advantage, especially by using data gathered from one company to unduly benefit another group company.[3] This dynamic creates substantial obstacles for new players and impedes free and fair competition.

1. Dhanendra Kumar, 'Impact of Digital Competition Bill on India's homegrown startup ecosystem', (*Business Standard*, 1 July 2024), <https://www.business-standard.com/companies/start-ups/impact-of-digital-competition-bill-on-india-s-homegrown-startup-ecosystem-124070101008_1.html> accessed 20 January, 2025.
2. ibid.
3. Soumyarendra Barik, 'What the draft Digital Competition Bill proposes, why Big Tech opposes it' (*Indian Express*, 16 May 2024) <https://indianexpress.com/article/explained/explained-law/draft-digital-competition-bill-big-tech-opposes-9330370/> accessed 20 January, 2025.

Drawing inspiration from European regulatory approaches, especially the Digital Markets Act (DMA),[4] India has proposed the Draft Digital Competition Bill (DCB).[5] The Committee on Digital Competition Law ("Committee") recognised the need for an ex-ante competition framework for digital markets in India,[6] and recommended designating certain entities as 'Systemically Significant Digital Enterprises' (SSDEs) owing to their peculiar features of digital markets that allow them to swiftly gain control. Some of these major features include[7]:

i. Extensive user data collection enabling market expansion,

ii. network effects that amplify service utility with increase in users, and

iv. economies of scale allowing incumbents to offer lower-cost services than new entrants.

Thus, it can be argued that the extensive collection and storage of data are pivotal in driving both network effects and economies of scale. In fact, in the digital economy, data has long been referred to as the "new gold", "new oil," or "new currency".[8] Access to data is crucial for creating wealth and driving success, particularly in data-driven markets where dominant players can exclude rivals by withholding user data, as seen in the European Commission's case against Google for Android licensing.[9] If there are no repercussions, a dominant firm in a market with access to vast amounts of data in an imperfect competition scenario would prioritize maximising profits by offering inferior goods or services at supernormal profits. Without competitive pressure, the firm

4. DMA - Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act) (2022) OJ L 265/1.
5. Draft Digital Competition Bill, 2024.
6. Ministry of Corporate Affairs, *Report of the Committee on Digital Competition Law*, (Committee on Digital Competition Law, 2024) <https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf> accessed 20 November 2025.
7. ibid.
8. Marie-Julie Goossens, 'Data Markets: Where Data Protection Meets Competition and Consumer Protection – 30 Years CiTiP Conference' (CiTiP Blog, 5 December 2022) <https://www.law.kuleuven.be/citip/blog/data-markets-where-data-protection-meets-competition-and-consumer-protection-30-years-citip-conference/> accessed 20 January 2025.
9. Vikas Kathuria and Jure Globocnik, 'Exclusionary conduct in data-driven markets: limitations of data sharing remedy', (2020) 8(3) Journal of Antitrust Enforcement, <https://doi.org/10.1093/jaenfo/jnz036> accessed 20 January 2025.

would lack motivation or incentives to invest in advancements or innovations. To address the issue of Big Tech leveraging substantial dominance in core digital services due to the amount of data collected and competing unfairly with business users, the Digital Competition Bill has proposed legal provisions to regulate and ensure proper data usage.

The following section of the paper will delve into the legal framework governing data usage and access in light of DCB, with an analysis of other relevant legislative acts that have served as a source of inspiration for the Digital Competition Law.

II. PART-I: ANALYSIS OF THE PROPOSED & EXISTING LEGAL FRAMEWORKS GOVERNING DATA ACCESS

A. Deciphering the Data Usage Framework under the Digital Competition Bill

At a time when the scale and intricacy of today's digital economy were unthinkable, the Competition Act of 2002's ex-post framework was created to guarantee fairness and contestability in traditional marketplaces. However, some features of this structure might not be appropriate for addressing the unique challenges presented by digital marketplaces, such as the lengthy enforcement procedure.[10]

Since digital marketplaces are dynamic, anti-competitive behaviour must be stopped promptly to avoid the market permanently shifting in favour of dominant businesses. The Competition Commission of India ('CCI') can successfully interfere in these situations by implementing a number of well-crafted ex-ante actions. Therefore, the competition authority serves as the "umpires of the game" through ex-post regulations and the "rules of the games" are established through ex-ante regulations incorporated by the DCB.[11]

The Bill acknowledges the importance of data in online marketplaces. The Committee observed that the digital economy is abound with "platform markets," in which enterprises conduct business on several fronts, with one side receiving subsidies from the other.[12] Resultantly, even if a

10. n 6.
11. ibid.
12. OECD, 'Network Effects and Efficiencies in Multisided Markets' DAF/COMP/WD(2017)40/FINAL<https://one.oecd.org/document/DAF/COMP/WD(2017)40/

service is advertised as "free," it may not actually be; as the user's data is the implicit cost. The Committee was also aware of how data gives big incumbents a distinct edge when they enter adjacent areas. Examples of the ensuing vertical integration brought about by data are the search engine Google's foray into comparison shopping and e-commerce giant Amazon's foray into retail with Amazon Basics.[13] The aggregated data at their disposal helps to create a network effect which results in entry-barriers for the new entities and business users, who do not enjoy access to such vast data pools.[14]

To address these concerns, the Committee aimed to craft provisions within the DCB that specifically target digital services prone to concentration i.e. SSDEs , thereby minimizing chilling effects. The next section examines Section 12 of the DCB on 'data usage' to determine if the provision effectively creates a level playing field between competing players:

This section is divided into three sub-sections, a) Non-Public Data Usage Limitations for SSDE to compete with Business Users, b) Restrictions on Data Intermixing, Cross-Usage, and Third-Party Access and c) Data Portability for Business and End Users.

1. *Prohibition on SSDE to Use of Non-Public Data to Compete with Business Users*

Section 12(1) outrightly prohibits an SSDE from accessing *"non-public data of business users operating on their Core Digital Service to compete with such business users."*[15] The term "non-public data" is defined to include both aggregated and non-aggregated data.[16]

The apparent legislative intent behind this provision is to prevent dominant platforms from leveraging proprietary, non-public data to gain an unfair advantage in the market. By doing so, the provision aims to ensure that SSDEs are barred from exploiting business information, such as sales

FINAL/en/pdf> accessed 20 January 2025.

13. Julie Creswell, 'How Amazon steers shoppers to its own products' (*The New York Times*, 23 January 2025) <https://www.nytimes.com/2018/06/23/business/amazon-the-brand-buster.html> accessed 20 January 2025.
14. European Commission, Directorate-General for Competition, Montjoye, Y., Schweitzer, H. and Crémer, J., *Competition policy for the digital era*, Publications Office, 2019, <https://data.europa.eu/doi/10.2763/407537> accessed 20 January 2025.
15. The Draft Digital Competition Bill, 2024 s 12(1).
16. ibid.

trends, customer preferences, or other internal metrics, to create competing products or secure a competitive edge over smaller businesses.

2. *Restrictions on Data Intermixing, Cross-Usage, and Third-Party Access*

Section 12(2) allows an SSDE to *"intermix or cross-use the personal data of end users or business users collected from various services, including its Core Digital Service",* and to share this data with third parties. The only condition is that the SSDE must obtain consent, which remains the key focus of the provision.[17]

While Sections 12(1) and 12(2) may seem different, they are, in fact, complementary. Sub-section 1 ensures fair competition by prohibiting SSDEs from using non-public business user data to gain an unfair competitive advantage, thereby preventing exploitation of dominant market positions. On the other hand, Sub-section 2 focuses on data privacy and consent, regulating the cross-use and sharing of personal data to protect user and business privacy. Cross-using of data in normal parlance can help deliver more personalized and integrated services across different platforms, thus adding value for both users and businesses.[18]

3. *Data Portability for Business and End Users*

Lastly, Section 12(3) provides that SSDEs must enable business users and end users to easily port their data in a specified format and manner.[19]

A thorough analysis of Section 12 under DCB raises an important question: Why cannot both the – business users and SSDEs, as co-generators of data, access non-public data from the SSDE's platform to innovate and meet user needs?

One possible justification for this restriction lies in the concept of data ownership and ensuring compliance with platform policies. Data ownership and control imply that while business users generate 'raw and

17. ibid.
18. Kang Xie, Yao Wu, Jinghua Xiao and Qing Hu, 'Value Co-Creation Between Firms and Customers: The Role of Big Data-Based Cooperative Assets' (2016) 53(8) Information & Management 1020 <https://www.sciencedirect.com/science/article/pii/S0378720616300593> accessed 22 January 2025.
19. Draft Digital Competition Bill, 2024 s 12(3).

ancillary data' through their activities on the platform, SSDEs typically claim ownership and control over this data, as outlined in their terms of service or user agreements. Larger platforms, in particular, often use detailed insights from this data to gain a competitive edge over smaller competitors. The legislative intent under Section 12 centres around identifying the dominant player and restricting its data access. However, it overlooks the fundamental issue of ensuring equitable access to data, which is essential for fostering a level playing field in the market.

Proposals for 'data sharing' as a remedy for antitrust concerns in digital markets have recently gained momentum, which will be addressed comprehensively in the latter part of the paper. However, to fully assess the feasibility of data sharing as a solution, it is essential to examine the DMA, which served as the primary inspiration for the DCB. The DMA confers business users a sort of a bilateral right to access and port data from the Gatekeeper platform.[20]

B. Analysing Data Access & Usage Framework under the Digital Markets Act, 2022

Digital Markets Act, 2022 (DMA) addresses data-related concerns and uses the term 'Gatekeepers' as an equivalent to SSDEs under the DCB framework. Due to economies of scale, aggregated data holds far greater social value than the private value of segmented data.[21] In this context, it is essential to analyse Articles 6(2), 6(10), and 6(11) of the DMA.

Section 12(1) of DCB closely mirrors Article 6(2) of the DMA. Both provisions prohibit SSDEs or Gatekeepers from using non-public data provided or generated by business users in competition with them. This includes aggregated and non-aggregated data, such as click, search, view, and voice data, which is collected through core platform services. This divides the Gatekeeper/SSDE from its vertical offerings that compete

20. European Commission, 'Staff Working Document on the free flow of data and emerging issues of the European data economy' COM (2017) 9 final <https://digital-strategy.ec.europa.eu/en/library/staff-working-document-free-flow-data-and-emerging-issues-european-data-economy> accessed 22 January 2025.
21. D Bergemann and A Bonatti, 'The economics of social data: An Introduction' (Cowles Foundation Discussion Paper 2203R, 2019) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360352> accessed 22 January 2025.

with the platform's business users, forming a *"Chinese Wall"* within the platform.[22]

However, Article 6(10) is crucial when read with Article 6(2). The former permits business users and third parties authorized by them to access both aggregated and non-aggregated data, including personal data (subject to consent). This data, which is provided or generated through the use of core platform services, must be accessible to business users engaging with those services. Key aspects of this provision include:

a. This access must be effective, high-quality, and in real-time.
b. For personal data, access is granted only when the data is directly related to the end user's interactions with the business user's products or services.
c. End users must opt-in to share their personal data by giving explicit consent.

A comprehensive reading of both Articles 6(2) and 6(10) reveals their nature to regulate data access. However, a key difference lies in their focus: Article 6(2) is restrictive as it is primarily concerned with outrightly preventing gatekeepers from using business users' non-public data to compete with them. Whereas Article 6(10) is facilitative as it allows access for business users and third parties to the aggregated and non-aggregated data, enabling them to use it to enhance their offerings, with the condition that personal data is shared only with user consent. This distinction highlights the broader intent of Article 6(10), which aims to foster data sharing for competition, innovation, and business collaboration, while Article 6(2) focuses on curbing anti-competitive behaviour by gatekeepers.

Amazon leverages the insights it gains regarding a specific product market and utilises it to aim for successful product markets, while avoiding those that require subjective efforts on behalf of the sellers.[23] This is unsurprising given the vast data Amazon collects on transactions. The risk of Amazon replicating successful products may discourage third

22. Cabral, L., Haucap, J., Parker, G., Petropoulos, G., Valletti, T., and Van Alstyne, M, 'The EU Digital Markets Act', (Publications Office of the European Union, 2021), <https://publications.jrc.ec.europa.eu/repository/handle/JRC122910> accessed 22 January 2025.
23. Zhu, F, and Liu, Q., 'Competing with complementors: An empirical look at Amazon.com', (2018) 39 Strategic Management Journal 2618 <https://www.hbs.edu/faculty/Pages/item.aspx?num=54598> accessed 22 January 2025.

parties from introducing new offerings.[24] However, it is undeniable that there is also a positive effect i.e., a better selection of products offered through the platform. Therefore, a lot of emerging and available literature seeks to balance both the pro-competitive and anti-competitive effects of regulation in the area of Gatekeeper's data advantage;[25] as a direct ban on the access and utilization of data for advancing a dominant platform's vertical offerings depicts the conundrum between opting for maximization of the data's social value in public interest and curbing the Platform's anti-competitive practices.[26]

It is in the pursuit of creating a level playing field that the concept of data sharing and access becomes crucial. Article 6(11) mandates that gatekeepers provide third-party search engines access to ranking, query, click, and view data based on the FRAND (Fair, Reasonable, and Non-Discriminatory) principles. This ensures that third-party search engines can compete fairly by having access to critical data, which is essential for their performance and market positioning.

The concept of data sharing and access thus becomes crucial in promoting fairness, encouraging innovation, and enabling healthy competition within digital markets. Information sharing enables the smaller competing platform or business user to comprehend user preferences and enhance its services, thereby increasing the network value it can offer to customers.[27]

C. Analysing Data Access & Usage under Data Act, 2023

Another crucial piece of legislation to consider in the legal analysis of data is the Data Act,[28] which emphasizes fair access and user rights while

24. Annie Palmer, 'Amazon uses data from third-party sellers to develop its own products, WSJ investigation finds' (CNBC 23 April 2020) < https://www.cnbc.com/2020/04/23/wsj-amazon-uses-data-from-third-party-sellers-to-develop-its-own-products.html > accessed 22 January 2025.
25. Hagiu, A., Teh, T.H. and Wright, J., 'Should Platforms Be Allowed to Sell on Their Own Marketplaces?' 2021 RAND Journal of Economics, Forthcoming < https://dx.doi.org/10.2139/ssrn.3606055 > accessed 22 January 2025.
26. n 20.
27. Petropoulos G, Martens B, Parker G and Van Alstyne M, 'Platform Competition and Information Sharing' (MIT Initiative on the Digital Economy, 28 September 2023) <https://ide.mit.edu/wp-content/uploads/2023/10/JMP_Petropoulos.pdf?x76181> accessed 22 January 2025.
28. Council Regulation (EU) 2023/2854 of the European Parliament and of the Council of 13 December 2023 on harmonised rules on fair access to and use of data and

ensuring the protection of personal data. Users' and data holders' rights and responsibilities in relation to product and service data access, usage, and availability are discussed in Article 4 of the Data Act. This article is a competition-friendly framework which advocates for a balanced approach where both co-generators of data i.e., the 'data holder' and the 'product user' are granted independent rights to access and use the data without requiring prior approval from the other party. This principle is rooted in the notion of symmetry:

i. *Data Holder's Autonomy*: The data holder should retain the right to use co-generated data without needing the consent of the product user, provided such use does not infringe upon the legitimate interests of the user.[29]

ii. *Product User's Access:* Similarly, the product user, having been granted access to data, should not need the data holder's approval for their intended utilization of the data, as supported by Article 4(2) of the Data Act.[30]

Such symmetry is critical under competition law, particularly regarding the rules governing information exchange. As stated earlier, data generated through usage is increasingly recognized as a competitively significant input, essential for fostering innovation.

Although Article 4 only talks about rights and obligations of users and data holders, the Data Act under Article 5(2) highlights that 'gatekeepers' are prohibited from soliciting or incentivizing users to share data or requesting data from data holders. These clauses are designed to protect users' data and prevent gatekeepers from manipulating users into sharing their data with them. However, it is proposed that in addition to significantly restricting product users' choice to decide how to use 'their' data, Article 5(2) would constitute a broad infringement on the gatekeeper's ability to compete. Accordingly, it might be much more pro-competitive and proportionate to allow gatekeepers access to data under Article 5,

amending Regulation (EU) 2017/2394 and Directive (EU) 2020/1828 (Data Act) 2023 OJ L, 2023/1.

29. Schweitzer H and Metzger A, 'Data Access under the Draft Data Act, Competition Law and the DMA: Opening the Data Treasures for Competition and Innovation?' (2023) 72(4) GRUR International <https://awards.concurrences.com/IMG/pdf/ikado12.pdf?116045/6f5ae93751d2ea8fe9bd5f710d54a70d4848c7622520069327f916bb43faed2a> accessed 22 January 2025.

30. ibid.

only in exchange for their pledge to make their own data repositories available for sharing.[31]

A comprehensive analysis of these legislative provisions reveals that an outright prohibition on the use of data by SSDEs or gatekeepers is counterproductive to achieving a level playing field. Instead, a more nuanced approach is required that emphasizes equitable data usage by the SSDE and its business users while promoting data sharing with new entrants. The next section of the paper explores the limitations of the current Data-access remedies, specifically focusing on the right of Data Portability.

III. PART-II: BEYOND DATA PORTABILITY: ADDRESSING DATA ASYMMETRY AND COMPETITION GAPS

Before delving into the diverse data-sharing and portability arrangements, it is crucial to establish a clear understanding of the terminologies related to different types of data. Although data exists in a multitude of forms, there is no universally recognized or comprehensive taxonomy to classify it.

A. Types & Forms of Data

For the purpose of this research and to propose solutions keeping in mind the Indian regulatory framework, especially in the context of the Digital Personal Data Protection Act (DPDPA), 2023, a clear distinction needs to be drawn between what is personal and non-personal data. Personal data is defined as *'data about an individual who is identifiable by or in relation to such data'*.[32] When it comes to digital platforms, this can include a wide variety of data. Hence, it is standard practice to categorise such personal data into at least four groups – a strategy that has been embraced by institutions like the OECD, European data protection authorities, and Commission advisors.[33] Personal Data can be further classified into the following categories, especially in the context of digital markets:[34]

31. ibid.
32. Digital Personal Data Protection Act, 2023 (22 of 2023), s 2 (t).
33. Richard Feasey and Alexandre de Streel, 'Data sharing for digital markets contestability: towards a governance framework', (Centre on Regulation in Europe, September 2020) <https://cerre.eu/wp-content/uploads/2020/09/CERRE_Data-sharing-for-digital-markets-contestability-towards-a-governance-framework_September2020.pdf > accessed 20 January 2025.
34. ibid.

i. *Provided Data*: Information that users voluntarily contribute, such when they sign up or utilise a social media platform or digital service. This data may have considerable value for digital platforms, even though it is replicable and is commonly in control of the user who has provided it.[35]

ii. *Observed Data*: This data is generated through interactions between an identifiable user and the platform.[36] Click patterns and other data gathered from user-platform interactions are crucial for comprehending rivals. Replication is difficult since a user would need to interact with the new platform or business user for a long time in order to create a comparable profile and data collection, in addition to having to move from one digital platform to another. However, when switching to a new platform, the user could have to give up these advantages if, as is frequently the case, observed data serves to assure higher quality interactions with the platform.[37]

iv. *Inferred Data*: Such data provides platforms with a competitive advantage by analysing data that has been supplied or seen. In digital markets where such insights may be converted into unique services, a digital platform's ability to draw insightful, creative, or practical conclusions from the data it has collected may be a significant source of competitive difference and edge.[38]

vi. *Acquired Data*: Usually accessible across several platforms, this information is obtained from third parties in order to complete user profiles or for other purposes.

On the contrary, non-personal data refers to the information that is not personally identifiable, frequently aggregated or anonymised. It may be disseminated without permission and reduces privacy issues. Interactions between the platform and identifiable users will produce this data, which will thereafter be reconfigured, anonymised or manipulated to eliminate any information that may be used to identify those users.[39]

35. ibid.
36. ibid.
37. ibid.
38. ibid.
39. ibid.

B. Limitations of Existing Data-Access Remedies

Subsisting regulatory frameworks that provide for mandatory sharing or access to data rights suffer from a limited scope in terms of the type of data. The problem of information asymmetry between big platforms and their business/end users remains unresolved. In the European Union, consumers and business users enjoy data portability rights under GDPR[40] and DMA.[41] Similarly, Australia enacted a Consumer Data Right (CDR) framework, which allows the users to share their data between service providers of their choosing in the banking and energy sectors, with a new provider to get a better offer, or with an app to access a new service.[42] The California Consumer Privacy Act ('CCPA') treats data portability as an extension of the "right of access" for the consumer, but such access is only limited to personal information.[43]

Right to Data Portability is a partial information-sharing remedy, and grants individuals the ability to access, retrieve, and reuse their personal information as needed across multiple platforms.[44] This may include, for example, a customer looking to transfer their login credentials or content preferences to a different social media site or a business looking to transfer their employee or corporate data to another cloud service provider.

It is interesting to note that the Data Portability right was earlier included as a separate right in the 2018 and 2019 draft Personal Data Protection Bills,[45] but the same has not been retained in either the DPDPA Act, 2023[46] or its recently released draft 2025 rules.[47] However, the CCI has explicitly recognised the right of Data Portability in the DCB and

40. Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) [2016] OJ L 119/1, Art. 20. (GDPR).
41. n 4 Art. 6(9).
42. Australian Competition and Consumer Commission, 'Consumer Data Right' (ACCC, 2025) <https://www.cdr.gov.au/> accessed 24 January 2025.
43. Spirion, 'The California Consumer Privacy Act of 2018' (2020) <https://www.spirion.com/Spirion_CCPA_v3> accessed 24 January 2025.
44. Information Commissioner's Office, 'A Guide to Individual's Right' (ICO 19 May 2023) <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/individual-rights/individual-rights/right-to-data-portability/> accessed 22 January 2025.
45. The Draft Personal Data Protection Bill, 2018; Draft Personal Data Protection Bill, 2019.
46. The Digital Personal Data Protection Act, 2023, (22 of 2023).
47. The Draft Digital Personal Data Protection Rules 2025.

mandates an SSDE to allow business users and end users to easily port their data.[48]

In the context of Competition Law, it is crucial to emphasize that data portability in itself does not completely resolve the issue of Data Asymmetry between SSDEs & business users. In the case of business users, Data Portability allows such users to access only their own data. This implies, for example, that Data portability allows a business user to observe its own sales but does not provide sufficient context of that data (data loses its contextual value when it is ported outside a platform) to fully optimize decisions.[49] As stated earlier, the root cause of SSDE's unfair advantage is the exclusive access they enjoy due to information asymmetry between business users and the SSDE's platform. To enable a business user to access the data required to estimate consumer demand and a specific user's willingness to pay for its own and for competing products, the scope of data access should extend beyond the boundaries of a right to data portability.

IV. PART-III: TOWARDS EQUITABLE DATA ACCESS: IN-SITU SHARING FRAMEWORK

In this regard, the authors would like to support an In-Situ Data Sharing Framework among competitors and end users, which is a step beyond Data Portability. The idea was originally proposed by economists Parker, G. and Van Alstyne.[50] Here, the business users or new entrants can bring algorithms to their data located inside the platform, as opposed to existing ex-situ data portability where business or end users remove their own data, transferring it to another platform. In the case of In-Situ access, data are not separated from their networked context and become directly actionable.

Business users can thus enhance their market positioning inside the platform, including in rivalry with the SSDE/Gatekeeper, once they have

48. n 19.
49. B Martens, G. Parker, G Petropoulos, and M. Van Alstyne, 'Towards Efficient Information Sharing in Network Markets' (Proceedings of the 57th Hawaii International Conference on System Sciences, January 2024) <https://dx.doi.org/10.2139/ssrn.3954932> accessed 22 January 2025.
50. Parker, G and Van Alstyne, M., 'Innovation, Openness, and Platform Control', (2018) 64 (7) Management Science <https://www.researchgate.net/publication/255997320_Innovation_Openness_and_Platform_Control> accessed 20 January 2025.

access to a broader market dataset that includes consumer preferences and willingness to pay. Consumers can utilize this right to invite business users to the SSDE/Gatekeeper Platform, regardless of the business user's existing affiliation with the platform, to access their interaction data, create value, and make competitive offers in relation to other products and customers. In contrast to current data portability rights that only permit access to an end user's personal data, the right gives the holder access to a far greater variety of contextual interaction data.

It is interesting to note that during the consultation period of the draft text of the DMA, the Committee on the Internal Market and Consumer Protection under the European Commission recommended expanding the scope of the proposed Data Portability right under Article 6, paragraph 1, to *"include at the request of the business user, the possibility and necessary tools to access and analyse data "in-situ" without a transfer from the gatekeeper."*[51] This was, however, not operationalised into the final Act.

Before we delve into how such an arrangement can work in principle, we need to explore what data such a remedy must extend to, and its potential antitrust concerns in terms of exchange of information.

A. Determining the Scope of Data to be Accessed

The European Commission announced "A European strategy for data",[52] identifying a number of impediments that currently prevent companies from sharing data, such as lack of economic incentives and the fear of losing a competitive edge. In order to promote and boost the use of data, which is by definition a non-rival resource, the law ought to focus on establishing rights of access to data instead of rights of exclusion. The distinctive characteristics of digital markets have undoubtedly helped Gatekeepers or SSDEs, but it is crucial to make sure that any suggestion for data exchange does not result in disciplinary action against these

51. European Parliament, 'Committee on the Internal Market and Consumer Protection', European Parliament 2019-2024 Committee on the Internal Market and Consumer Protection 2020/0374(COD) <https://www.europarl.europa.eu/doceo/document/IMCO-PR-692792_EN.pdf > accessed 20 January 2025.
52. Commission, 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A European Strategy for Data' COM (2020) 66 final <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0066> accessed 20 January 2025.

platforms. A data-sharing remedy should only be a policy tool to promote market competition, innovation, and consumer welfare. It would be unjust and might discourage an SSDE from developing new technologies or investing in data gathering and analysis tools if it were required to share its "inferred" data.[53]

A mandatory data access must be limited to data that is most indispensable to the market. The Essential Facilities Doctrine plays a key role in this regard, as reflected in Section 2 of the Sherman Act in the United States and Article 102 of the Treaty on the Functioning of the European Union (TFEU).[54] While the doctrine is not explicitly recognized under Indian competition law, Section 4(c) of the Competition Act, 2002 prohibits the abuse of a dominant position by denying competitors access to the market, embodying a principle closely aligned with the essential facilities doctrine.[55]

Consumer data serves as a vital asset for firms in digital markets, where numerous platforms operate on models that depend heavily on data collected from business and end users. The doctrine is often discussed as a mechanism to ensure access to critical inputs like search engine rankings and datasets necessary for developing competitive services.[56]

For an action under competition law principles to result in an obligation to grant access to an essential facility, including data, three key conditions must generally be met[57]:

53. Furman, J., Coyle, D., Fletcher, A., McAuley, D., and Marsden, P., *Unlocking digital competition*: *Report of the Digital Competition Expert Panel* (Gov.uk, 2019) <https://assets.publishing.service.gov.uk/media/5c88150ee5274a230219c35f/unlocking_digital_competition_furman_review_web.pdf > accessed 20 January 2025.
54. Inge Graef, 'Essential facilities doctrine and the digital economy', (2019) 53 RJTUM 33 <https://pure.uvt.nl/ws/portalfiles/portal/31400336/Montreal_Rethinking_essential_facilities_for_the_digital_economy_final_offprint.pdf > accessed 20 January 2025.
55. Rahul Bajaj and Chiranjivi Sharma, 'The Essential Facilities Doctrine - A Potent Tool for Mitigating the Rigours of Socially Pernicious Behaviour of Monopolists', (2015) 1 (2) RSLR <https://www.rsrr.in/_files/ugd/286c9c_8c49dc930de741bdb4ea35b7f7c2179a.pdf?index=true> accessed 20 January 2025.
56. Marina Lao, 'Search, Essential Facilities, and the Antitrust Duty to Deal' 2013 11 (5) Northwestern Journal of Technology and Intellectual Property 272 <https://dx.doi.org/10.2139/ssrn.2128613> accessed 20 January 2025.
57. European Union, 'Sharing data (anti-) competitively will European data holders need to change their ways under the proposed new data legislation?' (Publications Office of the European Union, 2022) <https://data.europa.eu/doi/10.2830/913446> accessed 20 January 2025.

- The data must be indispensable for creating a downstream product or service.
- The refusal to provide access must obstruct the emergence of the secondary product or service.
- There must be no objective justification for the refusal, meaning it should be practically feasible to allow access to the essential facility.

Regarding the indispensability criterion, data, like other resources, can be critical for effective competition in specific contexts. While substitutes may exist for many datasets, some data are inherently unique due to their connection to the distinctive products or services offered by a dominant entity.[58] Since data usage is non-rivalrous and many datasets are protected by trade secrets rather than full property rights, some argue for reducing the reliance on data access altogether. Under this view, a dominant entity's exclusive control over data warrants less protection, increasing the likelihood that a refusal to grant access is treated as exclusionary abuse, especially when access can be granted while maintaining trade secret confidentiality.[59] Despite extensive academic debate on applying the essential facilities doctrine to data, conflicting opinions persist. Therefore, we believe that a cautious and nuanced case-by-case analysis is essential to address this complex issue effectively.

Therefore, any mandatory data-sharing remedy in digital markets shall be limited to "Observed" data, which, as discussed earlier, is the data generated through interactions between an identifiable user and the Gatekeeper/SSDE Platform. There are three discrete stages, or products which comprise big data:

- raw user data (observed);
- algorithms and programming interfaces for data processing;
- data analytics and insights or conclusions derived through processing ("Inferred Data")

58. Schweitzer H and Metzger A, 'Data Access under the Draft Data Act, Competition Law and the DMA: Opening the Data Treasures for Competition and Innovation?' (2023) 72(4) GRUR International <https://awards.concurrences.com/IMG/pdf/ikado12.pdf?116045/6f5ae93751d2ea8fe9bd5f710d54a70d4848c7622520069327f916bb43faed2a> accessed 22 January 2025.
59. ibid.

It could be argued that raw observed data would be most appropriate to designate an essential facility when compared to the algorithms or analytics as the latter enjoys greater IP protections, because most of the innovation takes place at the processing & analytics stage.[60]

The extent to which observed data should be covered in Data Portability regulatory frameworks is a topic of continuous legal debate. The European Data Protection Board (EDPB) has opted a wide stance in its interpretative guidelines, proposing that the scope of data portability should encompass both observed and volunteered data, but exclude inferred data.[61] According to this understanding, specific behavioral data of the user including viewing habits, product-clicks, purchasing ranges, etc., need to be transferable with the user's permission. Considering In-Situ Access Right is an extension of Data Portability, the view by EDPB supports the inclusion of Observed Data into our proposed Data-sharing remedy.

B. Addressing Exchange of Information under Competition Act, 2002

Any mandated data-sharing remedy will result in exchange of information among the competitors, attracting concerns by Competition watchdogs worldwide. However, not all types of information exchange inherently raise antitrust issues.

The European Commission highlights the positive effects of information (data) exchange.[62] It acknowledges that *"Information exchange is a common feature of many competitive markets and may generate various types of efficiency gains. It may solve problems of information asymmetries, thereby making markets more efficient. Moreover, companies may improve their internal efficiency through benchmarking against*

60. Ryan Deirdre, 'Big Data and the Essential Facilities Doctrine: A Law and Economics Approach to Fostering Competition and Innovation in Creative Industries' (2021) 10 UCL Journal of Law and Jurisprudence 84 <https://student-journals.ucl.ac.uk/laj/article/id/1206/> accessed 22 January 2025.
61. European Commission, 'Guidelines on the right to data portability', (Article 29 Data Protection Working Party, 2017) <http://ec.europa.eu/newsroom/ document.cfm?doc_id=44099> accessed 22 January 2025.
62. European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (2023) OJ C 259/01 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023XC0721(01)> accessed 20 January 2025.

each other's best practices. Furthermore, information exchanges may directly benefit consumers by reducing their search costs and improving choice."

In India, the CCI's position on information sharing may be inferred from its previous rulings. The 2018 ruling in 'In re: Alleged Cartelisation in Flashlights Market in India'[63] ("Flashlight case"), commercially sensitive information such as "production and sales numbers, plans for price increases, wholesale pricing, margins, and discount plans, was disclosed by battery-powered torch manufacturers.[64] The Commission came to the conclusion that there was not enough evidence to prove that such sharing resulted in concerted price determination. Although the topic of data sharing has not been extensively explored in the Indian context, particularly concerning the exchange of information among competitors, the EU provides significant insights in this regard.

Nevertheless, looking from a vantage point of data sharing between two parties; the data pools that store unprocessed raw user data for the creation of novel goods and services may be in line with standard-setting initiatives, or research and development partnerships. These activities are generally seen as fostering innovation and efficiency rather than facilitating collusion. The raw data in these pools usually represents the buying habits and behaviour of consumers, allowing algorithmic computations without explicitly suggesting anti-competitive or collusive behaviour.[65] By implementing 'clean team arrangements', information firewalls and signing non-disclosure agreements are some key mitigating factors that companies should adhere to while sharing commercially sensitive information with competitors.[66]

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63. Competition Commission of India, In Re: Alleged Cartelisation in Flashlights Market in India, (2018) Suo Motu Case No. 01 of 2017 <https://www.cci.gov.in/antitrust/orders/details/1012/0> accessed 22 January 2025.
64. Yashvardhan Singh, 'Competition Policy and Exchange of Information: An Analysis' (NLIU Centre for Business and Commercial Law, 2 January 2020) <https://cbcl.nliu.ac.in/competition-law/competition-policy-and-exchange-of-information-an-analysis/> accessed 20 January 2025.
65. Björn Lundqvist, 'Data collaboration, pooling and hoarding under competition law' (Stockholm Faculty of Law Research Paper Series, 13 November 2018) <https://dx.doi.org/10.2139/ssrn.3278578> accessed 20 January 2025.
66. AZB & Partners Advocates & Solicitors, 'Information Exchange – A Standalone Violation under Indian Competition Law' (AZB & Partners Advocates & Solicitors, 31 December 2021) <https://www.azbpartners.com/bank/information-exchange-a-standalone-violation-under-indian-competition-law/> accessed 20 January 2025.

C. Implementing In-Situ Access in the context of DPDPA, 2023

In the context of DPDPA, non-personal data would mean information that does not trace back to an individual. The raw user-observed data by the SSDE or Gatekeeper, which may be classified as Personal Data can thereafter be reconfigured, anonymised or manipulated to eliminate any information that may be used to identify those users. This will exempt such Data from any End-User Consent Requirements under the DPDPA since the Act extends applicability only to personal data identifiable to an individual.[67] However, neither the Act nor the draft DPDPA 2025 Rules explicitly refer to or exclude, anonymized data from its ambit. Hence, much has to be seen on how the Ministry of Electronics & Information Technology adopts the interpretation of *"technical and organizational measures"* used by entities to make data non-identifiable.[68] Assuming that implementing such techniques exempt the requirement of Consent, the In-Situ Data Access framework is fairly simple:

Entrant Platform/Business User B requests permission from the Gatekeeper/SSDE Platform A to access aggregated/non-aggregated non-personal raw user data (e.g., anonymised) observed by and located in Platform A. Platform A grants the access, allowing Platform/Business User B to access the data that is located on the digital infrastructure of Platform A. In turn, Platform/Business User B runs its algorithm programme or application on that data for processing and derives critical insights from the input data ("Inferred Data").

Business users or new entrants can gain insights into the general traits of end-users purchasing from various business users on Platform A. This includes details like product attributes, pricing, sales volumes, and the browsing behavior of end-users—all while ensuring that consumer identities remain anonymous. However, such anonymized information sharing is limited to in-situ access, meaning it occurs directly at the platform's source, safeguarded by the Gatekeeper/SSDE Platform's firewall and data protection measures. Sharing this multi-faceted data ex-situ (i.e., outside

67. The Digital Personal Data Protection Act, 2023, (22 of 2023) s 3.
68. J. Borking, Why Adopting Privacy Enhancing Technologies (PETs) Takes so Much Time in Serge Gutwirth and others (eds), *Computers, Privacy and Data Protection: an Element of Choice* (Springer 2011) <https://www.researchgate.net/publication/226347540_Why_Adopting_Privacy_Enhancing_Technologies_PETs_Takes_so_Much_Time> accessed 22 January 2025.

the platform, as happens with data portability) poses a significantly higher risk of compromising consumer anonymity.[69] Furthermore, when data is shared ex-situ, recipients, such as sellers, have unrestricted freedom to process the data in any way. In contrast, in-situ sharing enables better control over the seller's computations, limiting outputs to aggregated or derived insights while safeguarding the underlying detailed and critical consumer data.[70]

Such a data-sharing framework, subject to correct implementation, will also be compatible with the Competition Act, of 2002, especially in the context of information exchange. Information-sharing between competitors will not result in collusion if the SSDE shares only raw observed user data and not the insights it gained from the data.

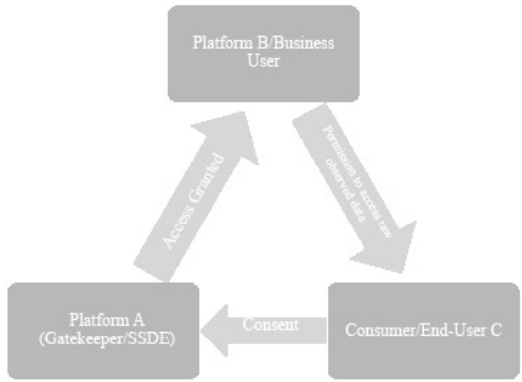
The model, however, may take a different approach while accessing the Personal Data of End-Users. Historically, competition law and data privacy have been treated as distinct and separate domains. However, over time, the collection and sharing of consumer data have become essential and highly relevant to competition policy and enforcement.[71] Hence, when assessing the scope of data eligible for sharing, it is crucial to ensure full compliance with the provisions and intent of the DPDP Act and its Rules.

In this backdrop, assigning in-situ data rights to end-users over their interaction data (observed by the SSDEs) is equally important. Data observed about individual consumers can include information they willingly share, such as search queries, browsing habits, and interactions with products on the Gatekeeper/SSDE Platform. It may also involve data provided by business users, like details about product features, pricing, and sales terms. Through in-situ access, consumers can directly share their search and interaction histories with other platforms, which in turn can offer them improved, more tailored responses. This setup not only promotes competition by opening up access to a platform's exclusive data

69. A. De Montjoye, L. Radaelli, V. K. Singh, and A. S. Pentland, 'Unique in the shopping mall: On the reidentifiability of credit card metadata' (2015) 347(6221) Science 536–539 <https://www.science.org/doi/10.1126/science.1256297> accessed 22 January 2025.
70. n 49.
71. OECD, 'The intersection between competition and data privacy', (Directorate for Financial and Enterprise Affairs Competition Committee, 2024) <https://one.oecd.org/document/DAF/COMP(2024)4/en/pdf> accessed 22 January 2025.

and infrastructure but also incentivizes the platform to pass on greater benefits of the data to its users.[72]

Evidently, such Observed Data would fall within the scope of the DPDPA Act, 2023, since it will be directly identifiable to an individual consumer. Therefore, the In-Situ Data Access framework will look something like this:



(Figure 1)

As depicted in Figure 1, the Platform B (or Business User) may request permission from consumer C to access her interaction data stored on Gatekeeper/SSDE Platform A. Alternatively, consumer C may proactively invite Platform B to access her data stored on Platform A. Once consumer C provides consent, Platform A enables Platform B to access her interaction data (data observed by Platform A) directly at its source on Platform A's infrastructure, allowing Platform B to use that data as input for its algorithmic processes on-site. Instead of transferring the data to Platform B, the platform brings its algorithms to the data within Platform A's infrastructure. At no point is consumer C's data moved outside Platform A. However, through on-site algorithmic analysis, Platform B can generate valuable insights into consumer C's preferences and characteristics ('Inferred Data')

Real-world examples already reflect practices similar to the in-situ proposal. For instance, a healthcare service provider has shifted away from transferring data to its analytics and AI solution partners. Instead, it offers full computational capabilities and real-time data access within

72. Inge Graef and Jens Prüfer, 'Governance of Data Sharing: A Law & Economics Proposal' (2021) 50 (9) Research Policy <https://www.sciencedirect.com/science/article/pii/S004873332100130X> accessed 22 January 2025.

a secure cloud environment maintained by the company.[73] Similarly, the Open Algorithms project seeks to harness the value of data collected by private organizations. With implementations in Colombia and Senegal, OPAL's defining feature is the use of algorithms within the data infrastructure of private companies, safeguarded by firewall protections.[74] This approach enables the derivation of key indicators that are derived within an in-situ design, which are then shared with ecosystem users to support their sustainability objectives.

D. Additional Creation of Competition for Algorithmic Processing

A Chief Scientist at Google admitted that *"we don't have better algorithms than anyone else. We just have more data."*[75] In the frameworks discussed above, it is important to note that the newcomer Platform/Business User gets access to the user's Observed Data and not the Inferred Data derived by the SSDE through its algorithms. There is no adverse effect on SSDE's incentives to process the observed data. To put it another way, competition moves from data gathering and collection to data analysis and evaluation. The majority of creative ideas in digital markets arise at this juncture, which increases the incentives for developing better algorithmic systems and enhancing market performance for consumer benefit.[76]

The authors acknowledge that some small business users on a platform may not by themselves have access to processing algorithms to derive "Inferred Data". They may require help from a third-party data analytics provider (a market that is expected to reach a projected revenue of US$ 21,286.4 million by 2030, with an expected compound annual growth

73. Jordan Bazinsky, 'Why True Healthcare Data Intelligence Depends on an AI-Powered Cloud', (Health IT Answers, 26 August 2021) <https://www.healthitanswers.net/why-true-healthcare-data-intelligence-depends-on-an-ai-powered-cloud/> accessed 22 January 2025.
74. Agence française de développement, 'Project OPAL: big data at the service of development' (The Agence Française de Développement Group, 23 May 2018) <https://www.afd.fr/en/actualites/project-opal-big-data-service-development> accessed 22 January 2025.
75. Asay, M, 'Tim O'Reilly: 'Whole web' is the OS of the future', (CNET, 18 March 2010) <https://www.cnet.com/culture/tim-oreilly-whole-web-is-the-os-of-the-future/> accessed 22 January 2025.
76. Parker, G., G. Petropoulos and M. Van Alstyne, 'Platform mergers and antitrust' (2021) Bruegel Working Paper 01/2021 <https://www.bruegel.org/sites/default/files/private/wp_attachments/WP-2021-01.pdf> accessed 22 January 2025.

rate of 35.8% in India[77]), especially while using encrypted in-situ processing technologies. Because multiple rival providers can offer these services, SSDE/Gatekeeper platforms will no longer be able to charge a monopolistic pricing for similar offerings.[78]

E. Application of FRAND Doctrine in terms of Data Access

It is acknowledged that sharing data gathered on a SSDE's platform might give rise to intellectual property rights (IPR) issues. Nevertheless, it is cardinal to note that copyright protection only covers a database's structure, not the actual contents.[79] Furthermore, legislation can restrict the protection granted to data that is considered a trade secret when the public interest is involved. This precisely demonstrates that intellectual property rights are not absolute.

The principle of FRAND access is increasingly viewed by competition authorities as a "good faith" remedy to ensure fair access to specific infrastructure or products.[80] Such access may involve legal arrangements like licenses, but in some cases, separate agreements might not be necessary if access is guaranteed.

To promote market contestability, it might be necessary to require SSDEs to share essential and raw user data in an In-Situ framework, on a case-by-case basis, subject to fair compensation, and terms of access in line with the FRAND Doctrine. Determining a fair, reasonable, and non-discriminatory price for access is a complex issue but essential for justifying the transfer of such Observed data.[81] Providing clear guidance on the scope and application of FRAND remedies in context of any mandatory Data-sharing framework would enhance legal certainty and support fair market practices.

77. Grand View Research, 'India Data Analytics Market Outlook' (Grand View Research, 2024) <https://www.grandviewresearch.com/industry-analysis/data-analytics-market-report> accessed 25 January 2025.
78. B Martens, G. Parker, G Petropoulos, and M. Van Alstyne, 'Towards Efficient Information Sharing in Network Markets' (Proceedings of the 57th Hawaii International Conference on System Sciences, January 2024) <https://dx.doi.org/10.2139/ssrn.3954932> accessed 22 January 2025.
79. Priyanka Bhat, 'Data Sharing for Contestability in Data-Driven Digital Markets: An Analysis' (2023) 4 (1) CCIJOCLP <https://ccijournal.in/index.php/ccijoclp/article/view/113/70> accessed 22 January 2025.
80. Petit Nicolas, 'Competition Cases Involving Platforms: Lessons from Europe' (October 17, 2018) <https://dx.doi.org/10.2139/ssrn.3285277> accessed 22 January 2025.
81. n 79.

V. CONCLUSION

As India charts its course with the proposed Digital Competition Bill (DCB), it becomes imperative to address the data-centric dynamics that define digital markets. The provisions under Section 12 aim at mitigating the competitive advantages of SSDEs by curbing exploitative practices and ensuring data portability. However, the insights drawn from comparative frameworks like the Digital Markets Act and Data Act explains a critical need for fostering equitable data-sharing mechanisms rather than merely restricting data access.

The proposition for an in-situ data-sharing framework emerges as a compelling alternative, ensuring that data remains actionable within its context while fostering innovation and competition. By granting business users-controlled access to observed data and encouraging consumer-centric data portability, this approach mitigates the risks of data monopolization without stifling innovation. Furthermore, integrating the principles of fairness, reasonableness, and non-discrimination can serve as a foundational guideline to facilitate such frameworks effectively.

Our paper's data-sharing solution is based on the premise that digital platforms will continue to gain substantial market power from their centralized control over large data sets that they have amassed by allowing dispersed user groups to conduct business with one another. Although this may be the case, CCI and other policymakers should also monitor (and possibly support) emerging technologies and architectures that could eventually allow for a much higher level of decentralization and broader data distribution, eliminating the very sources of market power that this paper has attempted to address.

However, any data-sharing remedy implemented must recognize that Big Tech platforms have made significant investments in building and maintaining platform-based ecosystems. As such, while ensuring business users' access to relevant data, these platforms should still be allowed to leverage the data they procure on their systems to enhance their own services and compete effectively. Striking a balance between data access and platform incentives is crucial to promote long-term innovation and platform sustainability.

For our final comments on the DCB's approach to regulate data access, we urge that the CCI's focus must be on why SSDE Platform ecosystems are competitive, and not on who is winning.

The Data Dilemma: Reimagining the Essential Facilities Doctrine for the Digital Age

—*Rishab Arora & Aakriti Verma*[*]

ABSTRACT

In an era where data is hailed as the new oil, the growing concentration of its control in the hands of a few dominant players poses significant challenges to competition law. This research delves into the evolving terrain where data, once considered an ancillary asset, has now emerged as the cornerstone of market power. At the heart of this analysis lies the Essential Facilities Doctrine (EFD)—a doctrine traditionally applied to physical infrastructure—which this paper seeks to transpose into the digital age. The paper addresses a fundamental issue by examining the potential application of the EFD to the arena of data: can data be regarded as "essential" in such a way that monopolistic enterprises must share it?

Drawing on key international cases, particularly in the European Union and India, this research delves into the complex interplay between market dominance, data control, and competition law. It examines the obstacles that competition authorities confront in identifying essential data, as well as the legal complexity involved in enforcing access to such data. The paper also looks into how data monopolies, rather than supporting innovation, can stifle potential competitors through data exclusivity.

At the intersection of competition and privacy, the paper also explores innovative regulatory solutions, including data portability, the use of open APIs, and collaborative data-sharing

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models, all positioned as alternatives to the traditional EFD application. By critically examining the regulatory landscape—both in India and globally—this paper advocates for a nuanced, forward-thinking approach that balances consumer welfare, innovation, and fairness. In doing so, it provides a blueprint for future competition law frameworks that may better control the intricacies of the digital economy, ensuring that data remains a force for competition rather than an exclusionary tool.

Keywords: Essential Facilities Doctrine, Data Monopolies and Market Power, Data Control, Competition Law.

I. INTRODUCTION

Growing antitrust scrutiny into Big Tech has led to a flurry of cases, driven by cartel-like practices, monopolistic conduct, and data privacy concerns, despite the keystone role that these digital markets and companies play. This sets off a domino effect in which jurisdictions facing similar conduct are compelled to take comparable action, casting doubt on how these companies' data is collected, processed, and commercially exploited, while also empowering both established corporations, and ambitious start-ups to use data as a strategic asset. This notion, known as *'big data'*[1], encompasses massive amounts of diverse information collected at high speeds and processed by sophisticated algorithms to generate unique datasets of enormous commercial worth. While data privacy laws primarily oversee the collection and use of personal data, big data's role in changing competitive dynamics has emerged as a major worry for authorities worldwide.

Competition law is intricately tied to privacy and consumer protection rules in the digital economy, creating many unprecedented issues. According to this, managing data access is same as managing the market. This control has given rise to significant entry barriers, potential competitors that are excluded from relevant markets. This phenomenon,

1. Viktor Mayer-Schönberger and Kenneth Cukier, *Big Data: A Revolution That Will Transform How We Live, Work, and Think* (John Murray 2013).

where the aggregation and monopolization of data provide a formidable competitive advantage, is aptly termed as the "***data moat***."[2]

The concept of the data moat underscores a critical argument: certain datasets are so essential to the operation and competitiveness of digital markets that denying access to them can stifle innovation, restrict competition, and harm consumer welfare. Enabling competitors to access such vital datasets may lessen entry barriers, foster healthier market dynamics, and improve customer outcomes. Without such measures, dominant corporations have little incentive to fix broken algorithms or enhance subpar systems, leaving customers to bear the weight of stagnation and inefficiency.

From a competition law perspective, a pertinent question arises: does the access and use of big data by enterprises confer market power and a competitive advantage over rivals? The response appears to be increasingly affirmative.[3] Data analysis tools and complicated self-learning computing algorithms necessitate large investments, making access to such data a daunting barrier for newcomers. This can result in highly concentrated marketplaces in which incumbents hold disproportionate power.

A stark example of this is *Reliance Retail's $200 million investment in Dunzo* raised concerns after Reliance allegedly used Dunzo's *proprietary data* to scale its own platform, JioMart Express, leaving Dunzo to struggle and fail. This case highlights that even with regulatory safeguards like India's Deal Value Threshold (DVT), which mandates approval for transactions above INR 20 billion, competition can remain skewed. This demonstrates how data can distort competition, potentially compromising the integrity and equitable objectives of mergers and acquisitions.

The Essential Facilities Doctrine (EFD) establishes a convincing paradigm for overcoming entry barriers in digital markets by requiring access to key data assets owned by dominant companies. Recognizing such data as an irreplaceable resource, akin to traditional vital facilities, may encourage fair competition, prevent abusive behaviour, and increase innovation. However, applying EFD to data necessitates overcoming

2. Bruce Schneier, *Data and Goliath: The Hidden Battles to Collect Your Data and Control Your World* (W.W. Norton & Company 2015).
3. Maurice E Stucke and Allen P Grunes, *Big Data and Competition Policy* (Oxford University Press 2016).

specific challenges such as defining 'essential data,' balancing privacy issues, and addressing jurisdictional complexities. *Can this doctrine, despite its potential, adequately dismantle the entrenched power of data monopolies in the digital economy?*

II. EFD AND DIGITAL MARKETS

A. Origin/development

This aim shall be achieved through the framework of the EFD, which has undergone substantial evolution around the world. EFD has transformed by building upon the original, meaning that it has adapted to new challenges but continued to stay firmly founded on its principles. Established in the case of *United States v. Terminal Railroad Association*[4], where the Court ordered non-discriminatory access to a major railroad bridge controlled by a consortium of competitors. The concept has evolved to address the issues raised by intellectual property and, more recently, the growing role of data in the digital economy.

In *MCI Communications Corp. v. AT & T,*[5] a four-factor test was expounded to determine what constitutes an essential facility- predominant monopoly in market, irreplicable and indispensable product, legitimate justification for denying access to data and, legal obligation to open it up to competitors under reasonable terms.

While the doctrine has seen limited application in U.S. jurisprudence, it gained substantial traction in European competition law under Article 102 of the Treaty on the Functioning of the European Union (TFEU). Landmark cases like *Oscar Bronner GmbH v. Mediaprint*[6] and *IMS Health* demonstrate[7] Europe's proactive approach to promoting competition through the EFD.

4. *United States v Terminal Railroad Association of St Louis*, 224 U.S. 383 (1912).
5. *MCI Communications Corp v American Telephone & Telegraph Co* 708 F2d 1081 (7th Cir 1983).
6. Case C-7/97 *Oscar Bronner GmbH & Co KG v Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co KG* [1998] ECR I-7791.
7. Case C-418/01 *IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039.

B. Traditional Applications of the EFD

In its most traditional form, the EFD was to cover physical infrastructure or more broadly, tangible facilities. Examples include essential utilities like railways, ports, and electricity grids. Over time, its scope expanded to encompass intellectual property and services functioning as critical inputs in downstream markets.

The IMS Health case illustrates this change. The European Commission (EC) found that IMS's database, which provides sales data for the pharmaceutical industry, was essential for competitors.[8] As a result, the EC's interim ruling required IMS to allow others access to the database, as not doing so would put competitors at a severe disadvantage and undermine competition.

Similarly, in the ***Reuters Instrument Codes*** **(RICs)** case, The EC questioned Thomson Reuters' restrictive practices involving proprietary financial codes. By requiring license obligations, the EC emphasized the principle that essential resources must remain accessible in order to maintain competitive markets.

C. Evolution of the EFD to Include Data in the Digital Economy

In the 21st century, data has emerged as a pivotal resource, often described as the *"new oil."*[9] Data aggregation, analytics, and its role in enabling digital markets have made access to data critical for competition. The application of the EFD to data reflects its adaptability to contemporary market realities.

Data can be distinguished from traditional resources due to its non-rivalrous use, network effects, and significance in artificial intelligence training. Certain datasets, particularly those compiled by dominant platforms, meet the requirements for indispensability. For instance, in the *International Swaps and Derivatives Association Inc (ISDA)* case, the

8. European Commission, 'Case No COMP/D2/39.654 – Reuters Instrument Codes' (20 December 2012) https://ec.europa.eu/competition/antitrust/cases/dec_docs/39654/39654_1251_3.pdf accessed 15 January 2025.
9. Competition Policy International, 'Data, Data Everywhere' (2020) 2 (2) Antitrust Chronicle <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/02/AC-February-II.pdf> accessed 15 January 2025

EC required the licensing of non-public credit default swap data, underlining the need of ensuring fair competition in financial markets.

In India, the essence of the EFD can be traced to Section 4(2)(c) of the Competition Act, 2002,[10] which prohibits the abuse of dominance through denial of market access. Sections 18 and 19 authorize the Competition Commission of India (CCI)[11] to address anti-competition practices, including data-related complaints. Though Indian law has not officially referenced the EFD, its ideas are becoming more relevant as data-driven enterprises expand.

D. Key Parameters of the EFD

The application of the Essential Facilities Doctrine (EFD) is governed by three fundamental parameters: ***indispensability, replication infeasibility, and market impact***. A facility is deemed essential if competitors need access to it to operate effectively, as shown in the Oscar Bronner case. In the digital marketplace, data—especially consumer behavior insights gathered by dominant platforms—often meets this criterion because it is unique and cannot be replicated, making it indispensable for competition.

The idea is built around the concept of replication infeasibility, whether it is technical or economic. In IMS Health, the European Commission acknowledged that recreating the database structure was neither technically nor economically feasible. This approach applies equally to digital marketplaces, where scale economies, intellectual property protections, and regulatory hurdles increase the importance of access to critical data in fostering competition.

Finally, the EFD tries to preserve competitive dynamics by ensuring that denial of access to an important facility has a major impact on entire market competition rather than just individual competitors. This was seen at Thomson Reuters, where restricted procedures regarding the release of Reuters Instrument Codes (RICs) affected the real-time financial data market. Collectively, these three factors show how the EFD has evolved.

The changing nature of competition law is reflected in the EFD, essentially developed with roots in physical infrastructure, has evolved to

10. The Competition Act, 2002 (12 of 2003) s 4(2)(c).
11. The Competition Act, 2002 (12 of 2003) ss 18, 19.

tackle difficulties presented by intellectual property and data. Its application to data highlights the critical need to balance innovation incentives with competition safeguards to ensure market access and customer welfare. As data continues to shape the global economy, the EFD offers a critical framework for addressing dominance and fostering competitive equity in the digital age.

III. APPLICATION TO DATA

There is a significant first-mover advantage that plays a prominent role in establishing a market leader. Thus, the existence of the Google, Apple, Facebook, Amazon, Microsoft ["GAFAM"] are, in practice, uncontested due to the vast amount of practically nonreplicable data amassed by them over the years

The concept of "essential data" in digital markets pertains to datasets that are crucial for competitors to operate or gain a foothold in a market. These datasets are typically marked by their exclusivity, high significance, and specific relevance to particular services or product markets. However, identifying such data presents considerable challenges. Unlike real infrastructure or facilities, data is immaterial, non-rivalrous, and frequently duplicated. Furthermore, its value is context-dependent, with large variations depending on the intended application.

For example, user behaviour data collected by platforms like as Google Search is invaluable due to its unequalled volume, variety, and accuracy in anticipating customer preferences. However, defining this as "essential" necessitates determining whether it is unique, non-replicable, and required for competition. Legal and ethical considerations, such as data privacy and intellectual property rights, complicate the process, emphasizing the importance of extensive research in classifying data as "essential."

IV. ASSESSING MARKET POWER IN DIGITAL PLATFORMS

Traditional methods for assessing market power, which focus on factors like pricing, production levels, and market share, often fall short in the digital sector. Here, dominance is more often tied to the control

of vast amounts of data, which act as major obstacles for potential new entrants.[12]

For instance, Google's supremacy in search services stems largely from its unparalleled access to data, which not only enhances its algorithms but also reinforces its market leadership. In a similar vein, Facebook's extensive collection of user data bolsters its competitive edge in the social networking domain. These vast data resources create a "data moat" that discourages competition and strengthens the incumbents' hold on the market.

Moreover, these platforms frequently hold power outside their respective industries by using data from multiple sectors. For example, Uber's expansion into food delivery and KakaoTalk's combination of ride-hailing and financial services shows how data-driven network effects allow corporations to dominate adjacent markets.[13] These activities compound entry obstacles, emphasizing the limitations of standard antitrust tools.

A. Cross-Market Leveraging of Data

Cross-market leveraging involves using data acquired in one market to dominate another, raising significant antitrust concerns. Platforms integrate services and leverage existing datasets to outperform competitors, as seen with Uber's use of ride-hailing data to capture the food delivery business. This not only broadens their dominance, but also maintains network effects, so strengthening their market power.

This scenario complicates the application of the Essential Facilities Doctrine. EFD, which has traditionally been used to physical infrastructure, must evolve to address data's unique properties[14]. Recognizing datasets as crucial only in the context of a particular market ignores their broader implications in integrated ecosystems. Regulatory monitoring must change to analyse such activities and prevent anti-competitive leverage, which stifles innovation and market diversity.

12. OECD, 'Data Portability, Interoperability and Competition' (2021).
13. Marc Hasselwander, 'Digital platforms' growth strategies and the rise of super apps' (2024) 10 HELIYON <https://doi.org/10.1016/j.heliyon.2024.e25856> accessed 12 January 2025.
14. OECD, 'The Essential Facilities Concept' (1996).

B. The CCI's Approach to Data as a Metric of Dominance

In India, the Competition Commission of India (CCI) has acknowledged the transformative impact of data on competition. Moving beyond traditional metrics like price and market share, the CCI has started focusing on data collection, sharing practices, and privacy concerns as indicators of market power.[15]

For example, in the ***Google Privacy Policy*** **case**, the CCI examined at how Google's data collection activities bolstered its market dominance.[16] Google built feedback loops by integrating user data across services, resulting in better services that attracted more users. As Shapiro and Varian (1999) pointed out, when this loop occurs again and again, extreme outcomes take place: the strong get stronger and the weak weaker[17]. This "rich-get-richer" cycle demonstrates how data-centric business models can establish dominance and marginalize competitors.

While the Essential Facilities Doctrine provides a foundation, its use with data must represent the changing, cross-market value of digital resources. Regulators, including the CCI, must strike a balance between the necessity to eliminate anti-competitive conduct and the imperative to foster innovation. Ultimately, ***a tailored approach that addresses data monopolies without stifling progress is essential to ensuring vibrant and competitive digital markets.***

V. INTERNATIONAL PERSPECTIVES

A. China: Data Security Law and Antitrust Applications

China's regulatory framework for data is outlined by the Data Security Law (DSL), which prioritizes national security and public interest over traditional competition law considerations. The DSL categorizes data

15. M Khan, 'Analysing CCI's Order on WhatsApp's 2021 Privacy Policy: A New Era for Data Protection and Competition Law Enforcement in India' (*Kluwer Competition Law Blog*, 6 January 2025) <https://competitionlawblog.kluwercompetitionlaw.com/2025/01/06/analysing-ccis-order-on-whatsapps-2021-privacy-policy-a-new-era-for-data-protection-and-competition-law-enforcement-in-india/> accessed 12 January 2025.
16. *In Re: Updated Terms of Service and Privacy Policy for WhatsApp Users* (Competition Commission of India 2021) <https://www.cci.gov.in/images/antitrustorder/en/01202116522585 03.pdf> accessed 12 January 2025.
17. Carl Shapiro and Hal R Varian, *Information Rules: A Strategic Guide to the Network Economy* (Harvard Business School Press 1999).

based on its strategic value, creating a legal framework for identifying "essential data" exceeding standard market power analysis.[18] This aligns conceptually with the Essential Facilities Doctrine (EFD), as it underscores the indispensability of specific data for economic and public welfare.

The ***Ningbo Senpu Information Technology case***[19] (2024) serves as a landmark application of the EFD in China. In this case, the court ruled that Senpu's control over bond transaction data constituted a monopoly, as it was essential for financial service providers. Senpu's exclusive agreements blocked competitors, stifling competition and innovation in the financial sector. The court's decision to mandate data-sharing echoed EFD principles, highlighting how access to indispensable data can promote competition.

China has also addressed algorithmic dominance through transparency and user control requirements introduced by the Cyberspace Administration.[20] These measures ensure fair access to essential data and prevent exclusionary practices in digital markets.

B. The European Union (EU)

The EU has positioned itself at the forefront of data governance with its *Digital Markets Act (DMA)*, effective since 2023. Targeting gatekeepers, dominant digital platforms controlling key resources such as data, the DMA prohibits anti-competitive practices like self-preferencing and restricting competitor access to data.[21] By framing data as a critical input for competition, the DMA aligns indirectly with the EFD.

Several EU case laws shaped this regulatory approach. In *IMS Health GmbH v. NDC Health (2004)*[22], the Court of Justice of the European

18. Data Security Law of the People's Republic of China (promulgated 10 June 2021, effective 1 September 2021) art 2.
19. Shanghai Municipal Administration for Market Regulation [2024] No. 202302 (Ningbo Senpu Information Technology Ci., Ltd.).
20. Cyberspace Administration of China, 'Internet Information Service Algorithmic Recommendation Management Provisions' (adopted 31 December 2021, effective 1 March 2022)
21. RSM Global, 'The Digital Markets Act: Cracking down on the big tech gatekeeprs' (*RSM Global,* 2 January 2025 <https://www.rsm.global/insights/digital-markets-act-cracking-down-big-tech-gatekeepers> accessed 13 January 2025.
22. Case C-418/01 *IMS Health GmbH & Co KG v NDC Health GmbH & Co KG* [2004] ECR I-5039.

Union (CJEU) recognized a database as an essential input, requiring IMS Health to distribute it on fair, reasonable, and non-discriminatory terms. Similarly, the Thomson Reuters Instrument Codes (RICs)[23] case required licensing of essential data to competitors. These rulings highlight the EU's application of EFD principles to ensure fair market access. However, there is no concrete ruling at the EU level that has invoked the EFD in the digital economy.

Mergers such as Facebook/WhatsApp[24] and Microsoft/LinkedIn[25] also demonstrated the competitive risks of data consolidation. These cases influenced the DMA by underscoring how data accumulation reinforces market dominance and limits consumer choice. While the DMA stops short of explicitly defining data as "essential," it enshrines fair access to critical inputs, fostering competition.

Graef, while analysing the Google Shopping and Google Android case, discussed how the yardstick for essential facilities has been lowered as the scope expands to other abuses. He further discusses the consequence, in the form of internal consistencies that would result from bypassing such thresholds as otherwise, intervention would only be allowed under the EDF. The author argues that this allows the European Commission (EC) to intervene in self-preferencing matters, and automatically assume them as problematic.[26]

This analysis is particularly relevant as it highlights how traditional competition law concepts, such as EFD, are being (albeit indirectly) adjusted to address emerging issues. The Commission's method shows a real-world shift in how essential facilities principles are being applied to digital platforms, without directly referencing the doctrine, a strategy that appears to be similarly adopted by Indian regulators, as we will explore in the subsequent section.

23. *Thomson Reuters v European Commission* [2018] Case AT.39740, [2018] OJ L 99/1.
24. Case COMP/M.7217 *Facebook/WhatsApp Merger Decision* [2014] OJ C417/3.
25. Case COMP/M.8124 *Microsoft/LinkedIn Merger Decision* [2016] OJ C388/1.
26. I Graef, 'The Application of the Essential Facilities Doctrine in the Digital Economy' (2021) 42(3) Journal of Competition Law & Economics 1.

C. Germany

Germany's Competition Act Against Restraints of Competition (ARC), amended in 2021, introduced provisions targeting digital market abuses. Section 19a[27] of the ARC empowers the Federal Cartel Office to regulate dominant platforms, including their handling of data. In the Facebook Data Collection case (2019)[28], The German Federal Cartel Office ruled that Facebook's massive data processing breached antitrust rules. The ruling emphasized the value of data as a source of market power, as well as the importance of fair competition.

The ARC reflects the EFD's principles by focusing on dominant firms' responsibilities to maintain competitive equity in data-driven markets. Its emphasis on tailored remedies for specific markets strengthens its applicability in the digital economy.

D. The United States of America (USA)

US follows a market-driven regulatory philosophy, emphasizing innovation and minimal intervention. However, this approach has exposed gaps in addressing anti-competitive conduct. High-profile cases like *Amazon v. Nucleus*[29] and *Craigslist v. 3Taps*[30] highlight how dominant firms use data to stifle competitors. In *eBay v. Bidder's Edge*, the court recognized data as a competitive resource, though it refrained from mandating data-sharing.[31]

EFD principles are not explicitly incorporated in the US antitrust framework which is rooted in the Sherman Act. The growing recognition of data's role in market dominance is demonstrated by litigation involving tech giants like Google, Facebook and Amazon. The absence of structured data governance laws limits the US's ability to address barriers effectively, contrasting with the EU's comprehensive framework.

Among these, the EU's approach stands out for its balance between innovation and competition. However, lessons from China's emphasis on

27. Gesetz gegen Wettbewerbsbeschränkungen [Act Against Restraints of Competition] (Germany) s 19a.
28. Bundeskartellamt, 'Decision B6-22/16: Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing' (6 February 2019) para 45.
29. *Amazon.com Inc v Nucleus Client Solutions* 2019 WL 77428 (WD Wash 2019).
30. *Craigslist Inc v 3Taps Inc* 942 F Supp 2d 962 (ND Cal 2013).
31. *eBay Inc v Bidder's Edge Inc* 100 F Supp 2d 1058 (ND Cal 2000).

public interest and Germany's focus on tailored remedies could enhance its effectiveness. Globally, the rise of data-sharing mandates and collaborative models reflects the growing importance of fair access in fostering competitive digital ecosystems.

The international regulatory landscape highlights the complexity of addressing data-related competition challenges. While the EU, China, Germany, and the US offer valuable models, their limits highlight the need for a global framework that combines competition law, public interest, and innovation incentives. The EFD, which was traditionally applied to physical infrastructure, remains an important premise for assuring equitable access to essential data in digital marketplaces.[32] By tailoring these ideas to the particular attributes of data, policymakers can foster a more equitable and dynamic global economy.

E. Indian Perspective

Indian regulators have increasingly become wary of the crucial competitive asset that data is and there is active recognition of it being used as a leverage point in markets.[33] The digital landscape has certain characteristics, amongst which is the "winner takes all" phenomenon and tipping of market, for which Digital Competition Bill, 2024 has come into play.[34] While digital markets were still fledgling, the CCI was taking a very pragmatic and innovation-friendly approach where they considered e-commerce and digital markets a different channel of supply of products and services and as an alternative to traditional means. Post-covid has seen such huge movement of e-commerce and it has been very agile in its approach.

CCI has acted proactively in this regard and is leading India in its evolving stance on data control by dominant platforms. Notably, *Digital*

32. Giuseppe Colangelo and Mariateresa Maggiolino, 'Big Data as Misleading Facilities' (2017) 13(2) European Competition Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2978465> accessed 14 January 2025.
33. Competition Commission of India *Market Study on E-Commerce in India: Key Findings and Observations* (CCI 2020) <https://www.cci.gov.in/images/marketstudie/en/market-study-on-e-commerce-in-india-key-findings-and-observations1653547672.pdf> accessed 14 January 2025.
34. Arpan Chaturvedi, 'Factbox: India's EU-like antitrust law worrying technology firms' (*Reuters*, 11 June 2024) <https://www.reuters.com/world/india/indias-eu-like-antitrust-law-worrying-technology-firms-2024-06-11/> accessed 15 January 2025.

Competition Bill will have to evolve the rules with which it all works today, may not necessarily be the rules that are in play a few days from now. In the past, network effects were seen as the ultimate factor in determining dominance, but that is no longer the case today. The CCI must operate in a way that promotes competition, reduces barriers, and fosters the introduction of new technologies.

CCI has had its fair share of cases which necessitated discussion of essential facilities; however, it is yet to address data as an essential facility comprehensively. For example, in the *Google Privacy Policy* case, the CCI identified concerns over data aggregation but stopped short of invoking principles resembling EFD. EFD finds no representation in Indian Competition Law, however, the core of the doctrine finds an implicit position in S.4(2)(c) of the Competition Act[35], which outlaws those practices that results in restriction of market access. While it theoretically aligns with EFD, there is no jurisprudential precedent to support its application to data.

The Ministry of Electronics and Information Technology, in 2020, formed the ***Kris Gopalakrishnan Committee*** to give a *Report on the Non-Personal Data Governance Framework* (hereinafter "Report","NPD")[36]. The Report acknowledged the imbalance in the market created by organisations that were generating value from data. And the subsequent necessity of the governments worldwide to regulate the same. It is pertinent to note here that the report recommended that India specify some high-value datasets- "data of special public interest or high-value dataset, like health, geospatial and/or transportation data. Additionally, it recommended that the data held by the private sector be requested for "community uses / benefits of public goods, research and innovation, etc."

This Report incorporates recommendations that share conceptual roots with the EFD. The doctrine evolved to ensure access to critical infrastructure, and now finds application in *the Patents Act*[37], 1970, *Telecom Regulatory Authority of India Act, 1997*[38], *Electricity Act*,

35. The Competition Act, 2002 (12 of 2003) s 4(2)(c).
36. Kris Gopalakrishnan Committee, *Report on Non-Personal Data Governance Framework* (2020) Ministry of Electronics and Information Technology <https://www.meity.gov.in> accessed 15 January 2025.
37. The Patents Act, 1970 (39 of 1970) s 84.
38. The Telecom Regulatory Authority of India Act, 1997 (24 of 1997) s 11.

2003 and the *Petroleum and Natural Gas Regulatory Board Act, 2006*.[39] Designations of "high-value datasets" parallel how the EFD identifies essential facilities, acknowledging that bottlenecks generated by accumulation of certain types of data in the competitive process is the same as how control over certain types of physical infrastructure used to do and still does. The framework therefore tries to adjust competition principles for the digital age, but this may push the EFD beyond the standard theoretical underpinnings it has relied on in the past. The tension between traditional competition law and the digital world markets showcases the broader challenge of regulating data-driven economies while maintaining incentives for innovation.

CCI has taken cognizance of the digital revolution and the anti-competitive practices that have occurred in the recent times in the digital markets, and has proposed the Digital Competition Bill, 2024.[40] The provisions of the bill are found to be in tandem with those of the DMA of the EU. The recognition of Systemically Significant Digital Enterprises (hereinafter "SSDEs"), [41] the concept of which is similar to "gatekeepers" albeit the threshold criterions, focus on the control of essential resources by dominant entities in the markets. There is also an explicit recognition that accumulation of user data by a certain influential enterprise will support its entrance to related markets, and thus, the regulations for SSDEs will address that concern. This evolution of regulatory attitude shows how India is gradually adopting EFD principles to tackle the unique "essential data" challenges of digital markets, even without its outright adoption.

VI. CHALLENGES WITH APPLICATION TO EFD

A. Complexities in Labelling Data as "Essential"

The EFD's core concept is that access to a facility must be required for competition. However, in the context of data, this premise is ambiguous. Data is non-rivalrous and may be replicated perpetually, distinguishing it from traditional critical infrastructure such as ports or pipelines.

39. The Petroleum and Natural Gas Regulatory Board Act, 2006 (19 of 2006) s 11.
40. The Digital Competition Bill, 2024.
41. PRS Legislative Research, 'Digital Competition Law' <https://prsindia.org/policy/report-summaries/digital-competition-law> accessed 15 January 2025.

However, the exclusivity and context-specific value of data could result in de facto essentiality.

For instance, in the European Union's *IMS Health GmbH* case, the ECJ held that a database format, having become an industry standard, was indispensable for competitors. However, this reasoning has limited applicability in most data contexts, as datasets indispensability is frequently determined by their proprietary nature or connection with other digital ecosystems, rather than universal requirement.

B. Legal Conflicts with Data Privacy Regulations

Even in advanced jurisdictions like the EU, challenges persist in identifying which data sets qualify as essential. The challenge is exacerbated when datasets are generated from personal information, raising concerns about replicability and legitimate access. This imposes a significant evidential burden, forcing authorities to assess the necessity of data on a case-by-case basis. The GDPR severely restricts data sharing, focusing on user consent and purpose limitation (Articles 5 and 6). Mandated data access under EFD[42] may contravene these principles, particularly when personal data is involved. The overlap between data portability (Article 20 of the GDPR)[43] and compulsory sharing obligations hampers enforcement.

Intellectual property laws, such as database rights in the EU and copyright protections in the United States, can safeguard data against compelled sharing. This conflict is particularly evident in jurisdictions such as the United States, where antitrust law favors innovation and investment, as seen in the *Verizon Communications Inc. v. Trinko* decision[44]. The reluctance to extend EFD to data stems from fears that forced sharing could disincentivize investment in proprietary datasets and undermine intellectual property protections.

C. Limited Scope of EFD in Competition Law

The application of EFD to data is hampered by its limited acceptability in global competition law. In jurisdictions like the United States, the

42. Regulation (EU) 2016/679 (General Data Protection Regulation) art 5(1).
43. Regulation (EU) 2016/679 (General Data Protection Regulation) art 20.
44. *Verizon Communications Inc. v Trinko LLP* 540 US 398 (2004).

doctrine is applied sparingly and with scepticism. The Trinko judgment stressed that compelled access is the exception rather than the rule, and warned against judicial overreach that could inhibit innovation. While the concept has been modified to data in certain circumstances, such as the Microsoft and Google Shopping rulings, it remains connected to a high level of necessity.

Even the European Commission's Thomson Reuters (RICs) case emphasizes the difficulty of applying EFD, as it required substantial investigation to demonstrate that RICs (Reuters Instrument Codes) were essential to competitors.

D. EFD and its Unsuitability for Data

The inherent limitations of EFD make it ill-suited for regulating data. Data's intangible, non-rivalrous nature, coupled with the legal protections surrounding its use, renders the doctrine's traditional boundaries inadequate.[45] Furthermore, the high evidentiary barrier for demonstrating indispensability, as well as the concerns of inhibiting innovation through compulsory data sharing, highlight its shortcomings.

Instead, a tailored approach that integrates alternative regulatory mechanisms is imperative. Balancing innovation, competition, and privacy requires moving beyond the constraints of traditional doctrines toward a more flexible, data-specific framework.

VII. ALTERNATIVE SOLUTIONS TO EFD

While the Essential Facilities Doctrine (EFD) provides a conceptual framework for addressing anti-competitive practices in the digital economy, it does not adequately address the challenges of data-driven marketplaces. The difficulties in evaluating the indispensability of data, legal entanglements in intellectual property and privacy rights, and the lack of a cohesive framework render EFD unsuitable to assure fair competition.

Consequently, Alternative approaches must be considered to solve the competitive issues created by data monopolies. This section discusses three primary solutions - data portability, mandated APIs, and data

45. Competition Commission of India, Report on Non-Personal Data Governance Framework (2020) <https://www.cci.gov.in> accessed 15 January 2025.

trusts - highlighting their legal, technical, and competitive implications through global and Indian perspectives.

A. Data Portability: Empowering Consumers and Enhancing Market Contestability

Data portability, as envisioned in Article 20 of the General Data Protection Regulation (GDPR) and Article 6(9) of the Digital Markets Act (DMA),[46] empowers individuals to transfer their data between platforms. Essentially, data portability is the right to transfer personal data from a controller to another organization or the data subject in the context of digital personal data and automated processing. It allows for the mobility of data, and encourages innovation as it facilitates in building data infrastructure. AI and Internet of Things require such hefty volume and high-quality of data to function. Worldwide, the benefits of data portability can be witnessed. Brazil has enforced the Lei Geral de Proteção de Dados Act,[47] Australia has Consumer Data Rights, Japan has its Data Portability guidelines and California has a Consumer Privacy Act[48]. This mechanism reduces switching costs, lowers entry barriers, and enhances market contestability.

For example, in the EU case of *Facebook v. German Federal Cartel Office*, Facebook was criticized for using its dominating position to collect user data across platforms. A strong data portability policy may have given users the freedom to move their data to rival platforms, thereby encouraging competition.[49] Similarly, India's Personal Data Protection Bill[50] prioritizes portability, echoing worldwide trends in consumer empowerment.

The competition implications are significant. Consider a ride-hailing service where users wish to switch from a market leader like Uber to a new entrant. Data portability enables seamless migration of user preferences, trip histories, and ratings, levelling the playing field. The CCI, in its investigations into data-driven markets like e-commerce, might

46. Digital Markets Act (EU), Art. 6(9).
47. Lei Geral de Proteção de Dados (Brazil), Art. 18.
48. California Consumer Privacy Act (CCPA), Cal. Civ. Code § 1798.100 et seq.
49. *Facebook v German Federal Cartel Office* Case No. B6-22/16 (German Federal Court, 2016).
50. The Digital Personal Data Protection Act, 2023 (22 of 2023).

use portability to increase consumer choice while upholding privacy standards.

Critics argue that the scope of data portability as defined in Art. 20 is too narrow, as it talks about data portability from the lens of privacy and instead, should be extensively incorporated in consumer and competition laws,[51] which would broaden the ambit of data under the purview of portability. It must also be taken into account that the requested data under portability rights may include some information about a third-party, and must ensure that it does not hamper upon the rights and freedoms of that party. Nevertheless, data portability is seen as a pro-competitive measure and elicits a positive response, as can be seen by its inclusion across various jurisdictions.

B. Mandated APIs: Interoperability Without Compromising Privacy

Application Programming Interfaces (APIs) facilitate interoperability between platforms, allowing third parties to access specific functionality or datasets on well-defined terms. Mandating APIs can prevent data monopolies by assuring equal access to essential resources while protecting privacy.

Consider a dominant e-commerce platform that denies smaller retailers access to its user reviews and ratings database, crucial for building trust in online transactions. A mandated API could enable these retailers to integrate reviews into their platforms, levelling the playing field without exposing sensitive personal data. Even in the Thomson Reuters case, the European Commission addressed abuse of power by compelling the business to license its Reuters Instrument Codes (RICs) to competitors. While the intervention was successful, a mandatory API may have provided a more robust solution, allowing for real-time data sharing and stimulating competitiveness without causing legal delays.

Although APIs promote interoperability, their mandated use raises concerns about security and misuse. Companies may resist sharing proprietary data, citing risks of IP theft or competitive harm. To balance

51. H. Zohar, 'Regulating Data Portability: A Comparative Analysis' International Journal of Data Privacy (2021), 56-59.

these concerns, regulators must establish strict criteria, as evidenced by India's Unified Payments Interface (UPI) system,[52] which successfully demonstrates the benefits of API-based interoperability in the financial industry.

C. Data Trusts and Commons: Collaborative Models for Non-Sensitive Data Sharing

Data trusts and commons represent a collaborative approach to data sharing, where non-sensitive datasets are shared and maintained by neutral companies for everyone's benefit. This concept solves concerns about data monopolization while also encouraging innovation by giving startups and smaller players access to key resources.

The concept has been explored in the UK through initiatives like the Open Data Institute's data trusts pilot projects.[53] For example, in healthcare, pooling anonymized patient data into a trust could accelerate research while maintaining privacy safeguards. In India, the National Data Governance Framework Policy envisions the creation of a data-sharing ecosystem to support startups and research institutions.

A pertinent case is the *ISDA and Markit CDS Information* case, where limited access to credit default swap data hampered market efficiency. A data trust that manages such financial data might assure fair access while retaining secrecy, allowing market participants to innovate.

Additionally, data commons may address difficulties in industries such as agriculture, where pooling meteorological and soil data could provide smaller enterprises and farmers with relevant data. Collaborative governance mechanisms and sector-specific regulations would be key to ensuring trust and transparency in such models.

A new discussion centered around the disruptive role of generative AI on data commons has emerged. It is quicker than ever, and potentially problematic in cases where data is supposed to be a shared resource.[54] It

52. India's Unified Payments Interface (UPI), National Payments Corporation of India, accessed 15 January 2025.
53. Open Data Institute, 'Data Trusts Pilot Project' UK Government, 2020.
54. Stefaan G. Verhulst, Hannah Chafetz and Andrew Zahuranec, 'Data Commons: Under Threat by or The Solution for a Generative AI Era? Rethinking Data Access and Re-use' (*Medium*, 9 May 2024) <https://medium.com/data-policy/data-commons-under-threat-by-or-the-solution-for-a-generative-ai-era-rethinking-9193e35f85e6#:~:text=Traditional%20

amplifies the risk of overexploitation via concentration in the hands of few- thus, bringing to the fore the term "*Tragedy of the Commons*."[55] Furthermore, generative AI risks the sustainable nature of data commons and in the absence of stringent regulations, may turn data commons into *data graveyards*- where the data cannot be utilized due to its unreliability and lack of structure. It diminishes the societal benefits derived from data commons.

EFD's limitations in addressing data monopolies necessitate the exploration of alternative solutions. Data portability empowers consumers and enhances market contestability, mandated APIs facilitate interoperability while respecting privacy, and data trusts offer a collaborative framework for equitable data sharing. Each approach, though not without challenges, provides a more nuanced and effective response to the competitive dynamics of digital markets. Regulators can ensure a fair and innovative ecology by refining and incorporating these alternatives into competition policy.

VIII. CONCLUSION

With all the boons that come with the emergence of digital markets, there has also been an unprecedented rise in competition cases worldwide. This has brought out serious inadequacies in the existing regulatory framework, thereby putting their ability to uphold fair competition and equitable access into question. This paper sought to analyse whether the EFD can be applied as a working tool in solving barriers that have been erected as a result of the rise of data-based monopolies in digital markets. Criticisms regarding the EFD argue that regulation would stifle innovation, but regulation is necessary since effective regulation promotes innovation by offering fair competition while preventing anti-competitive practices.

The analysis delineates that, although the doctrine has tremendous transformative potential, its practical application depends on a radical modification of its existing form. It must take into account the specific characteristics of data, such as contextual essentiality, cross-market

models%20of%20data%20commons,enclosed%20by%20just%20a%20few.> accessed 15 January 2025.

55. ibid.

necessity, and the inherent contradiction with privacy laws. The infringement on privacy rights in this context, however, seems substantial. As a result, this paper proposes that regulators should reassess what calls for essential facilities in the digital ecosystems. Even then, it may not prove sufficient to address the challenges of this dynamic problem, as the definition of "essential data" will not remain stagnant and will change in due course.

For this reason, the authors consider it plausible to look for those practices and methods that address the problems posed by data accumulation in a simpler and more efficient manner. These practices, such as portability, APIs, interoperability, data silos, data fiduciaries, data commons and trusts, allow for either data management by a third party or for more user control over the data, thus restricting the monopolistic or dominant control over the use of data. With data as the definition of economic power, competition policy must go beyond its static roots. Competition agencies, technical experts and regulators need to join hands and address these acute problems, and only such collaborative effort will yield the desirous outcome for a more contestable marketplace.

Post-Achmea Investor Protection: Sunset Clauses and Alternative Strategies

—*Paridhi Gupta*[*]

ABSTRACT

The European Union's campaign to halt intra-EU investor-state arbitration proceedings has had a significant impact on the investment protection landscape. The objective of this research is to examine the consequences of the coordinated withdrawal of the European Union from the Energy Charter Treaty and the termination of intra-EU Bilateral Investment Treaties. The author's objective is to examine the potential influence that domestic court cases involving intra-EU Energy Charter Treaty arbitration proceedings could have on the future of investment arbitration within the European Union.

The paper examines and promotes a diverse array of strategies that investors may implement to safeguard their investments in light of these developments. These strategies encompass the utilization of alternative legal avenues, such as human rights instruments, the enforcement of intra-EU awards outside of EU borders, and corporate restructuring through non-EU subsidiaries. The question is investigated by undertaking an analysis of the future of intra-EU investment arbitration, which considers the potential impact of international organizations, tribunals, and domestic courts.

Keywords: Intra-EU Investment Arbitration, Energy Charter Treaty Withdrawal, Bilateral Investment Treaties Termination, Investor Protection Strategies

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I. INTRODUCTION

As the "Investor-State Dispute Settlement" (**ISDS**) trends seemingly contradict predictions, the "International Centre for Settlement of Investment Disputes" (**ICSID**) has reported a surprising rise in investor-state arbitrations necessitating a critical analysis of the EU's deliberate efforts to eliminate the intra-EU ISDS system. With 57 cases in 2023, ICSID cases increased 39% over the previous year, even when the "European Union" (**EU**) withdrew from the "Energy Charter Treaty" (**ECT**) and ended intra-EU "Bilateral Investment Treaties" (**BITs**), this growth generates a complex legal, political, and economic situation that requires a comprehensive examination.[1]

The paper centers on the EU's objection to ISDS and the rise in global cases. The EU's policies, based on the "Court of Justice of the European Union's" (**CJEU**) Achmea ruling, were expected to dramatically reduce investor-state arbitrations in the EU and perhaps affect global trends. Yet, the ICSID numbers show that geopolitical changes, energy source movements, and modifications to legal agreements are increasing the importance of ISDS. This study analyses the complex interaction of many factors to assess the EU's campaign against ISDS and its significant effects on global investment arbitration.

Various factors necessitate this research, including the remarkable increase in investor-state arbitration and the EU's approach to investment protection reform, which seeks to balance investor rights with state regulatory authority and significantly shapes the global discourse. Depending on the outcome, the EU's experience may serve as a guiding model or warning, as other states face similar challenges. In 2023, 23% of new ICSID cases were related to the oil, gas, and mining industries, emphasizing the need to understand how, ISDS mechanisms affect global issues like energy security, climate change mitigation, and environmental protection.[2]

1. Herbert Smith Freehills, '*Surge in cases as ICSID releases its 2023 caseload statistics*' (*Herbert Smith Freehils*, 26 February 2024), <https://www.herbertsmithfreehills.com/notes/publicinternationallaw/2024-02/surge-in-cases-as-icsid-releases-its-2023-caseload-statistics#:~:text=57%20new%20cases%20were%20registered,decline%20in%20investor%2Dstate%20arbitrations.> accessed 12 January 2025.
2. Herbert Smith Freehills, '*Surge in cases as ICSID releases its 2023 caseload statistics*' (*Herbert Smith Freehils*, 26 February 2024), < https://www.herbertsmithfreehills.com/notes/publicinternationallaw/2024-02/surge-in-cases-as-icsid-releases-its-2023-caseload-

The article intends to provide valuable insights to investors, states, arbitrators, and legal practitioners navigating the uncertain world of international investment law. As we study this expanding sector, we want to contribute to the future of investor-state dispute settlement. Our analysis intends to help stakeholders navigate the complex legal, political, and economic factors that will influence ISDS's future, including geopolitical shifts, environmental issues, and legal ambiguity.

II. THE INTRA-EU BITS BUTCHERY

In recent years, the landscape of investment protection within the EU has undergone a seismic shift, primarily due to the CJEU landmark decision in "*Slovak Republic v. Achmea BV*" (**Achmea**),[3] dated Mar. 6, 2018. Vide this groundbreaking ruling, the CJEU declared that ISDS clauses in BITs amid the EU "Member-States" (**MS**) were discordant with EU law, thereby establishing that such provisions dwindle the autonomy and effectiveness of the EU legal system by allowing arbitral tribunals to construe and employ EU law exclusive of the possibility of the CJEU's judicial review.

The decision established several key principles. *Firstly*, it observed that the EU law is applicable in the MS, potentially requiring tribunals to interpret and apply it. *Secondly*, it held that the tribunals are not empowered to make references of preliminary rulings to the ECJ under Art. 267 of "Treaty on the Functioning of the European Union" (**TFEU**). *Thirdly*, it acknowledged the limited review of arbitral awards by domestic courts. Thus, in order to ensure that such tribunals do not prevent the effectiveness of EU laws, the ECJ ruled that Art. 267 and 344 of TFEU preclude provisions in intra-EU investment agreements.[4]

It questioned the validity of around 190 intra-EU BITs and numerous pending arbitration proceedings based on these treaties. It bolstered the "European Commission" (**EC**) age-old stand that intra-EU BITs are unnecessary and contrary to the fundamental principles, such as the predominance of EU law, the mutual trust amongst MS, and the EU's sole

statistics#:~:text=57%20new%20cases%20were%20registered,decline%20in%20investor%2Dstate%20arbitrations. > accessed 12 January 2025.

3. *Slovak Republic v Achmea BV* Case C-284/16, ECLI:EU:C:2018:158 (Mar. 6, 2018).
4. *Slovak Republic v Achmea BV* Case C-284/16, ECLI:EU:C:2018:158 (Mar. 6, 2018) paras 56, 62.

competency in matters of FDI under Art. 207 of the TFEU.[5] In the aftermath, the EC intensified its burden on MS to extinguish their intra-EU BITs and bring an end to the parallel system of investment protection.

The governments of 22 MS, on Jan. 15, 2019, agreeing to terminate their intra-EU BITs by Dec.6, 2019, signed a political declaration on the legal consequences of the Achmea ruling.[6] The declaration did, however, also pose the question of how the MS would implement this commitment and address the various complex legal issues brought by the termination of these treaties. To give effect to their political commitment, 23 MS (all signatories of the 2019 declaration except the United Kingdom) signed the "Agreement for the Termination of Bilateral Investment Treaties between the MS of the European Union" (**Termination Agreement** or **Agreement**) on May. 5, 2020.[7]

Enforced on Aug. 29, 2020, the treaty aimed to terminate all intra-EU BITs entailed in its Annex A and provide a framework for the resolution of pending arbitration proceedings. As a unique instrument in the history of international investment law, it sought to comprehensively dismantle a long-standing network of bilateral treaties within a regional economic integration organization, with the preamble emphasizing the primacy of EU law and the necessity to warrant coherent and practical use of EU law throughout the MS. It also reaffirmed the MS' commitment to protecting cross-border investments within the EU through the existing safeguards provided by EU law.

While Art. 2(1) of the Termination Agreement[8] stipulates that the BITs listed in Annex A are terminated, together with all rights and obligations arising from them, subject to the clauses of the agreement itself, Art.

5. Treaty on the Functioning of the European Union art. 207, Feb. 7, 1992, 2012 O.J. (C 326) 47.
6. European Union, '*Declaration of the Member States of 15 January 2019 on the legal consequences of the Achmea judgment and on investment protection*' (*European Union*, 17 January 2024), < https://finance.ec.europa.eu/publications/declaration-Member-States-15-january-2019-legal-consequences-achmea-judgment-and-investment_en.> accessed 12 January 2025.
7. Nikos Lavranos, '*Termination of Investment Treaties*', (*Jus Mundi*, 2 April 2024) < https://jusmundi.com/en/document/wiki/en-termination-of-investment-treaties.> accessed 12 January 2025.
8. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union art. 2(1), May 5, 2020, 2020 O.J. (L 169) 1.

2(2)[9] clarifies that the termination also applies to sunset clauses, stating that such clauses "are terminated" and "shall not produce legal effects," preventing investors from relying on the extended protection periods provided by sunset clauses, which typically range from 5 to 20 years after the termination of a BIT. Therefore, it is often regarded by the EC as a significant step towards establishing uniformity in application.

However, foreign investors and the international arbitration community have expressed concerns about the agreement, contending that it undermines the investor's reasonable expectations and the stability of the global investment law framework. However, whether it is consistent with the fundamental principles of globally acceptable legal principles and treaties or not is to be seen. Some have argued that the agreement's attempt to terminate sunset clauses retroactively violates Art. 70(1)(b) of the "Vienna Convention on the Law of Treaties" (**VCLT**), which provides that the termination of a treaty "*does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.*"[10]

Meanwhile, another legal dispute emerged as a result of the Termination Agreement, namely about its influence on ongoing arbitration cases. Art. 6 to 10[11] of the agreement provide a detailed framework for resolving ongoing cases, keeping in consideration their procedural status and the relevant arbitration procedures. Art. 7[12] mandates that arbitral tribunals must be notified that the ISDS provision in the terminated BIT cannot be used as a legal foundation for the proceedings since it conflicts with EU legislation, by the MS in ongoing disputes. Still, as the arbitral tribunals have consistently held that they have the authority to dictate their jurisdiction (i.e., "**Kompetenz-Kompetenz**") and are not constrained by the verdicts of the CJEU or the positions of the MS, the practical effect of such a notification is uncertain,[13]

9. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union art. 2(2), May 5, 2020, 2020 O.J. (L 169) 1.
10. Vienna Convention on the Law of Treaties art. 70(1)(b), May 23, 1969, 1155 U.N.T.S. 331.
11. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union art. 6-10, May 5, 2020, 2020 O.J. (L 169) 1.
12. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union art. 7, May 5, 2020, 2020 O.J. (L 169) 1.
13. Katariina Särkänne, '*EU Law in Investment Arbitration: A View from International Arbitral Tribunals*', 5 Eur. & World: L. Rev. 34 (2021).

This issue has come up previously in several pending intra-EU arbitrations, where respondent MS have invoked the Termination Agreement and the Achmea judgment to contest the jurisdiction of the arbitral tribunals. For example, in the case of "*Addiko Bank AG and Addiko Bank d.d. v. Republic of Croatia*,"[14] Croatia contended that the tribunal lacked jurisdiction because the agreement had terminated the Austria-Croatia BIT, and the sunset clause could not be relied upon due to its unsuitability with EU law. However, the tribunal rejected Croatia's arguments, holding that the BIT's arbitration clause remained valid and applicable until the culmination of the sunset period, notwithstanding the provisions of the agreement.

Similarly, in "*EDF International SA v. Republic of Slovenia*,"[15] Slovenia invoked the Termination Agreement to argue that the France-Slovenia BIT had been terminated and that the tribunal lacked jurisdiction. However, the tribunal rejected Slovenia's objections, finding that the BIT's sunset clause continued to apply and that the agreement could not retroactively deprive the investors of their rights under the BIT, illustrating the legal uncertainties and practical difficulties associated with the implementation of the agreement, particularly in the context of awaiting arbitration proceedings.

However, the agreements' efficiency in practice remains uncertain, despite its claims to provide a comprehensive framework for resolving intra-EU investment disputes, as arbitral tribunals continue to assert their jurisdiction, and investors continue to pursue their rights under the terminated BITs. Seeking to give effect to the CJEU's Achmea decision and to establish a uniform and coherent system of investment protection within the EU based on EU law, its attempt to retroactively terminate sunset clauses and its impact on pending arbitration proceedings have raised complex legal questions and generated uncertainty for investors, with arbitral tribunals have been reluctant to give effect to it, instead continuing to assert their jurisdiction over intra-EU investment disputes.

The aforementioned decisions have highlighted the tensions that persist between the EU's efforts to dismantle the intra-EU BIT regime and

14. *Addiko Bank AG & Addiko Bank d.d. v Republic of Croatia*, ICSID Case No. ARB/17/37, Award (Sept. 22, 2022).
15. *EDF International SA v Republic of Slovenia*, ICSID Case No. ARB/18/42, Award (Dec. 12, 2022).

the fundamental principles of international investment law, such as the irrevocability of consent to arbitration and the protection of acquired rights. As the investors continue to seek to enforce their rights under the terminated BITs and MS invoke the agreement to challenge the jurisdiction of arbitral tribunals, the legal challenges posed by the Termination Agreement are likely to continue to arise in future intra-EU arbitrations. The outcome of such disputes will significantly influence the future of investment protection within the EU and the development of international investment law more broadly.

Firstly, for investors, the termination of intra-EU BITs and the uncertainties surrounding the Termination Agreement highlight the importance and necessity of careful investment structuring and of considering alternative means of protection, such as investment insurance or contract-based arbitration. Investors should also stay informed by closely monitoring the legal developments in this area and consulting experienced international arbitration counsel to navigate the complex and evolving landscape of intra-EU investment disputes.

Secondly, for MS, effective coordination and cooperation are required for the implementation of the Termination Agreement to ensure a consistent and practical approach to resolving the pending and future intra-EU investment disputes. MS must also take into account the agreement's potential impact on their international obligations under other investment treaties and the need to provide adequate protection for foreign investments keeping in line with international law standards.

Finally, the termination of intra-EU BITs and the difficulties presented by the Termination Agreement highlights the significance of adapting to the changing legal and political landscape of international investment law, for the international arbitration community. While ensuring the integrity and effectiveness of the international arbitration system as a whole, the Arbitral tribunals and practitioners will need to carefully consider the implications of the Achmea decision and the Termination Agreement in the context of intra-EU investment disputes.

III. SUNSET CLAUSES AND INVESTOR UNCERTAINTY

Sunset clauses, also known as "survival clauses," extend the protection of a BIT to investments made before its termination for a specified period. These provisions aim to provide legal certainty and stability for investors who relying on the treaty's guarantees have made long-term investments.[16] The agreement seeking to neutralize the effect of sunset clauses in the terminated intra-EU BITs stipulates that they "are terminated" and "shall not produce legal effects."[17] Nonetheless, the agreement's signatories have effectively attempted to bypass the continuing protection offered by sunset clauses, arguing that such clauses are incompatible with EU law in light of the Achmea decision.

Recently, in the case of "*Adria Group Holding GmbH and others v. the Republic of Croatia*" (**Adria Group**),[18] where a group of Austrian investors-initiated arbitration proceedings against Croatia under the Austria-Croatia BIT, the tribunal addressed the question of whether the investors could still rely on the BIT's 15-year sunset clause (extended protection period). It decided, that in reference to jurisdiction, the BIT conferred direct rights upon the investors at the time they made their investments in Croatia, which the Termination Agreement cannot retroactively extinguish. This is because once an investor accepts the State's offer to arbitrate contained in the BIT, a separate and independent arbitration agreement is formed between the investor and the State, which cannot be unilaterally revoked by the State.

Consequently, the tribunal found that the agreement did not deprive the investors of their acquired rights under the BIT, including the right to initiate arbitration proceedings during the sunset period, thereby accentuating the tension between the EU's efforts to dismantle the intra-EU BIT regime and the fundamental principles of international investment law, such as the irrevocability of consent to arbitration and the protection of acquired rights. This tension is further exemplified by the recent decision of the Amsterdam Court of Appeal in a case involving a Dutch

16. Antonios Kouroutakis, '*Sunset Clauses in International Law and their Consequences for EU Law*', Eur. Parl. Doc. PE 703.592 (2022).
17. Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union art. 2, May 5, 2020, 2020 O.J. (L 169) 1.
18. *Adria Group Holding GmbH v Republic of Croatia*, ICSID Case No. ARB/20/23, Award (Oct. 31, 2023).

investor seeking to enforce an arbitral award against Poland under the terminated Netherlands-Poland BIT.[19]

In this case, the Dutch Court had refused to prevent the investor from pursuing arbitration proceedings seated in London, despite the fact that both the Netherlands and Poland had signed the Termination Agreement and sought to neutralize the BIT's sunset clause.[20] The Court ruled that the mere incompatibility of the BIT's arbitration clause with EU law did not render the initiation of arbitration proceedings outside the EU unlawful or abusive. This therefore, highlights the difficulties the MS may face in their attempts to implement the agreement and block ongoing or future intra-EU arbitrations.

Furthermore, the ambiguity surrounding the legal status of sunset clauses has led some investors to explore innovative strategies to safeguard their treaty-based rights. For example, a Bulgarian insurance group, in October 2023, threatened to bring arbitration proceedings against Romania under the Bulgaria-Romania BIT, which had been terminated in accordance with the Termination Agreement.[21] The investors argued that the BIT's 15-year sunset clause remained in force, notwithstanding the agreement's provisions to the contrary. While the outcome of this dispute remains to be seen, it illustrates the potential for investors to challenge the validity of the Termination Agreement and seek to enforce their rights under the terminated BITs.

Consequently, the challenges arising from the termination of intra-EU BITs are further exacerbated by the EU's efforts to coordinate a withdrawal from the ECT, which is a multilateral investment treaty that has been a key basis for intra-EU energy disputes. In July 2023, the EC proposed a joint withdrawal of the EU and its MS from the ECT, aiming

19. Johannes Hendrik Fahner, '*Anxieties about Achmea: Dutch Interim Relief Judge Refuses to Torpedo London-seated intra-EU Arbitration*', (*Kluwer Arbitration Blog*, 15 December 2022) <http://arbitrationblog.kluwerarbitration.com/2022/12/15/anxieties-about-achmea-dutch-interim-relief-judge-refuses-to-torpedo-london-seated-intra-eu-arbitration/>
20. Nathalie Colin, Gregorio Pettazzi, Alexandre Alonso, Florence Frühling, '*The EU's campaign to end intra-EU investor-State arbitration: pushing investor creativity*', (*Freshfields*, 31 May 2024) <https://www.freshfields.us/insights/campaigns/international-arbitration-in-2024/eu-campaign-to-end-intra-eu-investor-state-arbitration-pushing-investor-creativity/#:~:text=Similarly%2C%20in%20October%202023%20a,attempts%20remains%20to%20be%20seen> accessed 11 January 2025.
21. ibid.

to neutralize the treaty's 20-year sunset clause.[22] However, MS has responded inconsistently to this proposal, with some countries, such as France, Germany, Luxembourg, and Poland, unilaterally denouncing the ECT, while others remain reluctant to withdraw.[23] Henceforth, the legal effects of a coordinated or unilateral withdrawal from the ECT on the treaty's sunset clause are also highly uncertain under international law.

As Art. 47(3) of the ECT[24] specifies that the treaty's provisions shall continue to apply to investments made before a contracting party's withdrawal for 20 years, whether this clause can be effectively overridden by a joint withdrawal agreement or a subsequent treaty between the EU and its MS is a matter of debate among legal scholars and practitioners. Pending the resolution of these issues, States involved in intra-EU ECT arbitrations have increasingly sought the assistance of domestic courts to challenge the jurisdiction of arbitral tribunals. For example, Germany and the Netherlands have asked German Courts to declare the ECT's arbitration clause invalid in intra-EU disputes.

In July 2023, the German Federal Court of Justice ruled in favour of the MS,[25] finding that the ECT's arbitration mechanism is incompatible with EU law in light of the Achmea decision. While the impact of this ruling on international arbitration proceedings remains uncertain, it adds another layer of complexity to the already intricate web of legal issues surrounding intra-EU investment disputes. Faced with the increasing uncertainty and hostility towards intra-EU investment arbitration, some EU companies have begun exploring alternative strategies to safeguard their investments, where one such strategy involves restructuring investments through subsidiaries incorporated in non-EU countries, such as Switzerland or the United Kingdom.[26]

22. Monika Dulian, '*EU Withdrawal from the Energy Charter Treaty*', Eur. Parl. Rsch. Serv. PE 754.632 (Dec. 2023).
23. Alexis L. Namdar & Ilona Trouyet, '*Exodus From The Energy Charter Treaty - What is Left of Europe's Protections for Investors?*', (*Lexology*, 16 January 2024) <https://www.lexology.com/library/detail.aspx?g=01b27dfe-f587-41c1-95fb-f02ec894b311. > accessed 10 January 2025.
24. Energy Charter Treaty art. 47(3), Dec. 17, 1994, 2080 U.N.T.S. 95.
25. *Mainstream Renewable Power Ltd v Federal Republic of Germany*, ICSID Case No. ARB/21/26, (pending). ; *RWE AG v Kingdom of the Netherlands*, ICSID Case No. ARB/21/4, (pending).
26. European Investment Bank, Investment Report 2023/2024: Transforming for Competitiveness (2024).

By routing investments through these jurisdictions, investors may benefit from the protections offered by extra-EU BITs or other international investment agreements. However, the legitimacy of such corporate restructuring to secure treaty protection is subject to scrutiny by arbitral tribunals, which have developed various tests to assess whether the restructuring constitutes an abuse of process or a breach of the principle of good faith. Another potential avenue for investors seeking to enforce their rights is to rely on human rights instruments, such as the "European Convention on Human Rights" (**ECHR**).[27]

In "*Holding AS v. Slovakia*,"[28] the "European Court of Human Rights" (**ECHR**) held that a State's unjustified refusal to enforce a valid arbitral award may constitute a violation of the right to property under Art. 1 of Protocol No. 1 to the ECHR.[29] Consequently, it opened the door for investors to argue that a Member State's non-compliance with its obligations under the "New York Convention" (**NYC**) or the "International Centre for Settlement of Investment Disputes" (**ICSID**) Convention, on the basis of the Achmea decision or the agreement, could engage its responsibility under the ECHR.

The termination of intra-EU BITs and the EU's efforts to withdraw from the ECT has created a climate of uncertainty for investors seeking to protect their investments within the EU. The legal status of sunset clauses and the validity of the Termination Agreement are likely to remain contentious issues in the years to come as investors and MS continue to clash over the scope and application of these provisions. The outcomes of pending cases, such as Adria Group and the Bulgarian insurance group's threatened arbitration against Romania, will have significant implications for the future of intra-EU investment protection and the development of international investment law more broadly.

27. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.
28. *Holding AS v Slovakia*, App. No. 55617/17, Eur. Ct. H.R. (2023).
29. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.

IV. EU'S COORDINATED WITHDRAWAL FROM THE ENERGY CHARTER TREATY

The ECT, a multilateral agreement that has been in force since 1998, was established to create a legal framework for energy cooperation, energy security, and the protection of foreign investments in the energy sector.[30] However, in recent years, the treaty has faced increasing criticism for its alleged incompatibility with the EU's climate goals and its role in protecting fossil fuel investments. For instance, it empowers energy corporations to prosecute States and protects them against the 'alleged' damage to their investments despite environmental concerns.[31] It has led to a rise in ISDS cases, prompting the EC to propose a coordinated withdrawal, as outlined in a proposal published on Jul. 7, 2023.

At first, the EC believed that the current edition of the ECT did not align with the energy and climate objectives of the EU, such as the aim to achieve climate neutrality by 2050 as provided under the European Green Deal and the RE Power EU plan. Furthermore, the EC has raised concerns regarding the ECT's ISDS mechanism, which has been utilized in the fossil fuel industry by investors to contest environmental and climate-related policies implemented by EU MS.[32] These ECT arbitration cases which have been predominantly initiated against EU MS, by EU-based investors, often result in a lack of transparency, legal recourse, and supervision of arbitration rulings.

MS has taken disjointed actions in response to the ECT, despite the EC's call for a united front. Poland, France, Germany and Luxembourg, have all formally notified the ECT Secretariat of their withdrawal from the treaty, with these exits scheduled to take effect on various dates: Poland on 29 December 2023, France on 8 December 2023, Germany

30. Energy Charter Secretariat, '*The Energy Charter Treaty*' (*Energy Charter*, 18 February 2019), <https://www.energycharter.org/process/energy-charter-treaty-1994/energy-charter-treaty/.> accessed 12 January 2025.
31. Arthur Neslen, '*Energy lawsuits pact seen threatening Paris climate deal', (Reuters,* 4 October 2021), <https://www.reuters.com/legal/litigation/energy-lawsuits-pact-seen-threatening-paris-climate-deal-2021-10-01/> ; *RWE AG v Kingdom of the Netherlands* ICSID Case No. ARB/21/4, (pending); *Rockhopper Exploration Plc v Italian Republic*, ICSID Case No. ARB/17/14, Award (Aug. 23, 2022).
32. Press Release, European Commission, '*EU Notifies Exit from Energy Charter Treaty and Puts an End to Intra-EU Arbitration Proceedings*' (*European Commission*, 28 June 2024), < https://ec.europa.eu/commission/presscorner/detail/en/ip_24_3513.>

on 20 December 2023 and Luxembourg on 17 June 2024.[33] Additionally, Denmark, Ireland, the Netherlands, Portugal, Slovenia, and Spain have announced their intentions to withdraw unilaterally.[34]

The implications of these individual actions are significant from an international arbitration perspective. The lack of a coordinated approach may weaken the EU's negotiating position and create legal uncertainty for investors and MS alike. Moreover, the ECT's "sunset clause" stipulates that the treaty's provisions continue to apply to existing investments for 20 years after a party's withdrawal.[35] This means that even after leaving the ECT, MS may still face ISDS claims from investors for an extended period. The sunset clause has been a contentious issue in ECT arbitrations, with tribunals grappling with its interpretation and application, as seen in cases such as "*Rockhopper v. Italy*,"[36] where the tribunal found Italy liable for damages despite the country's withdrawal from the ECT in 2016.

In contrast, some MS, such as Cyprus, Greece, Hungary, and Slovakia, have shown reluctance to withdraw, choosing to remain in the treaty and support a modernized version of the ECT, which has been negotiated since 2017.[37] The modernization version seeks to update the treaty's investment protection standards and address concerns regarding its impact on the energy transition. However, with the growing number of MS opting for withdrawal and the failure to reach a majority in the Council to approve the modernization proposal in October 2022, its future is now uncertain.

The legal effects of a coordinated withdrawal from the ECT under international law are complex. While the EU and its MS have the sovereign right to withdraw from international treaties, the process must be carried out in accordance with the ECT's provisions and customary international law. The ECT's sunset clause, in particular, poses a significant

33. Alexis L. Namdar & Ilona Trouyet, 'Exodus From The Energy Charter Treaty - What is Left of Europe's Protections for Investors?', (*Lexology*, 16 January 2024), < https://www.lexology.com/library/detail.aspx?g=01b27dfe-f587-41c1-95fb-f02ec894b311 >
34. Monika Dulian, EU Withdrawal from the Energy Charter Treaty, Eur. Parl. Rsch. Serv. PE 754.632 (Dec. 2023).
35. Energy Charter Treaty art. 47(3), Dec. 17, 1994, 2080 U.N.T.S. 95.
36. *Rockhopper Exploration Plc v Italian Republic* ICSID Case No. ARB/17/14, Award (Aug. 23, 2022).
37. Monika Dulian, EU Withdrawal from the Energy Charter Treaty, Eur. Parl. Rsch. Serv. PE 754.632 (Dec. 2023).

challenge, as it may limit the immediate effectiveness of the withdrawal in terms of protecting MS from ISDS claims. The interpretation and application of the sunset clause in the context of a coordinated withdrawal may give rise to novel legal questions that will need to be addressed by arbitral tribunals and domestic courts.

Domestic Court cases involving intra-EU ECT arbitration proceedings have also added another layer of complexity to the situation. In recent months, Germany and the Netherlands have sought assistance from German courts to declare pending intra-EU ECT arbitrations inadmissible.[38] These cases include "*Mainstream Renewable v. Germany*"[39] and "*RWE v. the Netherlands*,"[40] both of which were initiated under the ECT and the ICSID Convention. The former concerns claims over legal changes to solar and wind power generation in Germany, while the latter relates to the Netherlands' plan to phase out coal-fired power generation by 2030.

On 27 July 2023, the "German Federal Court of Justice" (**BGH**) issued a landmark decision in the aforementioned cases, declaring the pending intra-EU ICSID arbitrations inadmissible under German procedural law and EU law. The BGH relied on the doctrine of the primacy of EU law and the rulings of the CJEU in cases such as Achmea and Komstroy,[41] which held that intra-EU investment arbitrations are incompatible with EU law. The BGH's decision is significant as it allows German courts to decide on the admissibility of intra-EU ECT arbitrations, including ICSID arbitrations, at an early stage, potentially limiting the jurisdiction of arbitral tribunals.

The BGH's decision has significant implications for the future of intra-EU ECT arbitrations and the enforcement of arbitral awards within the EU. It remains to be seen how ICSID tribunals will respond to this

38. Lars Markert and Anne-Marie Doernenburg, 'RWE and Uniper: (German) Courts Rule on the Admissibility of ECT-based ICSID Arbitrations in Intra-EU Investor-State Disputes', (Kluwer Arbitration Blog, 3 November 2022), <https://arbitrationblog.kluwerarbitration.com/2022/11/03/rwe-and-uniper-german-courts-rule-on-the-admissibility-of-ect-based-icsid-arbitrations-in-intra-eu-investor-state-disputes/ > accessed 12 January 2025.
39. *Mainstream Renewable Power Ltd v Federal Republic of Germany* ICSID Case No. ARB/21/26, (pending).
40. *RWE AG v Kingdom of the Netherlands* ICSID Case No. ARB/21/4, (pending).
41. *Republic of Moldova v Komstroy LLC* Case C-741/19, ECLI:EU:C:2021:655 (Sept. 2, 2021).

ruling and whether investors will seek alternative avenues for enforcing their rights, such as constitutional complaints or claims before the ECHR. The application of the CJEU's decisions in Achmea and subsequent cases has met a mixed response from investment treaty tribunals, with some continuing to confirm their jurisdiction over intra-EU investment arbitrations[42] on the basis of valid and applicable international investment treaties.

Arbitral awards rendered in ICSID arbitrations are internationally enforceable, and if enforcement is sought outside the EU, it may be beyond the jurisdiction of the CJEU and EU Member State courts. The EC's proposal for a coordinated withdrawal from the ECT and the subsequent actions by MS have created a complex and evolving legal landscape for international arbitration practitioners. The interplay between EU law, international investment law, and domestic court decisions will likely shape the future of the ECT and its role in the energy transition. As the situation unfolds, it will be crucial for investors, MS, and EU institutions to navigate this uncertainty and find a balance between protecting investments and advancing climate goals.

The EU's coordinated withdrawal from the ECT may have far-reaching implications for the global investment treaty regime in the future. As countries prioritize climate action and sustainable development, there may be a growing necessity to reevaluate the role of investment treaties in promoting these objectives. The ECT debate has opened a door for governments to rethink the kinds of investments that should be encouraged and protected, as well as how to ensure that investment and climate policies are inclusive. International arbitration professionals will be required to adapt and adjust to these evolving priorities and develop innovative strategies to balance the interests of the global community, states, and investors.

Therefore, the EC's proposal for a coordinated withdrawal from the ECT marks a significant shift in the EU's approach to international investment protection in the energy sector. While the move aims to align the EU's investment policies with its climate goals, the disjointed actions

42. Schwalb CG-S and Weiler M, 'German Federal Supreme Court Rules Intra-EU Arbitration under the ICSID Convention Inadmissible' (*Lexology*, 2 August 2023) < https://www.lexology.com/library/detail.aspx?g=32b38e73-0025-4145-9ee1-285e3c479942 > accessed 10 January 2025.

by MS and the uncertain future of the ECT's modernization process have created a complex legal and political landscape for international arbitration practitioners. Ultimately, the ECT debate underscores the importance of developing a more holistic and sustainable approach to investment protection, which balances the interests of investors, states, and the global community in the face of the urgent challenge of climate change.

V. INVESTOR STRATEGIES IN RESPONSE TO THE EU'S CAMPAIGN

EU's attempts to phase out intra-investors, and state arbitration have created a magnificent uncertainty for the innocent investors trying to protect their investments done within the arena. This phase of the evolving environment in the field of investment has disrupted traditional approaches to protecting the rights of investors. In contradiction to this, legal advisors are also guiding investors to consider various strategies such as strategically enforcing arbitral awards, corporate restructuring, and exploring alternative legal remedies which also include human rights to safeguard their rights.

One of the primary strategies investors are considering in the wake of the EU's campaign is the restructuring of their investments through subsidiaries incorporated in non-EU countries, with Switzerland and the "United Kingdom" (**UK**) emerging as favoured jurisdictions.[43] Through proper channelization of investments, investors may be able to protect themselves by the extra-EU BITs or other agreements. However, the viability of this strategy hinges on the timing of the corporate restructuring.

Arbitral tribunals have scrutinized efforts to determine whether a corporate restructuring constitutes a violation of good faith. The tribunal in "*Philip Morris v. Australia*"[44] articulated a high threshold for finding an abuse of process, requiring the claimant to have known of the dispute or of facts that could lead to a dispute at the time of the restructuring.

43. European Investment Bank, Investment Report 2023/2024: Transforming for Competitiveness (2024).
44. *Philip Morris Asia Ltd. v Commonwealth of Australia* PCA Case No. 2012-12, Award on Jurisdiction and Admissibility (Dec. 17, 2015).

Similarly, in "*Phoenix Action v. Czech Republic*,"[45] the tribunal found that a restructuring carried out shortly before the commencement of arbitration proceedings amounted to an abuse of rights. To avoid falling afoul of these principles, investors must carefully assess the timing of any restructuring efforts.

It is pertinent to note that, corporate restructuring is more likely to become authentic if it is carried out well in advance rather than in the event of a dispute arising. International arbitration professionals advise clients to conduct thorough due diligence and maintain comprehensive records documenting the legitimate business purposes behind any such restructuring. The case of "*Mobil Corporation v. Venezuela*"[46] illustrates the importance of timing in corporate restructuring. In this case, the tribunal found that the claimants' restructuring, which involved the transfer of their investments from a Dutch holding company to a newly incorporated Venezuelan subsidiary, was not an abuse of process because it occurred several years before the dispute arose and was motivated by legitimate business considerations.

Investors should also keep in mind that the denial of benefits clause of the ECT (Art. 17[47]) may have substantial implications when undergoing corporate restructuring. This allows the states party to the ECT to deny benefits to investors who are owned or effectively controlled by nationals of a non-ECT party and have no substantial business activities in the ECT state where they are organized. In "*Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V. v. Spain*,"[48] the tribunal found that the denial of benefits clause did not apply to the claimants, as they had substantial business activities in the Netherlands, an ECT Contracting Party.

Despite the CJEU opinions rendered in Achmea and later cases, which now interpret EU law as to render outside, arbitrary, any securities of intra-EU awards, more and more often will the investors now defer to non-EU Courts for enforcement, as such countries seem ready to concede

45. *Phoenix Action, Ltd. v Czech Republic* ICSID Case No. ARB/06/5, Award (Apr. 15, 2009).
46. *Mobil Corp. v Bolivarian Republic of Venezuela* ICSID Case No. ARB/07/27, Award (Oct. 9, 2014).
47. Energy Charter Treaty art. 17(1), Dec. 17, 1994, 2080 U.N.T.S. 95.
48. *Antin Infrastructure Servs. Lux. S.à.r.l. v Kingdom of Spain* ICSID Case No. ARB/13/31, Award (June 15, 2018).

on the intra-EU awards enforcement. In this respect, England has seized real estate assets and bank accounts of State entities to help satisfy awards. For instance, in *Micula v. Romania*,[49] the UK Supreme Court enforced an ICSID award against Romania, finding that the award did not constitute illegal State aid under EU law, thereby helping investors to enforce EU awards before UK Courts.

In accepting enforcement of intra-EU investment treaty awards, the Australian courts have exhibited a permissive approach. In "*Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l. v. Kingdom of Spain*,"[50] the Federal Court of Australia went on to hold the ICSID Award enforceable against Spain while turning down the public policy and jurisdiction objections such as the Achmea case. The US, with its high concentration of MS assets, has been a particularly popular jurisdiction for enforcement efforts. Investors have relied on the US Courts' long-standing practice of treating arbitral awards as final and binding, subject only to narrow grounds for refusal of enforcement under the NYC.

However, the recent setback in "*Novenergia II-Energy & Environment (SCA) v. Kingdom of Spain*,"[51] where a US court refused to enforce an ECT award against Spain, has cast some doubt on the prospects for intra-EU award enforcement in the US. The case is currently pending before the "US Court of Appeals for the District of Columbia Circuit" (**UCADDC**), and its outcome will have significant implications for the future of intra-EU award enforcement in the US. Despite this setback, market participants remain cautiously optimistic about the prospects for enforcement.

Investment funds still buy intra-EU awards on the secondary market, even at a discount, in reflection of their strong conviction that these awards would be enforceable in one jurisdiction or another. It is guided by the importance of being strategic about enforcement initiatives and the need for the investor to take the most seriously possible view of the most amenable jurisdictions for enforcing their awards are underlined by the

49. *Micula v Romania* [2020] UKSC 5.
50. *Eiser Infrastructure Limited and Energía Solar Luxembourg S.à r.l v Kingdom of Spain* [2020] FCA 157.
51. *Novenergia II - Energy & Env't (SCA) v Kingdom of Spain* Civil Action No. 1:18-cv-1148 (D.D.C. filed May 16, 2018).

continuing interest in intra-EU awards on the secondary market. As part of the traditional sectors for investment protection, particularly within the context of the EU, investors are exploring alternative justice avenues to protect their rights include invoking human rights instruments.

The ECHR decision in "*BTS v. Slovakia*"[52] opened the door for investors to argue that the unjustified refusal of the State to enforce a valid arbitral award would be a violation of the right to property guaranteed under Article 1 of Protocol No. 1.[53] The ECtHR observed that the Slovak Courts' refusal to enforce a valid arbitral award rendered under the Agreement on Encouragement and Reciprocal Protection of Investments between the Slovak Republic and the Republic of Belarus (the Slovakia-Belarus BIT) amounted to a violation of the claimant's right to property. The Court reasoned that the arbitral award constituted a "possession" within the meaning of Art. 1 of Protocol No. 1[54] and that any legitimate public interest did not justify the Slovak courts' refusal to enforce the award.

Furthermore, investors may seek to rely on the aforementioned precedent to challenge EU MS' non-compliance with their obligations under the NYC or the ICSID Convention, arguing that such non-compliance, based on the Achmea decision or the Termination Agreement, could engage the State's responsibility under the ECHR. Although this legal course of action has not yet been tested for its feasibility, it is still potentially a significant development for investors who are objecting to the EU's campaign against intra-EU investment arbitration.

In addition, investors could also invoke other international human rights instruments to support their claims against states that have violated their investment treaty obligations or failed to enforce arbitral awards. For example, the "International Covenant on Civil and Political Rights" (ICCPR) and the "Universal Declaration of Human Rights" (UDHR) both contain provisions that might be invoked in the context of investment disputes, such as the right to property (Art. 17 of UDHR[55])

52. *BTS v Slovakia* App. No. 55617/17, Eur. Ct. H.R. (2023).
53. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.
54. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Mar. 20, 1952, 213 U.N.T.S. 262.
55. Universal Declaration of Human Rights art. 17, G.A. Res. 217A (III), U.N. Doc. A/810 (Dec. 10, 1948).

and the right to an effective remedy (Art. 2(3) of ICCPR[56]). For example, the case of "*Hydro S.r.l. and others v. Republic of Albania*"[57] describes a possibility for human rights arguments to be raised in the context of investment disputes.

In this case, the claimants argued that Albania's failure to enforce an ICSID award rendered in their favour constituted a violation of their right to property under the ECHR. Although the tribunal ultimately declined to rule on the human rights arguments, the case highlights the growing intersection between investment arbitration and human rights law. In consequence, restructuring transactions outside the EU via corporate structures, selective enforcement of its awards outside the EU, and reliance upon alternative channels of law, human rights instruments, are just some of the strategies international arbitral practitioners recommend to clients as a consequence of these events.

Nonetheless, each mechanism carries with it risks and challenges. For example, the timing and nature of corporate restructuring must be such as to avoid the risk of challenging its very integrity and bona-fide about the measures taken. The cross-border enforcement of intra-EU awards must be understood deeply in diverse legal settings and jurisprudence attitudes in various jurisdictions. Human rights instruments may also serve as solutions to disputes, however, when further developed and refined in order to accommodate the financial interests of investors. Ultimately, the success of these strategies will depend on the creativity, skill, and perseverance of investors and their advisors in the face of unprecedented challenges to the traditional framework of international investment law.

VI. THE FUTURE OF INTRA-EU INVESTMENT ARBITRATION

As the future of intra-EU investment arbitration hangs in the balance with concentrated efforts to dismantle the existing system, the EU's aggressive termination of intra-EU BITs, along with the coordinated withdrawal from the ECT, has resulted in the erosion of the principle of pacta-sunt-servanda. Mainly through the retroactive termination of

56. International Covenant on Civil and Political Rights art. 2(3), Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171.
57. *Hydro S.r.l. v Republic of Albania* ICSID Case No. ARB/15/28, Award (Apr. 24, 2019).

sunset clauses in the Termination Agreement, the disruption of pacta-sunt-servanda raises profound questions about the sanctity of international agreements.

The divergent approach is contributing to the increasing fragmentation of international investment law, with the applicable legal framework becoming increasingly dependent on the specific regional context. Here, again, a critique of traditional ISDS from the EU has globally drawn a discussion for a reassessment of more substantive scope of investment protection. Basic concepts that are involved are fair and equitable treatment and indirect expropriation, for which the practitioners must adapt their advocacy strategies.

A. Possible Scenarios for the Evolution of ISDS within the EU

The future direction of Investor-State Dispute Settlement (ISDS) in the European Union is unclear, leaving practitioners to contemplate various potential scenarios. The EU's proposed permanent multilateral investment court could become the primary forum for resolving investment disputes, necessitating a fundamental shift in advocacy approaches and requiring practitioners to adapt to a standing body of adjudicators and potentially different procedural rules. A potential solution may be to incorporate both arbitration and an appeal system, which would address concerns over the accuracy and uniformity of outcomes while yet allowing for some flexibility in the arbitration process.[58]

Alternatively, the EU might implement a system where local courts have the primary responsibility for resolving investment disputes. However, they would have the opportunity to bring issues related to EU law to the CJEU through a preliminary referral mechanism. The EU might further advocate for the implementation of a hierarchical dispute resolution system, prioritizing mediation as a compulsory initial stage before arbitration, necessitating practitioners to refine their proficiency in other means of resolving disputes. An alternative option is to implement industry-specific methods for resolving disputes, employ distinct strategies for different economic sectors, and maintain the conventional ISDS system for important industries while subjecting other sectors to new regulations.

58. *Central Organisation for Railway Electrification v M/s ECI SPIC SMO MCML (JV) A Joint Venture Company* CA no. 9486-9487 of 2019.

B. The Potential Influence of UNCITRAL Working Group III on ISDS Reform

UNCITRAL Working Group III's ongoing efforts to reform ISDS might also have a significant role to play in shaping the future of intra-EU investment arbitration. The Working Group's efforts to develop a code of conduct for adjudicators and regulate third-party funding could establish new global standards that influence EU reforms. Discussions on expedited procedures, security for costs, and early dismissal of unfounded claims could lead to efficiency gains that the EU might incorporate into its system.

The Working Group's focus on valuation methodologies and principles for awarding compensation could address EU concerns about excessive damages in ISDS cases. Creating a versatile international vehicle to execute several reform choices might serve as a blueprint for the EU to accomplish its changes in a synchronized manner. The establishment of an advising centre on resolving foreign investment disputes under the proposed legislation might serve as a model for the EU to create comparable assistance systems for its MS and investors.

C. Potential Spillover Effects on Investment Arbitration in Other Regions

As a result of the EU's approach to reforming intra-EU investment arbitration, it is likely other regions might also experience significant spillover effects. Other states may be prompted to renegotiate their investment treaties to incorporate EU-inspired reforms, such as more precise definitions of investment standards or limitations on ISDS access. The EU's focus on aligning investment protection with sustainable development goals may inspire similar approaches in other regions, potentially leading to a recalibration of the balance between investor rights and state regulatory space. Furthermore, other states may follow the EU's lead in introducing more extensive carve-outs and exceptions in their investment treaties, particularly in areas such as environmental regulation and public health.

D. The Role of International Organizations and Tribunals

In addition, international organizations and courts will have a vital role in determining the future of investment arbitration within the EU, particularly with the CJEU having to maintain its influential role in elucidating the connection between EU law and international investment law through its legal decisions. Additionally, the ICSID may also have to modify its regulations and processes to address the specific concerns of the EU. At the same time, commercial arbitration organizations such as the ICC, SIAC and HKIAC may also have to attempt to address the void created by the decrease in intra-EU investment arbitration by creating specific regulations for investment disputes.

The "Organization for Economic Cooperation and Development" (**OECD**) could play a role in developing best practices for investment protection that align with EU concerns, potentially influencing global standards. The "International Court of Justice" (**ICJ**) may be called upon to resolve inter-state disputes arising from the EU's termination of intra-EU BITs, potentially shaping the interpretation of international investment law principles.

E. The Role of Domestic Courts in Intra-EU Investment Arbitration

As they are about to take on a more critical role in resolving investment disputes within the EU, domestic courts become the up-and-coming venue for arbitration, necessitating practitioners to adapt their advocacy techniques with MS, creating specialized tribunals inside their domestic legal systems. Expertise in both domestic and EU law will be crucial for the consistent interpretation of EU law in investment disputes since the interaction between domestic courts and the CJEU will be vital. The preliminary reference procedure will play a key role in this process.

Domestic courts may encounter intricate issues with the implementation of investment awards throughout the EU, especially considering the Achmea ruling and following changes in EU legislation. The possibility of different methods across courts in EU MS may lead to the development of new tactics for choosing the most advantageous countries for filing investment claims, necessitating a thorough examination. To effectively handle any simultaneous legal processes, it will be necessary to employ

advanced case management methods that address the interaction between domestic court proceedings and any remaining arbitration alternatives.

VII. CONCLUSION

As the global investment law has entered a phase of ambiguity and complication as a result of the EU's efforts to remove investor-state arbitration within the EU, it has substantially influenced the investment protection framework. The Achmea decision, delivered by the CJEU, and the following decisions have fundamentally impacted our understanding of the link between EU law and foreign investment treaties. It not only undermines the legitimacy of present EU investment agreements, but it also raises questions about the future of dispute settlement between investors and EU MS.

Despite its goal to give clarity, the Termination Agreement has continued to obscure significant legal concerns such as the enforceability of existing arbitral awards, treatment of pending arbitral proceedings initiated prior termination, and most, notably those relating to the retroactive termination of sunset clauses. In addition, the coordinated withdrawal from the ECT by the EU represents a more fundamental shift in thinking on energy investment protection, driven by the pressure to bring investment policies in line with environmental concerns and climate change worries. Nevertheless, while this decision has brought an increase in the uncertainty and complexity faced by energy investors, the reactions from Member States are of a mixed nature.

To overcome these issues, investors and their legal advisors have had to devise novel techniques to safeguard assets and preserve entitlements. Potential measures include actively pursuing award enforcement in non-EU countries, reorganizing firms with entities headquartered outside of the European Union, and exploring new legal routes, such as human rights instruments. Nonetheless, each of these options implies unique risks and challenges, demanding the assistance of an experienced adviser and careful evaluation.

Future developments in investment arbitration within the European Union are expected. The continuing activities of UNCITRAL Working Group III on ISDS reform, the growing importance of local tribunals and

the ongoing deliberations on the creation of a global investment court may have a bearing upon the whole future of investment dispute resolution inside the European Union and worldwide. The EU's approach may shape the investment treaties and arbitration practices in other states, causing, therefore, a reconsideration of the trade-off between allowing governments regulatory authority vis-a-vis protecting investors.

As arbitrators, we must unswervingly keep in view and adapt ourselves to changes along the way. Modern market intricacies must be dealt within a global context, taking into account human rights law, international investment law, and EU law. We should be prepared to tackle polarized judicial systems. The ways and means of conflict resolution will be very variable, depending upon the movements of each case. Finally, it forms the very essence of our job to provide an active contribution to the ongoing discourse regarding ISDS in doing so.

Practitioners must consider several practical approaches, including but not limited to, structured investments through jurisdictions outside the EU that maintain strong investment protection frameworks and develop unique dispute resolution clauses that allow redressal via. Furthermore, for ongoing arbitrations, strategies must be construed to ensure award enforcement outside the EU jurisdiction and contribute to the standardisation of the determination of the centre of main interests and legitimate business purposes behind any corporate restructuring to avoid allegations of treaty shopping. Lastly, practitioners should closely monitor developments in the proposed EU Investment Court System and adapt their dispute resolution strategies accordingly.[59]

This includes lobbying, taking part in academic discussions, and working with professional organizations to create a compromise between government regulatory power and the legal rights of investors while considering wider public policy objectives. The EU's efforts to settle intra-EU investor-state arbitration pose both challenges and chances for progress and restructuring in the field of international investment law. In this era of transformation, it is our responsibility as lawyers to not only provide sound advice and advocacy to our clients but also to actively contribute

59. *Vattenfall AB v Federal Republic of Germany* ICSID Case No. ARB/12/12; *Masdar Solar & Wind Cooperatief U.A. v Kingdom of Spain* ICSID Case No. ARB/14/1, Award (May 16, 2018).

to the creation of a long-term, transparent, and equitable framework for the protection of international investments.

To successfully navigate the future of investment arbitration, one has to believe in and adhere to core tenets of justice and rule of law, with great expertise and adaptability. Through rational input, we may contribute to the advancement of investment arbitration in a manner that meets the constantly changing needs of the world. Despite these challenges, it is essential to remember the fundamental goal of protecting investments: to encourage sustainable growth and economic cooperation. We want to ensure that freshly established approaches successfully and reasonably attain this goal within the complex context of 21st-century global financial exchanges.

Regulating the Silos: Harnessing DigiTwin Innovation to Unlock Secure and Efficient Cross-Border Payments in India

—*Siddhi Joshi and Aaditya Singh*[*]

ABSTRACT

The Indian cross-border payments system is swiftly undergoing a technological metamorphosis, fuelled by the expanding digital economy and adoption of cutting-edge AI-based technologies. That said, the institutional structure still faces a myriad of challenges, slow processing, high costs and regulatory fragmentation. To alleviate such issues, the introduction of the Digital Twin Technology presents a promising solution. Digital twinning entails the creation of virtual duplicates of the real-time infrastructures, enabling real-time monitoring, predictive analysis and enhanced risk management. It holds immense potential to streamline various stages of cross-border payments by optimizing the interoperability standards. Therefore, by improving the efficiency and security of international transactions, digi Twins can aid India in competing more effectively on the global stage.

In light of the same, this paper critically explores the integration of digital twins into the cross-border payment system in India, focusing on the legal and ethical concerns that can arise. The premise is allocated towards constructive scrutiny of the current operational landscape in India utilising AI-advanced technologies. The digital twin framework thus emerges as a holistic remedy, in contrast to the conventional usage of artificial intelligence in issue-specific circumstances. By providing an all-encompassing virtual model for operational, managerial and liquidity concerns, it can simulate entire banking operations,

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enabling predictive transformations. The paper further addresses the need for robust data governance to protect data privacy and ensure regulatory compliance across multiple jurisdictions. Case studies and jurisdictional comparisons have been outlined for issues relating to adherence to AML/KYC norms, existing resource models, fraud mitigation and transparency measures. Ultimately, it lays down a suggestive framework offering policy recommendations aimed at rectifying the legal and operational hurdles in the adoption of digital twins.

Keywords: Cross-Border Payments, Digital Twin Technology, Fraud Mitigation, Risk Management.

I. INTRODUCTION

Digital twinning offers a promising remedy to the Achilles' heel of the cross-border banking systems in India, where systemic vulnerabilities threaten the seamless flow of financial transactions. It has emerged as a revolutionary tool in finance and banking addressing inefficiencies in transaction speed, transparency, and risk management.[1] Additionally, the virtual replicas enable the stakeholders to simulate the financial activities without any real-time interference.

Globally, the adoption of digital twins in cross-border payments is still in its infancy, with countries like the UK and Singapore exploring their potential to improve transaction speeds and reduce costs.[2] Even so, the potential for digital twins (**DigiTwin**) in the cross-border payment ecosystem in India is immense, given the growing role of the country in global remittances and international trade. India stands as one of the largest recipients of remittances worldwide, as per the World Migration Report of 2024, making efficiency critical in its cross-border mechanism.[3] The domestic financial sector is already undergoing a digital revolution,

1. 'Digital Twin' (*TechTarget*) <https://www.techtarget.com/searcherp/definition/digital-twin- > accessed 25 January 2025.
2. '5 Real-World Examples of Digital Twins' (*Palamir*) <https://www.palamir.com/news/5-real-world-examples-of-digital-twins> accessed 25 January 2025.
3. International Organization for Migration, World Migration Report 2024 (International Organization for Migration 2024) <https://worldmigrationreport.iom.int/> accessed 25 January 2025.

driven by the administrative push for technological adoption, alongside advancements in AI and mobile data. All the same, the implementation of digital twins faces several roadblocks, ranging from operational complexities to legal challenges like data privacy, multi-jurisdictional compliance, and fraud prevention.[4]

Therefore, this study navigates the potential of digital twins in cross-border payments in India through a dual-prolonged analysis. The first section examines the current operational framework and the technical feasibility. Based on the persisting issues, it examines the methodology of implementing digital twins in streamlining the stages of cross-border payments. The second section addresses the regulatory hurdles and legal reforms required for the seamless integration of digital twins into the financial systems of India. Since the technology relies on AI models, legalities concerning data privacy, cross-border compliance, and the establishment of standardized frameworks are probed.[5] Based on the aforementioned assessment, the study proposes reforms based on the significance of international collaboration for globally aligned data governance thus enabling the effective integration of digital twinning into the domestic cross-border payment ecosystem.

II. THE CURRENT LANDSCAPE OF CROSS-BORDER PAYMENTS IN INDIA

As per the report released in 2025 by the *Ministry of Electronics and Information Technology* (**MeitY**), India's digital economy is projected to grow nearly twice as fast as the overall economy, contributing about 20% to national income by 2030.[6] This transformation can be attributed to the adoption of technological advancements, a robust regulatory system and the increasing usage of digital payment solutions.[7]

4. 'Digital Twins: Legal Considerations' (*Clifford Chance*, February 2023) <https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/02/digital-twins-legal-considerations.html> accessed 25 January 2025.
5. Xiongbiao Ye, Yuhong Yan, Jia Li, and Bo Jiang, *Privacy and Personal Data Risk Governance for Generative Artificial Intelligence: A Chinese Perspective* (2024) 48 *Telecommunications Policy* 102851 <https://www.sciencedirect.com/science/article/pii/S0308596124001484> accessed 24 January 2025.
6. Estimation and Measurement of India's Digital Economy, Ministry of Electronics and Information Technology, Government of India (January 2025).
7. 'Cross-Border Payments 24x7' (*Citigroup*) <https://www.citigroup.com/global/insights/cross-border-payments-24x7> accessed 25 January 2025.

In October 2024 alone, the *Unified Payments Interface system* (**UPI**) processed over 16.58 billion transactions valued at ₹23.5 trillion, underscoring its international scalability and adaptability.[8] *NPCI International Payments Ltd* (**NIPL**), has already engaged with over 20 countries to develop similar systems, recently signing agreements with Peru and Namibia for launches by 2026-27.[9] Apart from UPI, India has also adopted other digital payment platforms such as *National Electronic Funds Transfer* (**NEFT**), *Real Time Gross Settlement* (**RTGS**) and *Immediate Payment Service* (**IMPS**),[10] each offering distinct advantages for credit transfers and even retail transactions. The modernization of the cross-border payment infrastructure is thus marked by cutting-edge technologies: the collaboration of RBI with Open Financial Technologies to develop blockchain-based payment solutions, the Central Bank Digital Currency (**CBDC**) initiative and the most-favoured Unified Payments Interface.[11] The development is in line with the global banking sector witnessing substantial integration of such technologies, notably through *natural language generation* (**NLG**), *natural language processing* (**NLP**), *computer vision* (**CV**), and advanced machine learning (**ML**) applications utilising neural networks (**NN**).[12]

AI therefore finds its usage in a number of commercial activities performed in Indian banking systems.[13] For instance, the introduction of

8. Ministry of Finance, 'UPI: Revolutionizing Digital Payments in India' <https://pib.gov.in/PressReleasePage.aspx?PRID=2079544> accessed 4 January 2025.
9. National Payments Corporation of India, 'NPCI International and the Central Reserve Bank of Peru Partner to Develop UPI-Like Real-Time Payments System in Peru' <https://www.npci.org.in/PDF/npci/press-releases/2024/NIPL-Press-Release-NPCI-International-and-the-Central-Reserve-Bank-of-Peru-Partner-to-Develop-UPI-Like-Real-Time-Payments-System-in-Peru.pdf> accessed 14 January 2025.
10. Anshul Gupta, *Why Does India Have 4 Funds Transfer Systems?* (Wint Wealth, 6 May 2023) https://www.wintwealth.com/blog/why-does-india-have-4-funds-transfer-systems/> accessed 24 January 2025.
11. IBS Intelligence, 'FinTech revolutionises cross-border payments, fuelling India's rise in global trade'< https://ibsintelligence.com/blogs/fintech-revolutionises-cross-border-payments-fueling-indias-rise-in-global-trade/> accessed 4 January 2025.
12. Nemika Tyagi and Bharat Bhushan, 'Demystifying the Role of Natural Language Processing (NLP) in Smart City Applications: Background, Motivation, Recent Advances, and Future Research Directions' (2023) 130 *Wireless Personal Communications* 857.
13. Amitabh Chaudhry, 'Here Are 4 Ways AI is Streamlining Banking in India' (*World Economic Forum*, 20 December 2023) <https://www.weforum.org/stories/2023/12/how-ai-can-streamline-indian-banking/> accessed 8 January 2025.

Conversational Payments by RBI[14] establishes a sophisticated framework for conducting transactions through intuitive messaging interfaces, streamlining the process of monetary transfers. Such initiatives improve accessibility in underserved rural areas by offering intuitive, user-friendly interfaces, in line with the goal of financial inclusivity.[15] Additionally, AI is also being used in enhancing security with real-time fraud detection, analysing the transaction patterns to spot and prevent suspicious activities. Further, biometric authentication, which is in the works by NPCL, includes facial recognition, fingerprint verification etc. rather than the traditional PIN-based systems and linking of Aadhar.[16]

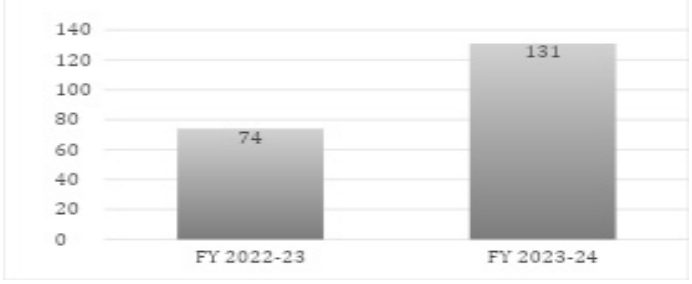


Fig 1: Over 131 billion UPI transactions in FY 2023-24 as per the PwC India Report, 2024[17]

III. USE OF DIGITAL TWIN TECHNOLOGY IN REVOLUTIONIZING BANKING AND FINANCIAL SERVICES

A digital twin is a virtual counterpart of a physical entity or process, modelled within its digital environment. It enables organizations to simulate

14. 'RBI Proposes to Launch Conversational Payments' (Sep 2023) <https://www.nelito.com/blog/rbi-proposes-to-launch-conversational payments.html#:~:text=Conversational%20Payments%20on%20UPI%20will,real%2Dtime%20during%20a%20chat > accessed 3 January 2025.
15. UNDP, *Digital Inclusion in a Dynamic World* (UNDP, May 2024) <https://www.undp.org/sites/g/files/zskgke326/files/2024-05/undp_digital_inclusion_in_a_dynamic_world.pdf> accessed 3 February 2025.
16. Kritika Krishnamurthy, 'Regulatory Imperatives: AI Integration in Indian Banking' (*Chambers and Partners*, 1 August 2024) <https://chambers.com/articles/regulatory-imperatives-ai-integration-in-indian-banking-2>accessed 5 January 2025.
17. Shehnaz Ahmed, Sanhita Chauriha, and Suyash Rai, 'Addressing Regulatory Frictions in Cross-Border Payments' (*Vidhi Centre for Legal Policy*, October 2024) <https://vidhilegalpolicy.in/research/addressing-regulatory-frictions-in-cross-border-payments/> accessed 14 January 2025.19.

real-world scenarios, analyse outcomes, and make informed decisions.[18] At its core, a digital twin comprises three components: physical systems to replicate, digital representations created with data and 3D modelling, and data connections acting as a bridge that use sensors and IoT for real-time updates.[19] Operating within a secure cloud environment, this approach mirrors demand deposit Account balances and processes transactions in real-time, while maintaining synchronization with the core system. By utilizing *Application Programming Infrastructure* (**API**) along with event-driven architecture, digital twin technology provides a seamless means to real-time functionality.[20]

Unlike typical AI applications that operate in isolated contexts and have limited scope, digital twin technology represents a transformative integration of data, algorithms, and AI systems.

Digital twins rely on advanced Information and Communication Technologies (**ICT**) and employ Artificial Intelligence (**AI**) models, scalable Machine Learning (**ML**), Neural Machine Learning, and Natural Language Processing (**NLP**) to analyse and optimize performance.[21] While digital twins are not AI systems in themselves, they use AI-powered models to enhance their functionality, enabling financial institutions to streamline transaction authorizations, optimize infrastructure, and improve the agility of payment systems.[22]

The traditional AI tools that are used on a case-to-case basis demonstrate significant limitations in their isolated applications. In this context, Digital twin technology assumes a far greater role than a mere

18. 'What is a Digital Twin?' (*IBM*, 5 August 2021) <https://www.ibm.com/think/topics/what-is-a-digital-twin> accessed 7 January 2025.
19. 'What is Digital-Twin Technology?' (*McKinsey & Company*, 26 August 2024) <https://www.mckinsey.com/featured-insights/mckinsey-explainers/what-is-digital-twin-technology#/> accessed 16 January 2025.
20. [x]cube LABS, *Event-Driven Architecture: Unlocking Agility and Real-Time Responsiveness* (13 December 2023) <https://www.xcubelabs.com/blog/event-driven-architecture-unlocking-agility-and-real-time-responsiveness/> accessed 3 February 2025.
21. 'Making Cross-Border Payments Faster, Safer and Less Costly for Financial Institutions' (*J.P. Morgan*, 2024) <https://www.jpmorgan.com/insights/payments/cross-border-payments/cross-border-payments-financial-institutions> accessed 16 January 2025.
22. Alex Cosmas, Guilherme Cruz, Sebastian Cubela, Mark Huntington, Sohrab Rahimi, and Sanchit Tiwari, *Digital Twins and Generative AI: A Powerful Pairing* (McKinsey & Company, 11 April 2024) <https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/tech-forward/digital-twins-and-generative-ai-a-powerful-pairing> accessed 24 January 2025.

technological upgrade. Therefore, this approach marks a significant departure from conventional banking practices. With respect to the customer experience, banks can create detailed models of customer journeys, enabling them to identify the pressure points and personalise the banking experiences.[23] This aspect is significant especially in countries like India, where linguistic diversity and digital illiteracy can come in the way of financial inclusivity.[24] Looking ahead, the role of digital twins in banking is expected to expand further, particularly in areas that require complicated system integration and real-time decision making.[25] The digital twin in finance market size is poised to grow from USD 0.1 billion in 2023 to USD 0.5 billion by the end of 2028, at a CAGR of 34.8%, on a global scale.[26]

One such area thus proves to be the mechanism of cross-border payments where the abilities of DTT can be leveraged to optimise efficiency and combat the persisting issues.

IV. CHALLENGES IN THE INDIAN CROSS-BORDER PAYMENT SYSTEM

The success of digitalisation in transactional activities presents an encouraging template for international expansion, however, there are significant hurdles concerning operational and legal structures.

A. Operational Challenges

India faces practical implementation of interoperability that entails overcoming both technical and governance challenges.[27] The current approach

23. ALTAIR, 'The Premier Digital Twin Technology Solution for Banking, Financial Services, and Insurance' (*One Total Twin*) <https://altair.com/one-total-twin/bfsi >accessed 17 January 2025.
24. Chandan Kumar Sahu, and Pravesh Kumar Bhargava, 'The Impact of Digital Twins on the Finance Function' (*TCS*) <https://www.tcs.com/what-we-do/industries/high-tech/article/digital-twins-finance-functions >accessed 16 January 2025.
25. Dr. Mark Nasila, 'With Digital Twin Technology, the Financial Sector Can Reimagine Itself for an Uncertain Globalized Future' (*CIO Talk Network*, 2022) <https://www.ciotalknetwork.com/digital-twin-technology-in-banking-finance/ >accessed 17 January 2025.
26. Markets and Markets, Digital Twin in Finance Market (Report Code: TC 8625, 2023).
27. Sanhita Chauriha, 'Tackling the Frictions in Cross-Border Payments: A Call for Innovative Solutions' *The Hindu* (*The Hindu*, 26 August 2024)< https://www.thehindu.com/sci-tech/technology/tackling-the-frictions-in-cross-border-payments-a-call-for-innovative-solutions/article68566622.ece >accessed 16 January 2025.

for global transactions poses significant challenges for businesses due to currency volatility, complex hedging strategies, and limited resources, particularly for SMEs and startups.[28]

The compliance burden deters potential investors from investing in startups due to stagnant growth since profits are not able to be predicted due to a mismatch of regulatory aspects. Gradually, the stability of foreign markets is also affected. One recent lesson can be taken from the withdrawal of the American digital payments platform, Stripe. In May 2024, the platform temporarily withdrew in the form of invite-only, from India, citing rigid KYC policies and the inability to present "easy onboarding" for new users.[29]

Further, the traditional cross-border payment process lacks transparency, involving multiple intermediaries that can cause delays and errors.[30] In the same vein, the transaction charges involved are often unpredictable, varying country by country and cannot be always precisely calculated, beforehand.[31] The lack of real-time tracking, multiple intermediary involvement and high-cost setup creates a challenge for entities, both personal and public who are seeking to minimise the expenditures involved.

B. Technical Infrastructure Limitations

SWIFT transactions, widely used internationally, typically take three-four working days, with three processing options: standard (two days), urgent (one day), and express (same-day) transfers.[32] But these options come with escalating fees and variable transaction costs that depend on

28. Ruchi Rathor, *Cross-Border Payments: Challenges and Opportunities for Businesses* (Finextra, 30 September 2024) <https://www.finextra.com/blogposting/26921/cross-border-payments-challenges-and-opportunities-for-businesses> accessed 24 January 2025.
29. Times of India, 'Stripe Goes Invite-Only in India' https://timesofindia.indiatimes.com/business/india-business/stripe-goes-invite-only-in-india/articleshow/110604875.cms accessed 14 January 2025.
30. Varun Kamani, 'Cross-Border Payments and Fintech Solutions in India' (*LinkedIn*, 28 October 2024) <https://www.linkedin.com/pulse/cross-border-payments-fintech-solutions-india-varun-kamani-qaptf/> accessed 16 January 2025.
31. 'Cross Border Payments in India: Current Challenges and Future Opportunities' (*NTT Data Pay*, 11 October 2024) <https://www.nttdatapay.com/blog/cross-border-payment/#:~:text=Security%3A%20Businesses%20must%20implement%20strong,can%20hinder%20cross%2Dborder%20transactions> accessed 16 January 2025.
32. Amit Kumar Sharma, 'SWIFT Adoption Challenges' (*Infosys*, 2018) <https://www.infosys.com/industries/cards-and-payments/resources/documents/swift-adoption-challenges.pdf> accessed 16 January 2025.

the number of intermediary banks involved. The continued reliance on the traditional wire transfer and SWIFT mechanisms results in substantial inefficiencies in terms of both time taken and the costs incurred.[33]

Unlike the system of domestic payments, the international setup takes up to a larger amount of time leading to production delays and inability to meet deadlines. The slackened pace results in uncertainty in measuring the expenses and calculating the revenue acquired.[34] A parallel challenge emerges in the realm of user interaction, where the effectiveness is contingent upon the ability of the users to articulate queries in machine-comprehensible formats. This issue is substantially layered given the diverse customer base of banking services and the varying levels of digital literacy among the users, in India as well as the other developing nations.[35]

C. Financial and Currency Management Challenges

A significant hidden cost associated with the operational limitations is the complexity of liquidity management across currencies and jurisdictions.[36] Currency value fluctuations create financial risks for both the buyers and sellers, potentially causing deficits between the stages of transaction initiation and settlement.[37] Multiple intermediaries, evident in the cross-border mechanism, increase the bank and the payment fees, which are passed to the purchasers through exchange rate charges.[38]

Additional costs are incurred by payment systems with the payee entities often requiring upfront funds to access foreign currency. In nations like India where personal financial capital still faces disparities, maintaining sufficient funds for timely international transactions is challenging. UPI

33. ibid.
34. Chidananda Vasudeva, 'UPI Transaction Limit Per Day in 2025: UPI Transaction & Payment Charges, Guidelines & Applicability' (*Razorpay*, 11 October 2024) <https://razorpay.com/learn/upi-transactioncharges/#:~:text=The%20UPI%20transaction%20limit%20per,transactions%20in%20a%20single%20day>accessed 16 January 2025.
35. Dr. Mark Nasila, 'With Digital Twin Technology, the Financial Sector Can Reimagine Itself for an Uncertain Globalized Future' (*CIO Talk Network*, 2022) <https://www.ciotalknetwork.com/digital-twin-technology-in-banking-finance/ >accessed 17 January 2025.
36. ibid.
37. Corporate Finance Institute, *Foreign Exchange Risk - Overview, Types, Examples* (Corporate Finance Institute, 2025) <https://corporatefinanceinstitute.com/resources/foreign-exchange/foreign-exchange-risk/> accessed 24 January 2025.
38. AWS, 'What is Digital Twin Technology?' (*Amazon*)< https://aws.amazon.com/what-is/digital-twin/ >accessed 19 January 2025.

currently limits domestic transactions to INR 1 lakh, with slightly higher caps for specific transactions like capital market investments.[39] These restrictions hamper the potential of UPI for larger business-to-business payments (B2B) and cross-border transactions. For instance, a US-based financial services company offering inward remittances is constrained by the INR 1 lakh domestic limit.[40]

V. APPLICATION OF DIGITAL TWINS IN CROSS-BORDER PAYMENTS

Digital Twinning therefore emerges as a comprehensive solution to the existing limitations. The twins can be divided into four basic kinds, where each is suited for different application levels, however, they can also co-exist within a particular system.[41] In the preliminary stage, that of initiation, the payer provides the essential details, including the name of the recipient, the account number, and the transfer amount. Here, *component twins* can be utilized to digitally replicate such details which ensures accuracy even before the transaction has commenced. For instance, cross-verifying the KYC details against the banking databases in a UPI-based international transaction, thus minimizing the manual errors and maintaining data integrity.[42]

Moving forward, the next step is authorization, where the bank verifies the information of the account, the legal procedures followed, and the availability of funds. In this, *asset twins* can be used which combine multiple components like fraud detection systems, compliance with domestic and global norms and sufficiency of the existing finances.[43] For

39. Michael Parks, 'Digital Twinning: Types of Digital Twins' (*Mouser Electronics*, 2022) <https://www.mouser.in/applications/digital-twinning-types/?srsltid=AfmBOopJZxgiovYdfRQ4oaiRoBexB-hdKX4EBTCvboOP8OVPeVnPxt1H >accessed 21 January 2025.
40. Emma Cutler, 'New Maturity Model Provides Roadmap For Corporate Climate Risk Management' (*Verdantix*, 13 May 2024) <https://www.verdantix.com/insights/blogs/new-maturity-model-provides-roadmap-for-corporate-climate-risk-management >accessed 22 January 2025.
41. DIGITAL DIRECTIONS, '4 Types of Digital Twins (Basic Overview with Examples)' (*DIGITAL DIRECTIONS*, 2023) <https://digitaldirections.com/4-types-of-digital-twins-basic-overview-with-examples/ >accessed 19 January 2025.
42. Ankitha VP, 'What Are The 4 Types of Digital Twins?' (*Toobler*, 13 December 2024) <https://www.toobler.com/blog/types-of-digital-twins >accessed 19 January 2025.
43. Precog, 'Types of Digital Twins' (*Precog*, 2024) <https://precog.co/blog/types-of-digital-twins/> accessed 25 January 2025.

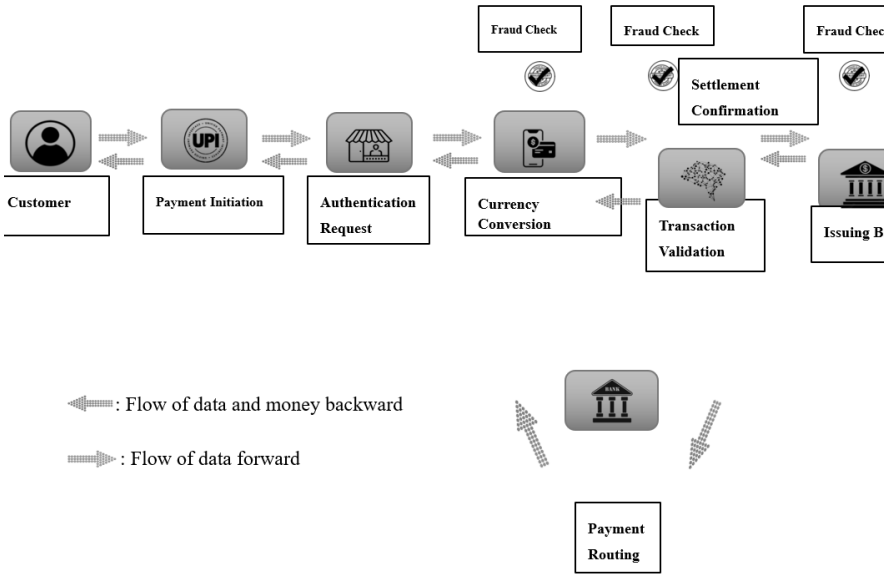
instance- Indian banks can utilise asset twins to ensure that the payments adhere to RBI and AML regulations. Further, it can be ensured that the domestic standards are not in conflict with the international ones, such as Recommendation 16 of the Financial Action Task Force on cross-border payments.

Subsequently, the payment undergoes clearing, where the network validates the account details of the recipients and routes the funds to the respective bank. For which, *system twins* can be utilised which model the interaction between the domestic and international clearinghouses and routing of transactions.[44] In India, these twins can be used to integrate systems like UPI with international networks like SWIFT or PayNow, ensuring that the transactions are routed seamlessly. The inefficiencies arising due to costs and the duration can be decreased since system twins can identify the most efficient routes and reduce unnecessary intermediary fees and network congestion.

Ultimately, in the settlement stage, the accounts of the payer and the recipient are adjusted at their corresponding banks at the settlement stage. *Process twins* oversee this final adjustment by synchronizing the settlement process across the different banks and time zones.[45] They can aid in streamlining the currency conversions and management of the costs associated with forex discrepancies. For instance- In 2024, the RBI announced that the digital rupee in cross-border payments had been implemented as a trial run, developed in collaboration with Project Dunbar under Bank of International Settlements (BIS).[46] With the usage of process twins, such initiatives can be effectively simulated to estimate the transactional accuracies and infrastructural feasibility.

44. ibid.
45. Mouser Electronics, 'Types of Digital Twinning' (*Mouser Electronics*, 2024) <https://www.mouser.in/applications/digital-twinning-types/?srsltid=AfmBOopJZxgiovYd-fRQ4oaiRoBexB-hdKX4EBTCvboOP8OVPeVnPxt1H> accessed 25 January 2025.
46. Times of India, 'RBI Digital Rupee Can Be Used for Overseas Payments' (*Times of India*, 25 January 2025) <https://timesofindia.indiatimes.com/city/mumbai/rbi-digital-rupee-can-be-used-for-overseas-payments/articleshow/107866736.cms>accessed 25 January 2025.

VI. CROSS-BORDER PAYMENT PROCESSING VIA BANKING UPI IN INDIA



VII. ILLUSTRATING MATURITY LEVELS AND IMPLEMENTATION OF DIGITAL TWIN IN CROSS-BORDER TRANSACTIONS

Verdantix, the leading research and advisory firm specializing in operational and technological frameworks, has proposed a four-level maturity model for DTT adoption.[47] However, the effectiveness of each stage depends on how the resources are being applied at foundational levels. Given the evolving state of cross-border payments in India, this framework can aid in the assessment of the existing position and future prospects in the adoption of digi twins. The recommended structure consists of four phases.

The *Descriptive stage* is first utilised at the foundational level. It creates digital replicas of cross-border payment networks, mapping initial interactions between the banks, settlement mechanisms, and clearing systems to determine payment routes and transaction flows. For instance- virtual

47. Emma Cutler and Ryan Skinner, 'Strategic Focus: A Maturity Model for Corporate Climate Risk Management' (Verdantix, 26 April 2024)< https://www.verdantix.com/report/strategic-focus-a-maturity-model-for-corporate-climate-risk-management> accessed 10 January 2025.

mapping of the integration of UPI with Singapore's PayNow system with reference to the required.

In terms of advancement, the *Informative phase* enhances the operational visibility by inclusion of data in real-time from multiple sources across international banking routes. Additionally, it can manage the live monitoring of the transactions, instead of preliminary mapping by tracking the exchange rate fluctuations and the settlement status being processed at the current moment.[48] Informative Digital Twinning is most suited for India due to the current stage of development. Since cross-border collaboration is developing and remittance inflows are a significant economic factor, live monitoring of the transaction flows and compliance for AML measures becomes essential.[49] The objective of operational visibility aligns with the available technical implementation, paving way for the more advanced stages.[50]

With respect to advanced capacities, the next phase that emerges is the *Predictive model*. Building on the historical data and machine learning algorithms, it forecasts the economic status of cross-border payments. It can showcase the currency exposure risks across the multiple jurisdictions, liquidity requirements for the nostro accounts of domestic banks and potential regulatory issues that may arise.[51] In terms of sophisticated implementation, the Comprehensive stage examines the scenarios utilised in the previous three stages and provides an impact assessment input. Moreover, it can also provide a simulation of systemic risks in global payment markets which can make it easier to provide mitigation strategies. At the pinnacle is the *Autonomous stage* which represents the most advanced level of digital twins, delivering the maximum action.[52] For

48. The Digital Twin Maturity Journey (*Service Works Global*) <https://www.swg.com/blog/digital-twin-maturity-journey/ > accessed 11 January 2025.
49. Carl Dahlman and Anuja Utz, *India and the Knowledge Economy: Leveraging Strengths and Opportunities* (World Bank, 2005). <https://documents1.worldbank.org/curated/ru/375181468041958316/pdf/329240India0Knowledge01notoexternal1.pdf> accessed 3 February 2025.
50. Napier AI, *What is Transaction Monitoring in AML?* (Napier AI, 2024) <https://www.napier.ai/knowledgehub/what-is-transaction-monitoring> accessed 24 January 2025.
51. Priyanka Bawa and Elisa Molero, 'Verdantix ESG & Sustainability Consulting Green Quadrant 2024' (*Deloitte*, 21 February 2024) <https://www.deloitte.com/global/en/about/recognition/analyst-relations/2024-verdantix-esg-and-sustainability-consulting-green-quadrant.html> accessed 8 January 2025.
52. Malavika Tohani, Kiran Darmasseelane and Henry Kirkman, 'Best Practices: Transitioning to Predictive Maintenance for Enhanced Asset Management' (*Verdantix*, 8

instance- it can provide an assessment of dynamic routing based on cost and speed, real-time intervention and monitoring in case of legal issues and can automatically optimise the liquidity management across multiple currencies.[53]

VIII. CASE STUDIES

A. Digital Twins in Financial Services: CDBB Whitepaper (2022)

The Centre for Digital Built Britain published a whitepaper in 2022 titled "How Finance and Digital Twins Can Shape a Better Future for the Planet."[54] The report is based on research conducted with major institutions including the Asian Development Bank, European Central Bank, Macquarie Infrastructure & Real Assets, and European Bank for Reconstruction and Development. Three primary applications have been identified: risk assessment and management, asset valuation, and banking operations.[55] In risk management, digital twins can enable real-time verification of risk controls, leading to more competitive lending rates. For asset valuation, implementation enhances the asset transactability by incorporating the digital maturity ratings into due diligence processes. In the banking operations, the research demonstrated that £1 investment in information management yielded £6 in operational savings, improving the lending decision accuracy through enhanced data quality.[56] The whitepaper further proposed a three-step implementation framework: integrating digital maturity assessment into banking due diligence; standardizing data quality across transactions and; incorporating cybersecurity protocols within digital twin systems.

November 2022) <https://www.verdantix.com/report/best-practices-transitioning-to-predictive-maintenance-for-enhanced-asset-management> accessed 13 January 2025.

53. ibid.
54. Centre for Digital Built Britain, *Finance and the Future of Infrastructure: A White Paper* (Centre for Digital Built Britain, 2020) <https://www.cdbb.cam.ac.uk/files/finance_white-paper.pdf> accessed 25 January 2025.
55. Centre for Digital Built Britain, *The Gemini Principles* (Centre for Digital Built Britain, 2020) <https://www.cdbb.cam.ac.uk/DFTG/GeminiPrinciples> accessed 25 January 2025.
56. ibid.

B. Project Sangam DigiTwin Initiative by India

The Indian government launched the country's first program employing digital twinning to leverage this technology for infrastructure development and planning. Named as Sangam Digital Twin program, it aims to digitise and foster cross-sector collaboration amongst the major Indian cities by 2035.[57] The initiative also promises collaboration across various sectors, promoting the use of technologies such as 5G, IoT, AR/VR, AI, 6G, and Digital Twin to revolutionize infrastructure planning.

In 2023, the Geospatial World under the Think Tank on Digital Twin Strategy for Indian Infrastructure, conducted a comprehensive study on a National Digital twin Policy for India. The research was based on integration of advanced technologies like GIS, BIM, AI, and IoT to create real-time digital models of physical assets and systems.[58] It noted that an innovative approach could boost infrastructure investment by 33% and contribute to India's ambitious goal of reaching a $40 trillion economy by 2047. The policy would enable a holistic, data-driven approach to infrastructure management across its entire lifecycle.[59]

Based on these developments, which have primarily been introduced in the manufacturing and infrastructure sectors so far, their usage in the financial sector in India holds a promising future.

IX. THE ADVANTAGEOUS KEY APPLICATIONS OF DIGITAL TWINNING

A. Real-time Monitoring and Compliance

One of the primary benefits of DTT lies in its potential real-time mapping and monitoring of payment flows.[60] This critical function relates

57. Sangam, 'About the Initiative' <https://sangam.sancharsaathi.gov.in/about> accessed 25 January 2025.
58. 'India Needs Digital Twin Policy to Drive 33% Increase in Infra Investment and Achieve USD 40 Trillion Economy by 2047: Study' (*Economic Times*, 24 January 2025) <https://government.economictimes.indiatimes.com/news/economy/india-needs-digital-twin-policy-to-drive-33-increase-in-infra-investment-achieve-usd40-tn-economy-by-2047-study/111770138> accessed 25 January 2025.
59. Geospatial World, 'India BIM and Digital Twin Think Tank' (*Geospatial World*, 2024) <https://geospatialworld.net/consulting/india-bim-and-digital-twin-think-tank.html> accessed 25 January 2025.
60. Sanction Scanner, *The Importance of Real-Time Transaction Monitoring in Preventing Fraud* (Sanction Scanner, 17 September 2024) <https://www.sanctionscanner.com/blog/

to the legal framework surrounding Anti-Money Laundering (AML) compliance and Know-Your-Customer (**KYC**) verification. In India, the primary governing laws for the same are the Prevention of Money Laundering Act, 2002 (**PMLA**) along with the Prevention of Money Laundering (Maintenance of Records) Rules, 2005 (**PML**).[61]

With respect to digital twins, the banks can optimise them to integrate live data streams with predictive analysis for ensuring seamless coordination between the banking networks, consumer interactions and compliance protocols.[62] On a broader scale, replicas may be created of various ecosystems to simulate the adoption of transformative technologies such as the new guest in the tech town, blockchain.[63] For instance, the AML directives govern the filing of Suspicious Activity Reporting (**SAR**) by any financial body in case any suspicions crop up in the transactions.[64] The banks can integrate blockchain within the digi-twin replica to assess compliance with AML directives by modelling decentralised transactions.[65] The virtual model then traces any adverse patterns and links the pseudonymous wallets to the existing KYC profiles. By automating the SAR filing workflows, digi twins ensure that the global AML regulations are abided by to maintain a high standard of audit trailing.[66]

Similarly generative AI complements the simulation by creating synthetic data and scenarios, improving the decision- making models.[67] Since the data is continuously fed into the system, the model can adjust the AML screening algorithm to identify potential anomalies: sudden spike

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the-importance-of-real-time-transaction-monitoring-in-preventing-fraud-930> accessed 24 January 2025.

61. Reserve Bank of India, 'Notification' (RBI, 2025) <https://www.rbi.org.in/commonman/English/scripts/notification.aspx?id=2607> accessed 24 January 2025.
62. ResearchGate, 'Cross-Border Digital Payments: Investigating Challenges and Opportunities in Regulatory and Technological Aspects' https://www.researchgate.net/publication/376207653_Cross-border_digital_payments_Cross-Border_Digital_Payments_Investigating_Challenges_and_Opportunities_in_Regulatory_and_Technological_Aspects accessed 14 January 2025.
63. ibid.
64. Securities and Exchange Board of India, 'Strategic Plan' (SEBI, 2025) <https://www.sebi.gov.in/sebi_data/commondocs/str_h.html> accessed 24 January 2025.
65. ibid.
66. Flagright, 'Leveraging AI in Suspicious Activity Reporting' (Flagright, 2025) <https://www.flagright.com/post/leveraging-ai-in-suspicious-activity-reporting> accessed 24 January 2025.
67. Dr. Jagrrit, 'Generative AI's Potential in the Creation of Synthetic Data' (LinkedIn, 2025) <https://www.linkedin.com/pulse/generative-ais-potential-creation-synthetic-data-dr-jagrrit> accessed 24 January 2025.

in the transaction amount, restructuring of the payments, or even the geographic inconsistencies in transfer of funds.[68] However, financial institutions have to abide by the twin obligations of data sharing regulations alongside the PMLA framework. The intricacies surrounding the data protection mechanisms have been detailed in the subsequent part.

B. Enhanced Risk Management

While the conventional analysis relies on the static historical data, digital twins incorporate the live payment flows for managing the complexity of the multi-currency transactions, correspondent banking relationships and varying settlement routines exercised across different jurisdictions.[69]

Since India is a signatory to the global Basel III standards, the risk scenarios have to comply with the existing international norms too for adequate stress testing.[70] This indicates the presence of various sanction laws and trade restrictions, which may become difficult if faced with strict regimes like North Korea, Afghanistan and so on. In this context, digital twins facilitate the geopolitical risks by immediately flagging any risks that can rise.[71] In addition to this, the persistent usage of cybersecurity can be tackled.[72] As the model is based on continuous stress testing and revisions, banks can refine the cyber risk strategies in accordance with the RBI Cybersecurity Framework.[73]

Moreover, the RBI also provides the Data Security and Privacy Guidelines which provide strict standards for data management, such as encryption, processing, storage etc. to prevent any breaches and unau-

68. Dmitry Ivanov, 'Intelligent Digital Twin (iDT) for Supply Chain Stress-Testing, Resilience, and Viability' (2023) 263 International Journal of Production Economics <https://doi.org/10.1016/j.ijpe.2023.108938 >accessed 25 January 2025.
69. ibid.
70. Bank for International Settlements, 'Basel III: International Regulatory Framework for Banks' (BIS, 2025)< https://www.bis.org/bcbs/basel3.htm> accessed 24 January 2025.
71. Zuben Rustomjee, 'Geopolitics of ABCDs: Actors, Boundaries, and Communication' (LinkedIn, 2025) <https://www.linkedin.com/pulse/geopolitics-abcds-actors-boundaries-communication-zuben-rustomjee >accessed 24 January 2025.
72. INCIBE, 'Cybersecurity Challenges of Digital Twins: Threats and Security Measures' (INCIBE, 2025) <https://www.incibe.es/en/incibe-cert/blog/cybersecurity-challenges-digital-twins-threats-and-security-measures> accessed 24 January 2025.
73. Reserve Bank of India, 'Notification' (RBI, 2025) <https://www.rbi.org.in/commonman/english/Scripts/Notification.aspx?Id=1721> accessed 3 February 2025.

thorised usage.[74] Here, the digi twins can simulate the marshalling of data usage through banking processes to ensure regular verification checks and data tokenization for the sensitive details.[75] Thus, the institutions can effectively mitigate the operational and the regulatory risks that may prove to be an impediment towards smooth transactions across the borders.[76]

C. Liquidity and Infrastructure Management

Furthermore, once the operational metrics are able to be predicted, liquidity requirements can also be managed effectively. Real-time data in this case can be integrated from various sources, domestic payment systems like UPI, international messages using SWIFT and the equivalent banks in different countries. Once data is integrated, intelligent estimates are provided regarding the rise and fall of exchange rates through meta representations.[77] Any economic damages arising out of currency conversion losses can be thus foreseen and managed accordingly. In the realm of infrastructure management, digital twins enable the banks to monitor the physical assets such as data centres, ATM networks and the branch operations.[78]

According to the RBI's guidelines on financial disclosure,[79] banks are required to report liquidity gaps, asset-liability mismatches, and the status of their liquidity buffers. This level of transparency is crucial to meet legal requirements and maintain trust with regulators and investors.

74. Nimesa, 'RBI Guidelines for Fintech: The Role of Data Protection and Data Backup' (Nimesa, 2025) <https://nimesa.io/blogs/rbi-guidelines-for-fintech-the-role-of-data-protection-and-data-backup/> accessed 24 January 2025.
75. 'Cross Border Payments in India: Current Challenges and Future Opportunities' (*NTT Data Pay*, 11 October 2024) <https://www.nttdatapay.com/blog/cross-border-payment/#:~:text=Security%3A%20Businesses%20must%20implement%20strong,can%20hinder%20cross%2Dborder%20transactions> accessed 16 January 2025.
76. Reserve Bank of India, 'Notification' (RBI, 2016) <https://www.rbi.org.in/commonman/Upload/English/Notification/PDFs/NT41802062016.pdf> accessed 24 January 2025.
77. European Payments Council, 'UPI: Revolutionising Real-Time Digital Payments in India' (European Payments Council, 2025) <https://www.europeanpaymentscouncil.eu/news-insights/insight/upi-revolutionising-real-time-digital-payments-india> accessed 24 January 2025.
78. Fred Fuller, Doubling Down on Legacy: Digital Twins in Banking (Endava, 2024) <https://www.endava.com/insights/articles/doubling-down-on-legacy-digital-twins-in-banking> accessed 24 January 2025.
79. Reserve Bank of India, 'Notification' (RBI, 2025) <https://www.rbi.org.in/Commonman/English/Scripts/Notification.aspx?Id=1281> accessed 23 January 2025.

The legal aspects of liquidity management involve ensuring that the RBI guidelines on capital adequacy are sufficiently followed.[80] The liquidity protection models may be constructed in a manner that does not only account for the statutory domestic requirements but also international ones, such as the International Financing Reporting Standards (IFRS).[81]

The banking systems usually operate through the traditional data centres. Often, it imposes substantial energy costs and maintenance burdens notwithstanding the bulk of transactions or the fluctuations.[82] To combat this aspect, Digital twins emerge as a strategic enabler for cloud-based transformation. Mainly, if cloud is utilised in the international banking operations, it can deliver multifaceted benefits like dynamic scalability to accommodate transaction volumes in different markets and deployment velocity across the geographical areas. The flexibility provided is helpful in engaging with different regulatory environments.[83] Nevertheless, it must also be noted that the increasing usage of digital technologies can expose the banking framework to data protection risks.

X. LEGAL ISSUES IN AI-INTEGRATED CROSS-BORDER MODELS

Given that cross-border payments span multiple jurisdictions and integrate various financial systems, they fall under a multitude of international legal and regulatory frameworks. This complex regulatory landscape can result in conflicts over jurisdictional authority and the coordination of oversight.[84] In the same vein, the following analysis shall delve into key challenges pertaining to data privacy, stringent compliance requirements and regulatory inconsistencies across jurisdictions.

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80. CAFRAL, 'Regulatory Approach' (CAFRAL, 2024) <https://www.cafral.org.in/sfControl/content/Speech/5162024120705PMJKDRegulatoryApproach.pdf>accessed 24 January 2025.
81. Investopedia, 'IFRS - International Financial Reporting Standards' (Investopedia, 2025) <https://www.investopedia.com/terms/i/ifrs.asp> accessed 24 January 2025.
82. Simmons & Simmons, 'Top 10 Issues in Data Centres' (Simmons & Simmons, 2025) <https://www.simmons-simmons.com/en/publications/cluuzeox800hyuatcw3kkq0xs/top-10-issues-in-data-centres> accessed 24 January 2025.
83. 'Making Cross-Border Payments Faster, Safer and Less Costly for Financial Institutions' (*J.P. Morgan*, 2024) <https://www.jpmorgan.com/insights/payments/cross-border-payments/cross-border-payments-financial-institutions> accessed 16 January 2025.
84. Financial Stability Board, *Stocktake of International Data Standards Relevant to Cross-border Payments* (FSB, 25 September 2023) <https://www.fsb.org/uploads/P250923.pdf> accessed 24 January 2025.

A. Data Privacy Concerns in Payment Processing Stage

As shown in Figure 2, each stage of cross-border payment presents unique data vulnerabilities. The Payment Processing stage is especially susceptible to risks, heightened by AI integration, due to the flow of sensitive customer information and the potential for bias and errors.

This stage involves the exchange of Personal Identifiable Information (**PII**)[85] such as names, addresses, financial account details and transaction histories. These data are of critical value to both the costumes and the banking institution, as it is significant for customer verification, fraud detection and compliance, forming the backbone of any cross-border transactions.[86] The concerns that various stakeholders have highlighted is that the integration of AI, will only exaggerate the data breach concerns as witnessed in the past incidents like the Bangladesh Bank heist[87] and Capitol Data breach.[88] During this stage the AI will process and analyse vast quantities of PII, raising concerns about data anonymization and secure storage. For example, without proper anonymization techniques, even minor breaches could expose sensitive information to risks, which can be used for theft, phishing scams, and unauthorized transactions.[89]

Reliance on improperly marked outputs or excessive reliance on raw datasets can compromise confidentiality, especially during system audits or cross-institutional collaborations. Additionally, the use of unsupervised learning techniques in anomaly detection introduces a risk of

85. Alexander S. Gill, 'Personally Identifiable Information (PII)' (*TechTarget*, June 2024) <https://www.techtarget.com/searchsecurity/definition/personally-identifiable-information-PII> accessed 10 January 2025.
86. Huan Liu, Kai Li, Yan Chen and Xin (Robert) Luo, 'Is Personally Identifiable Information Really More Valuable? Evidence from Consumers' Willingness-to-Accept Valuation of Their Privacy Information' (2023) 173 ScienceDirect <https://www.journals.elsevier.com/decision-support-systems> accessed 13 January 2025.
87. Tanzina Sultana, 'Cyber Risk Management in Financial Institutions: Before and After the Bangladesh Bank Heist' (2024) 15(8) Journal of Business and Economics 405-421 <https://www.researchgate.net/publication/387699993_Cyber_Risk_Management_in_Financial_Institutions_Before_and_After_the_Bangladesh_Bank_Heist> accessed 18 January 2025.
88. Shaharyar Khan, Ilya Kabanov, Yunke Hua, and Stuart Madnick, 'A Systematic Analysis of the Capital One Data Breach: Critical Lessons Learned' (2024) 26(1) ACM Transactions on Privacy and Security Article No. 3 <https://dl.acm.org/doi/10.1145/3546068> accessed 13 January 2025.
89. Abdulaziz Aldoseri, Khalifa N. Al-Khalifa and Abdel Magid Hamouda, 'Re-Thinking Data Strategy and Integration for Artificial Intelligence: Concepts, Opportunities, and Challenges' (2023) 13(12) *MDPI* <https://www.mdpi.com/2076-3417/13/12/7082> accessed 14 January 2025.

overfitting[90], where the AI system may incorrectly process more PII than necessary, breaching the fundamental principle of limiting data collection to what is strictly required. A recent study found out that around 77% of businesses were exposed to the data breach of their AI models, posing a significant threat to the organizations.[91] Global Legislation like GDPR[92] and CCPA[93], impose strict requirements regarding the exchange of sensitive data like processing of personal data, encryption and access controls. Non-compliance with these regulations can result in severe penalties.

Entities found to act in contravention of GDPR can face fines of up to 4% of their annual global turnover or 20 million euro (whichever is higher).[94] In this background it becomes a more daunting task for financial institutions to utilize AI or any modern development, as any breach in this will not only pose security risks but also substantial financial and reputational damage.

1. *The Black Box Effect*

In the context of DigiTwin and financial data, the "black box" effect refers to the opacity in AI-driven decision making, where the internal logic and rationale behind outcomes remain inaccessible or difficult to interpret.[95] This issue is particularly pronounced in AI-powered Digital Twins used for real-time financial decision-making, as they rely on complex machine learning models to assess risks, detect fraud, and optimize payment flows.[96] While these AI models enhance efficiency and predictive accuracy, they also inadvertently introduce algorithmic biases, where cer-

90. ibid.
91. 'AI Data Breaches: Why They Happen and How to Protect Your Business' (*Yeo & Yeo*, 24 October 2024) <https://www.yeoandyeo.com/resource/ai-data-breaches-why-they-happen-and-how-to-protect-yourbusiness#:~:text=A%20recent%20study%20on%20AI,property%2C%20and%20disrupt%20critical%20operations.> accessed 14 January 2025.
92. General Data Protection Regulation (EU) 2016/679.
93. California Consumer Privacy Act (CCPA), Cal. Civ. Code §§ 1798.100–1798.199 (2018).
94. Article 83(5), UK General Data Protection Regulation 2016/679.
95. Dino Pedreschi and Fosca Giannotti, 'Meaningful Explanations of Black Box AI Decision Systems' (2019) 33(01) *Proceedings of the AAAI Conference on Artificial Intelligence* 9780<https://www.researchgate.net/publication/335221443_Meaningful_Explanations_of_Black_Box_AI_Decision_Systems >accessed 16 January 2025.
96. Ahmed Marey et al, 'Explainability, Transparency and Black Box Challenges of AI in Radiology: Impact on Patient Care in Cardiovascular Radiology' (2024) 55 *Egyptian Journal of Radiology and Nuclear Medicine* 183 <https://ejrnm.springeropen.com/articles/10.1186/s43055-024-01356-2#citeas> accessed 18 January 2025.

tain groups of customers (e.g., those from specific regions or demographics) are unfairly flagged or treated differently.[97] This algorithimic bias, can perpetuate or even amplify systemic financial discrimination. Since these models are trained on historical transaction data, they may replicate past biases embedded in financial systems, leading to disproportionate flagging of transactions originating from certain jurisdictions— even in the absence of actual risk factors[98].

Similarly, AI-based risk assessments could unfairly categorize specific demographic groups as high-risk borrowers or fraud-prone entities, leading to higher rejection rates, increased scrutiny, or additional compliance barriers. In a Digital Twin environment, this bias could scale up rapidly, as AI decisions are not confined to isolated transactions but are scaled across multiple financial operations simultaneously, affecting a broad set of customers.[99]

Beyond this risk of bias, the lack of interpretability in AI-driven Digi Twins creates challenges in institutional governance and accountability.[100] Financial institutions relying on AI-based models must be able to justify and audit their decisions, particularly when these models influence high-stake financial transactions. However, many Black Box AI models operate as proprietary or deep learning-based systems, making it difficult for the financial institutions to trace decision logic or offer meaningful explanations to affected customers.[101] Customers, especially those in vulnerable financial situations, are left without an understanding of why a transaction was flagged. This lack of transparency can erode customer

97. Simon Caton and Christian Haas, 'Fairness in Machine Learning: A Survey' (2024) 56(7) *ACM Computing Surveys* 166 <https://dl.acm.org/doi/10.1145/3616865> accessed 24 January 2025.
98. Philip Adler et al, 'Auditing Black-Box Models for Indirect Influence' (2018) 54(1) *Knowledge and Information Systems* 95 <https://dl.acm.org/doi/10.1007/s10115-017-1116-3> accessed 24 January 2025.
99. ibid.
100. Sandra Pérez Arteaga, Ana Lucila Sandoval Orozco and Luis Javier García Villalba, 'Analysis of Machine Learning Techniques for Information Classification in Mobile Applications' (2023) 13(9) *Applied Sciences* 5438 <https://doi.org/10.3390/app13095438> accessed 24 January 2025.
101. Zhuang Wang, Chenyang Yao, 'A Roadmap of Explainable Artificial Intelligence: Explain to Whom, When, What and How?' (2024) *ACM Transactions on Autonomous and Adaptive Systems* 19:4 (1-40) <https://dl.acm.org/doi/10.1145/3702004> accessed 24 January 2025.

trust and hinder institutions' ability to defend AI-driven financial decisions during regulatory inquiries or disputes.[102]

B. Compliance Requirements during Verification

Compliance with legal requirements for customer identification and verification often involves a complex interplay of various laws, such as data protection, and Anti-Money Laundering (**AML**) regulations.[103] A survey done by FATF on cross-border payment discrepancies, revealed that a major obstacle to effective "identification and verification" of customers, across different jurisdictions,[104] were the conflicts of law that existed in different national laws and divergent regulatory frameworks of different jurisdictions. These inconsistencies significantly hinder smooth compliance and create challenges for financial institutions in navigating cross-border transactions.[105]

In many jurisdictions, the application of Customer Due Diligence (**CDD**)[106] is inconsistent. CDD mandates vary, with some regions requiring extensive documentation, such as proof of address, tax identification numbers, or source-of-fund declarations and risk-based approaches, that may not be suitable for all customers coming from low-income regions or underbanked populations where the individuals may not have all the required formal documents.[107] While certain regions restrict the types of

102. Daniel Faggella, 'AI Transparency in Finance – Understanding the Black Box' (Emerj, last updated 27 January 2020) https://emerj.com/ai-transparency-in-finance/ accessed 24 January 2025.
103. Shweta Sharma and Michael Hill, 'The Biggest Data Breach Fines, Penalties, and Settlements So Far' (*CSO Online*, 26 April 2024) <https://www.csoonline.com/article/567531/the-biggest-data-breach-fines-penalties-and-settlements-so-far.html> accessed 25 January 2025.
104. FATF Recommendation 16: Four Possible Implications and Data Considerations on the Revision (*Moodys*, 26 November 2024) <https://www.moodys.com/web/en/us/kyc/resources/insights/fatf-recommendation-16-possible-implications-and-data-insights-for-compliance.html> accessed 17 January 2025.
105. Cross-Border Payments: Survey Results on Implementation of the FATF Standards (*Financial Action Task Force*, October 2021) <https://www.fatf-gafi.org/content/dam/fatf-gafi/reports/Cross-Border-Payments-Survey-Results.pdf> accessed 18 January 2025.
106. Opportunities and Challenges of New Technologies for AML/CFT (*Financial Action Task Force*, 21 July)<https://www.fatf-gafi.org/content/dam/fatf-gafi/guidance/Opportunities-Challenges-of-New-Technologies-for-AML-CFT.pdf.coredownload.pdf>accessed 18 January 2025.
107. Kuntay Celik, Impact of the FATF Recommendations and Their Implementation on Financial Inclusion: Insights from Mutual Evaluations and National Risk

customers categorise the customer into "high" or "low" risk without considering the specifics of the individual or the transactions, failing to take into account the nuanced factors such as customer behaviour patterns, transaction histories and geographical variables.[108]

This rigid One-Size-Fits-All Risk assessment framework may lead to unnecessary delays in processing low-risk customers, and even result in wrongfully de-risking certain customers leading to inefficiencies and complexities in navigating the conflicting standards operating in multiple jurisdictions. To better illustrate these compliance challenges, consider the example of a financial institution operating in India, which is also involved in cross-border payment services and collaborating with partners in the EU.

Illustration: When the Indian financial institution needs to transfer customer transaction data to a partner bank in the EU to facilitate cross-border payment, it has to first pass through local laws like DPDA[109], which requires that the data must be stored and processed in India unless explicit consent is obtained from the customer, However, in the EU, the GDPR governs the transfer of personal data outside the EU. The GDPR[110] requires that before personal data can be transferred, the targeted country must be deemed "adequate" in terms of data protection standards. If the country is not adequate, additional safeguards must be in place like Mutual Legal Assistance Treaties (**MLATs**), *Standard Contractual clauses* (**SCCs**) and *Binding Corporate Rules* (**BCRs**).[111] MLATs are bilateral agreements between countries that facilitate the exchange of evidence and provide assistance in legal matters. SCCs are pre-approved contractual terms used by organisation to ensure the personnel transferred from the EU to non-EU countries complies with the GDPR.[112]

Assessments (*World Bank Group*, 2021) https://documents1.worldbank.org/curated/en/597781637558061429/pdf/Impact-of-the-FATF-Recommendations-and-their-Implementation-on-Financial-Inclusion-Insights-from-Mutual-Evaluations-and-National-Risk-Assessments.pdf? accessed 19 January 2025.

108. ibid.
109. The Digital Personal Data Protection Act, 2023 (22 of 2023) s 8(2).
110. n 67.
111. Natalie Whitney, 'GDPR: Standard Contractual Clauses vs Binding Corporate Rules' (*GRCI*, 8 April 2021) <https://www.grcilaw.com/blog/international-data-transfers-model-contract-clauses-vs-binding-corporate-rules >accessed 20 January 2025.
112. Standard Contractual Clauses (SCC) (*European Commission*, 4 June 2021) <https://commission.europa.eu/law/law-topic/data-protection/international-dimension-data-protection/standard-contractual-clauses-scc_en> accessed 18 January 2025.

BCRs, conversely, refer to the internal policies established by multinational companies to regulate data transfers within the organisation across various jurisdictions. These complex and divergent compliance requirement across two jurisdictions creates a significant legal challenge for the financial institutions, as they must the must navigate the tension between t local data obligations and the cross-border data transfer regulations. Failure to comply with either set of regulations, can lead to legal liabilities and hefty fines.[113]

XI. JURISDICTIONAL DIVERGENCES IN REGULATING AI-INDUCED CROSS-BORDER PAYMENT SYSTEM

A. India: PA-CB

In India there are no specific laws directly governing cross-border payments leveraging AI models. However, DPDP Act and guidelines of RBI[114], play a crucial role in regulating and governing the compliance in the flow of data for a safe transaction.

Section 16(1) of the DPDPA[115], read together with Section 2(x)[116] provides clarity on the definition of the cross-border data. It restricts data transfer to countries which have been notified in the 'blacklist' category by the Central Government, depending on a comprehensive assessment of the concerned factors. This allows the government to balance data protection and economic growth in the sector-specific areas with flexibility, although the exact criteria for this assessment remains unclear. Importantly, DPDPA does not override any other laws or regulations that govern sector-specific transfer of data such as the RBI regulations on the storage of financial data, ensuring it remains in force alongside DPDPA.

The RBI through the Payment Aggregator -Cross border (**PACB**) regulates and supervise the Cross-border payment, allowing both the Authorised Dealer (**ADs**)[117] and the non-banking entities to participate

113. n 69.
114. The Reserve Bank of India Act, 1934 (Act 2 of 1934).
115. The Digital Personal Data Protection Act, 2023 (22 of 2023) s 16.
116. The Digital Personal Data Protection Act, 2023 (22 of 2023) s 2(x).
117. Neha Dharurkar, 'Cross-Border Payment Aggregators: Regulations and Business Use Cases' (*PwC*, 2023) <https://www.pwc.in/industries/financial-services/fintech/payments/cross-border-payment-aggregators-regulations-and-business-use-cases.html> accessed 18 January 2025.

in cross-border transactions. On October 31, 2023, RBI introduced a revised PA-CB framework to enhance the security, transparency and efficiency of cross-border payments.[118] The latest notification requires the entities to fully comply with the Know Your Customer Direction, 2016,[119] which mandates PACBs to undertake due diligence during transactions amounting to more than two lakh fifty thousand rupees, and complete customer due diligence, ensuring that all necessary checks and verifications are completed before processing payments or transactions to ensure alignment with the Foreign Trade Policy. This new framework also replaces the fragmented circulars from 2010, 2013 and 2015, bringing all entities facilitating cross-border payments under direct RBI regulation.[120]

B. USA: AI-RFI

Similarly, even the United States approach to regulating cross-border financial data particularly (AI) remains fragmented. While there are sector-specific laws, such as automated financial trading or AI applications in lending, there is no overarching framework for regulating AI in the financial sector.[121] For instance while the Dodd-Franks Act[122], states on the protection of consumers' financial data, there is no specific regulation guiding the use of AI in financial transactions or algorithmic decision-making within the sector. Even the Securities and Exchange Commission (**SEC**) is yet to take any enforcement action, because of the lack of a regulatory framework for problems associated with AI involvement in the banking system.

118. Reserve Bank of India, 'RBI/2023-24/80 CO.DPSS.POLC.No.S-786/02-14-008/2023-24' (2023).
119. Reserve Bank of India, 'Master Direction - Know Your Customer (KYC) Directions, 2016' (*Reserve Bank of India*, 2016) <https://www.rbi.org.in/Scripts/BS_CircularIndexDisplay.aspx> accessed 18 January 2025.
120. ibid.
121. Lambert Kofi Osei, 'Unlocking the Full Potential of Digital Transformation in Banking: A Bibliometric Review and Emerging Trend' (2023) 9(1) Journal of Business and Economic Perspectives <https://www.researchgate.net/publication/372192633_Unlocking_the_full_potential_of_digital_transformation_in_banking_a_bibliometric_review_and_emerging_trend> accessed 19 January 2025.
122. The Wall Street Reform and Consumer Protection Act of 2009 (H.R. 4173) (United States of America).

Observing all these complexities,[123] U.S Department Portraiture in December, 2024 released the "*Report on the Uses, Opportunities, and Risks of Artificial Intelligence in the Financial services sector*" (**AI-RFI**)[124] that dealt with key issues pertaining to assessment of AI deployment in financial services, focusing on the impact on financial firms, consumers, regulators, and other stakeholders.[125] The report also highlighted the importance of a "rigorous assessment of data quality and relevance" guided by the federal banking agencies.[126] It emphasised the significance of the Gramm-Leach-Bliley Act (**GLBA**)[127] in providing consumer data protection by restricting the disclosure of non-public personal information to unaffiliated third parties, ensuring that the data transfer to international partners aligns with requirements of GLBA.

C. European Union: FiDA

The EU's Financial Data Access (**FiDA**) Regulations[128] aims to democratize access to consumer data held by financial institutions. By granting third-party fintech startups and developers' access, it seeks to enhance transparency, empower consumers, and drive innovation. A key provision requires financial intermediaries to share customer data with the regulators, particularly when using AI models, while also emphasising the protection of consumer data during cross-border transactions.[129]

123. Qirui Chang, 'The Legal and Regulatory Issues of AI Technology in Cross-Border Data Flow in International Trade' (2024) 8th International Conference on Economics and Management, Education, Humanities and Social Sciences (2024)< https://wepub.org/index.php/TEBMR/article/view/2874> accessed 19 January 2025.
124. 'Request for Information on Artificial Intelligence in the Financial Sector' (*U.S. Department of the Treasury*, 2024) <https://home.treasury.gov/system/files/136/Treasury-AI-RFI-financial-sector-2024.pdf> accessed 25 January 2025.
125. Deekshith Narsina, Jaya Chandra Srikanth Gummadi, Satya Surya Mklg Gudimetla Nag, 'AI-Driven Database Systems in FinTech: Enhancing Fraud Detection and Transaction Efficiency' (2019) 10(1) Asian Accounting and Auditing Advancement 81-92 <https://www.researchgate.net/publication/386575787_AI-Driven_Database_Systems_in_FinTech_Enhancing_Fraud_Detection_and_Transaction_Efficiency >accessed 20 January 2025.
126. n 125 page 97.
127. Gramm-Leach-Bliley Act, 15 U.S.C. § 6801 et seq. (1999).
128. 'What to Know About the Financial Data Access (FIDA) in the European Union' (*Stripe*, 11 October 2024) https://stripe.com/resources/more/fida-financial-data-access-in-european-union accessed 21 January 2025.
129. Lambert Kofi Osei, 'Unlocking the Full Potential of Digital Transformation in Banking: A Bibliometric Review and Emerging Trend' (2023) 9(1) Journal of Business and Economic Perspectives <https://www.researchgate.net/

In this context, the role of National Competent Authorities (**NCAs**)[130] plays a critical role in implementing these frameworks. Initiatives by the European Supervisory Authorities such as the Digital Finance Supervisory Academy help operationalize the regulatory frameworks by building the capacity of NCAs to enforce news rules for financial data effectively. Additionally, the integration of Suntech Solutions[131] enables the regulators to leverage AI for dynamic, data-driven oversight, ensuring agile responses to emerging risks.[132] NCAs are also tasked with enforcing AI regulation and governance while encouraging financial institutions to establish their internal guardrails. These efforts extend to mitigating risks associated with AI systems in the context of cross-border transactions. Techniques such as Retrieval-Augmented Generation (RAG) help enhance AI accuracy and reliability, ensuring that financial institutions can navigate the complexities of international regulations, and systemic integrity in financial data governance.[133]

XII. RECOMMENDATIONS

A. Defining AI Models and Ensuring Data Standards for Cross-Border Financial Integration

Establishing a unified and a consistent definition, particularly in the context of cross-border payments. The existing lack of clarity in defining AI models especially in context of cross-border payments, results in more regular inconsistency and inhibits innovations. Guidance can be

publication/372192633_Unlocking_the_full_potential_of_digital_transformation_in_banking_a_bibliometric_review_and_emerging_trend> accessed 19 January 2025.

130. EU Supervisory Digital Finance Academy (*European Union*, 2022) https://reform-support.ec.europa.eu/what-we-do/financial-sector-and-access-finance/eu-supervisory-digital-finance-academy_en accessed 23 January 2025.
131. Federica Cacciatore, 'Patterns of Networked Enforcement in the European System of Financial Supervision: What is the New Role for the National Competent Authorities?' (2019) 10(3) European Journal of Risk Regulation<https://www.researchgate.net/publication/334658884_Patterns_of_Networked_Enforcement_in_the_European_System_of_Financial_Supervision_What_is_the_New_Role_for_the_National_Competent_Authorities> accessed 23 January 2025.
132. Philipp S. Krüger and Jan-Philipp Brauchle, *The European Union, Cybersecurity, and the Financial Sector: A Primer* (Carnegie Endowment for International Peace, 16 March 2021) <https://carnegieendowment.org/research/2021/03/the-european-union-cybersecurity-and-the-financial-sector-a-primer?lang=en> accessed 23 January 2025.
133. Melissa Malec, 'RAG in Financial Services: Use-Cases, Impact, & Solutions' (*Hatchworks AI*, 4 October 2024) <https://hatchworks.com/blog/gen-ai/rag-for-financial-services/> accessed 23 January 2025.

drawn from established frameworks, such as those developed by EU and OECD, to craft a sector-specific definition.[134] The authors acknowledge that AI, by its very nature, defies a singular, universal accepted definition due to its evolving and dynamic characteristics. However, a standardised sector-specific definition of AI, developed through consensus among diverse stakeholders, would ensure interagency collaboration, enhance cross-border alignment, and avoid the extraneous legal complications. For example, the AI Act[135] includes specific definition of high-risk AI systems in sectors such as healthcare and transportations. Something on the same line cab be devised for the financial sector[136]

Equally critical is the establishing clear and robust standards of data privacy, security and quality. High Quality data characterised by cleanliness and comprehensiveness is fundamental for AI models.[137] This consistency will enhance the reliability over the AI model used and would aid in mitigating the risks such as biasness, consumer harm and inefficiency. Clearly articulated data standards, would enhance collaboration between government agencies and private entities, fostering more compliance towards data privacy and diligence to be taken by the financial firms. This in turn will allow the financial institutions in aligning with a secure data curation and fine-tuning datasets, preventing systemic bias and entailing trust over the AI model like DigiTwin in equitable lending and pricing decisions.[138]

Similarly for streamlining the identity checks across borders, countries can consider forming KYC utilities or information repositories, which are protected databases of relevant identity information concerning KYC purposes, subject to AML and cross-border data regulations. This would enable the standardisation of the information stored in the KYC utilities and a smooth exchange of such utilities can take place with the authorised

134. ibid.
135. AI Act, 2023 (EU).
136. Kenneth C Randall, 'Universal Jurisdiction under International Law' (1987) 66 Tex L Rev 787 <https://heinonline.org/HOL/LandingPage?handle=hein.journals/tlr66&-div=39&id=&page=> accessed 22 January 2025.
137. Z Tóth, R Caruana, T Gruber et al., 'The Dawn of the AI Robots: Towards a New Framework of AI Robot Accountability' (2022) 178 J Bus Ethics 899< https://doi.org/10.1007/s10551-022-05050-z >accessed 22 January 2025.
138. Hannah Ruschemeier, 'The Problems of the Automation Bias in the Public Sector – A Legal Perspective' (May 8, 2023) Weizenbaum Conference proceedings 2023 <https://ssrn.com/abstract=4521474> accessed 22 January 2025.

financial service provider. A unified approach to KYC data management through these utilities can help mitigate risks such as fraud, money laundering and identity thefts, which are heightened in cross-border payment systems. This will also significantly reduce the time required for customer verification, while also lowering the CDD.[139]

B. International Cooperation: A Catalyst for Secure and Efficient Cross-Border Payment Systems

In addition, promoting international collaboration is essential in addressing the complexities and fragmented nature of cross-border payments, particularly in light of advancements like DigiTwin which have a transformative potential in the financial sector. Effective collaboration allows the financial institutions in streamlining the payment processes, enhance security and reduce costs. By working together, the financial institutions can create a cohesive system that minimises regulatory friction and facilitate smoother, faster transactions.

Illustrative of the benefits of such cooperations are initiatives taken up by Singapore's Monetary Authority of Singapore (**MAS**), which has been pioneer in this domain, spearheading initiatives like Project Mandal, which fosters collaboration among central banks and financial institutions to streamline cross-border payments. Another notable example is Project PayNow-PromptPay[140], linkage established between in 2021 between MAS and Thailand's Bank of Thailand (**BOT**). This initiative enabled real-time transactions between the two countries, marking the first multi-stakeholder collaboration involving payment system operators, bankers' associations, and participating banks.

Similarly global initiatives like Project Nexus, led by the BIS Innovation Hub, aims at simplifying cross border payments by linking domestic payment systems. Distributed Ledger Technology-based collaboration such as Project Inthanon-LionRock between Bank of Thailand and the Hong Kong Monetary Authority, have successfully developed proof-of-concept

139. ibid.

140. Monetary Authority of Singapore, *Singapore and Thailand Launch World's First Linkage of Real-time Payment Systems* (29 April 2021) https://www.mas.gov.sg/news/media-releases/2021/singapore-and-thailand-launch-worlds-first-linkage-of-real-time-payment-systems accessed 23 January 2025.

prototypes for atomic payment versus payment settlements (**PvP**)[141]. Another approach can be found in Article 45 of the UK GDPR[142] allows cross-border data transfer based on the EC's adequacy decisions certifying that the recipient country's data protection regime meets the prescribed standards. Similarly, Article 24 of Japan's Act on the Protection of Personal Information (**APPI**)[143] empowers its data protection authority to recognise foreign countries with equivalent data protection standards. India could also adopt a similar unilateral recognition framework under its DPDPA.

C. Evolving Regulatory Sandboxes in Digi-twin powered Cross-border payments in India

Regulatory Sandboxes are a critical instrument for driving innovation explicitly tailored for cross border payment solutions. This enables the regulators to provide temporary exemptions or relaxations under specific conditions by addressing the overlaps that exists between different frameworks such as the PMLA[144] and DPDPA. In India, the RBI has instituted regulatory sandbox framework designed to foster innovations by allowing participants of startups and innovators to test groundbreaking products offering "innovative products and services" such as marketplace lending, digital KYC and financial advisory. While the framework accommodates advancements in technologies like AI, blockchain and ML under its "innovative technologies" category. However, this scope remains limited to domestic financial innovations and not in transnational transaction or financial data exchange.[145] To address this, RBI should expand the sandbox framework to include AI models under DigiTwin to enable real time data synchronisation in cross border payment across jurisdictions. This expansion would allow the financial institutions to test these innovations

141. Hong Kong Monetary Authority, *Leveraging Distributed Ledger Technology to Increase Efficiency in Cross-Border Payments* https://www.hkma.gov.hk/media/eng/doc/key-functions/financial-infrastructure/Report_on_Project_Inthanon-LionRock.pdf accessed 21 January 2025.
142. Article 45, UK General Data Protection Regulation 2016/679 (United Kingdom).
143. Article 24, Act on the Protection of Personal Information (APPI) (Japan) 2003.
144. The Prevention of Money Laundering Act, 2002 (Act 15 of 2003).
145. Bank Quest, 'Paradigm Shift in Banking - Moving towards a Resilient, Inclusive and Sustainable Model', (*Bank Quest*, 2024), <https://www.iibf.org.in/documents/BankQuest/October-December%202024/Bank%20Quest%20October-December%202024_new.pdf,> accessed 24 January 2025.

in a controlled and collaborative environment spanning multiple jurisdictions.[146] Such testing would help identify potential issue and refine their solutions before launching them on a large scale, ultimately leading to faster, more efficient, and cheaper cross-border transactions.

XIII. CONCLUSION

Digital Twin Technology therefore represents a transformative paradigm in financial services, enabling sophisticated simulations of transactional behaviours and generating insights into the complexities of the financial ecosystems. The research has thus explored the potential of digital twins to revolutionize India's cross-border payment system, highlighting its ability to optimize processes, improve risk management, overcome operational barriers, and enhance liquidity control. Nevertheless, technological advancements cannot operate in isolation. They demand vigorous ethical frameworks addressing critical concerns around data utilization. This necessitates the introduction of comprehensive legal protocols that can align operational efficiency with privacy protection. Additionally, collaboration by India with global regulatory bodies will be crucial in aligning its financial objectives with international standards.

The significance of this research therefore lies in its potential to shape the domestic financial ecosystem by offering a more efficient and inclusive cross-border payment system. The recommendations, such as the creation of AI frameworks, utilizing regulatory sandboxes, and fostering international collaboration, seek to offer a roadmap for policymakers and financial institutions to harness the full potential of DTT. The main crux lies in creating flexible yet controlled environments, leveraging potential with stringent standards, and protecting both systemic interests and participants' rights. Therefore, it stands imperative for legal and technological expertise to converge for mapping the sophisticated landscape of data collection, utilization, and transmission.

146. F*intech and Digital Financial Services Ecosystem Data for Supervision and Market Intelligence*, Guideline Note No. 55,(Alliance of Financial Institutions, April 2024) <https://www.afi-global.org/wp-content/uploads/2024/04/DFS_FINTECH_DATA_FOR_SUPERVISION_AND_MARKET_INTELLIGENCE.pdf> accessed 24 January 2025.

Charting a Roadmap to Equitable Innovation: Assessing the Antitrust Conundrum of Big Tech Influence over the Generative Artificial Intelligence Market

—*Mayank and Anudha Singhai*[*]

ABSTRACT

Recent innovations in generative artificial intelligence have gained unprecedented market growth. Bordering the enormous benefits of this technology, there have been concerns vis-à-vis the market dynamics as its growing demand has enticed tech giants to consolidate their market position and undermine the flourishing competition in the generative AI market. The preferential alliances between the dominant firms and start-ups are intended to influence and dominate the market by curtailing access to essential inputs necessary for the development of Generative AI. These alliances injure competitors by hindering innovation in the market by concentrating resources in the hands of a few, leaving the consumers with fewer options. This paper accentuates an interdisciplinary approach through an analysis that spans law and technology, highlighting the concerning crossroads between Generative AI and Competition Law. To elaborate on this, the paper is divided into three major sections, the first of which delineates the development chain of Generative AI to elucidate the eminence of essential resources required for deploying it in the market. The second section deals with the competitive foreclosure of the market, resulting from the unfair market practices of the big techs. The authors argue that anti-competitive practices such as tying, bundling, acqui-hires, and below-threshold mergers are consequences of partnerships between dominant firms and AI start-ups, causing the concentration of market power and scarcity of key inputs. Thus, this endangers the competition in the

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market by creating entry barriers for newer competitors. The last section provides a solution-oriented model based on the inclusion of Generative AI in the list of Core Platform Services under the Digital Market Regulations. Throughout the paper, the authors highlight the importance of promoting competition in the market by proposing a reformative approach based on the enforcement of antitrust claims.

Keywords: Generative Artificial Intelligence, Big-Tech Dominance, Digital Market Regulations, Market Foreclosure

I. INTRODUCTION

Generative Artificial Intelligence ("**GenAI**") technology is developing at a stupendous rate, with big techs understanding its potential and investing billions of dollars into the vision.[1] GenAI is defined in Article 28b (4) of the European Union Artificial Intelligence Act ("**AI Act**") as, "computational techniques which are capable of generating content such as text, images, videos or audios based on prompts provided by the user."[2] Some prominent examples include Chat-GPT, Anthropic, and Gemini. etc., these tools function through chatbots that process user queries as input and deliver outputs based on the information available in the public domain.[3]

Central to GenAI's infrastructure are foundation models ("**FMs**"), which are deep learning neural networks that are fed with massive amounts of data to create new content and can execute a wide array of outputs.[4] In simpler words, FMs act as the fabric for every GenAI service as they provide the foundation layer on which these applications

1. Microsoft Corporate Blogs 'Microsoft and OpenAI extend partnership' (*Official Microsoft Blog*, 23 January 2023) <https://blogs.microsoft.com/blog/2023/01/23/microsoftandopenaiextendpartnership/> accessed 12 January 2025.
2. Stefan Feuerriegel and others, 'Generative AI' (2024) 66 Bus & Info Sys Eng'g < https://doi.org/10.1007/s12599-023-00834-7> accessed 11 January 2025.
3. Vladimir Vuskovic, 'Conversational AI on Gen App Builder unlocks generative AI-powered chatbots and virtual agents' (*Google Cloud Blog*, 19 July 2023) <https://cloud.google.com/blog/products/ai-machine-learning/generative-ai-powered-chatbots-and-virtual-agents> accessed 12 January 2025.
4. Nick Routley, 'What is generative AI? An AI explains' (*World Economic Forum*, 6 February 2023) <https://www.weforum.org/stories/2023/02/generative-ai-explain-algorithms-work/> accessed 12 January 2025.

are built. The leader in the GenAI market remains to be Open AI's Chat GPT, with its latest edition of GPT-4 garnering a staggering global user base of 200 million users weekly.[5]

Considering this significant market growth, competition concerns have also started to grow, with jurisdictions like the European Union ("EU"), United States of America ("USA"), France, and United Kingdom ("UK") launching market studies and policy briefs on the implication of GenAI on competition law.[6] These competition authorities press on several anti-competitive issues such as partnership (vertical integration) of AI start-ups with big tech firms which have access to essential components required for the development of the GenAI such as cloud computing, funding, and data. Such partnerships result in preferential access to vertically integrated firms and help them develop GenAI models. This causes the creation of an entry barrier for entrants that do not have access to such privilege, thus limiting their ability to sustain in the market.[7]

For instance, Open AI's exclusive partnership with a big tech such as Microsoft has panned out in its favor as it has gained unconditional access to Microsoft's cloud computing. Microsoft also invested USD 13 billion in Open AI,[8] proving the latter's dependence on Microsoft for access to critical inputs. This paper will also make an argument against Nvidia's dominance in the Graphics Processing Units ("**GPU**") industry,

5. Reuters 'OpenAI says ChatGPT's weekly users have grown to 200 million' (30 August 2024) <https://www.reuters.com/technology/artificial-intelligence/openai-says-chatgpts-weekly-users-have-grown-200-million-2024-08-29/> accessed 12 January 2025.
6. European Commission, 'Competition in Generative AI and Virtual Worlds' (*European Commission*, 18 September 2024) <https://competition-policy.ec.europa.eu/document/download/c86d461f-062e-4dde-a662-15228d6ca385_en> accessed 12 January 2025; 'FTC Staff Report on AI Partnerships & Investments 6(b) Study' (*Federal Trade Commission*, 14 January 2025) <https://www.ftc.gov/reports/ftc-staff-report-ai-partnerships-investments-6b-study> accessed 12 January 2025; 'Generative artificial intelligence: the Autorité issues its opinion on the competitive functioning of the sector' (*Autorité de la concurrence*, 28 June 2024) <https://www.autoritedelaconcurrence.fr/en/press-release/generative-artificial-intelligence-autorite-issues-its-opinion-competitive> accessed 12 January 2025; 'AI Foundation Models: Initial Report' (*Competition Markets Authority*, 18 September 2023) <https://www.gov.uk/government/publications/ai-foundation-models-initial-report> accessed 12 January 2025.
7. 'Artificial intelligence, data and competition' (*OECD*, 14 June 2024) <https://one.oecd.org/document/DAF/COMP(2024)2/en/pdf> accessed 15 January 2025.
8. Jordan Novet, 'Microsoft's $13 billion bet on OpenAI carries huge potential along with plenty of uncertainty' (*CNBC*, 8 April 2023) < https://www.cnbc.com/2023/04/08/microsofts-complex-bet-on-openai-brings-potential-and-uncertainty.html> accessed 15 January 2025.

which is necessary for the training of FMs[9] and how its unfair market practices are harming the smaller competitors in the GenAI space. Interestingly, considering the possible threat to the AI industry, even the Competition Commission of India ("**CCI**") has issued notice to conduct a market study on the potential competition issues in the AI ecosystem.[10] Throughout this paper, the authors have discussed the disruptive position of big techs and the scope of their actions in antitrust law. The paper attempts to prove that practices such as tying, bundling, and acqui-hires can distort competition at the cost of foreclosing the GenAI market for nascent competitors.

Following this backdrop, this paper is divided into five sections. The first of which seeks to explain the development of GenAI's value chain. The second section exhibits the antitrust issues in the GenAI market from the touchstone of anti-competitive agreements, abuse of dominance, tying, bundling, and big techs leveraging their dominant position to enter into the GenAI market. The third section will discuss how global competition regimes deal with competition concerns arising in the GenAI market. The fourth section deals with challenges in enforcing merger control regulations in the GenAI market. Finally, in the last section, the paper proposes a reformative framework that argues for the inclusion of GenAI under the ambit of core platform services in jurisdictions such as the EU and India to mitigate the anti-competitive effects they cause in the GenAI industry.

II. COMPREHENDING THE GENERATIVE AI VALUE CHAIN

The GenAI value chain refers to the stages primarily involved in an FM's development. The value chain is divided into three categories, namely: (a) hardware, (b) cloud computing, and (c) deployment, and each of these categories has its distinct roles in the training and application of the final product.

9. Kif Leswing, 'Nvidia dominates the AI chip market, but there's more competition than ever' (*CNBC*, 2 June 2024) <https://www.cnbc.com/2024/06/02/nvidia-dominates-the-ai-chip-market-but-theres-rising-competition-.html> accessed 15 January 2025.
10. 'Competition Commission of India Launches Market Study on Artificial Intelligence and Competition' (*Competition Commission of India*, 22 April 2024) <https://www.cci.gov.in/antitrust/press-release/details/385> accessed 22 January 2025.

A. The Hardware Necessitation

The first step involves computing hardware, specifically, the micro-processing GPU chips, which are responsible for carrying out the large-scale calculations essential for the development of AI.[11] Functions such as processing of data and minimising the scope of errors while generating an output based on the large amount of information fed, are all the necessary functions of GPU chips. Firms that aim at deploying AI models require these chips in large amounts thus, increasing demand in the market. For example, Meta reportedly spent billions of dollars worth of GPUs to train its Large Language Model Meta AI ("LLaMA") model.[12] Owing to its importance, the demand for GPU chips remains high. However, the concerning part is that most of the market is acquired by a single tech giant, Nvidia, holding a substantial market share.[13]

B. Cloud Computing as an Infrastructure for AI Model Training

As discussed above, GPU chips are crucial for developing the GenAI models. However, the second step is equally important as an FM consumes large amounts of data, generally supplied to it during development. For instance, Open AI's GPT-3 was trained on 175 billion parameters and 45 terabytes of data.[14] The processing of such large datasets necessitates significant computation power, which is made available by cloud computing infrastructure. Cloud computing means *"Access to a scalable and elastic pool of configurable computing resources."*[15] In simpler words, cloud computing firms provide AI developers with supercomputers, giving access to computer servers, storage, and other necessary software that

11. Saif M. Khan and Alexander Mann, 'AI Chips: What They Are and Why They Matter' (*Centre for Security and Emerging Technology*, 3 April 2020) <https://cset.georgetown.edu/publication/ai-chips-what-they-are-and-why-they-matter/> accessed 15 January 2025.
12. Harrison Smith, 'The metaverse-industrial complex' (2024) Info Comm & Soc'y <https://doi.org/10.1080/1369118X.2024.2423346> accessed 15 January 2025.
13. John Wang and others, 'A Comprehensive Analysis of Nvidia's Technological Innovations, Market Strategies, and Future Prospects' (2024) 17 Int'l J Info Tech Sys <https://www.igi-global.com/pdf.aspx?tid=344423&ptid=332410&ctid=4&oa=true&isxn=9798369323182> accessed 15 January 2025.
14. Jan Kocoń and others, 'ChatGPT: Jack of all trades, master of none' (2023) 99 Info Fusion <https://www.sciencedirect.com/science/article/pii/S156625352300177X> accessed 15 January 2025.
15. Council Directive concerning measures for a high common level of security of network and information systems across the Union, (2016/1148 of 6 July 2016) OJ L 194/14.

act as the advanced platform upon which GenAI is built.[16] Additionally, these servers provide a secure and highly regularised storage and computation system which are operated by tech giants such as Amazon Web Services ("AWS"), Microsoft Azure, and Google Cloud Platform. Given this, the market for cloud computing is oligopolistic, as the majority of the market share is concentrated in the hands of these three.

C. Development to Deployment: Harnessing the True Potential of GenAI

In the deployment stage, the GenAI model almost achieves finality; however, before deployment, these models are fine-tuned to meet the market standards. Fine-tuning is the training of a pre-trained model that has already been fed vast amounts of data for better results and efficiency.[17] This is an important step as it maximizes user experience and makes the GenAI model more efficient in terms of responses.

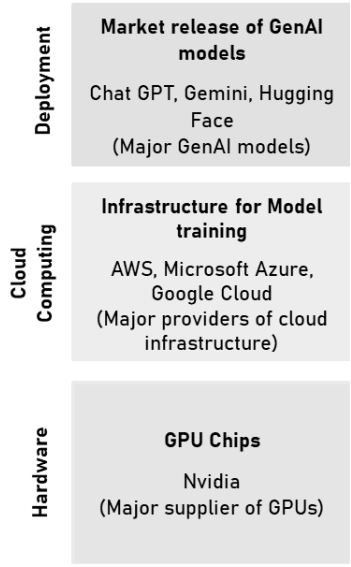
The GenAI models will be released in the market once this process is complete. However, these models differ from each other in their functionalities; for example, once deployed, they can be broadly categorised into open-source and closed-source models.[18] Open-source refers to a model where the source code of the application is released on public platforms giving access for its modification and distribution.[19] Developers of the open source model argue that making the software public promotes innovation within the market as; developers can build upon work that has already been put into them, making them better trained for new tasks.[20]

16. Ganesh Sitaraman and Tejas Narechania, 'An Antimonopoly Approach to Governing Artificial Intelligence' (2024) 43(95) Yale L & P Rev.
17. Jay Rao and Babu Kariyaden Parambath, 'Best practices to build generative AI applications on AWS' (*Amazon Web Services*, 14 March 2024) <https://aws.amazon.com/blogs/machine-learning/best-practices-to-build-generative-ai-applications-on-aws/> accessed 15 January 2025.
18. 'Open vs. closed-source generative AI' (*Delloite,* 22 November 2023) <https://www.deloitte.com/uk/en/Industries/technology/blogs/open-vs-closed-source-generative-ai.html> accessed 15 January 2025.
19. Seow Hiong, 'Open Source And Commercial Software' (*World Intellectual Property Organisation*, 2005) <https://www.wipo.int/edocs/mdocs/copyright/en/wipo_ip_cm_07/wipo_ip_cm_07_www_82575.pdf> accessed 15 January 2025.
20. 'On Open-Weights Foundation Models' (*Federal Trade Commission*, 10 July 2024) <https://www.ftc.gov/policy/advocacy-research/tech-at-ftc/2024/07/open-weights-foundation-models> accessed 15 January 2025.

An example of an open source model includes Stable Diffusion, which is a GenAI model which generates images from text.

Closed-sourced models are private applications made available to the public after being licensed.[21] These models are generally paid, and less information is available about them publicly as developers wish to own the proprietary control over the product. This is done for commercial purposes since anyone who knows how the models work can recreate them and hinder the market share of the firms that own the proprietary data. While these models might be expensive to use, they are generally preferred over open source due to their regular maintenance and constant support from the developer. Google's Gemini and OpenAI's ChatGPT are prominent examples of closed-sourced models.

Figure 1: Representation of the GenAI value chain



Source: Analysis by authors

21. Cristian AVATAVULUI and others, 'Open-Source And Closed-Source Projects: A Fair Comparison' (2023) 17 J Info Sys Oper Mgmt <https://web.rau.ro/websites/jisom/Vol.17%20No.2%20-%202023/JISOM%2017.2_1-22.pdf> accessed 15 January 2025.

III. ANTITRUST CONCERNS IN THE GENERATIVE AI MARKET

The meaning of power is regularly reviewed in the field of competition law. Overseeing anti-competitive agreements, mergers, and abuse of market power falls directly under its domain. In simpler words, competition law examines how firms may use their dominant position to distort competition. However, the rapid pace of GenAI's growth raises antitrust challenges as the existing frameworks may not sufficiently address competition issues in the digital market.

The evolution of the digital market has undergone significant changes—not due to the entry of new players, but because the dynamics have shifted to a 'winner-takes-all or most.'[22] Big tech firms monopolise services essential for the formation of GenAI, such as financing, computing, and access to data.[23] They exploit their market power in the downstream market of FM deployers via various strategies. These may include competition concerns like leveraging their position to enter the market of GenAI, tying & bundling service, unfair dealing, copying, and self-preferencing.[24] These antitrust issues are of great concern because they strike at the very foundation of competition law - promoting competition and consumer welfare.

A. Market Concentration and Structural Barriers in the GenAI Value Chain

The development of GenAI is taking place in a concentrated value chain. This value chain can be categorised into two market structures: the upstream and the downstream markets. Resources such as micro-processing GPUs and cloud computing software constitute the upstream market, while FMs and AI developers constitute the downstream market. Though

22. Nic Newman, 'Overview and key findings of the 2024 Digital News Report' (*Reuters Institute*, 17 June 2024) <https://reutersinstitute.politics.ox.ac.uk/digital-news-report/2024/dnr-executive-summary> accessed 15 January 2025; A Capobianco and A Nyeso, 'Challenges for Competition Law Enforcement and Policy in the Digital Economy' (2018) 9(1) J Euro Comp L & P 19.
23. 'Growing reliance on Big Tech firms for AI carries new risks: European banks' (*Business Standard* New Delhi, 7 June 2024) <https://www.business-standard.com/world-news/growing-reliance-on-big-tech-firms-for-ai-carries-new-risks-european-banks-124060700354_1.html> accessed 15 January 2025.
24. 'FTC Probes Big Tech and GenAI Partnerships' Impact on Competition' (*PYMNTS*, 25 January 2024) <https://www.pymnts.com/news/artificial-intelligence/2024/ftc-investigates-generative-ai-partnerships-impact-competition/> accessed 15 January 2025.

competition in the downstream market might be striving, it cannot be denied that essential components in the upstream market are highly consolidated with entrenched tech behemoths.[25] The concentration of this technology is more prominent in the development layer of the foundation model as essential services such as cloud computing, hardware, capital, and technical expertise are scarcely available to the smaller players. Taking this into consideration, this sub-section elucidates the exclusionary conduct within the framework by tech giants possessing a high concentration of market power.

1. *Monopolistic Control in the GPU Market and its Impact on Competition*

The market structure for GPU chips is monopolised, with Nvidia controlling over 80-95% of the market concerning the development and design of the chips.[26] Since the AI boom, the demand for these GPU chips has skyrocketed, which has resulted in high prices and scarcity of supplies.[27] For example, Nvidia's latest H100 chips cost a staggering USD 40,000 per unit[28] with Microsoft acquiring over 500,000 chips in a single order being the leading buyer of these chips[29] followed by Meta which acquired over 350,000 chips.[30] This leaves the newer entrants at a disadvantageous position since the big tech can outbid them easily.

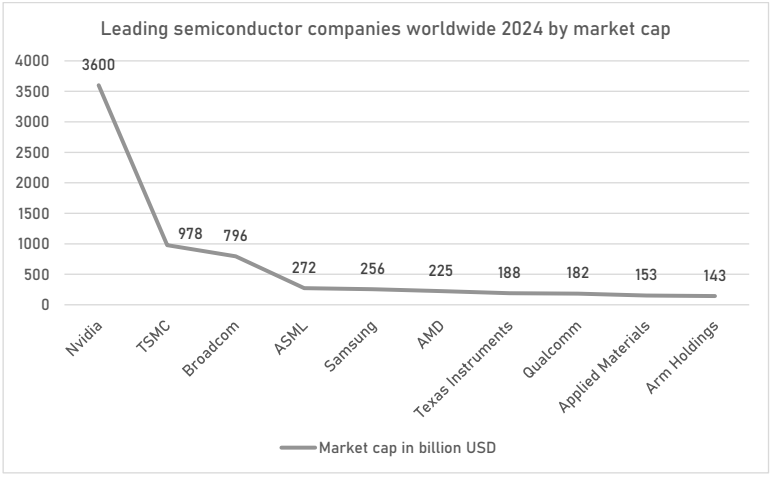
Take the analogy of Apple, which is another big tech company in the digital space. Apple exercises direct control over the distribution of apps on IOS devices through its App Store. Its monopoly over the platform stimulates its arbitrary terms over developers, such as collecting

25. Christophe Carugati, 'The Generative AI challenges for competition authorities' (2024) 59 Intereconomics <https://www.intereconomics.eu/contents/year/2024/number/1/article/the-generative-ai-challenges-for-competition-authorities.html> accessed 15 January 2025.
26. n 9.
27. Paresh Dave, 'Nvidia Chip Shortages Leave AI Start-ups Scrambling for Computing Power' (*Wired*, 24 August 2023) <https://www.wired.com/story/nvidia-chip-shortages-leave-ai-startups-scrambling-for-computing-power/> accessed 15 January 2025.
28. Peter Cohan, *Brain Rush*, (1st ed., Apress Berkeley 2024).
29. Tim Bradshaw and Stephen Morris, 'Microsoft acquires twice as many Nvidia AI chips as tech rivals' (*Financial Times*, 18 December 2024) <https://www.ft.com/content/e85e43d1-5ce4-4531-94f1-9e9c1c5b4ff1> accessed 15 January 2025.
30. Kevin Lee and others, 'Building Meta's GenAI Infrastructure' (*Engineering at Meta*, 12 March 2024) <https://engineering.fb.com/2024/03/12/data-center-engineering/building-metas-genai-infrastructure/> accessed 15 January 2025.

commission fees as high as 30% for listing their apps on the App Store.[31] This leads to the creation of entry barriers for the smaller developers as they have no alternate platform to reach the IOS users. While established developers having access to more resources can easily bear this cost, the smaller competitors often struggle with these terms, limiting their ability to grow or compete in the market.

Similarly, Nvidia's control over the essential GPUs poses a significant threat to competition in the GenAI market. With most of the market under its dominance, smaller developers have no alternatives, putting them at a severe disadvantage. They not only struggle to acquire the GPUs but also face direct competition with big techs with access to unlimited resources, which secure large quantities of GPUs, leaving the smaller competitors discriminated against and injured. To simplify the market dynamics, the authors have represented Nvidia's dominance in the semiconductor industry with the following figure:

Figure 2: A comparison of GPU chips providers' market share[32]



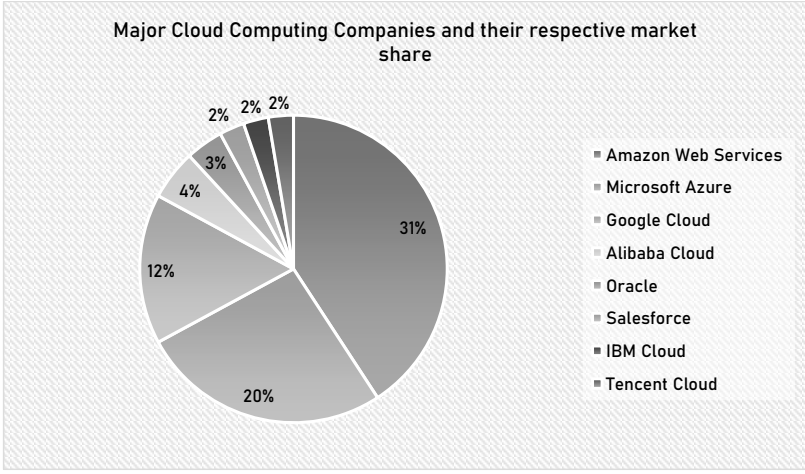
Source: Statista: Analysis by authors

31. Bhumika Indulia, 'Apple charging a commission of up to 30% on all payments made through its in-app purchase system, is a violation of its dominant position? CCI orders investigation' (*SCC Online*, 3 January 2022) <https://www.scconline.com/blog/post/2022/01/03/apple-charging-a-commission-of-up-to-30-on-all-payments-made-through-its-in-app-purchase-system/> accessed 15 January 2025.
32. 'Nvidia: power the AI revolution a report' (*Statista*, December 2024) <https://www-statista-com.elibrary.siu.edu.in/study/176449/nvidia-powering-the-ai-revolution/> accessed 15 January 2025.

2. *Cloud Computing Infrastructure: Market Hegemony and Structural Entrenchment*

Cloud computing is centred among Amazon, Microsoft, and Google,[33] acquiring two-thirds of the marketplace. Training state-of-the-art models (the most advanced models) mandates data spanning across thousands of terabytes that FM developers require from cloud computing software to train their respective models. This enormous access is possible due to the partnership that AI start-ups such as Open AI enter with giants like Microsoft for computing power and investment. In return, the dominant firm gains exclusive access to the AI start-up's technology.[34] Figure 2 below presents the authors' analysis of the market structure of the cloud computing industry, representing the dominance of the big techs.

Figure 3: An analysis of the dominance of major cloud computing companies in their respective market[35]



Source: Statista: Analysis by authors

33. Anne Helmond and others, 'Big AI: Cloud infrastructure dependence and the industrialization of artificial intelligence' (2024) 11 Big Data & Soc <https://journals.sagepub.com/doi/10.1177/20539517241232630> accessed 15 January 2025.
34. Max von Thun and Daniel A. Hanley, 'Stopping Big Tech from Becoming Big AI - A Roadmap for Using Competition Policy to Keep Artificial Intelligence Open for All' (2024) <https://blog.mozilla.org/wp-content/blogs.dir/278/files/2024/10/Stopping-Big-Tech-from-Becoming-Big-AI.pdf> accessed 19 January 2025.
35. Felix Ritcher, 'Statista Amazon Maintains Cloud Lead as Microsoft Edges Closer' (*Statista*, 1 November 2024) <https://www.statista.com/chart/18819/worldwide-market-share-of-leading-cloud-infrastructure-service-providers/> accessed 19 January 2025.

Owing to the years of dominance and services spanning several markets, the tech giants have generated large amounts of capital resources, which they use to maintain their current market status and influence other markets. Looking at the figures, companies like Microsoft, Amazon, and Meta all have market valuations above a trillion, with each company having billions of cash in hand.[36] These firms possess the ability to invest big chunks of money into AI ventures, such as Microsoft investing $13 billion in OpenAI.[37] Such financial presence allows them to invest heavily in AI start-ups. This dominance is not unaccounted for, as in the past, there have been cases of abuse of dominance by these big tech companies.

For instance, in the case of *Matrimony* v. *Google LLC & others*,[38] the CCI fined Google over its abuse of dominance in the online search market. It was observed that Google created an uneven playing field by favouring its services and maximising advantages for its vertical partners. This shows that the big tech companies have previously also hampered the competition by favouring their vertically integrated partners and injuring their competitors. Similar dynamics are at play in the GenAI space, with the big techs abusing their dominance by acquiring access to all critical inputs essential for the development of GenAI.

While all the resources put into developing an ideal AI product are significant yet, one of the most essential resources is technical expertise. Highly required roles include software engineers, AI developers, machine learning experts, and data scientists. Professions such as these require profound knowledge in areas like machine learning, algorithms, neural networks, etc.[39] AI firms struggle to fill technical roles since professionals specialising in this field are scarce in numbers.[40] Most professionals who possess these technical skills are hired by dominant firms such Microsoft,

36. Tim Mullaney, 'How the market's biggest companies, from Apple to Tesla and Microsoft, invest their cash' (*CNBC*, 5 April 2023) <https://www.cnbc.com/2023/04/05/how-markets-biggest-companies-manage-cash-and-investments.html> accessed 19 January 2025.
37. n 8.
38. *Matrimony.com Limited v Google LLC & others* 2018 SCC OnLine CCI 1.
39. 'Generative artificial intelligence: the Autorité issues its opinion on the competitive functioning of the sector' (*Autorité de la concurrence*, 28 June 2024) <https://www.autoritedelaconcurrence.fr/en/press-release/generative-artificial-intelligence-autorite-issues-its-opinion-competitive> accessed 19 January 2025.
40. 'New McKinsey survey reveals the AI tech-talent landscape' (*McKinsey & Company*, 20 January 2023) <https://www.mckinsey.com/about-us/new-at-mckinsey-blog/ai-reinvents-tech-talent-opportunities> accessed 19 January 2025.

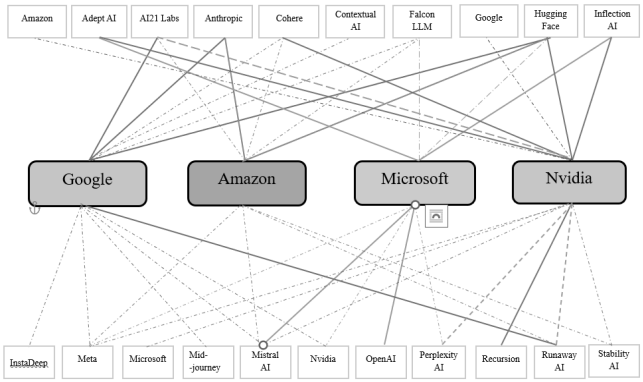
Google, OpenAI, and Apple. Such circumstances stifle competition by concentrating expertise among the dominant companies, thereby creating entry barriers for other downstream players.

B. Vertical Integration and Strategic Partnerships: Reinforcing Big Tech's Control in GenAI Ecosystem

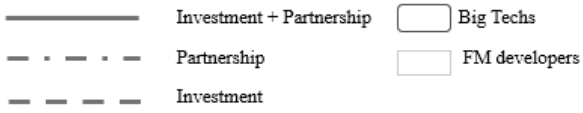
AI firms do not operate independently; they often engage in close-knit partnerships with larger companies with a strong presence in digital markets.[41] For instance, Microsoft has established partnerships with OpenAI and Mistral, involving multi-billion-dollar investments, extensive collaboration in research and development, and certain exclusivity agreements.[42]

In its market study, the Competition Markets Authority ("**CMA**") has identified a complex network of 90 partnerships involving big barons.[43] Figure 3 below illustrates these partnerships-

Figure 4: Partnership between big techs and FM deployers/ data providers/ developer tool providers



41. Teodora Groza and Aleksandra Wierzbickas, '*Mergers by Other Means? AI Partnerships and the Frontiers of (Post-)Industrial Organization*' (2024) Concurrences <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4967357> accessed 13 January 2025.
42. 'OpenAI and Microsoft Extend Partnership' (*OpenAI,* 23 January 2023) <https://openai.com/index/openai-and-microsoft-extend-partnership/> accessed 13 January 2025; 'Microsoft and Mistral AI Announce New Partnership to Accelerate AI innovation and Introduce Mistral Large First on Azure' (*Microsoft Corporate Blogs*, 26 February 2024) <https://www.mckinsey.com/about-us/new-at-mckinsey-blog/ai-reinvents-tech-talent-opportunities> accessed 13 January 2025.
43. Competition and Market Authorities, 'AI Foundation Models initial review' (*Gov.UK*, 4 May 2023) <https://www.gov.uk/cma-cases/ai-foundation-models-initial-review> accessed 13 January 2025.



Source: Market Study by Competition and Market Authority: Analysis by authors.

The rationale behind vertical integration between large tech firms and start-ups is to gain computing power[44] and data at scale,[45] which is essential to train its FMs. This data-driven edge creates a self-reinforcing feedback loop' where more data leads to better services, attracting more users and thus more data.[46] These large firms also have highly skilled engineers[47] and funds to invest in and finance start-ups.[48] Smaller incumbents and new entrants, who do not have access to these resources, are growing more dependent on the larger firms and thus entering into partnerships. For example, Amazon's recent investment in Anthropic was contingent on it serving as Anthropic's primary training partner, cloud provider, and supplier of AI chips.[49] It is important to understand that while this Vertical integration may increase efficiency gains and innovation, it can also injure an honest competitor.

The partnerships between big techs and AI start-ups are nascent, allowing the former to control AI development in a way that serves their commercial goals, thereby diminishing market diversity and restricting genuine consumer choices.[50] Additionally, start-ups become reliant on

44. Copenhagen Economics, 'Generative Artificial Intelligence: The Competitive Landscape' (White Paper, prepared for CCIA Europe, February 2024).
45. Competition and Market Authorities, 'AI Foundation Models Technical update report' (*Competition & Market Authority*, 16 April 2024) <https://assets.publishing.service.gov.uk/media/661e5a4c7469198185bd3d62/AI_Foundation_Models_technical_update_report.pdf> accessed 13 January 2025.
46. Andrei Hagiu and Julian Wright, 'To Get Better Customer Data, Build Feedback Loops into Your Products' (Harvard Business Review 11 July 2023) <https://hbr.org/2023/07/to-get-better-customer-data-build-feedback-loops-into-your-products> accessed 13 January 2025.
47. (n 46) 12.
48. Competition and Market Authorities, 'Cloud Services Market Investigation Competitive Landscape Working Paper' (2023) <https://www.gov.uk/cma-cases/cloud-services-market-investigation> accessed 14 January 2025.
49. 'Amazon and Anthropic Deepen Their Shared Commitment to Advancing Generative AI' (*Amazon,* 27 March, 2024) <https://www.aboutamazon.com/news/company-news/amazon-anthropic-ai-investment> accessed 13 January 2025.
50. Daniel A. Hanley, 'Per Se Illegality of Exclusive Deals and Tying As Fair Competition' (2022) 37 Berkeley Tech. L.J. 1057.

tech giants, and their innovations are more likely to complement (rather than challenge) the services, AI technology, and ecosystem of the dominant Big Tech entity. This can raise barriers to entry for rivals by cutting off their access to core products and services.

To decipher the commercial advantage that big tech gains out of the partnerships with smaller incumbents, the authors compares the financial positioning of Microsoft pre and post-integration with OpenAI

Figure 5: Microsoft's Partnership with OpenAI – Increment in key financial parameters

Parameters	Pre-integration	Post-integration	Percentage changes
Revenue	$52.9 billions	$61.9 billions	17%
Profit	$18.3 billions	$21.9 billions	19.9%
Earnings per share	$2.45 billions	$2.94 billions	20%

Source: Microsoft: Analysis by authors.

The vertical integration results in big tech leveraging its position in the downstream market of GenAI, thereby foreclosing competitors. There is a variety of other antitrust issues arising out of the partnership, such as tying and bundling products, predatorily pricing competitors in downstream markets, charging unreasonable prices for utility services to downstream competitors, copying the products of downstream competitors, self-preferencing their own downstream products and acqui-hires among others. Several competition authorities view the vertical integration between big tech and start-ups as falling under merger control regulations, abuse of dominance, and anti-competitive agreements.

1. *Leveraging Dominant Position: Abusing Market Power to Foreclose Competition*

Leveraging is when a dominant company exploits its position in one market to enter a different but related market, eventually foreclosing it.[51] Tech giants have been rapidly expanding into new markets in recent

51. Daniel Mândrescu, 'On-platform Tying or Another Case of Leveraging – A Discussion on Facebook Marketplace' (*Kluwer Competition Law Blog*, 4 January 2023) <https://competitionlawblog.kluwercompetitionlaw.com/2023/01/04/on-platform-tying-or-another-case-of-leveraging-a-discussion-on-facebook-marketplace/> accessed 15 January 2025.

years. On one hand, these companies are providing start-ups with cloud computing, data, and investment, while on the other, they are becoming their competitors.[52]

To further elaborate, the Autoridade da Concorrência (Portuguese Competition Authority), in an issue paper on competition and GenAI, stated that "*incumbents have accumulated advantages, e.g., scale effects, data, etc., so they are in a better position to enter and expand in the field of GenAI.*" A notable example of this is Microsoft's integration of copilot (based on OpenAI's GPT model) into its own services, such as Microsoft 365 and Windows, which resulted in direct competition with start-ups offering similar AI-based answer engines.[53] This demonstrates how Microsoft leverages its market power to enter the downstream market by creating a chatbot of its own.

Additionally, the cloud providers are pre-installing their own apps on devices. For instance, the Google/Samsung partnership integrates Google's AI models into some Samsung devices. In the case of *Umar Javeed and others v. Google LLC*, the CCI concluded that the mandatory pre-installation of the entire Google Mobile Services Suite amounts to leveraging Google's dominance in Play Store to protect the relevant markets such as online general search, which is in contravention of section 4(2)(*e*) of the Competition (Amendment) Act, 2023 ("**Competition Act**").

Moreover, the EC has been looking into whether the partnership between Google and original equipment manufacturers (or smartphone manufacturers) to pre-install Gemini Nano (Google's AI model) on mobile phones raises anti-competitive concerns by creating barriers for another foundation model to be accessed or pre-installed on those devices.

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52. Paulo Abecasis and Federico De Michiel, 'Generative AI Partnerships: Separating Good from Bad' (2024) Competition P. Int'l. <https://copenhageneconomics.com/wp-content/uploads/2024/07/2-GENERATIVE-AI-PARTNERSHIPS-SEPARATING-GOOD-FROM-BAD-Paulo-Abecasis-Federico-Di-MiChiel.pdf> accessed 13 January 2025.
53. OpenAI and Microsoft Extend Partnership' (*OpenAI*, 23 January 2023) <https://openai.com/index/openai-and-microsoft-extend-partnership/> accessed 13 January 2025.; 'Microsoft and Mistral AI Announce New Partnership to Accelerate AI innovation and Introduce Mistral Large First on Azure' (*Microsoft Corporate Blogs*, 26 February 2024) <https://azure.microsoft.com/en-us/blog/microsoft-and-mistral-ai-announce-new-partnership-to-accelerate-ai-innovation-and-introduce-mistral-large-first-on-azure/> accessed 13 January 2025.

2. *Self-Preferencing, Tying and Bundling: Tactics of Market Distortion*

When a single company controls both the FMs and the operating system ("**OS**"), it might prioritise its own applications over those developed by independent developers using its platform. This could occur in various forms, such as lowering the visibility of third-party apps in rankings or restricting the quality of Application Program Interface ("**API**") access, which in turn hinders the competition in the GenAI market and causes harm to consumers by restricting their choices.[54]

Drawing an analogy with the *Google Shopping case*,[55] where the EU has imposed a fine of €2.42 billion on Alphabet (Google's parent company) for favouring its price comparison service over its competitors. Google's price comparison service was prioritised by being conspicuously placed at the top of the search results. Meanwhile, price comparison services from other providers, like Yelp, Idealo.de, and others, were demoted in the generic search results. Considering this, the EC ruled that Alphabet is abusing its dominant position by self-preferencing its services over the others, thus creating an uneven playing field.

Another anti-competitive issue is bundling, which refers to a company combining multiple products into a single package. Additionally, tying occurs when a company sells one product on the condition that the consumer also buys a separate product.[56] For instance, Google has integrated its AI-based answer engine into its Google Search, Google Chrome, and Google Workplace.[57]

In the case of *Sonam Sharma v. Apple Inc.*, the CCI laid down three parameters for tying to be characterised as anti-competitive. *Firstly*, there

54. Friso Bostoen and Anouk van der Veer, 'Regulating Competition in Generative AI: A Matter of Trajectory, Timing and Tools' (2024) 2024(2) Concurrences <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4756641> accessed 15 January 2025.
55. European Commission, 'Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison-shopping service' (*European Commission*, 27 June 2017) <https://ec.europa.eu/newsroom/comp/items/104946/> accessed 15 January 2025.
56. Adam Brandenburger and Barry Nalebuff, 'Sell/Buy Bundling' (2021) 1(1) CPI <https://competitionpolicyinternational.com/wp-content/uploads/2021/09/1-SellBuy-Bundling-By-Adam-Brandenburger-Barry-Nalebuff.pdf> accessed 16 January 2025.
57. Google, 'Announcing Gemini for Google Workspace' (*Google workspace*, 22 February 2024) <https://workspace.google.com/blog/product-announcements/gemini-for-google-workspace> accessed 15 January 2025.

should be a presence of two distinct products that are capable of being tied. *Secondly*, the seller should have considerable economic power over the tying product for it to hinder competition in the market of the tied product. *Lastly*, the tying arrangement should affect a substantial portion of commerce. Drawing an analogy to Google's integration of its AI-based answer engine, it must be demonstrated that (a) the answer engine and products like Google Search and Chrome are distinct, (b) Alphabet holds substantial control over the answer engine, and (c) the engine creates barriers that hinder competition, potentially distorting the market and reducing consumer choice.

Moreover, Microsoft is also integrating its GPT-powered Co-pilot applications in its search engine Bing, Microsoft Edge, and its OS.[58] This brings up a similar concern to that of the EC's earlier ruling, where Microsoft was found abusing its dominant position in the computer OS market, primarily by tying its media player with its OS. This led to Microsoft facing a penalty of €497 million while being mandated to provide a version of the Windows OS without Windows Media Player.[59]

C. Exploitation of Dominant Market Power by Incumbent Firms

Big techs have implemented strategies to solidify their dominance by enabling lock-in effects that raise the cost of consumer switching providers.[60] In the market of cloud computing, entry barriers for smaller competitors include limited interoperability and long-term contracts, which undermine the competitive dynamics of the market to the detriment of consumer welfare.[61]

The vertical integration discussed above raises concerns regarding 'strip mining' where a cloud provider copies the application from

58. Microsoft, 'Introducing Microsoft 365 Copilot – your copilot for work' (*Official Microsoft Blog*, 16 March 2023) <https://blogs.microsoft.com/blog/2023/03/16/introducing-microsoft-365-copilot-your-copilot-for-work/> accessed 15 January 2025; Microsoft, 'Microsoft Copilot improvements for Windows 11' (*Microsoft Blog*, 29 February 2024) <https://blogs.windows.com/windowsexperience/2024/02/29/microsoft-copilot-improvements-for-windows-11/> accessed 15 January 2025.
59. *Microsoft Corp v Commission of the European Communities* (Case T-201/04 of 2007) ECR II-03601.
60. Tejas N. Narechania and Ganesh Sitaraman, 'An Antimonopoly Approach to Governing Artificial Intelligence' (2024) 43 Yale L & P Rev.
61. Carugati (n 26) 8.

downstream developers and integrates them into their own offerings.[62] For example, Google has invested approximately USD 550 million in Anthropic providing the latter its cloud services and infrastructures to help make its services better.[63] Interestingly, Google also operates in the downstream GenAI market by deploying its chatbot Gemini AI which uses Anthropic's Claude (AI model) to help improve its model as, one of the outputs provided by Gemini explicitly stated: "*I am Claude, created by Anthropic*."[64]

Another way of exploitation by big techs is the refusal to deal, which arises when a firm uses its dominance to weaken or harm a dependent firm.[65] In such instances, the dependent firm is denied access to a crucial resource, key commercial channel, or vital business relationship, often making it unable to operate effectively. For instance, Microsoft has threatened to block access to its index data for rivals that use it to develop their answer engine.[66] If these threats are carried out, it would be akin to refusal to deal with the competitors in the market that wish to develop their own GenAI models. In the case of *Deutsche Telekom v. Commission*[67] and *Slovak Telekom* v. *Commission*,[68] the Court of Justice ruled that constructive refusal to deal does not require proving indispensability. It occurs when a dominant firm grants access to crucial inputs under unfair terms and conditions. Therefore, preventing competitors from accessing index data to develop their answer engine would be unfair, as it would put them at a competitive disadvantage compared to Microsoft.

62. Tejas N. Narechania and Ganesh Sitaraman, 'An Antimonopoly Approach to Governing Artificial Intelligence' (2024) 43 Yale L & P Rev.
63. Amazon, 'Amazon and Anthropic Deepen Their Shared Commitment to Advancing Generative AI' (*About Amazon*, 27 March 2024) <https://www.aboutamazon.com/news/company-news/amazon-anthropic-ai-investment> accessed 19 January 2025.
64. 'Google is using Anthropic's Claude to make responses by Gemini AI better: Report' (*The Indian Express New Delhi* 27 December 2024) <https://indianexpress.com/article/technology/artificial-intelligence/google-using-anthropic-claude-gemini-better-report-9745001/> accessed 19 January 2025.
65. Daniel A. Hanley, 'Illuminating the Anti-coercion Foundations of Refusals to Deal' (2024) 2 Competition P. Int'l.
66. Leah Nylen and Dina Bass, 'Microsoft Threatens Data Restrictions in Rival AI Search' (*Bloomberg*, 25 March 2023) <https://www.bloomberg.com/news/articles/2023-03-25/microsoft-threatens-to-restrict-bing-data-from-rival-ai-searchtools> accessed 19 January 2025.
67. *Deutsche Telekom v Commission* (2018) Cases T- 827/14.
68. *Slovak Telekom v Commission* (2018) Case T- 851/14.

IV. EXISTING GLOBAL ANTITRUST FRAMEWORK: CROSS-JURISDICTIONAL APPROACHES TO REGULATING COMPETITIVE CONCERNS IN GENERATIVE AI MARKET

In the EU, there are two remedies available to address antitrust issues in the GenAI supply chain, namely, Article 101 and Article 102 of TEFU.[69] Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") grants the EU the authority to investigate cases of abuse of dominant position.[70] Additionally, it stipulates the practices that would be categorised as abuse of dominance. These practices involve imposing "unfair purchase or selling prices or other unfair trading conditions," "applying dissimilar conditions to equivalent transactions with other trading parties," and "making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which have no connection with the subject of such contracts," and "self-preferencing."[71]

In the USA, two key antitrust laws, namely, the Federal Trade Commission ("**FTC**") Act and the Sherman Act, can be used to address monopolistic practices employed by Big Tech companies. For example, Section 2 of the Sherman Act restricts practices that monopolise or attempt to monopolise.[72] Furthermore, Section 5 of the FTC Act allows the FTC to initiate lawsuits for unfair methods of competition without requiring that firms possess market power.[73]

In the context of India, the antitrust issues are dealt with by utilising Sections 3 and 4 of the Competition Act. Section 3 prohibits anti-competitive agreements,[74] whereas Section 4 restricts a dominant entity from abusing its dominance.[75] Furthermore, competition authorities will have to assess the balance between anti-competitive and pro-competitive effects of alleged antitrust issues listed in Section 3, including but not limited to - self-preference, tying, leveraging, and bundling, through the rule of reason analysis.

69. Teodora (n 42) 11.
70. Treaty on the Functioning of the European Union 2009, art. 102.
71. Treaty on the Functioning of the European Union 2009, art. 102.
72. The Sherman Antitrust Act 1890(26 Stat. 209, 15 U.S.C. §§ 1–7) s. 2.
73. Federal Trade Commission Act 1914 (15 U.S.C. §41 et seq.) s. 5.
74. The Competition (Amendment) Act, 2023 (9 of 2023) s. 3.
75. The Competition (Amendment) Act, 2023 (9 of 2023) s. 4.

The Supreme Court in *Tata Engineering and Locomotive Co. Ltd. v. Registrar of Restrictive Trade Agreement*[76] gave a three-pronged test to determine whether a particular practice is anti-competitive or not. *First*, the particular facts about the business that led to the imposition of a restraint. *Second*, what is the impact of that restraint by analysing the before and after effects? And *lastly*, the nature of the restraint imposed and its actual and probable effect must be considered. So, to determine whether practices such as tying, bundling, or leveraging harm the market, applying the rule of reason on a case-by-case basis is crucial for identifying potential violations of competition law.

Considering the growth digital markets have achieved over the past years. Many jurisdictions have introduced competition acts, particularly focusing on the digital market. These laws are enacted to promote healthy competition in the digital markets by preventing big tech firms from exploiting their market power.[77]

Figure 6: The comparative analysis of digital antitrust laws across the EU, the UK, and India

COUNTRY VIABLE	**EUROPEAN UNION**	**UNITED KINGDOM**	**INDIA**
Name of the legislation	Digital Markets Act, 2022 ("DMA")	Digital Market Competition and Consumer Act, 2024 ("DMCCA")	Draft Digital Competition Bill ("DDCB")
Dominant firm's designation	Gatekeeper	Strategic Market Status ("SMS")	Systematically Significant Digital Enterprise ("SSDE")

76. *Tata Engineering and Locomotive Co. Ltd. v Registrar of Restrictive Trade Agreement* 1977 SCR (2) 685.
77. 'The Digital Markets Act: ensuring fair and open digital markets (*European Commission*, 6 September 2023) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/digital-markets-act-ensuring-fair-and-open-digital-markets_en> accessed 17 January 2025; 'The Digital Markets, Competition and Consumer Act 2024: A consumer lens' (*FootAnstey*, 16 January 2025) <https://www.footanstey.com/our-insights/articles-news/the-digital-markets-competition-and-consumer-act-2024-a-consumer-lens/> accessed 19 January 2025.

COUNTRY VIABLE	EUROPEAN UNION	UNITED KINGDOM	INDIA
Service offered by the designated firms	Core Platform Services ("CPS")	No service categorisation	Core Digital Services ("CDS").
Criterion for designation (Quantitative)	Turnover exceeding €7.5 billion or market capitalisation of at least €75 billion, with 45 million active users and 10,000 business users in the EU for 3 years.	Turnover exceeding £1 billion or global turnover exceeding £25 billion in the last 12 months.	Turnover exceeding INR 4000 crore or USD 30 billion and 1 crore users or 10,000 business users in India for 3 years.
Criterion for designation (Qualitative)	Significant market impact, Core Platform service acting as a gateway, Strong market position or expected to maintain it.	Engaged in digital activity	Based on volume of commerce, user base, economic power, network effects, and other relevant factors.
List of services	includes online search engines, social networking, video-sharing, OS, cloud services, advertising, web browsers, and virtual assistants.	No detailed list of services provided.	Includes online search engines, social networking, video-sharing, communications services, OS, web browsers, cloud services, advertising, and intermediation.

COUNTRY VIABLE	EUROPEAN UNION	UNITED KINGDOM	INDIA
Prohibition on conduct	Ban on processing personal data for ads without consent, restricting third-party sales, limiting user appeal rights, mandating specific payment services, and forcing extra subscriptions for core services.	Bans on discriminatory terms, preferential treatment, tying, bundling, leveraging market power, restricting compatibility, restricting the use of competing products and unfair data use.	Prohibition on self-preferencing, tying, bundling, restricting third-party apps, and anti-steering.

Source: Authors analysis of DMA, DMCC and DDCB

V. EXPLOITING REGULATORY LOOPHOLES: CHALLENGES IN ENFORCING MERGER CONTROL REGULATION IN THE GENAI MARKET

The GenAI market has not seen large acquisitions.[78] It has seen a wave of partnerships, investment, and hiring of key members involving large tech firms and start-ups. Competition authorities across many jurisdictions view vertical integration as falling under the ambit of merger control rule.

However, many of these partnerships do not satisfy the legal definition of a merger. This is due to two factors. Firstly, to prove that the transaction will come under the ambit of merger control regulation, the acquirer company must exert 'control' on the smaller start-up in question. Secondly, since the annual turnover of the start-up is so low, the big techs often evade the requirement for a "turnover threshold" to be established. Turnover refers to the revenue based on the last available audited accounts of the company in the immediately preceding financial year.[79] If the combined turnover of the merging entities exceeds the threshold

78. 'Statement Regarding Termination of Nvidia Corp.'s Attempted Acquisition of Arm Ltd' (*FTC*, 14 February 2022) <https://www.ftc.gov/news-events/news/press-releases/2022/02/statement-regarding-termination-nvidia-corps-attempted-acquisition-arm-ltd> accessed 19 January 2025.
79. The Competition (Amendment) Act, 2023 (9 of 2023) s. 6(c).

set by the relevant competition authority, the merger may be reviewed to assess its potential impact on market competition. Drawing lessons from the past, Facebook acquired WhatsApp in 2014, and the $19 billion acquisition was not notifiable as it did not cross the turnover threshold.[80]

The European Union Merger Control ("**EUMR**") regulates "concentrations," i.e., mergers and acquisitions that bring about "a change of control on a lasting basis."[81] It evaluates whether a concentration could considerably hinder effective competition within the internal market, specifically by creating or reinforcing a dominant position. A concentration is said to have a community dimension when the combined turnovers of the parties involved meet specific, significantly high thresholds.[82] Every concentration that meets the criteria for a community dimension must be reported to the Commission.[83]

To evade this stringent requirement, below-threshold mergers used to be referred to the European Commission ("**EC**") using 'Article 22' of the EUMR. Provided that 'a member state (country that is a part of the EU), or multiple member states, can ask the Commission to review a concentration, even if it lacks a community dimension,[84] provided it influences trade between Member States and poses a serious risk of substantially impacting competition within the requesting Member State's territory.'[85]

However, In the case of *Illumina v. European Commission*, the Court of Justice ruled that the EC does not have jurisdiction to accept a referral request in a case if the member state requesting the referral does not have jurisdiction under its national law to review the concentration in question.[86] Microsoft/Inflection partnership, Microsoft hired the Chief Executive Officer and core employees of Inflection ("**Acquihires**"). However, the partnership could not be reviewed by the Commission as it

80. *Facebook/WhatsApp* (2014) Case No COMP/M.7217.
81. The European Union Merger Regulation, 2004 (O.J.L 24/1, 29).
82. The European Union Merger Regulation, 2004 (O.J.L 24/1, 29) (3(1)); The European Union Merger Regulation, 2004 (O.J.L 24/1, 29) art. (2(2); The European Union Merger Regulation, 2004 (O.J.L 24/1, 29) art. 2(3).
83. The European Union Merger Regulation, 2004 (O.J.L 24/1, 29) art 1(2); The European Union Merger Regulation, 2004 (O.J.L 24/1, 29) 1(3).
84. The European Union Merger Regulation, 2004 (O.J.L 24/1, 29) art. 1.
85. Alan Riley, 'Illumina/Grail: What is the Solution for Killer Acquisitions Now?' (Kluwer Competition Law Blog 15 October 2024) <https://competitionlawblog.kluwercompetitionlaw.com/2024/10/15/illumina-grail-what-is-the-solution-for-killer-acquisitions-now/> accessed 17 January 2024.
86. *Illumina v European Commission* (2024) Case C-611/22.

was not notifiable in any member state.[87] Moreover, the Google/Anthropic partnership was not investigated by the EC as it was found that the rights granted to Google did not amount to any form of 'control.'[88]

In the context of the UK, a transaction is categorised as acquisition when the acquirer, de jure, or de factor can exert 'material influence' over the conduct of the target company.[89] The Competition Markets Authority ("**CMA**") has the authority to initiate a sector inquiry and enforce commitments aimed at correcting, reducing, or preventing competitive harm, regardless of the threshold.[90] For instance, the Microsoft/Mistral partnership for the supply of cloud computing infrastructure to Mistral has been under scrutiny by the CMA, although Microsoft's potential shareholding was less than 1%.[91] This is due to CMA's examination focused on the acquirer's ability to *materially influence* the policy of the target entity in question. CMA, in its market study on GenAI's impact on competition law, noted that it is committed to "*Stepping up our use of merger control to examine whether such arrangements fall within the current rules and, if so, whether they give rise to competition concerns*."[92]

In the context of India, Section 5 of the Competition Act lays down the threshold for the notifiable 'Combination' (Mergers & Acquisitions) to the Competition Commission of India ("**CCI**").[93] Moreover, Section 6 of the Competition Act prohibits Combination that causes or is likely to cause an appreciable adverse effect on competition within the relevant market in India.[94]

87. 'Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft' (*European Commission*, 18 September 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727> accessed 17 January 2024.
88. 'Alphabet's AI partnership with Anthropic no longer under UK scrutiny' (*Reuters*, 19 November 2024)
<https://www.reuters.com/technology/artificial-intelligence/alphabets-ai-partnership-with-anthropic-no-longer-under-uk-scrutiny-2024-11-19/> accessed 17 January 2024.
89. Rolf Ali, 'The CMA's approach to jurisdiction in recent merger cases' (*Convington Competition*, 27 August 2020) <https://www.covcompetition.com/2020/08/the-cmas-approach-to-jurisdiction-in-recent-merger-cases/> accessed 17 January 2024.
90. The Enterprise Act 2002, s. 5.
91. CMA, Microsoft Corporation's partnership with Mistral AI Decision on relevant merger situation ME/7102/24 by CMA UK (2024) <https://assets.publishing.service.gov.uk/media/664c6cfd993111924d9d389f/Full_text_decision.pdfL> accessed 13 January 2025.
92. Competition and Market Authorities (n 46) 13.
93. The Competition (Amendment) Act 2023 (9 of 2023) s. 5.
94. The Competition (Amendment) Act 2023 (9 of 2023), s. 6.

'Control' is defined in the Competition Act as "*the ability to exercise material influence, in any manner whatsoever, over the management or affairs or strategic commercial decisions*." CCI has defined the term material influence in multiple cases. The CCI, in the case of Jet/Etihad, defined material influence as "*the lowest level of control, implies presence of factors which give an enterprise ability to influence affairs and management of the other enterprise including factors such as shareholding, special rights, status and expertise of an enterprise or person, etc.*"[95]

In India, the current merger control law is based on an asset and turnover threshold. The Competition (Amendment) Act 2023 addressed this legislative gap through the introduction of the 'Deal Value Threshold' ("**DVT**"). As per this provision, if the value of a *transaction* related to the acquiring control, shares, voting rights, or assets of a business or a merger or amalgamation exceeds INR 2,000 crore, then such Combination has to be notified to the CCI. Hence, the partnership between big tech and smaller companies can be reviewed in India using the provision of DVT.

The competition authorities should first promote predictability and legal certainty in merger control.[96] Prospective policy options to improve notification of potentially problematic acquisitions include introducing a 'transaction-based value threshold' alongside the traditional turnover-based threshold.[97] This approach has gained traction in policy discussions in jurisdictions such as Germany,[98] Austria and India.[99]

The commissions should explore other avenues to address below-threshold mergers, acqui-hires, and the conundrum of the 'control' threshold, by accepting the current legal framework and employing an ex-post facto mechanism through reliance on legislation that prohibits abuse of dominance, that is, Section 4 of the Competition (Amendment) Act, 2023

95. *Jet/Etihad Combination* (2013) Case No. 2013/05/122.
96. Christophe Carugati and Nicole Kar, 'Assessing the Competitive Dynamics of AI Partnerships' (11 December 2024) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5025769#paper-references-widget> accessed 19 January 2025.
97. Mats Holmström and others, 'Killer Acquisitions? The Debate on Merger Control for Digital Markets' (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465454> accessed 12 January 2025.
98. Gesetz gegen Wettbewerbsbeschränkungen 2023, s. 35(1).
99. Bundeskartellamt and Bundeswettbewerbsbehörde, 'Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)' (2018) <https://www.bwb.gv.at/fileadmin/user_upload/Downloads/standpunkte/201807_Guidance_Transaction_Value_Thresholds.pdf> accessed 12 January 2025.

Competition Act and Article 102 of TFEU.[100] In the recent judgment, *Towercast v. Autorité de la concurrence*,[101] the Court ruled that national competent authorities, as well as national courts, can apply Article 102 TFEU to a non-notifiable concentration. However, there is a limitation to this option. Notably, the undertaking acquiring control of another must already hold a dominant position. By contrast, establishing that an enterprise is dominant is not a prerequisite under the merger control regulation.

VI. POLICY RECOMMENDATIONS

As discussed in the previous sections, the emergence of GenAI and the competition concerns it has gathered concerning market monopolisation cannot be overlooked. Legislations such as the EU's DMA and Artificial Intelligence Act, the DMCCA of the UK, the DDCB, and the GCA have been adopted to regulate digital markets. However, GenAI is still not a formal part of these acts. This section proposes reformative changes in the current global regime to put generative AI under competition scrutiny by amending existing laws.

DMA resulted from the incapability of the TFEU to address the unfair practices affecting competition in the digital markets. As explained in Figure VI, section IV, DMA's regulation of the digital market is centred upon two classifications; gatekeepers and CPS.[102] A gatekeeper is defined under Article 3(1) stating that: (a) 'one that can have a significant impact on the market,' (b) 'one that offers a CPS acting as a gateway between the business and the end user,' (c) 'one that possesses a strong market position and or is foreseen to maintain the similar position in near future.'[103]

Though the DMA does not define CPS, it can be simply understood as services that are integral to the operation of a digital business. Drawing reference to Figure VI, which provides a list of current CPS, it is evident that the list does not include GenAI. The authors argue that though there is a similarity of characteristics between GenAI and other CPS,

100. Carugati (n 97) 23.
101. *Towercast v Autorité de la concurrence* (2023) Case C-449/21.
102. 'Digital Markets Act: Commission designates six gatekeepers' (*European Commission*, 6 September 2023) <https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328> accessed 13 January 2025.
103. The Digital Market Act, 2022 (1925 of 2022) art. 3(1).

such as strong network effects, the ability to connect to end users, and lock-in effects.[104] However, the list of current CPS features 'online search engines' and 'virtual assistants,' which many argue resembles the closest to GenAI. Considering this, we suggest that GenAI chatbots need a separate categorisation under the DMA, as the services provided by online search engines and virtual assistants differ in functionality and output.

Article 2(6) of the DMA defines an 'online search engine' as a digital service allowing users to input queries to perform searches on all websites.[105] Results are then based upon displaying the relevant websites that align with the query. The AI chatbots differ from this as users do not utilize their service to perform searches. Instead, the chatbots generate content directly by gathering information from the web to produce enhanced responses with the latest data.[106] GenAI chatbots also differ from virtual assistants. Article 2(12) of the DMA defines virtual assistants as software that processes demands or tasks and, based on that, provides access to other services or connected physical devices.[107] Although, in a way, chatbots also process user prompts instead of connecting to a service or a physical device they directly generate outputs in terms of data and present a detailed analysis.[108] The differentiation between the two CPS and GenAI supports the argument that to effectively regulate the GenAI market its inclusion into the DMA becomes essential for the struggling competition in the market.

The inclusion of GenAI under the category of CPS would address anti-trust concerns as mentioned in section III, as the competition authorities, on a case-to-case basis, may designate a company as a gatekeeper. Such designation would solve major anti-trust concerns as, under the DMA, gatekeepers must refrain from a range of practices that could hinder the competition in the digital market. These include forcing users to subscribe to additional services offered by the gatekeeper,[109] using data collected

104. *Bytedance Ltd v European Commission* (2024) Case T-1077/23
105. Digital Market Act, 2022 art. 2(6).
106. Ayse Gizem Yasar and others, 'Integration of Generative AI in the Digital Markets Act: Contestability and Fairness from a Cross-Disciplinary Perspective' (2024) LSE Legal Studies Working Paper No. 4/2024, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4769439> accessed 19 January 2025.
107. Digital Market Act 2022 art. 2(12).
108. n 107.
109. The Digital Market Act, 2022 (1925 of 2022) art. 5(8).

from business users to compete against them,[110] preventing users from uninstalling specific software,[111] ranking one's own services and products more favourably than those offered by third parties,[112] and providing preferential interoperability.[113] Considering these practices the inclusion of GenAI as a CPS becomes crucial as this would limit the harm big techs are causing to the GenAI market and establish an equitable market.

Moreover, legislation like DMA can also come to the rescue in addressing the conundrum of 'killer acquisition.' As Article 14 of DMA states, "*a gatekeeper shall inform the Commission of any intended concentration within the meaning of Article 3 of Regulation, where the merging entities or the target of concentration provide core platform services or any other services in the digital sector.*"[114]

As explained in the previous section, India's DDCB has similarities with that of the EU's DMA as the categorization of CPS and gatekeepers in the DMA is synonymous with the DDCB's categorization of CDS and Systematically Significant Digital Enterprise. Therefore, GenAI's non-inclusion in the list of CDS ousts similar concerns to those of the DMA. Considering that the DDCB provides a mechanism to amend and modify the list of CDS.[115] Hence, the addition of GenAI as a CDS would remedy the competition concerns in the GenAI sector since the current list of CDS does not cater to this market. However, competition authorities must exercise restraint to avoid hindering competition in the emerging GenAI market. Such an approach can be implemented by employing a rule of reason approach to carefully weigh the competitive benefits and potential anti-competitive effects.

VII. CONCLUSION

This paper has shown that GenAI has emerged as a transformative force in the digital market, reshaping competitive landscapes through its capacity to generate content and enhance decision-making capabilities. The paper also contends that the two layers of the GenAI value chain

110. The Digital Market Act, 2022 (1925 of 2022) art. 6(2).
111. The Digital Market Act, 2022 (1925 of 2022) art. 6(3).
112. ibid.
113. The Digital Market Act, 2022 (1925 of 2022) art. 6(17).
114. Digital Market Act, 2022 art. 14.
115. The Draft Digital Competition Bill 2024, s 47.

are concentrated between dominant players such as Nvidia, Microsoft, and Amazon (to name a few), acquiring the majority of market share and resources necessary for the development of AI. Because of their influence, these entities engage in vertical integrations, resulting in anti-competitive practices such as self-preferencing, bundling, tying, acqui-hires, and below-threshold mergers. The concentration of essential resources limits their ability to compete effectively and leaves them and the consumers without alternatives to choose from due to the market's dominant nature.

Considering the anti-competitive effects caused by the big techs, competition authorities worldwide, such as the UK, EU, France, and the USA, have released market studies and investigations into the GenAI market. For example, the FTC has recently highlighted that partnerships between big techs and GenAI developers have the potential to damage competition in the market by creating entry barriers for smaller AI start-ups and restricting their access to crucial resources. Initiatives such as these symbolise advancements in the GenAI market by fostering innovation and safeguarding consumer interest, thus, promoting fair competition.

Considering the present competitive concerns at hand, the authors have proposed a framework to include GenAI under the ambit of competition authorities. The framework advocates for including GenAI in the category of CPS under the digital market regulations of both India and the EU. This would subject the industry to antitrust scrutiny by providing a set of rules and regulations that big techs, along with the AI developers, must follow. This will not only regulate the abuse of power in the GenAI sector but also encourage competition in the market by removing entry barriers for newer entrants. As the GenAI market is still nascent and rapidly evolving, competition authorities must adopt a measured and cautious approach to regulation. This will ensure that they do not stifle innovation while upholding the core objective of competition law: to promote and sustain a competitive market while safeguarding consumer interests.

Front Running in India: A Regulatory Quandary amidst Lax Laws

—*Agastya Shukla and Arihant Sethia*[*]

ABSTRACT

Front-running regulations in India serve a dual purpose: safeguarding investor interests and maintaining the integrity of the securities market. A recent high-stake debacle, such as the Ketan Parakh and the Quant Mutual Fund front-running case, has revealed the breach in the crevice of the present regulatory framework. Notwithstanding the active approach of the regulatory watchdog, such market catastrophes are often unattended, not because such issues are left in the dark but because the spotlight is often too fleeting to prompt the true insider. This paper offers a rigorous analysis of these deficiencies by evaluating SEBI's current approach and contrasting them with real-world cases. We find that the existing regulatory framework, while robust in certain aspects, fails to address specific gaps in market conduct enforcement and investor protection. Therefore, two logical inferences follow from this, SEBI needs a strong technical framework and subsequently, an ex-ante detection regulation is a pressing necessity. The research is further characterized by India's regulatory approach to implementing Chinese walls and evaluating insider networks, where information asymmetry plays a significant role. Furthermore, the paper investigates the internal fraud detection mechanisms through scrutinization of pre-trade patterns and revised disclosure norms to enhance the efficacy of fraud detection systems and by aligning these recommendations to the Indian financial context, the authors call for a transformative legislative reform aimed at securing investor's interests and mitigating the risk of pre-emptive traders, ultimately contributing to a more secure financial system where everyone is on the same starting line.

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Keywords: Mutual Funds, Front Running, SEBI Regulations, Ketan Parekh, Quant Mutual Fund.

I. INTRODUCTION

The Securities and Exchange Board of India (SEBI) uncovered a complex front-running scam involving Ketan Parekh and Rohit Salgaocar, a trader based in Singapore.[1] The scam exploited non-public information from a significant US-based foreign portfolio investor, referred to as the "Big Client." Ketan Parekh, infamously known as the "Kingpin of two stock market scams," was debarred from trading for 14 years but managed to execute yet another fraudulent trade using insider information relayed by Salgaocar. Six entities acted as frontrunners between January 1, 2021, and June 20, 2023, and executed trades based on leaked data. These trades were processed through Nuvama Wealth Management and Motilal Oswal Financial Services, with Salgaocar holding a referral agreement with the brokerages. The scam was exposed when SEBI detected unusual trading patterns related to the Big Client, which prompted a comprehensive search operation in June 2023 to gather evidence. However, the damage had already been done. While the loopholes should have been detected promptly, the market regulator only intervened at the curative phase.

SEBI came in 1992 to operate on par with growing market use and new instruments coming in place, and there was a need to protect the interests of the investors. The same is reflected in Section 11 of the Securities Exchange Board of India Act, 1992.[2] Additionally, the pillars of SEBI indicate that the primary objective of SEBI is to protect investors and develop the securities market.[3] However, in the digital era, where information is transmitted and processed at lightning speed, the financial

1. Securities and Exchange Board of India, 'Ex-Parte Interim Order Cum Show Cause Notice', WTM/KV/ISD/ISD-SEC-7/31103/2024-25, <https://www.sebi.gov.in/sebi_data/attachdocs/dec-2024/Front_Running_Order_Big_Client.pdf>.
2. Security and Exchange Board of India Act, 1992 (15 of 1992) s 11.
3. Security and Exchange Board of India Act, 1992 (15 of 1992) Preamble.

markets have become increasingly susceptible to various forms of misconduct, such as front running.[4]

In June 2024, SEBI launched an investigation into alleged front-running activities at Quant Mutual Fund,[5] involving search and seizure operations and questioning of Quant dealers and affiliates, with purported profits from these activities estimated at ₹20 crore. Quant mutual fund witnessed outstanding growth expanding its AUM from ₹100 crore in 2019 to over ₹93,000 crore in 2024, managing 27 funds worth over ₹84,000 crore.[6] Despite the expansion of the mutual fund, such allegations undermine investor confidence not just from selective mutual funds but from the market itself.[7] Such incidents illuminate fundamental deficiencies within the regulatory framework governing India's securities market.

In a span of one year, there have been two major instances involving front-running in India, and upon a perusal of the regulations available, it can be observed that there is a desperate need for a legal and regulatory infrastructure solely based on the prohibition of front-running practices in India. Front-running, which involves trading confidential information ahead of large orders to gain an unfair advantage, has evolved with the advent of technology.[8] The need to prevent front running has never been more pressing, as it undermines market integrity and investor trust.[9] For

4. Financial Markets Standard Board, 'Behaviour-Pattern Conduct Analysis: Market Misconduct through the Ages', (May 2022) <https://fmsb.com/wp-content/uploads/2022/05/22020525_BCA_Report_2022_FINAL.pdf> accessed 3 January 2025.
5. Nikhil Agarwal, 'Quant mutual fund front-running case: What is it and should investors be worried?', *The Economic Times,* <https://m.economictimes.com/mf/mf-news/quant-mutual-fund-front-running-case-what-is-it-and-should-investors-be-worried/articleshow/111223460.cms> accessed 19 Dec 2024.
6. ibid.
7. Sekhar, Metla Sudha and others, 'Quant Mutual Fund Front-Running Case: What Is It and Should Investors Be Worried?' *The Economic Times* <https://economictimes.indiatimes.com/mf/mf-news/quant-mutual-fund-front-running-case-what-is-it-and-should-investors-be-worried/articleshow/111223460.cms> accessed 19 Dec 2024.
8. Ruchita Sonawane, 'Front-running is unfair, undermines trust in markets', *The Economic Times*, <https://economictimes.indiatimes.com/markets/stocks/news/front-running-is-unfair-undermines-trust-in-markets/articleshow/116976465.cms?> accessed 03 Feb 2025.
9. Security Exchange Board of India, 'Consultation Paper on Institutional Mechanism for asset management companies for deterrence of possible market abuse and fraudulent transactions', <https://www.sebi.gov.in/reports-and-statistics/reports/may-2023/consultation-paper-on-institutional-mechanism-for-asset-management-companies-for-deterrence-of-possible-market-abuse-and-fraudulent-transactions_71440.html> accessed 19 Dec 2024).

example, if a trader knows that a mutual fund is about to buy a large number of shares in a company, they might quickly buy shares of that company beforehand, expecting the mutual fund's purchase to raise the share price. This unfair advantage allows the trader to make easy profits, breaking market rules and harming trust among investors.

The aim of this piece is to critically examine front-running within the Indian financial market, assess SEBI's approach, address the gaps and inconsistencies in the current regulatory framework and propose a comprehensive framework to address these gaps. The researchers aim to provide a utilitarian framework which will aim at curbing market abuses such as front-running without changing the current regulatory framework substantially.

Firstly, The paper deals with understanding the contours and implications of front running; *secondly*, it analyses the measures taken by SEBI for investor protection; *thirdly*, the research transitions into the study of global practices in India's context and suggests structurally novel reforms and lastly, it critically appraises the comparative framework by assessing the cost and benefits of the proposed reforms whilst concluding with a special emphasis on the need for structural regulatory reforms.

II. UNDERSTANDING 'FRONT RUNNING'

Front-running, also known as forward-trading or tailgating involves a series of transactions amongst brokers or fund managers who trade based on non-public and privileged information about their clients' impending large orders.[10] These financial intermediaries use insider knowledge to execute trades before fulfilling their clients' orders, thereby profiting from the anticipated price movements that their clients' trades will cause.[11]

The Securities and Exchange Board of India's (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003[12] prohibit

10. Cory Mitchel, 'Front-Running Definition, Example, and Legality' (*Investopedia*, 16 Sept 2024) <https://www.investopedia.com/terms/f/frontrunning.asp> accessed 19 Aug 2024.
11. Rajath Sethi, Abhishek Singh, 'Decoding front running trades', (*S&R Associates*, 2024), <https://www.snrlaw.in/decoding-front-running-trades/> accessed 19 Dec 2024.
12. Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003 (amended on 25 Jan 2022) <https://www.SEBI.gov.in/legal/regulations/jan-2022/securities-and-exchange-board-of-india-prohibition-of-fraudulent-and-unfair-trade-practices-relating-to-securities-mar-

fraudulent, manipulative, and unfair trade practices in the securities market. Presently, Section 4(2)(q) of these regulations, classifies front-running as a fraudulent and unfair practice:

> "*Dealing in securities shall be deemed to be manipulative, fraudulent or an unfair trade practice… if it involves any order in securities placed by a person, while directly or indirectly in possession of information that is not publicly available, regarding a substantial impending transaction in those securities, its underlying securities or its derivative*;"[13]

Investors expect fiduciaries (advisors, brokers, etc.) to act in their best interests, however, when such brokers engage in front-running, they breach this fiduciary duty. Such breaches, also compromise the integrity of the market by exploiting confidential information resulting in price distortions and unexpected volatility.[14] This practice further triggers price movements that are not based on genuine supply and demand but on confidential information, which fundamentally disrupts the role of price discovery or information asymmetry in financial markets.[15] Brokers have a fiduciary obligation to act in the best interests of their clients, ensuring transparency, fairness, and integrity in their dealings. Such fiduciaries are entrusted to ensure that their recommendations align with the investor's financial objectives, risk tolerance, and investment profile and most importantly, they are required to maintain confidentiality and avoid fraudulent practices.

On the other hand, front-running occurs based on pending or anticipated orders which have the potential to fluctuate market prices. It typically occurs when a broker or trader use their position or advanced knowledge to prioritise their own trades ahead of those of their clients or the general public. The difference between insider trading and front-running lies in the "*source and use of information*." Insider trading exploits non-public information directly related to the company's internal operations and prospects, while front-running relies on knowledge of

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ket-regulations-2003-last-amended-on-january-25-2022-_55604.html> accessed 23 Dec 2025.

13. Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, S.O.816(E), s 4(2)(q).
14. n 8.
15. Deepali Aggarwal & Zarnash Khan, *The Spoofing Puzzle: Deciphering Market Manipulation* (2024) (unpublished Master's thesis, Stockholm Business School), <https://su.diva-portal.org/smash/get/diva2:1875413/FULLTEXT01.pdf> accessed 20 Dec 2024.

clients'pending large orders. Both practices are illegal because they create unequal opportunities in the market and, therefore, create information asymmetry.[16]

III. SEBI'S MEASURES FOR INVESTOR PROTECTION

SEBI has recognised common patterns of front-running trades, which squarely involve a BBS pattern (buy by the front-runner, buy by the client, and subsequent sell by the front-runner) or an SSB pattern (sell by the front-runner, sell by the client, and subsequent buy by the front-runner).[17] SEBI has also identified other patterns, such as a BSB pattern (buy by the front-runner, sell by the front-runner, and then buy by the client), expanding the traditional understanding of front-running.[18] The watchdog has also acknowledged that front-runners might place orders at any time before the last or substantial tranche of the client's order which exploits the incremental nature of orders of the client.[19]

However, the Ketan Parekh front running case has revealed another interesting pattern of trading wherein Front Runners (FRs) have modified the usual modus operandi of front running and, thus, have adopted a novel approach to benefit from the Non-Public information (NPI) with respect to substantial impending transaction of the Big Client. After the traditional BBS and SSB trading strategy, the prices in a scrip generally retrace to normal levels after the big trades get executed. A person equipped with the knowledge of the impending big order and knowing how the prices in the scrip behave post such big trades can undertake the Non-Public Information -based trades by matching quantities with Big Client and also by taking positions in larger quantities than the position of Big Client and then squaring off their excess position when the prices

16. Anshul June, 'What is front-running and how it differs from insider trading - CNBC TV18 CNBCTV18' (2024), <https://www.cnbctv18.com/personal-finance/quant-mutual-fund-allegations-what-is-front-running-SEBI-probe-investors-impact-insider-trading-19432642.htm#:~:text=Front%2Drunning%20versus%20insider%20trading&text=Insider%20trading%20typically%20involves%20company,of%20their%20clients'%20pending%20trades> accessed 30 Dec 2024.
17. Member Service Department, National Stock Exchange of India Limited Circular, (Nseindia NSE/MSD/61893), <https://nsearchives.nseindia.com/content/circulars/MSD61893.pdf> accessed 19 Dec 2024.
18. n 8.
19. n 8.

in the scrip retrace to normal levels.[20] In both instances, FRs can make huge profits in a short span of time. Therefore, the aforesaid approach was understood as Buy-Buy-Sell-Buy (BBSB) or Sell Sell-Buy-Sell (SSBS) or Sell-Buy-Sell (SBS) or Buy-Sell-Buy (BSB).

Similarly, the front runners have evolved their strategies to change the traditional norms of executing the trade and thus it becomes imperative for regulatory authorities to change their traditional approach to address such market abuses. In response, SEBI has implemented proactive measures to ensure transparency and accountability in the financial markets. Enhanced surveillance through technology enables real-time monitoring of trading activities, helping to identify and prevent suspicious transactions.[21]. The way, SEBI has escalated the enforcement processes is worth appreciating and the effective action against such detected misconduct also ensures that the contraventions are addressed promptly and appropriately.[22]

However, such proactive measures remain ineffective in curbing such market abuses *in toto*. Despite the swift action, the ever-evolving nature of market manipulation presents a substantial hurdle for the regulatory watchdog. A crucial problem is that front-runners are often caught only after their trades have been executed, making enforcement largely reactive rather than preventive. Distinctly, there are a plethora of challenges we must address before making an attempt to catch such market abuses.

IV. LACUNAE IN THE CURRENT REGULATORY APPROACH

One of the fundamental challenges lies in the complexity of the detection of such operations. Market manipulators continuously evolve their tactics to evade detection and those engaged in front-running and insider trading further innovate new methods to bypass surveillance through collusion among multiple parties or by using offshore accounts. This constant evolution makes it difficult for regulatory systems to keep pace.

20. n 1.
21. Security Exchange Board of India, 'Consultation Paper on Institutional Mechanism for asset management companies for deterrence of possible market abuse and fraudulent transactions', <https://www.SEBI.gov.in/reports-and-statistics/reports/may-2023/consultation-paper-on-institutional-mechanism-for-asset-management-companies-for-deterrence-of-possible-market-abuse-and-fraudulent-transactions_71440.html> accessed 19 Aug 2024).
22. ibid.

Additionally, the sheer volume of transactions and the complexity of financial markets result in a very high rate of false positives and false negatives.[23] Innocent activities could be flagged as 'suspicious,' while manipulative ones can go undetected. This essentially implies that even with advanced systems, not all the illicit activities are caught in time. Human factors also play a significant portion in such issues wherein the employees (within financial institutions or those with access to non-public information) can still engage in front-running or insider trading by exploiting their knowledge and timing. The SEBI regulations on rumour verification raises concerns about their practicality and the burden they place on listed entities.[24] The amendments to the *Listing Obligations and Disclosure Requirements (LODR) Regulations*, particularly *Regulation 30(11)*, aim at providing an objective framework for rumour verification through mechanisms like the Material Price Movement (MPM) framework and the Unaffected Price framework.[25] However, the short response window of 24 hours and the stringent disclosure obligations risks the dissemination of confidential or sensitive business information and this could lead to a situation where the competitive advantages and market stability end up being undermined. Additionally, the overlap with the principles of Unpublished Price Sensitive Information (UPSI) under the SEBI (Prohibition of Insider Trading) Regulations, 2015 would further complicate the compliance for companies operating in the securities market. The unintended consequences of these regulations include the potential misuse of the rumour verification framework by competitors and the fragility of the Indian securities market.

What is essentially missing is a preemptive regulatory strategy that identifies and intercepts front running activities before they occur. Developing such an approach would require a substantial shift from the

23. Halima Oluwabunmi Bello et al., *Implementing Machine Learning Algorithms to Detect and Prevent Financial Fraud in Real-Time*, (5 Computer Sci. & IT Research J. 1539, 2024), https://doi.org/10.51594/csitrj.v5i7.1274 accessed 20 Dec 2024.
24. R Roychowdhury, A Shah and P Muchhala, 'India's Securities Regulator Revisits Market Rumour Verification Regime for Listed Companies' (*The National Law Review*, 29 January 2024) https://natlawreview.com/article/indias-securities-regulator-revisits-market-rumour-verification-regime-listed accessed 3 February 2025.
25. Cyril Amarchand Mangaldas, 'SEBI's Amendments to the Rumour Verification Framework –No Smoke without a Fire?' (23 May 2024) https://www.cyrilshroff.com/wp-content/uploads/2024/05/Client-Alert-Rumour-Verification-Amendment.pdf accessed 3 February 2025.

post trade detection to real time surveillance and analytics, which would ensure that the market abuses are curbed at the inception rather than merely penalized after the act.

V. SUGGESTED REFORMS

Front-running is one of the major challenges faced by SEBI, and it has the potential to largely undermine market confidence. With the growth of financial services in the country there is an urgent need to make robust regulatory reforms to avoid such practices. This paper proposes several suggestions which can be incorporated by SEBI in order to reduce the instances of such market abuse. The suggestions are drawn from International Best Practices in a way that they can be incorporated into Indian Securities Market without making any significant change in Indian Securities Regulatory Landscape.

A. Establishing a Market Abuse Detection Authority

Currently, the Serious Fraud Investigation Office (SFIO) is the prominent fraud detection authority to detect and investigate serious corporate frauds in India.[26] However, SFIO faces many challenges in its operations, which diminish its ability to detect fraud in the market. One of the biggest challenges it faces is taking up fraud, which has high inter-departmental repercussions. Significant involvement of public interest and investigation leads to a clear improvement in systems, laws, and procedures.[27] This often renders front running outside the scope of SFIO and leaves India in the need for a robust detection authority to detect these market abuses.

This research proposes to establish a specialised *Market Abuse Detection Authority (Referred to as 'MADA')* under the oversight of SEBI. The authority must focus on detecting and reporting potential market abuses through advanced analysis of trading patterns, volumes, and participant behaviour.

26. The Detection Of Market Abuse On Financial..., https://www.consob.it/documents/1912911/2006254/qdf54en.pdf/d31b160c-9ba5-e08d-d39d-a78bddfc698e accessed 19 Aug 2024.
27. Tabrez Ahmad, *Role of Serious Fraud Investigation Office (SFIO) in protection of Investor's interest: An overview* (January 2014 Vol. 1, (Issue III) <https://www.researchgate.net/publication/273189171_Role_of_Serious_Fraud_Investigation_Office_SFIO_in_Protection_of_Investor%27s_Interest_An_Overview> accessed 11 January 2025.

B. Proposed Structure of MADA

1. *Focused Mandate*

MADA's primary role will be to identify and report suspicious activities in the market. Unlike SEBI, which has a broader enforcement mandate, MADA will concentrate solely on surveillance and detection of market abuse, serving as a specialised arm that enhances SEBI's capacity to maintain market integrity. Furthermore, MADA will employ advanced analytical tool in order to scrutinise transaction prices, traded volumes, and trader identities. The analysis must constitute- (i) Price Analysis;[28] (ii) Volume Analysis;[29] and (iii) Market Concentration.[30]

2. *Tripwire Mechanism*

MADA shall develop a set of dynamic thresholds or "tripwires" based on the financial variables mentioned above. These tripwires will trigger alerts if suspicious activities occur in the market. The system will be calibrated using historical data to ensure its accuracy and effectiveness in identifying potential abuses. "*The Detection of Market Abuse on Financial Markets: A Quantitative Approach*" further provide a detailed framework regarding the dynamic thresholds to be provided in these detection systems.[31]

3. *Machine Learning and Regtech Integration*

MADA can further employ machine learning models and advanced RegTech solutions to enhance its detection capabilities. These technologies will enable the authority to:[32] firstly, identify Temporal Discontinuities,[33]

28. Glosten, L., Milgrom, P. *Bid, Ask and Transaction Prices in a Specialist Market with Heterogeneously Informed Traders* (Journal of Financial Economics, 14, 1985), pp.71-100.
29. Shalen, C. *Volume, volatility, and the dispersion of beliefs*, (Review of Financial Studies, 6, 1993), pp. 405-34.
30. The detection of market abuse on financial, <https://www.consob.it/documents/1912911/2006254/qdf54en.pdf/d31b160c-9ba5-e08d-d39d-a78bddfc698e> accessed Aug 19 2024.
31. ibid.
32. Lucy Thompson, Machine Learning In Market Abuse Detection UCL Parnassus Blog Machine Learning In Market Abuse Detection Comments, <https://blogs.ucl.ac.uk/parnassus/2022/12/12/machine-learning-in-market-abuse-detection/> accessed 19 Aug 2024.
33. Download Media Success, Risk.net, <https://www.risk.net/media/download/1087468> accessed 19 Aug 2024.

then monitor group behaviour and assess Discontinuities with Ordinary behaviour.[34]

4. *Surveillance and Data Collection*

The authority will continuously collect and analyse data from various sources, including market transactions, communications, and public disclosures. This data will further provide a brief picture of market behaviour and will be instrumental during investigation.

5. *Reporting and Accountability*

Upon detecting suspicious activities, MADA will promptly report its findings to SEBI. SEBI will then decide on the necessary enforcement actions under Section 11 of SEBI act.[35]

C. New Real-Time Market Surveillance System

The primary responsibility lies on the AMCs and detection authorities to implement robust systems to deter such kind of misconducts in the market. The systems must be capable of transmitting millions of transactions in a matter of seconds in order to analyse trading patterns and detect any kind of irregularity in the market.[36] These tools must be automated in order to improve the efficiency in the market as well as for the regulators. Reference can be made to Poland and Brazil, which are already modernising their surveillance systems to include such sophisticated functionalities. Poland's Market Surveillance Application is being updated with new, sophisticated alerts to improve fraud detection,[37] while South Africa is upgrading its equities surveillance system to a more modern platform with enhanced capabilities.[38]

34. ibid.
35. Security and Exchange Board of India Act, 1992 (15 of 1992) s 11.
36. Security and Exchange Board of India, 'Consultation Paper on Institutional Mechanism for asset management companies for deterrence of possible market abuse and fraudulent transactions' <https://www.SEBI.gov.in/reports-and-statistics/reports/may-2023/consultation-paper-on-institutional-mechanism-for-asset-management-companies-for-deterrence-of-possible-market-abuse-and-fraudulent-transactions_71440.html> accessed 19 Aug 2024).
37. Domestic Operations Department Financial System Department, Financial Market in Poland, <https://nbp.pl/wp-content/uploads/2022/10/financial_market.pdf> accessed 19 Aug 2024).
38. Investec, Your Bank & Specialist Financial Partner - South Africa, <https://www.investec.com/en_za.html> accessed 19 Aug 2024.

Further, AMCs may fundamentally ensure customising the applications in accordance with their specific thresholds and parameters based on the back-testing of the historical data. It has been seen in several emerging markets that automated tools are capable of analysing markets effectively through abnormal price and volume movements, trading concentration, large open interest, and other parameters which can trigger alerts on breaching set thresholds.[39] Reference can be made to the Market Oversight Commission (MOC) of the Korea Stock Exchange (KRX), which has implemented a cross-market surveillance system in line with an automated surveillance system to monitor both futures and stock markets to detect unfair activities swiftly.[40] Its cross-market surveillance system, integrated with automated technologies, enables real-time monitoring of both futures and stock markets. This system enhances the detection of manipulative activities, insider trading, and other unfair practices, ensuring transparency and investor confidence.[41]

Additionally, AMCs need to process alerts related to potential misconduct by combining system-driven alerts with soft alerts, such as lifestyle checks and recorded communications (emails, chats, CCTV footage).[42] The investigation should thoroughly consider the trade patterns, communication records, related party transactions etc. AMCs must provide their full support and share all the relevant data with the investigating authority in the case of investigation.[43] The process should also include a Standard Operating Procedure (SOP) that categorises the actions as actionable or non-actionable to make things clearer. SEBI can adopt

39. Emerging Markets Committee of the International Organization of Securities Commissions, Approaches to market surveillance in emerging markets, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD313.pdf> accessed 19 Aug 2024.
40. n 35.
41. Lucy Thompson n 28.
42. Documents & Reports - All Documents, <http://documents1.worldbank.org/curated/en/205241468273597596/text/Korea-Republic-of-Detailed-assessement-of-observance-IOSCO-objectives-and-principles-of-securities-regulation.txt> accessed 19 Aug 2024.
43. Security Exchange Board of India, Consultation Paper on Institutional Mechanism for asset management companies for deterrence of possible market abuse and fraudulent transactions, <https://www.SEBI.gov.in/reports-and-statistics/reports/may-2023/consultation-paper-on-institutional-mechanism-for-asset-management-companies-for-deterrence-of-possible-market-abuse-and-fraudulent-transactions_71440.html> accessed 19 Aug 2024.

similar approach for standard operating procedure as it adopted for Monitoring and Recognition of default.[44]

Further, with globalised markets, inter-market surveillance has become a need of the hour in India in order to monitor cross-market activities in different jurisdictions or different markets in the same jurisdiction. This is particularly important in active derivatives markets, where cross-market surveillance should be conducted extensively. Reference can be made to Korea's KRX which uses a cross-market monitoring database to identify potential manipulative activities involving futures as well as the stock market.[45] Similarly, in Malaysia, the equity and derivatives surveillance units regularly investigate possible domestic inter-market abuses.[46] Reference can be made to the Intermarket Surveillance Group as well, which "*provide a global network for the sharing of information and the coordination of regulatory efforts among exchanges trading securities and other products to address potential intermarket manipulation and trading abuses*."[47]

Finally, the framework must incorporate best practices from other countries as well. The *IOSCO Technical Committee Report on Multi-Jurisdictional Information Sharing*,[48] for Market Oversight highlights the importance of sharing information among regulators to facilitate market oversight. This includes details of trader's information, transaction details, reports of market abuses etc. Implementing such a comprehensive real-time market surveillance system, combined with effective inter-mar-

44. Security Exchange Board of India, Guidelines for enhanced disclosures by credit rating agencies (CRAS), <https://www.SEBI.gov.in/legal/circulars/jun-2019/guidelines-for-enhanced-disclosures-by-credit-rating-agencies-cras-_43268.html> accessed 19 Aug 2024.
45. Republic of Korea: Financial System Stability Assessment and press release for the Republic of Korea, IMF (2020) <https://www.imf.org/en/Publications/CR/Issues/2020/04/20/Republic-of-Korea-Financial-System-Stability-Assessment-and-Press-Release-for-the-Republic-49350> accessed 19 Aug 2024);International Organization of Securities Commissions, *Approaches to Market Surveillance in Emerging Markets: Final Report* (December 2009) https://www.iosco.org/library/pubdocs/pdf/ioscopd313.pdf accessed 3 February 2025.
46. International Monetary Fund, *Republic of Korea: Financial System Stability Assessment*, Monetary and Capital Markets Department (2014, International Monetary Fund).
47. Abhilash, Intermarket Surveillance Group (ISG) - Definition & Meaning Financial Glossary (*Fisdom*, 3 March 2023) <https://www.fisdom.com/glossary/intermarket-surveillance-group-isg/#:~:text=Objectives%20of%20ISG&text=a)%20To%20monitor%20and%20identify,disciplinary%20action%20against%20offending%20parties> accessed 19 Aug 2024.
48. Multi-jurisdictional information sharing - Final report, <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD248.pdf> accessed 19 Aug 2024.

ket surveillance and information-sharing arrangements, will significantly enhance the ability to detect, deter, and address front-running and other market abuses in India.

D. Strict Disclosure Policies

Disclosure norms in India lack the robustness seen in global standards, leaving gaps in transparency and accountability, which can undermine investor trust and market fairness. Upon a wide perusal of the literature available on the standardized disclosure codes amongst nations, FINRA disclosures norms from the USA can be advised to be replicated in the Indian context. Financial Industry Regulatory Authority (FINRA)[49] is "*authorized by Congress to protect America's investors by making sure the broker-dealer industry operates fairly and honestly*".[50] These regulations will help in increasing transparency in the market and will boost investor confidence. While these codes may not function as a direct "plug-and-play" implementation of established norms, it is essential to adapt them to incorporate a distinctly Indian perspective.[51]

This research is further strengthened by integrating the underlying jurisprudence of these mechanisms into India's regulatory framework to establish structurally fit regulations and policies to steer clear of front-running practices. Upon mapping multifarious regulatory approaches across jurisdictions, the following emerge as the most suitable for India's complex regulatory landscape.

1. *Best Execution Policy*

Best execution essentially means to prioritize a broker's clients' interests when carrying out orders. This requirement obliges brokers to take all necessary steps to secure the most favourable terms for their clients,

49. *FINRA Rules, FINRA.org. (n.d.). A vibrant market is at its best when it works for* <https://www.finra.org/rules-guidance/rulebooks/finra-rules> accessed 20 Dec 2024.
50. On the front lines of investor protection, A vibrant market is at its best when it works for everyone, <https://www.finra.org/rules-guidance/enforcement/customer-cooperation#:~:text=FINRA%20is%20overseen%20by%20the,registered%20brokers%20in%20the%20U.S> accessed 19 Aug 2024).
51. A. Kumar, R. Shankar, and V.K. Dubey, 'Effectiveness and Efficiency of RFID Technology in Supply Chain Management: Strategic Values and Challenges' (2008) *Journal of Theoretical and Applied Electronic Commerce Research* 3(2) DOI:10.4067/S0718-18762008000100007 accessed 3 February 2025.

factoring in aspects like price, costs, speed, the likelihood of execution and settlement, order size, and other relevant considerations. Order routing transparency is crucial for maintaining market integrity and ensuring best execution[52]. This principle is key to building trust in financial markets, as it ensures brokers put their clients' interests ahead of their own or those of third parties.

For example, SEC Rule 606[53] requires brokers to publish quarterly reports that detail their order routing practices, including statistical information on how customer orders are handled. In the context of the Indian market being fertile to the susceptibility of such rule(s), such transparency would allow investors to evaluate whether their brokers are routing orders in a way that serves their best interests, rather than for the broker's own financial benefit.

2. *Trading Ahead of Customer Orders*

FINRA Rule 5320[54] explicitly forbid firms from executing trades for their own accounts at prices that would fulfil a customer's order unless they immediately fulfil the customer's order at the same or better price. This rule is meant to prevent conflicts of interest and ensure customers are treated fairly. It highlights the importance of prioritizing customer orders over proprietary trading, helping to maintain fairness in the market. By adopting similar regulations, other jurisdictions can improve market fairness and protect investors from unethical practices. Additionally, FINRA Rule 5270[55] addresses the front running issue by banning such behaviour and ensuring that firms cannot misuse confidential information about large trades that could significantly alter a security's market price.

The 188-page interim order[56] in the Ketan Parekh case delineates the "modus operandi" of the front running wherein the orders placed by

52. Financial Conduct Authority, *Best Execution and Payment for Order Flow* (Thematic Review TR14/13, July 2014) https://www.fca.org.uk/publication/thematic-reviews/tr14-13.pdf accessed 3 February 2025.
53. Securities and Exchange Commission, 'Rule 606' (US Code of Federal Regulations, 17 CFR § 242.606).
54. FINRA Rule 5320, *Prohibition Against Trading Ahead of Customer Orders* (FINRA, 2024) https://www.finra.org/rules-guidance/rulebooks/finra-rules/5320 accessed 3 February 2025.
55. FINRA Rule 5270, *Front Running of Block Transactions (*FINRA, 2012) https://www.finra.org/rules-guidance/rulebooks/finra-rules/5270 accessed 3 February 2025.
56. n 1.

the Big Client revealed the recurrent matching of the scrip, price, quantity, and timing of trades between the Big Client which would not have been possible unless FRs were in possession of NPI or NPI-based trading instructions relating to impending orders of the Big Client in various scrips. Hence, the matter was further investigated and it was observed that the Non-Public Information relating to impending orders of the Big Client was being passed from Rohit Salgaocar to Ketan Parekh who in turn used to communicate trading instructions based on such NPI to the six Front Runners for execution to gain undue profits.[57] Thus, this paves the way for the Indian regulatory authority to import such rules on the lines of FINRA and most importantly, lay a special consideration on establishing robust pre and post-trade disclosure norms.

E. Pre-Trade and Post-Trade Disclosures

As mentioned earlier, AMCs have the scope to undertake market abuse in several forms and in different ways. Inappropriate and unreliable disclosures remain as one of the reasons for such practices. Asset Management Companies should adopt a robust post-trade transparency framework similar to the requirements under Markets in Financial Instruments Directive II (MiFID)[58] and Markets in Financial Instruments Regulation (MiFIR)[59] to ensure market integrity and investor protection.

The following detailed disclosure norms are listed for two specific reasons. Firstly, the pre-trade disclosure norms are a novel addition to India's regulatory framework, primarily addressing the concern of front-running. This is crucial as the key issues involve pre-trade front-running and the subsequent non-disclosure of these trades by the front runners. The following recommendations outline how Asset management companies must align their pre- and post-trade disclosure practices with the MiFID framework:

57. ibid.
58. MIFID II: European Securities and Markets Authority, MiFID II, European Securities and Markets Authority, <https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook/mifid-ii> accessed 19 Aug 2024.
59. European Securities and Markets Authority, Mifir reporting (2024), <https://www.esma.europa.eu/data-reporting/mifir-reporting> accessed 19 Aug 2024.

1. *Pre-Trade*

Recommendation	**Description**	**Details to be Disclosed**
1. Pre-Trade Transparency for Large Orders	Disclose large orders that could significantly impact the market.	1) Anticipated Size 2) Nature of Trades (e.g., buying or selling securities)
2. Disclosure of Actionable Indications of Interest (IOIs)	Disclose actionable IOI that contain sufficient detail to initiate a trade.	1) Price (indicative or firm) 2) Volume 3) Direction (buy or sell)
3. Use of Request-for-Quote (RFQ) Systems	Ensure all quotes are published simultaneously once they are executable.	1) Full Spectrum of Quotes
4. Order Management and Volume Caps	Manage orders transparently, including order management facilities and reporting volumes under pre-trade waivers.	1) Volume of Trades Executed 2) Use of Order Management Facilities (e.g., iceberg orders)

The very emphasis is on the pre trade disclosure since active steps towards such pre trade disclosure norms would enhance transparency, increase market surveillance. Additionally, it would ensure simultaneous publication of quotes, enhancing data synchronization across platforms and most importantly, would facilitate automated compliance checks within order management systems and therefore ensure adherence to volume caps and pre-trade waivers by the Asset Management Companies.

2. *Post-Trade*

Recommendation	**Description**	Details to be Disclosed
1. Expansion of Scope to Include Equity-Like Instruments	Include post-trade disclosures for equity-like instruments in addition to equities.	**1**) Equity Instruments Equity-Like Instruments (e.g., depositary receipts, ETFs)
2. Real-Time Reporting	Disclose transaction details as close to real-time as technically possible, with a maximum delay of one minute.	**1**) Price **2**) Volume Time of Transaction

Recommendation	**Description**	Details to be Disclosed
3. Deferred Publication for Large Transactions	Implement deferred publication regime for large transactions, exceeding specified thresholds and authorised by competent authority.	**1**) Threshold for Deferred Publication Timing of Deferred Publication

Such post trade disclosures would enhance market stability by mitigating data congestion[60] and enhancing the efficiency of trading amongst the participants. Additionally, these norms are a novel addition to India's regulatory framework, and to ensure that they do not become redundant in nature or get entangles in the regulatory gridlock, the authors further propose usage of real time data and data analytics tools to ensure that such regulations remain dynamic in an equally dynamic environment of the market.

F. Use of Data Analytics

According to a SEBI circular dated August 5, these regulations focus on identifying and preventing such activities in securities managed by AMCs, with the responsibility for enforcement resting on top officials, including the CEO, managing director, and Chief Compliance Officer of the AMC.

To improve the regulatory oversight of front-running rules in India, a suggestive method that follows for SEBI is to use a data-driven approach as similar to the U.S. Securities and Exchange Commission (SEC) in its enforcement of insider trading laws. Despite the roping in of the big tech players (namely, Tata Consultancy Services (TCS), Wipro, Capgemini Technology Services India, Larsen & Toubro Infotech, and NEC Corporation India) by SEBI[61] to strengthen anti-front-running practices and breach detection in 2021, India has witnessed myriads of

60. Cory Mitchell, 'Market Congestion: What It Means, Causes, and Example' (*Investopedia*, 26 September 2024) https://www.investopedia.com/terms/c/congestion.asp accessed 3 February 2025.
61. Securities and Exchange Board of India, '*Guidelines for Data Analytics and Use of Data Analytics for Surveillance and Enforcement*,' (May 2019), <https://www.SEBI.gov.in/SEBI_data/tenderfiles/may-2019/1559105959099.pdf> accessed 30 Dec 2024.

front-running fiascos. Thus, the inadequate oversight, coupled with weak enforcement of regulations has led to these instances of veiled error.[62]

Economic modelling and its tools like market basket analysis, time series analysis, etc. can aid in assessing the pre and post trade patterns[63] to extrapolate activity patterns inconsistent with the average pattern data.[64] In a matter involving such a dynamic environment which is entirely based on the economics and its digital derivatives, the legislators cannot miss a chance to not address the non – regulatory or rather the technical aspect of the measures to protect front running practices.

Certain digital tools can come handy like K-means clustering and decision trees that can sort the trading patterns and find odd behaviours that would reflect front-running patterns.[65] Additionally, the regulators can also assess the need to incorporate Artificial Neural Networks (ANN) that can be trained to spot complex patterns in trading data, making them a strong tool in predicting and finding such activities.[66]

G. Internal Fraud Detection

Internal fraud, also known as worker fraud or insider fraud, is a big and growing problem for organizations around the world. According to the Association of Certified Fraud Examiners (ACFE), organizations lose an average of 5% of their yearly earnings to fraud, with a large part of that coming from insider schemes.[67] The problem gets worse during tough

62. Analytics India Magazine, '*SEBI Shortlists 5 Indian Firms for Data Analytics Key Projects and Ambitions*', (9 Aug 2023), <https://analyticsindiamag.com/ai-origins-evolution/SEBI-shortlists-5-indian-firms-for-data-analytics-key-projects-ambitions/>.
63. Sandeep Ghosh, '*Regulation and Market Reactions: Evidence from Planned Sales*', (SSRN, Aug 2024), <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4681661> accessed 19 Dec 2024.
64. A Sonam, 'Insider Trading and Market Manipulation', *Proceedings of the 13th International Conference on Financial Engineering* (2013) <https://poloclub.github.io/polochau/insider/asonam13_insider.pdf> accessed 29 Dec 2024.
65. CR A, 'Exploring Clustering Algorithms: Explanation and Use Cases' (*neptune.ai*, 9 August 2023) <https://neptune.ai/blog/clustering-algorithms> accessed 17 August 2024.
66. Parshv Chhajer, 'The Applications of Artificial Neural Networks, Support Vector Machines, and Long–Short Term Memory for Stock Market Prediction' (Decision Analytics Journal, 24 November 2021) <https://www.sciencedirect.com/science/article/pii/S2772662221000102> accessed 17 August 2024.
67. Examiners A of CF, 'ACFE Report Estimates Organizations Worldwide Lose 5% of Revenues to Fraud' (ACFE Press Release) <https://www.acfe.com/about-the-acfe/newsroom-for-media/press-releases/press-release-detail?s=ACFE-Estimates-Organizations-Lose-5-percent-to-Fraud> accessed 17 August 2024.

economic times, which can push even usually honest employees to commit fraud. Over the past few years, incidents of insider fraud have tripled, showing the limits of old ways of spotting and investigating these schemes.[68]

Internal fraud happens when employees use their access to a company's systems and knowledge dishonestly for personal gain. As fraud keeps changing, old ways of spotting it based on simple rules and separate pieces of data do not work anymore. To keep up with tricky fraud schemes, organizations need to use advanced tools that can look at the connections within large and varied data sets. One such tool is graph analytics, which represents a big step forward in fighting the front running fraud.[69]

This is essentially a malpractice that can harm mutual funds by forcing them to buy stocks at inflated prices or sell at lower prices and thereby, diminishing returns for investors and undermining the competitive integrity of market. Such situations are not a hit in a dark. Even though the damages caused by front-running scandals to mutual funds is significant, these funds recover over time. Such malign attempts of front running, for instance, HDFC Mutual Fund and Axis Mutual Fund, even though they managed to stabilize their performance within a few months owing to their stronger compliance measures, damaged the fundamental structure of the mutual fund. The figures from these cases reveal the significant financial gains made through illicit activities, as well as the strong response from regulatory bodies like SEBI, which has imposed fines, penalties, and bans on those involved.

H. Chinese Walls and Information Barriers

A Chinese wall is an internal information barrier designed to prevent the unauthorised sharing of confidential information between different departments or individuals within a company or firm. It acts as a virtual boundary to prevent conflicts of interest and ensure impartial

68. 'The Threat within: New Approaches to Internal Fraud Detection & Investigation' (*Linkurious*, 14 August 2024) <https://linkurious.com/blog/internal-fraud-detection-investigation/> accessed 17 August 2024.
69. Tahereh Pourhabibi et al., Fraud Detection: A Systematic Literature Review of Graph-Based Anomaly Detection Approaches, (133 Decision Support Sys. 113303, 2020) <https://doi.org/10.1016/j.dss.2020.113303> accessed 20 Dec 2024.

treatment.[70] During mergers and acquisitions, competitors sometimes exchange price-sensitive information and use "clean team agreements" to secure this data and prevent misuse. Information protected by these Chinese wall policies or clean team agreements can only be shared with individuals who have a legitimate need to know. A Clean Team Agreement (CTA) is a document that helps reduce antitrust risk when merging parties exchange sensitive information.

An incidental problem associated with front running is that the asymmetrical information[71] is meddled with, and the whole notion of an equal and fair financial market goes into vain.[72] To infuse a clean team principle in the mutual funds 'mechanism, we must structurally analyse the mutual funds, break them into tiers, and then imbue the suggested reforms. A typical mutual fund management is structured into 3 tiers in India. Namely, Sponsors, Trustees and AMCs. Asset Management Companies who are placed at the third tier of the structure should establish a baseline control room to oversee the flow of information, flag the information associated with unusual trading patterns[73].

In the second tier, trustees should operate independently from the fund sponsor and based on the Hong Kong Code, AMCs must maintain a clear physical boundary between their roles to safeguard the sensitive information within the mutual fund structure; fund sponsors should establish distinct communication channels for strategic decisions and daily operations handled by the AMC.[74]

Furthermore, the other participants to mutual fund must be made vary of the consequences of front running along with a pervasive sensitization of compliance and non-disclosure policies. The policies must outline

70. Itaú Unibanco Holding S.A., *Risk and Capital Management – Pillar 3 Report* (Dec. 31, 2022), <https://ww69.itau.com.br/fileserver/relatorios/PR66-eng.pdf> accessed 20 Dec 2024.
71. Kevin S. Haeberle, *Information Asymmetry and the Protection of Ordinary Investors*, Faculty Publications, Paper 1954 (2019) <https://scholarship.law.wm.edu/facpubs/1954> accessed 30 Dec 2024.
72. Jakub Demski & Florian Heider, *The Timing of Insider Trading: The Role of Discretion and Ambiguity*, 106 J. Corp. Fin. 101794 (2022) <https://www.sciencedirect.com/science/article/abs/pii/S0929119921000110> accessed 20 Dec 2024.
73. S.P. Kothari, *Short Selling, News, and Liquidity*, Carnegie Mellon University, <https://sulawesi.tepper.cmu.edu/pdf/13-snam-insider.pdf> accessed 20 Aug 2024.
74. David S. Huntington, *Recent Development in Insider Trading Enforcement: What You Need to Know* (13 Fordham J. Corp. & Fin. L. 465, 2008), <https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1169&context=jcfl> accessed 30 Dec 2024.

detailed SOPs for information management, including the rules for crossing information barriers ("Over the Wall" and "Above the Wall") and implementing physical and logical access controls. These controls would ensure that only authorized individuals can access sensitive information.

Such Chinese wall policies are in fact recognized as a classic best practice to curb the flow of insider information. International precedents illustrate what constitutes effective arrangements. For instance, the Australian Corporations Act, 2001,[75] and a prominent Australian precedent such as *Australian Securities and Investments Commission* v. *Citigroup Global Markets Australia Pty. Ltd.*,[76] emphasize the necessity of well-established Chinese Walls, supported by robust compliance programs, to prevent insider trading. Similarly, the UK case of *Prince Jefri Bolkiah* v. *KPMG* reinforced that Chinese Walls should be an integral part of the firm's structure rather than being created ad hoc.[77]

I. Need for Regulatory Reforms

The researchers suggest integrating a whistleblower policy which is like the Dodd-Frank Whistleblower Program[78] in the USA in a way that it could be implemented in Indian regulatory framework.[79] The whistleblowing framework must create a safe reporting requirement for market abuses such as front running.[80] Financial incentives such as a share from the penalty on the front runner will incentivize more people to come out

75. Trade Practices Amendment (Australian Consumer Law) Act 2010 (Cth), Australian Government, <https://www.legislation.gov.au/C2004A00818/2019-07-01> accessed 20 Aug 2024.
76. Kevin S. Haeberle, *Trading on Legislative Knowledge: The Rise of Political Intelligence and the Need for a More Comprehensive Regulation*, (5 Wm. & Mary Bus. L. Rev. 59, 2014), <https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1063&context=wmblr>.
77. Insider trading: Building Chinese walls in India, https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1075&context=nlsblr accessed 19 Aug 2024.
78. Final Rule: Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, *Securities and Exchange Commission* (May 25, 2011) https://www.sec.gov/rules/final/2011/34-64545.pdf accessed 20 Dec 2024; Proposed Rule Release No. 34-63237.
79. Whistleblower program, Dodd-Frank Act Rulemaking: Whistleblower Program, <https://www.sec.gov/spotlight/dodd-frank/whistleblower.shtml> accessed 19 Aug 2024.
80. Nishith Desai Associates, *Whistleblowing in India: Are We There Yet?*, White Collar and Investigations Practice, <https://www.nishithdesai.com/SectionCategory/33/White-Collar-and-Investigations-Practice/12/52/WhiteCollarandInvestigationsPractice/4426/1.html> accessed 20 Aug 2024.

to report such market misconduct.[81] Whistleblower complaints must contain detailed and independent information, and regulatory bodies will be required to act promptly on these reports, imposing appropriate sanctions if wrongdoing is confirmed.[82]

Transparency can be increased by requiring AMCs to disclose the network centrality measures of key insiders and providing detailed disclosures of insider trades, including size, frequency, and timing. Additionally, transparency regarding information flow and communication channels between insiders and their networks must be improved to incorporate stricter trading rules applicable to the insiders within the high network centrality.[83] An additional suggestion for SEBI is to form an anonymous Market Abuse reporting platform where anyone can file an anonymous complaint of market abuse with relevant proof and backing. This platform also must levy a reasonable charge for anonymous reporting to restrict abuse of such platform to put innocent people under scrutiny.[84]

All these measures seek to highlight the existing regulatory gaps in addressing front-running while also outlining the challenges SEBI currently faces, as well as potential future obstacles. They provide comprehensive policy recommendations with a strong focus on the technical aspects of front-running. Additionally, such measure emphasizes to enhance the disclosure and transparency through the introduction of reformed disclosure norms and a robust whistleblower policy which is specific to the regulatory environment of India.

VI. COST-BENEFIT ANALYSIS OF PROPOSED REFORMS

To assess and incorporate the reforms proposed in the piece, the researchers have assessed the costs associated with the inculcation of such reforms and put forward, that the benefits outweigh the costs associated with the

81. Front Running: Unveiling Market Manipulation and Regulatory Responses - Experts' Opinion, *Taxmann*, <https://www.taxmann.com/research/company-and-SEBI/top-story/105010000000024367/front-running-unveiling-market-manipulation-and-regulatory-responses-experts-opinion> accessed 20 Aug 2024.

82. *Best Practices for Protecting Whistleblowers and Preventing and Addressing Retaliation*, U.S. Dep't of Labor (Apr. 21, 2015) <https://www.whistleblowers.gov/sites/default/files/2016-11/WPAC_BPR_42115.pdf> accessed 19 Aug 2024.

83. Mansoor Afzali & Minna Martikainen, *Network centrality and value relevance of insider trading: Evidence from Europe*, (56 Financial Review 793–819, 2021).

84. Anonymous Reporting, *Integrity Line* (20 Aug 2024), <https://www.integrityline.com/expertise/blog/anonymous-reporting/>.

implementation of such procedures. The following cost-benefit analysis delves into the strategic advantages and financial implications of the proposed framework, shedding light on its potential to reshape the landscape of market integrity.[85]

Category	Costs	Benefits
Implementation Costs	Infrastructure (technology, compliance monitoring systems)	Enhanced market integrity through better control over front-running
	Training for law firms, financial institutions, and M&A teams on new rules	Increased investor confidence as markets become more transparent and secure
	Regular audits and reviews for compliance with Chinese Walls and clean teams	Global standardisation in line with MiFID and MiFIR, making India more attractive for foreign investment
Operational Costs	Extra work for firms in managing Chinese Walls, clean teams, and the Market Abuse Detection Authority (MADA).	Enhanced ability to spot and prevent market abuse before it escalates.
	Regular maintenance and upgrades of real-time market surveillance technology.	Reduced chances of costly legal battles, as firms will better understand their obligations.
Regulation Compliance Costs	Increase in costs due to new regulatory compliances	More foreign investment in India
	Costs of pre-trade and post-trade disclosures	More transparency
Legal Liabilities	Potential litigation from firms or individuals due to breaches of information barriers	Protection from litigation by implementing clear guidelines for information barriers and clean team usage

While the initial costs in technology, training, infrastructure, and administration may be high but it will provide long-term stability due to significant investor confidence and a more transparent market. By

85. Richard A. Posner, *Cost-benefit analysis: Definition, justification, and comment on conference papers*, (The Journal of Legal Studies 1153–1177, 2000).

preventing large-scale financial misconduct early, these systems save more than they cost in the long run.[86]Stronger regulations will attract more foreign investors in India which will make the financial market even stronger.[87]

VII. CONCLUSION

In the bustling marketplace of finance, trust is the most prized commodity, much like the essential currency in a grand bazaar. The recent probe of Ketan Parekh and the Quant Mutual Fund's front-running sheds light on a shadowy corner where regulatory scrutiny has not yet fully penetrated. The line between strategic acumen and a deceit is as thin as a tightrope walk where such missteps could send the entire market integrity to a record crash down. The aim of the paper is to construct a regulatory policy that withstands the waves of manipulation, addressing not just the immediate leaks but also reinforcing the entire structural integrity. As we continue to advocate for these standards, we strive for a market where every player runs the same race without an unfair advantage, where integrity marks the finish line, not a backdoor of an opportunist.

The piece advocates for reforms to address front-running activities, emphasizing the need for a robust legislative backing to achieve the goal of "*marking the starting line*." The intent is to establish a framework that ensures certainty in addressing pre-trade front-running. By doing so, the watchdog would catch front-runners early and safeguard the interests of investors which would in turn foster a more transparent and equitable trading environment. By incorporating such best practices, the disclosure norms suggested would address the specific needs of the Indian market, and would ensure that they are both pragmatic and impactful. This approach would facilitate a more nuanced and responsive regulatory environment that is better equipped to handle the complexities of the Indian financial system.

86. Dirk Broeders & Jermy Prenio, *Innovative Technology in Financial Supervision (Suptech) –The Experience of Early Users*, FSI Insights on Policy Implementation No. 9 (Fin. Stability Inst. July 2018).

87. Investing in India: Cross-Border Investment, *White & Case* (last visited Aug. 20, 2024), <https://www.whitecase.com/insight-our-thinking/investing-india-cross-border-investment> accessed 19 Aug 2024.

Global Policy Perspectives on the Draft Digital Competition Bill 2024: Insights from South Korea and the EU

—*Akshay Nasi and Aniruddha Kishore*[*]

ABSTRACT

India's digital economy, set to surpass $1 trillion by 2028, is driven by increased financial inclusion and affordable internet access. However, this rapid growth has exposed vulnerabilities to monopolistic practices by major technology firms. The current ex-post regulatory framework under the Competition Act of 2002 is insufficient to address these challenges, leading to the proposed Digital Competition Bill (DCB). This legislation introduces ex-ante measures to proactively regulate Systematically Significant Digital Enterprises (SSDEs) in Core Digital Services (CDS) prone to market concentration. This paper uses a doctrinal approach, analysing legislative texts, case studies, and global frameworks like the European Union's Digital Markets Act (DMA) and South Korea's Telecommunications Business Act (TBA). The DMA's focus on gatekeeper platforms highlights challenges in balancing innovation and market fairness, while South Korea's TBA, which targets monopolistic in-app payment practices, raises concerns over fairness and regulatory complexity. The study highlights key challenges with the DCB, such as overly broad SSDE designation criteria and rigid provisions that risk stifling innovation. Emerging sectors like e-commerce and fintech may face significant compliance burdens, while fragmented regulatory environments complicate adherence. The paper advocates a balanced framework tailored to India's unique economic landscape. Recommendations include harmonizing regulations through inter-ministerial collaboration, streamlining grievance mechanisms, addressing consent fatigue,

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and introducing flexible, pro-business exemptions. Additionally, balancing geopolitical considerations is critical to fostering innovation and maintaining global competitiveness. The DCB represents a pivotal step in regulating digital markets. Its success depends on avoiding overreach, promoting innovation, and ensuring fair competition. A nuanced approach informed by global best practices can position India as a leader in digital innovation while safeguarding market fairness and consumer welfare.

Keywords: Digital Competition Bill, Systematically Significant Digital Enterprises, Market Fairness, Global Regulatory Frameworks

I. INTRODUCTION

India's digital economy, driven by the government's innovative initiatives toward financial inclusion and expanded internet access, is flourishing due to affordable data tariffs and a large, youthful demographic. These elements make India an attractive hub for digital companies to expand and innovate, leveraging economies of scale. A report suggests that India's digital economy could exceed $1 trillion by 2028.[1]

Given this industry's rapid and disruptive nature, addressing antitrust issues has become imperative. The Competition Act of 2002, which is sector-agnostic, serves as the principal framework for regulating antitrust concerns in India. The Competition Commission of India ("CCI"), established under this act, investigates cases individually to assess the presence of anti-competitive practices and imposes penalties, when necessary, a process referred to as an ex-post framework. However, the question arises whether the existing framework is sufficient to address antitrust issues in digital markets, or whether there is a need for an ex-ante framework.[2]

1. Sudha Sekhar Metla, 'India to Become $1 TN Digital Economy by 2028' (*The Economic Times*, 20 October 2024) <https://economictimes.indiatimes.com/news/economy/indicators/india-to-become-1-tn-digital-economy-by-2028-enabled-by-internet-4g-5g-and-digitalisation/articleshow/113875328.cms?from=mdr> accessed 23 January 2025.
2. Mathur S, Dikshit D and Joshi R, "India: Navigating Digital Markets through the Proposed Ex-Ante Framework" (*Global Competition Review*, October 2 2024) <https://globalcompetitionreview.com/guide/digital-markets-guide/fourth-edition/article/india-navigating-digital-markets-through-the-proposed-ex-ante-framework> accessed 3 February, 2025.

Recognizing the significance of these issues, the Parliamentary Standing Committee on Finance extensively consulted with various industry stakeholders, business users, and consumer associations. This effort culminated in a report titled "Anti-Competitive Practices by Big Tech Companies" highlighting the structural differences between digital and traditional markets.[3] In digital markets, increasing returns to scale are primarily driven by the declining marginal costs associated with growth, which is largely attributable to network effects.[4] This phenomenon creates a powerful incentive for rapid expansion, often leading to markets that favour one or two dominant players, thereby resulting in monopolistic "winner-takes-all" outcomes. By contrast, traditional markets experience diminishing returns to scale once they reach optimal efficiency. Beyond this point, marginal costs begin to rise, leading to decreased returns and fostering a competitive balance that naturally discourages further scaling.

The "winner-takes-all"[5] dynamic in digital markets typically materializes within a 3 to 5-year window, after which the market tends to solidify around the dominant players. This consolidation stifles innovation and erects substantial barriers for new entrants. Consequently, the committee underscored the urgent need for proactive measures to prevent monopolization before it becomes deeply entrenched.

Furthermore, the committee identified ten anti-competitive practices employed by major technology companies, including:[6]

1. Anti-steering provisions restrict business users from directing customers to competing platforms offering similar services. A notable example is the Google App Store case,[7] where Google mandated the use of Google Pay for in-app and related purchases, thereby limiting app developers and consumers from exploring alternative payment options.

3. Standing Committee on Finance, *Anti-competitive practices by Big Tech Companies* (LS 2022-2023, 17).
4. ibid.
5. Standing Committee on Finance, *Anti-competitive practices by Big Tech Companies* (LS 2022-2023, 17).
6. ibid.
7. *XYZ v Alphabet Inc.*, 2020 SCC OnLine CCI 41.

2. Platform Neutrality / Self -preferencing: Digital platforms who primarily serve as intermediaries between business users and end consumers. For instance, the Play Store connects app developers with end users. However, these platforms increasingly engage in self-preferencing, promoting their own products or services at the expense of other business users.[8] For example, the Play Store reportedly skewed search results to favour Google Pay.[9]
3. Bundling and Tying services: Digital platforms, beyond offering their core services, often mandate the purchase of related services, leveraging this competitive advantage to enter other markets and compel consumers to buy additional products or services offered by the platform.[10]
4. Data Usage: "Data is the new oil"[11] is a widely used metaphor in the digital economy. BigTech platforms leverage their vast data repositories for consumer profiling, enabling them to expand into new markets and entrench their dominance. Such monopolistic use of data enables the creation of monopolies, giving these platforms an unfair competitive edge over other business users when entering new markets.
5. Mergers & Acquisitions: "It is better to buy than to compete," remarked Mark Zuckerberg,[12] CEO of Facebook, which acquired Instagram and WhatsApp—assets that arguably add more value to the parent company than Facebook itself. This reflects the disruptive nature of the tech industry, where BigTech companies often prefer acquisitions over building from scratch. Such "killer

8. Standing Committee on Finance, *Anti-competitive practices by Big Tech Companies* (LS 2022-2023, 17).
9. *XYZ v Alphabet Inc.*, 2020 SCC OnLine CCI 41.
10. Payal Malik, 'Competition Issues in Digital Markets' (*IPCIDE Policy Brief No 5, ICRIER*, January 2022) <https://icrier.org/pdf/IPCIDE-Policy_Brief_5.pdf> accessed 3 February 2025.
11. LaRock T, '"Data Is the New Oil," but That Also Means It Can Be Risky' (*Database Trends and Applications*, 6 October 2022) <https://www.dbta.com/Columns/Next-Gen-Data-Management/Data-is-the-New-Oil-But-That-Also-Means-it-Can-be-Risky-155275.aspx> accessed 23 January 2025.
12. Diwakar A, 'Zuckerberg: "It's Better to Buy than Compete". Is Facebook a Monopoly?' (*TRT World - Breaking News, Live Coverage, Opinions and Videos*, 10 December 2020) <https://www.trtworld.com/magazine/zuckerberg-its-better-to-buy-than-compete-is-facebook-a-monopoly-42243#:~:text=In%20one%202008%20email%20highlighted,-first%20place%20%E2%80%93%20and%20that's%20true.> accessed 23 January 2025.

acquisitions"[13] frequently bypass the CCI's scrutiny, as current regulations are based on assets and turnover thresholds.

6. Pricing and Deep Discounting: This anti-competitive practice is frequently observed in e-commerce platforms. Initially, these platforms often announce misleading sales by artificially inflating prices before the sales event. During the actual sale, they significantly reduce these prices, leaving sellers with little control over the final price of their products.[14] Additionally, a favouritism issue arises when platforms like Flipkart and Amazon choose to share the discount costs with their preferred sellers. This practice puts non-preferred sellers at a significant disadvantage.[15]
7. Exclusive tie-ups: This practice is commonly observed on e-commerce platforms, where they enter into exclusive arrangements with sellers, ensuring that the products or services are available solely on their platform.
8. Search and Ranking Preferencing: Search results on digital platforms should remain unbiased. However, when certain business users are prioritized and consistently appear at the top of search lists, it creates a clear bias. This practice places other users at a significant competitive disadvantage.
9. Restricting Third-Party Applications: Digital platforms often impose restrictions on third-party applications that provide similar services to consumers. This practice limits competition and consumer choice, allowing platforms to maintain control and dominance in the market.
10. Advertising Policies: Digital platforms leverage consumer data using "*artificial intelligence and machine learning to deliver cost-effective advertising*".[16] Giving them an unfair advantage over

13. 'Combinations and Competition: Why the Draft DCB Must Account for Digital Mergers and Acquisitions' (*Centre for Internet & Society*, 5 August 2024) <https://cis-india.org/raw/combinations-and-competion> accessed 23 January 2025.
14. Nadar Satarwala Chopra, 'Does India Require Ex-Ante Competition Regulation in Digital Markets?' (*Shardul Amarchand Mangaldas & Co*, 19 May 2023) <https://www.amsshardul.com/insight/does-india-require-ex-ante-competition-regulation-in-digital-markets/> accessed 23 January 2025.
15. Standing Committee on Finance, *Anti-competitive practices by Big Tech Companies* (LS 2022-2023, 17).
16. Standing Committee on Finance, *Anti-competitive practices by Big Tech Companies* (LS 2022-2023, 17).

competitors while raising concerns about data privacy and market dominance.

The Parliamentary Standing Committee observed, "*In India, as in many other countries, the prevailing Competition Acts are ex post which means that they are designed to penalise anticompetitive behaviour only after it has already occurred. Unfortunately, given the pace at which digital markets move, such ex-post measures may be too delayed to prevent irreparable harm to affected parties and as a result, ex post monetary penalties are unlikely to be fully effective in dealing with the issue.*"[17]

The committee underscored the importance of ex-ante measures to regulate digital platforms and proposed a specialized legislative framework. It advocated for identifying "winners" or "gatekeepers" based on metrics such as turnover, market capitalization, and active users, labelling them as Systemically Important Digital Intermediaries (SIDIs). These entities would then be subject to pre-emptive ex-ante provisions to ensure adherence to fair practices.

Following this, the Ministry of Corporate Affairs established a Committee on the Digital Competition Bill to evaluate the need for ex-ante provisions through standalone legislation and to analyse international best practices.[18]

The committee's findings highlighted that the rapid evolution of digital markets often makes the ex-post framework of the Competition Act inadequate. The time required to investigate and address alleged anti-competitive practices under this framework is often too slow to prevent harm, while the Act's sector-agnostic nature further reduces its effectiveness.[19] As a result, the committee recommended a new ex-ante legislative framework to proactively address the unique challenges of digital markets.

The proposed draft bill introduced the concept of identifying "core digital services" that are particularly vulnerable to anti-competitive behaviour, restricting the application of ex-ante provisions to these areas.

17. ibid.
18. Committee on Digital Competition Law, *Report of the Committee on Digital Competition Law* <https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf> accessed 24 January 2025.
19. Centre for Democratic and Constitutional Law, *Report on Parliamentary Developments* (PRS India, 12 March 2024) https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf accessed 3 February 2025.

Additionally, it defined Systematically Significant Digital Enterprises ("SSDEs") based on specific qualitative and quantitative thresholds. These SSDEs would be required to comply with all regulatory provisions, with non-compliance resulting in penalties to ensure accountability and fair competition. The following section examines several shortcomings of the proposed bill, highlighting areas that require further refinement to effectively address the challenges of digital markets.

II. CHALLENGES WITH EX-ANTE REFORMS IN INDIA

A. Unnecessary Reform

Ex-ante regulation is often justified as a response to market failures, but India's current digital economy presents a more nuanced picture. According to a report, India is among the top 10 global leaders in key strategic industries, particularly high-tech ones.[20] While India's $90 billion IT and Information Services industry may not expand as fast as the broader economy, its digital markets continue to play a vital role. India's startup landscape, the third largest globally, boasts over 68,000 startups across diverse sectors, including IT services, healthcare, and DeepTech, and continues to attract significant venture capital despite global economic headwinds. This dynamism reflects a competitive and innovative digital market rather than one plagued by failures.[21] DCA and DMA do not necessarily come under competition law because these laws are made with the object of aiding other small companies while punishing the large ones rather than helping consumers.[22]

One concern with the proposed ex-ante reforms is that they may stifle the very market forces driving India's digital economy. For instance, while network effects and economies of scale can concentrate market power, these features often result in consumer benefits. Many digital markets, contrary to the perception of "winner-take-all" dynamics,

20. Robert D Atkinson and Ian Tufts, 'The Hamilton Index, 2023: China Is Running Away with Strategic Industries' (*ITIF*, December 2023) <https://itif.org/publications/2023/12/13/2023-hamilton-index/> accessed 22 January 2025.
21. Inc42 Media, 'The State of Indian Startup Ecosystem Report 2023' (2023) <https://inc42.com/reports/the-state-of-indian-startup-ecosystem-report-2023/> accessed 22 January 2025.
22. Adam Kovacevich, 'The Digital Markets Act's "Statler & Waldorf" Problem' (*Chamber of Progress, Medium*, 7 March 2024) <https://medium.com/chamber-of-progress/the-digital-markets-acts-statler-waldorf-problem-2c9b6786bb55> accessed 22 January 2025.

enable consumers to engage in multihoming, using multiple platforms to meet their needs. This increases competition and challenges the assumption that market concentration is inherently harmful.[23]

Even if market failures are identified, the proposed ex-ante measures, such as bans on self-preferencing, cross-use of data, and refusal to deal, could dampen competition and innovation.[24] These practices, often labelled anti-competitive, can have legitimate, pro-competitive benefits by enabling product improvements and incremental innovations that enhance consumer welfare. The report fails to provide evidence that the benefits of ex-ante regulations will outweigh the potential harms, including increased compliance costs and false positives.

Another limitation of the proposed reforms lies in their potential overlap with existing ex-post enforcement mechanisms. While the report emphasizes the complementary nature of ex-ante and ex-post enforcement,[25] this does not necessarily prove that introducing an ex-ante regime will improve consumer welfare. Ex-post investigations would likely continue alongside ex-ante measures, negating claims of reduced administrative costs. Additionally, the regulatory burden of ex-ante provisions, including non-compliance inquiries, extensive fact-finding, and adversarial proceedings, could increase administrative complexity rather than alleviate it.

The proposed company-specific conduct rules, inspired by the UK's Digital Markets, Competition, and Consumers Bill,[26] also present challenges. Tailoring rules to individual companies may lead to regulatory capture, raising concerns about bias and preferential treatment for established players at the expense of new entrants.[27] This approach risks

23. Herbert Hovenkamp, 'Antitrust and Platform Monopoly' (2021) 130 Yale LJ 1, 14.
24. Coniglio J and Kiss L, "Comments to the Indian Ministry of Corporate Affairs Regarding Digital Competition Law" (*Information technology and innovation foundation*, May 15, 2024) <https://itif.org/publications/2024/05/15/comments-to-the-indian-ministry-of-corporate-affairs-regarding-digital-competition-law/> accessed 3 February, 2025.
25. Committee on Digital Competition Law, *Report of the Committee on Digital Competition Law* <https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf> accessed 24 January 2025.
26. Digital Markets, Competition, and Consumers Bill, 2023.
27. Robert D Atkinson, Joseph V Coniglio, and Lilla Nóra Kiss, 'Comments to the UK Parliament Regarding the Digital Markets, Competition, and Consumers Bill' (*ITIF*, 22 January 2024) <https://itif.org/publications/2024/01/22/comments-to-uk-parliament-regarding-digital-markets-competition-and-consumers-bill/> accessed 22 January 2025.

undermining the very principles of fair competition that the reforms seek to uphold.

Ultimately, while the reforms aim to address perceived market imbalances, they risk creating a system that increases administrative costs, stifles innovation, and fails to substantively improve market outcomes. A more balanced approach, incorporating lessons from India's thriving digital markets and global best practices, is essential to ensure that regulatory interventions do not hinder the growth and dynamism of India's digital economy.

B. Can Hamper Innovation

While the need for digital regulation in India is debated, the proposed Draft Digital Competition Bill ("DCB") raises several concerns, particularly regarding its potential to stifle innovation. Unlike the European Union's Digital Markets Act ("DMA")[28] and the UK's Digital Markets, Competition, and Consumers ("DMCC")[29] Bill, the DCB lacks a clear requirement for market power as a criterion for regulation. This omission could result in companies being targeted simply for their size, rather than for actual market failures or anti-competitive practices. Furthermore, the bill includes a three-year designation period for SSDEs, with automatic renewal and limited provisions for revoking designations. This approach fails to account for the constantly changing nature of digital markets, where dominance is often short-lived and can shift quickly due to ongoing innovation and transformation.[30]

The criteria for designating SSDEs are also overly broad and vague, with qualitative triggers granting the CCI wide discretionary powers. The inclusion of 15 factors, along with an open-ended "catch-all" provision, creates uncertainty for businesses that may not know whether they fall under the regulation's scope. Such ambiguity risks opening the door

28. Regulation (EU) 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) (2022) OJ L265/1.
29. ibid.
30. Joseph V. Coniglio, Lilla Nora Kiss, "*Comments to the Indian Ministry of Corporate Affairs Regarding Digital Competition Law*" (*Information Technology and Innovation Foundation*, 15 May 2024). <https://itif.org/publications/2024/05/15/comments-to-the-indian-ministry-of-corporate-affairs-regarding-digital-competition-law/> accessed 22 January 2024.

to regulatory capture and raises significant concerns about fairness and due process in enforcement.[31]

The DCB's reliance on blanket prohibitions, such as bans on self-preferencing and data usage, further threatens to hinder innovation. Self-preferencing, where a platform prioritizes its own products or services, is common in the digital economy and often enhances user experience by integrating services and improving platform efficiency. For example, Google's search defaults on Android devices enhance the quality of search results and promote competition with other operating systems like Apple's iOS.[32] A blanket ban on such practices fails to recognize the potential advantages they can bring to consumers and might deter companies from developing other innovations that similarly prioritize consumer interests.[33]

Similarly, the bill restricts SSDEs from utilizing non-public user data obtained through their platforms to compete with other businesses. While this is framed as preventing "data misappropriation," it ignores the fact that aggregated data usage is essential for reducing information asymmetries and understanding consumer preferences. Firms like Amazon use such data to offer more relevant products, a practice that benefits consumers and is common in both digital and traditional retail environments. Treating this as inherently anti-competitive undermines the importance of data-driven business practices that enhance market efficiency.

The proposed restrictions on third-party application access and anti-steering provisions add to these challenges. Prohibiting platforms from restricting access to third-party applications may seem pro-competitive but can undermine innovation by reducing incentives for platforms to invest in security and user experience. For instance, Apple's so-called

31. Dirk Auer, Geoffrey A. Manne, Viswanath Pingali, "Comments of the International Center for Law & Economics on the Report of the Committee on Digital Competition Law" (*International Center for Law and Economic,* 22 April, 2024).
32. Press Release, "Commission Fines Apple Over €1.8 Billion Over Abusive App Store Rules for Music Streaming Providers" (4 March 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_1161> accessed 22 January 2025.
33. Portuese A, ""Please, Help Yourself": Toward a Taxonomy of Self-Preferencing" (*Information technology and Innovation Foundation*, October 21, 2021) <https://itif.org/publications/2021/10/25/please-help-yourself-toward-taxonomy-self-preferencing/> accessed 3 February, 2025.

"anti-steering" policies, which limit developers from directing users to external websites for transactions, it aims to preserve the ecosystem's integrity by prioritizing user privacy and security. Restricting such practices could harm consumers by reducing trust and safety in the digital environment.

Finally, the bill's ban on tying and bundling practices—where platforms incentivize or require the use of additional products—fails to account for the pro-competitive benefits these practices often provide. Tying and bundling can enhance consumer value, prevent inefficiencies like free-riding, and create seamless product ecosystems that improve user experience. Overlooking these benefits risks discouraging technological integration and innovation in digital markets.

C. The Developing Market

Indian economy is not as developed as Europe's and South Korea's, hence, the implementation of a DMA-like regime in India could stifle domestic companies that are not yet mature enough to handle the increased compliance costs and regulatory burdens. Emerging digital markets in India, such as e-commerce and fintech, rely heavily on continuous investment and operational flexibility to scale and meet consumer demand.[34] Regulations requiring the government to set competitive benchmarks for nascent industries could create significant roadblocks for businesses and deter foreign investment at a time when India is viewed as an investment-friendly economy. This reform could even affect the job market unfavourably in a country where youth employment is reaching records.[35]

Ex-ante regulatory frameworks, like the DMA, impose restrictions on platforms without fully considering potential efficiencies or consumer benefits. Pre-emptive prohibitions discourage experimentation and innovation, which are vital for young and dynamic markets like India's.[36]

34. Dirk Auer, Geoffrey A. Manne, Viswanath Pingali, "Comments of the International Center for Law & Economics on the Report of the Committee on Digital Competition Law" (*International Center for Law and Economic,* 22 April, 2024).
35. Sharma M, "Youth Unemployment in India at 10.2%, Says Union Labour Minister" (*India Today*, November 26, 2024) <https://www.indiatoday.in/business/story/youth-unemployment-in-india-at-102-percent-says-union-labour-minister-shobha-karandlaje-2640498-2024-11-26> accessed January 22, 2025.
36. Radic L, "India Should Question Europe's Digital-Regulation Strategy" (*Truth on the Market*, April 12, 2024) <https://truthonthemarket.com/2024/04/12/india-should-

Instead of promoting competition, such measures could lead to a more restrictive environment that hampers technological progress and economic growth.

India's digital economy has benefited immensely from platforms that have built critical infrastructure during its growth stages. Companies such as Paytm, Zomato, and Ola Cabs, among others, have been instrumental in driving this transformation. Imposing a rigid regulatory structure risks stifling these companies, denying consumers essential benefits, and slowing down the deployment of critical infrastructure.

D. Unpredictable for Corporates

The coexistence of multiple regulations with overlapping or conflicting objectives creates significant challenges for businesses, especially in emerging sectors. This regulatory multiplicity leads to compliance uncertainty and a perception of over-regulation, countering policy objectives aimed at fostering growth and innovation. For businesses, especially start-ups, complying with different regulations for various functions increases costs and can act as a barrier to entry. Additionally, it risks enabling regulatory arbitrage, where entities adhere only to favourable regulations, potentially bypassing other important mandates. This inconsistency can lead to confusion among consumers and entities, resulting in contradictory interpretations during disputes.

These challenges are particularly pronounced in emerging technologies like Artificial Intelligence (AI), where risks vary depending on context. For example, a machine learning algorithm designed for credit scoring poses different challenges than one used for traffic prediction. While policymakers often depend on sector-specific expertise to tackle such issues, this can result in overlapping efforts and inefficiencies among regulators. While the Digital Competition Bill (DCB)[37] aims to examine innovations from a competition and consumer welfare perspective, other regulators may evaluate the same innovations through a sector-specific lens, further complicating compliance.[38]

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question-europes-digital-regulation-strategy/> accessed 3 February, 2025.

37. The Draft Digital Competition Bill, 2024.

38. "Research Report: Indian Policy Instruments and Objectives of the Proposed Digital Competition Act: Implications, Challenges, and Way Forward" (*The Dialogue*, February 2, 2024) <https://thedialogue.co/publication/research-report-indian-policy-instruments-

This disjointed regulatory system creates significant hurdles for businesses developing new technologies. Companies often have to seek approvals from multiple regulators under various frameworks, which increases costs and slows down the rollout of new products or services. Start-ups are especially impacted, as they face the added challenge of navigating complex and overlapping approval processes for cross-sector innovations.

III. REGULATING THE DIGITAL GIANTS: LESSONS FROM SOUTH KOREA AND THE EUROPEAN UNION

The regulation of digital markets has become a focal point for some governments worldwide as they seek to address concerns over monopolistic practices by dominant technology platforms. South Korea and the European Union (EU) have emerged as pioneers in this effort, introducing landmark legislation aimed at curbing the excessive market power of big tech companies.[39] South Korea's amendments to the Telecommunications Business Act,[40] made it the first country to outlaw monopoly practices in in-app payments, setting a precedent for protecting smaller businesses and consumers. Meanwhile, the EU's Digital Markets Act[41] (DMA) seeks to establish a fair and competitive digital ecosystem, categorizing major platforms as "gatekeepers" and imposing obligations to ensure contestability and transparency. These regulatory frameworks reflect the global shift toward rebalancing power in digital markets but also highlight the complexities and challenges of implementing such reforms. This section examines the approaches of South Korea and the EU, their potential impacts on innovation, and the lessons they offer for crafting effective digital competition policies.

A. South Korea

South Korea became the pioneering nation that banned big tech firms' monopoly on in-app purchases.[42]This decision was taken to protect

and-objectives-of-the-proposed-digital-competition-act-implications-challenges-and-way-forward/> accessed 22 January, 2025.

39. Anirudh Agrawal, "Anti-Google Law by South Korea" (*Study IQ*, 2021) <https://blog.studyiq.com/anti-google-law-by-south-korea-free-pdf/> accessed 22 January 2025.
40. Telecommunications Business Act, 1998.
41. Digital Markets Act, 2022.
42. Graison Dangor, "South Korea Becomes First Country to Ban Google and Apple Monopolies on App Store Payments" (*Forbes,* 31 August 2021) <https://www.forbes.com/

independent digital creators from these giants.[43] The main aim behind drafting this act was to stop Google from monopolizing in-app purchases.[44] These brands exploited users by forcing them to use their payment systems while trying to execute an in-app purchase.[45]

The South Korean National Assembly Legislation and Judiciary Committee approved the bill on 26 August 2021, which, if passed, would amend the Telecommunications Business Act.[46] The bill was passed by 180 parliamentarians voting in favour of it making SA the first country to make legislation against big firms. The Act empowers the state to ban these policies of these brands and to impose fines on them.[47] The Act also addresses potential discriminatory practices by prohibiting delays in the review process for mobile content submitted by providers using alternative payment platforms or systems. Such delays were previously utilized as a retaliatory tactic by app store operators against content providers who opted for payment methods other than those mandated by the platforms. The legislation also requires app marketplaces to provide clear and comprehensive refund and payment policies in their terms and conditions, promoting greater transparency. To protect the interests of content providers, oversight and investigation of marketplace operations are entrusted to the Korea Communications Commission ("KCC") and the Ministry of Science and Information and Communications Technologies ("ICT"). The Act imposes strict penalties, authorizing fines of up to 3% of the revenue earned by app stores in instances of non-compliance.[48]

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sites/graisondangor/2021/08/31/south-korea-becomes-first-country-to-ban-google-and-apple-monopolies-on-app-store-payments/?sh=2f963e592f4f accessed> 22 January 2025.

43. Arjun Rizvi, "South Korea Approves "Anti-Google Law", Aims to Curb Monopoly on Payment Systems' (*The Logical Indian*, 2021) <https://thelogicalindian.com/trending/south-korea-anti-google-law-30561> accessed 22 January 2025.
44. Reuters, "China Fines Alibaba Record $2.75bn for Anti-Monopoly Violations" (*Economic Times*, 2021) <https://economictimes.indiatimes.com/news/international/business/alibaba-fined-usd-2-8-billion-on-monopoly-charge-in-china/articleshow/81999154.cms?-from=mdr> accessed 22 January 2025.
45. Jagga S, "Anti-Google Law: An Analysis" (2023) Competition Commission of India Journal on Competition Law and Policy 97.
46. Emine Geris, "South Korea Passes Anti-Google Law" (*Jurist*, 1 September 2021) <https://www.jurist.org/news/2021/09/south-korea-passes-anti-google-law/> accessed 22 January 2025.
47. Jagga S, "Anti-Google Law: An Analysis" (2023) Competition Commission of India Journal on Competition Law and Policy 97.
48. Library of Congress, "South Korea: Amended Telecommunications Business Act Will Ban App Payment Monopolies" (16 September 2021) <https://www.loc.gov/item/global-

Experts have identified three major challenges with the bill. Firstly, it risks creating an uneven playing field within South Korea's digital ecosystem by excluding Chinese technology companies from its scope.[49] This exclusion could put U.S. and South Korean platforms at a disadvantage, limiting their ability to develop key value drivers like interoperable services, while Chinese companies continue to operate without similar restrictions. This imbalance could undermine competition and create security risks, as Chinese tech firms have faced global scrutiny over data practices and national security concerns. By failing to regulate Chinese companies, the bill could inadvertently weaken the competitive landscape and pose risks to data security within the country.[50]

Secondly, the bill could unintentionally raise costs for the very small and medium-sized enterprises ("SMEs") and consumers it seeks to protect. South Korea's competition policies are shaped by local dynamics, unlike Europe's approach, which focuses on regulating foreign tech giants. Many South Korean commentators, including Haeyoon Kim and Simon Lester, have noted that local regulations often stem from concerns that large domestic platforms treat users unfairly.[51] For example, Kim Nam-geun, a prominent supporter of the bill, has emphasized its goal of shielding small businesses and consumers from excessive fees. He has specifically highlighted the dominance of companies like Baedal Minjok (delivery services), Musinsa (fashion retail), and Yanolja (accommodation services), each holding over 50% market share in their respective sectors, these platforms dominate their industries. However, critics, such as the Korea Platform Seller Organization, contend that the proposed law could increase costs for SMEs that depend on these platforms for their growth and success.

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legal-monitor/2021-09-16/south-korea-amended-telecommunications-business-act-will-ban-app-payment-monopolies/> accessed 22 January 2025.

49. Kiss L, "Why South Korea Should Resist New Digital Platform Laws" (*Information technology and innovation foundation*, December 9, 2024) <https://itif.org/publications/2024/12/09/south-korea-should-resist-new-digital-platform-laws/> accessed 3 February, 2025.
50. Suominen K, "South Korea's New Digital Competition Bill: A Step Backward for Innovation and Investment" <https://www.csis.org/analysis/south-koreas-new-digital-competition-bill-step-backward-innovation-and-investment> accessed 22 January, 2025.
51. Suominen K, "South Korea's New Digital Competition Bill: A Step Backward for Innovation and Investment" (*Centre for Strategic & International Studies*, August 16, 2024) <https://www.csis.org/analysis/south-koreas-new-digital-competition-bill-step-backward-innovation-and-investment> accessed 3 February, 2025.

This concern mirrors criticisms of Europe's DMA, which has faced similar challenges in balancing competition regulation with practical business needs.

Third, the bill risks unintended consequences that could harm innovation and market efficiency. A comparable example comes from the DMA, which prohibits Google from self-preferencing. In response, Google redirected customers to third-party aggregators like Kayak after ceasing to aggregate travel and lodging info on its search page. While this policy benefits third-party platforms, it forces airlines and hotels to pay higher intermediation fees, a cost they previously avoided when working directly with Google.[52] South Korea's bill could lead to similar outcomes, with large platforms facing restrictions that inadvertently benefit intermediaries rather than businesses or consumers.[53] The Korean Venture Business Association has warned that such regulations might stifle investment in platform startups, reduce foreign direct investment, and discourage venture funding. Experts like Dr. Dae Sik Hong, have highlighted that the key point is the 'burden of proof' and if it is shifted from the government to the companies, it would be a major extra cost of doing business in South Korea.[54] Imposing restrictions on established platforms, the bill could unintentionally deter innovation and harm the broader digital economy.[55], These laws could unintentionally harm consumers by limiting their access to essential services and information. Large digital platforms are driven by intense competition to capture consumer attention, or "eyeballs," which encourages them to innovate and offer enhanced value. This competition results in platforms providing a variety of valuable services that consumers have come to rely on, such as search engines, review platforms, and social media.

Take Google as an example, which offers users comprehensive reviews and recommendations for local businesses. If regulatory measures

52. ibid.
53. Kiss LN, "Why South Korea Should Resist New Digital Platform Laws" (*Information Technology and Innovation Foundation | ITIF,* December 9, 2024) <https://itif.org/publications/2024/12/09/south-korea-should-resist-new-digital-platform-laws/> accessed 3 February, 2025.
54. Hong DS, "The View from Korea: A TOTM Q&A with Dae Sik Hong" (*Truth on the Market*, 11 December, 2024) <https://truthonthemarket.com/2024/12/11/the-view-from-korea-a-totm-qa-with-dae-sik-hong/> accessed 3 February, 2025.
55. ibid.

impose restrictions on these platforms or limit their capabilities, consumers might lose access to the wealth of information that helps them make informed decisions. Reducing the functionality or reach of these services could diminish consumer choice and convenience, leaving users without critical resources they depend on in their daily lives.[56]

The effects of this act are contended by big firms and people who support this law. The limitations imposed on app store operators like Apple and Google concerning content providers align with South Korea's Monopoly Regulation and Fair-Trade Act ("MRFTA"), which serves as the foundational legal framework for ensuring fair contracting practices. However, the updated Telecommunications Business Act ("TBA") introduces a specific provision: if an administrative penalty or corrective action is enforced under the TBA for violations of its updated provisions, app store operators cannot face additional administrative penalties or sanctions under the MRFTA for the same violation. Consequently, in cases of conflict between the TBA and MRFTA, the provisions of the TBA take precedence.[57] According to the tech giants, the newly introduced law is expected to have a notable effect on their revenue streams. Moreover, it is anticipated to serve as an influential example for other nations, encouraging them to adopt comparable legislation aimed at addressing and reducing the monopolistic practices of companies like Apple and Google.

B. European Union

Countries all around Europe such as Germany,[58] the UK,[59] and even the US,[60] are either drafting or implementing some policies that protect the users from these big tech giants. EU is no exception to this trend, in September 2022, the EU adopted the Regulation on contestable

56. Kiss LN, "Why South Korea Should Resist New Digital Platform Laws" *Information Technology and Innovation Foundation | ITIF* (9 December, 2024) <https://itif.org/publications/2024/12/09/south-korea-should-resist-new-digital-platform-laws/> accessed 22 January 2025.
57. Bostoen F, "Understanding the Digital Markets Act" (2023) SSRN Electronic Journal.
58. Gesetz zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen für ein fokussiertes, proaktives und digitales Wettbewerbsrecht 4.0 (GWB-Digitalisierungsgesetz), 18 January 2021.
59. Tom Smith, "Full Steam Ahead for the UK Digital Markets Unit" (*The Platform Law Blog*, 17 November 2022) <https://www.theplatformlawblog.com/2022/11/full-steam-ahead-for-the-uk-digital-markets-unit> accessed 22 January 2025.
60. American Choice and Innovation Online Act, 117th Congress (2021–2022).

and fair markets in the digital sector, commonly known as the Digital Markets Act.[61] The Digital Markets Act ("DMA") is a key component of the European Union's broader initiative to regulate different aspects of digital markets. It operates alongside other legislative measures like the Digital Services Act ("DSA"). While the DMA addresses competition and fairness in digital markets, the DSA focuses on ensuring that online platforms are held accountable for managing illegal and harmful content effectively. Together, these acts form a cohesive regulatory framework targeting various challenges the digital economy poses.[62] The Digital Markets Act[63] DMA builds on and extends several existing regulatory frameworks within the European Union. It surpasses the scope of the 2019 Platform-to-Business (P2B) Regulation, which primarily aimed to enhance transparency in the relationships between digital platforms and their business users. Additionally, the DMA aligns with the General Data Protection Regulation (GDPR) by addressing data protection concerns and even strengthening certain aspects[64]. Its objective of fostering contestability mirrors the pluralism promoted by the Audiovisual Media Services Directive. Furthermore, while not specifically designed for the digital economy, the Unfair Commercial Practices Directive shares a focus on fairness and includes a "blacklist" of prohibited practices, reflecting similar goals to those of the DMA.[65]

DMA categorizes the big tech firms as the 'Gatekeeper' and the criteria for being o gatekeeper is defined in the DMA[66] as;

> *"(a) it has a significant impact on the internal market: this is the case where it achieved an annual EU turnover above €7,5B in each of the last three financial years, or where its average market cap amounted to at least €75B in the last financial year, and it provides the same CPS in at least three Member States;*

61. Regulation (EU) 2022/1925 of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector [2022] OJ L265/1 (DMA).
62. EC, 'Digital Services Act: Commission Welcomes Political Agreement on Rules Ensuring a Safe and Accountable Online Environment' (Press release, 23 April 2022) IP/22/2545.
63. Bostoen F, "Understanding the Digital Markets Act" (2023) SSRN Electronic Journal.
64. Regulation (EU) 2016/679 of the European Parliament and of the Council on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data [2016] OJ L119/1 (GDPR).
65. Directive 2005/29/EC of the European Parliament and of the Council Concerning Unfair Business-to-Consumer Commercial Practices in the Internal Market [2005] OJ L149/22.
66. Digital Markets Act, 2022, s 1-3.

(b) the CPS it provides is an important gateway for business users to reach end-users: this is the case where in the last financial year, the CPS had at least 45M monthly active end-users established or located in the EU and at least 10,000 yearly active business users established in the EU;

(c) it enjoys an entrenched and durable position: this is the case where the thresholds of (b) were met in each of the last three financial years."

The major problem with this act is that the gatekeeper platforms are required to comply with its regulations. The Act mandates that providers of core platform services must develop and offer interfaces enabling business users to reach end users more efficiently and on improved terms.[67] For instance, app developers will be entitled to distribute their apps via alternative app stores, use different payment systems, direct users to purchase content online, and charge varying prices across different sales channels. Gatekeepers are obligated to provide the necessary application programming interfaces ("APIs") to facilitate these rights for business users.

Nevertheless, the DMA does not specify these APIs' exact nature or design. Instead, it requires that the provided interfaces be "effective," meaning they should enable business users to participate, compete, and innovate within the platform's ecosystem. Since creating such interfaces may not align with the gatekeeper's interests, input from business users and the European Commission is essential for assessing compliance with the law.[68] However, to date, there has been limited evidence of platforms collaborating with business users, offering interfaces for review, or business users providing feedback on the design of interfaces that would promote competition and entry.[69]

67. Martín Peitz and Heike Schweitzer, 'Competition Policy in the Digital Age: A Report on Key Challenges and Policy Options' (Bruegel Working Paper 02/2024, January 2024) <https://www.bruegel.org/system/files/2024-01/WP%2002%202024_0.pdf> accessed 3 February 2025.
68. European Commission, 'Proposal for a Regulation on Contestable and Fair Markets in the Digital Sector (Digital Markets Act)' COM (2020) 842 final, 15 December 2020 <https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2020/0842/COM_COM(2020)0842_EN.pdf> accessed 3 February 2025.
69. Bostoen F, "Understanding the Digital Markets Act" (2023) SSRN Electronic Journal.

This situation presents a dilemma akin to the classic "chicken and egg" scenario: Should the development of interfaces precede business user input, or should business user involvement come first to shape the interfaces? On one hand, effective interfaces could incentivize new business users to enter and invest in innovative services. On the other hand, business user participation is crucial to ensure the development of interfaces that genuinely meet their needs. Achieving a balance between these interdependent factors will be essential for successfully implementing the DMA.[70]

IV. POLICY RECOMMENDATIONS

A. Harmonization

The Digital Competition Bill is a major step forward in regulating digital markets in India. However, it is not the first attempt to address issues in this domain. Various laws and regulations already govern aspects of digital platforms, such as data protection, digital competition, and consumer protection on e-commerce platforms. These initiatives, often led by multiple regulators and ministries, are at different stages of development, creating a fragmented regulatory landscape.

One key challenge for the DCB is the potential for differing interpretations by various ministries and regulators, especially concerning new concepts introduced in the Act, which have limited legal precedents. This divergence risks undermining the DCB's objectives by creating inconsistencies and overlaps in regulatory jurisdiction. Past conflicts, such as those between the CCI and sectoral regulators in telecommunications and energy, underscore the importance of regulatory harmony. Unfortunately, these disputes have often required intervention by courts or Parliament to resolve.

To address this, a coordinated inter-ministerial and inter-regulatory effort is essential. Mechanisms such as Memorandums of Understanding (MoUs) between regulators, as recommended by the Financial Sector Legislative Reforms Commission (FSLRC), can help ensure better

70. "The Chicken-and-Egg Problem in the European Union Digital Markets Act" (*Bruegel | The Brussels-based economic think tank*) <https://www.bruegel.org/working-paper/chicken-and-egg-problem-european-union-digital-markets-act> accessed 22 January 2025.

collaboration. While India's Personal Data Protection Bill initially included provisions for inter-regulatory consultation, these were removed from the enacted DPDP Act, missing an opportunity to formalize cooperation.[71]

B. The Need for Unified Grievance Redressal Mechanisms

On the demand side, consumers and entities currently rely on a variety of grievance redressal mechanisms to address their complaints. For instance, financial sector regulators each have their ombudsman, and the Cyber Appellate Tribunal operates under the IT Act. However, it remains uncertain whether the DCB will establish its grievance redressal framework or if consumers will continue to lodge complaints through existing provisions of the Competition Act.[72]

In the technology sector, grievances often span multiple domains, requiring interactions with tribunals and ombudsman systems. The current fragmented approach to grievance handling risks becoming obsolete, burdensome, and confusing for consumers. This disjointed structure can lead to regulatory uncertainty, where certain complaints might be denied redressal because they fall outside a particular regulator's jurisdiction. Consumers may struggle to decide which mechanism to approach, further complicating the process. Moreover, the differences in the approaches and processes of these mechanisms could add to consumer stress as they navigate multiple systems.[73] Without coordination and information-sharing among redressal bodies, these systems may operate in silos, limiting their ability to learn from one another. For example, complaints related to data processing could provide valuable insights for addressing competition and consumer welfare issues, but this potential remains untapped due to a lack of collaboration.

71. "Research Report: Indian Policy Instruments and Objectives of the Proposed Digital Competition Act: Implications, Challenges, and Way Forward" (*The Dialogue*, February 2, 2024) <https://thedialogue.co/publication/research-report-indian-policy-instruments-and-objectives-of-the-proposed-digital-competition-act-implications-challenges-and-way-forward/> accessed 22 January 2025.
72. Centre for Democratic and Constitutional Law, 'Parliamentary Developments Report' (PRS India, 12 March 2024) <https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf> accessed 3 February 2025.
73. "Research Report: Indian Policy Instruments and Objectives of the Proposed Digital Competition Act: Implications, Challenges, and Way Forward" (*The Dialogue*, February 2, 2024) <https://thedialogue.co/publication/research-report-indian-policy-instruments-and-objectives-of-the-proposed-digital-competition-act-implications-challenges-and-way-forward/> accessed 22 January 2025.

A unified grievance redressal framework under the DCB is essential to address these challenges. Such a system could integrate existing mechanisms, ensure process consistency, and facilitate knowledge-sharing across domains. This would provide consumers with a streamlined and accessible platform for resolving grievances, improving trust and efficiency in the regulatory environment.

C. The Issue of 'Consent' in the Draft Bill

Section 12[74] of the Draft Bill prohibits SSDEs from leveraging non-public user data to compete on their CDS, effectively banning practices like self-preferencing. However, an exception permits platforms to combine user data from other sources if explicit consent is obtained. This means enterprises can still collect and utilize user data, including selling it to insurers or sharing it with third parties, as long as the data usage does not directly compete with the platform's core business users and user consent is provided.[75]

The Draft Bill adopts an opt-in model, requiring users to explicitly grant consent for data usage. However, this consent-based approach may not sufficiently address monopolistic behaviours, especially in an era of growing consent fatigue. Users, overwhelmed by frequent requests for consent, may blindly agree without fully understanding the implications. Additionally, companies may exploit tools like artificial intelligence and manipulative design tactics, such as dark patterns, to nudge users toward providing consent. These strategies can create the illusion of choice, exploiting psychological vulnerabilities to steer users into decisions they might not make if fully informed or aware of alternatives. Thus, relying solely on user consent may not adequately prevent data misuse or monopolistic practices.

D. Clarity in Exemptions

The Draft Bill's uncertainty in defining the parameters and scope of exemptions leaves room for subjective interpretation during implementation.

74. Digital Competition Bill, 2024 s 12.
75. "Revamping Antitrust for Digital Ecosystems: Exploring 'The Draft Digital Competition Bill, 2024'" (*The HNLU CCLS Blog*, September 2, 2024) <https://hnluccls.in/2024/09/02/revamping-antitrust-for-digital-ecosystems-exploring-the-draft-digital-competition-bill-2024/> accessed 22 January 2025.

This oversight risks concentrating arbitrary powers with the Central Government, potentially reducing enterprise efficiency and adversely impacting consumers.[76] India could consider adopting the "countervailing benefits exemption" from the UK's DMCC Bill, 2023 to address these concerns.

The countervailing benefits exemption allows practices that may appear to violate competition rules if they deliver significant benefits that outweigh any potential harm. For this exemption to apply, the conduct must demonstrably provide clear user advantages, with the benefits exceeding any negative effects on competition. Moreover, such conduct must be necessary and proportionate, ensuring it does not undermine effective competition.

Incorporating this exemption into India's regulatory framework would prevent financially dominant companies from leveraging undue benefits. At the same time, it would protect businesses from unintended consequences that could stifle innovation or harm competition. Balancing consumer welfare with competition concerns could ensure fair outcomes while promoting market efficiency and innovation.

E. Fair Pricing & Discounting Policy for E-Commerce Platforms

To prevent predatory pricing and anti-competitive discounting, India should implement a Fair Pricing & Discounting Policy under the DCB. E-commerce giants like Amazon[77] often engage in deep discounting,[78] exclusive tie-ups, and price manipulation, which disadvantages small businesses and independent sellers. This policy would prohibit dominant platforms from influencing seller pricing through preferred partnerships or algorithm-driven price distortions. Additionally, it would mandate cost transparency in platform commissions, ensuring that platforms do

76. "Revamping Antitrust for Digital Ecosystems: Exploring 'The Draft Digital Competition Bill, 2024'" (*The HNLU CCLS Blog*, 2 September, 2024) <https://hnluccls.in/2024/09/02/revamping-antitrust-for-digital-ecosystems-exploring-the-draft-digital-competition-bill-2024/> accessed 22 January 2025.
77. Brad Albert and Hannah Lamb, "Reverse Payments: From Cash to Quantity Restrictions and Other Possibilities", Federal Trade Commission (September 26, 2023).
78. Skipworth, Will, 'Amazon Allegedly Used Secret Algorithm to Raise Prices on Consumers, FTC Lawsuit Reveals' (Forbes, 3 October 2023) <https://www.forbes.com/sites/willskipworth/2023/10/03/amazon-allegedly-used-secret-algorithm-to-raise-prices-on-consumers-ftc-lawsuit-reveals/> accessed 23 October 2023.

not unfairly favour their own products over third-party sellers. A Fair Price Benchmarking Mechanism would be introduced, requiring dominant e-commerce firms to justify discounts below a certain threshold, preventing unsustainable pricing strategies that drive smaller competitors out of the market. By enforcing pricing fairness and transparency, this policy would ensure a level playing field in online marketplaces, fostering healthy competition, consumer choice, and sustainable business growth in India's digital economy.

F. Digital Market Code of Conduct for Algorithmic Transparency

To prevent search bias, self-preferencing, and unfair ranking manipulation, India should introduce a Digital Market Code of Conduct under the DCB. Dominant platforms like, Amazon,[79] use opaque algorithms to prioritize their services over competitors, distorting fair competition. This policy would require SSDEs to disclose ranking factors and offer independent audits of their recommendation algorithms to prevent anti-competitive behaviour. Additionally, platforms must provide algorithm transparency reports, explaining how search results, ad placements, and product rankings are determined. A user-control mechanism should be introduced, allowing consumers to switch to an unbiased ranking mode for more neutral search results. By enforcing algorithmic fairness and transparency, this policy ensures that digital markets remain open, competitive, and consumer-friendly, preventing dominant players from unfairly influencing search visibility and e-commerce rankings to their advantage.

G. Flexible Exemptions: Market-Based Thresholds & Periodic Review

A rigid, one-time designation of SSDEs under the proposed DCB risks overregulating emerging companies and discouraging investment in high-growth sectors. Global best practices demonstrate that market dominance is not static, and regulations should reflect evolving competition dynamics. The European Union's DMA allows companies to appeal

79. Schiller B, "You Are Being Exploited by The Opaque, Algorithm-Driven Economy" (*Fast Company*, 4 August, 2017) <https://www.fastcompany.com/40447841/you-are-being-exploited-by-the-opaque-algorithm-driven-economy> accessed February 3, 2025.

their "gatekeeper" designation if they can prove increased competition or declining market power. Similarly, the United Kingdom's DMCC provides a mechanism to challenge SSDE status based on changing market conditions. Even in India, the CCI already evaluates market dominance dynamically, allowing firms to demonstrate that they no longer meet dominance criteria.

To align with these global principles, India should introduce a three-year market-based review mechanism for SSDE designation, ensuring that firms meet dominance criteria for three consecutive years before being subjected to ex-ante obligations. This approach would prevent temporary market leaders from facing excessive regulation due to short-term success. Additionally, SSDEs should have the right to appeal their designation, allowing them to present evidence of increased competition, declining market share, or structural market shifts. Appeals should be reviewed by the CCI and an independent Digital Markets Committee, ensuring fair evaluation based on objective market performance metrics.

Further, the DCB should introduce sector-specific exemptions for high-growth industries, particularly fintech, AI startups, and digital health, where premature regulatory burdens could stifle innovation. Instead of imposing blanket SSDE regulations, firms in these industries should only be subject to partial compliance obligations until they reach clear market consolidation thresholds. For instance, a fast-growing Indian fintech startup should not be regulated the same way as Google Pay or PhonePe, as it still requires room for innovation and market expansion.

H. Considering Geopolitical Ramifications

The Committee on Digital Competition Law's report rightly contextualizes the proposed legislation within the global landscape. However, it is crucial for India to carefully assess how the law might impact its strategic relationships, particularly with key allies like the United States, at a time when the rise of China poses significant techno-economic challenges.[80] A regulatory framework that disproportionately burdens leading American technology firms, while failing to promote a collaborative innovation

80. Dirk Auer, Geoffrey A. Manne, Viswanath Pingali, "Comments of the International Center for Law & Economics on the Report of the Committee on Digital Competition Law" (*International Center for Law and Economic,* 22 April, 2024).

environment, risks undermining India's own long-term strategic and economic interests.

India's digital economy thrives on innovation and partnerships, many of which involve collaboration between Indian and American firms.[81] Overregulating in ways that hinder these partnerships could inadvertently benefit China, which seeks to establish itself as a global leader in technology and digital markets. By imposing rigid compliance requirements on foreign firms without addressing the unique dynamics of India's digital ecosystem, India risks discouraging investment and innovation, both of which are critical to maintaining its global competitiveness.

Rather than replicating frameworks like the European Union's Digital Markets Act, India should pursue a regulatory approach tailored to its own needs. A balanced, flexible framework would allow India to foster innovation, strengthen strategic alliances, and position itself as a global technology leader, without inadvertently empowering its competitors.

I. Prioritize Pro-Business Policies

India should prioritize fostering innovation and growth over adopting rigid regulations like the EU's DMA, which has proven problematic for businesses and consumers. Instead of imposing heavy-handed rules, India must support its thriving startup ecosystem by creating an environment conducive to investment and entrepreneurship. If regulation is necessary, it should be based on clear, measurable criteria for durable market power and avoid per se bans on business practices.[82] A flexible approach that allows pro-competitive justifications would ensure that beneficial practices are not stifled. This balanced framework will sustain growth and reflect India's unique economic priorities.

V. CONCLUSION

India's digital economy is poised to become a trillion-dollar sector. Sensing the strategic importance of this emerging domain, the Parliamentary

81. International Trade Administration, 'India - Digital Economy' (US Department of Commerce, 2024) <https://www.trade.gov/country-commercial-guides/india-digital-economy> accessed 3 February 2025.

82. Dirk Auer, Geoffrey A. Manne, Viswanath Pingali, "Comments of the International Center for Law & Economics on the Report of the Committee on Digital Competition Law" (*International Center for Law and Economic,* 22 April, 2024).

Standing Committee on Finance produced a comprehensive report examining anti-competitive practices by big tech companies and proposing ex-ante regulatory provisions as an effective intervention strategy.

Taking cognizance of the committee's insights, the Ministry of Corporate Affairs subsequently constituted a dedicated committee to draft the Digital Competition Bill. The proposed legislation aims to pre-emptively regulate SSDEs operating within CDS, sectors particularly susceptible to market concentration risks.[83]

While inspired by frameworks like the EU's Digital Markets Act, the DCB must account for the nuances of India's dynamic digital landscape. Lessons from global approaches, including South Korea's targeted regulatory strategies, underscore the importance of encouraging innovation while curbing monopolistic practices. A balanced, pragmatic regulatory framework tailored to India's economic and technological priorities will be critical to ensuring sustainable growth and maintaining its global competitive edge.

83. Centre for Democratic and Constitutional Law, 'CDCL Report on Parliamentary Developments' (PRS India, 12 March 2024) <https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf> accessed 3 February 2025.