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*Foreword by Dr. Kiran Rai*

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# FOREWORD

I feel a sense of pride in writing this foreword. The present issue is being published after my transition from MNLU Mumbai, where my role has evolved from Faculty Advisor of the journal to a Member of its Advisory Board.

The idea of this journal was first brought to me by a group of enthusiastic students who approached me as a teacher specialising in Corporate Law. They proposed starting a student-run journal at MNLU Mumbai and had come well prepared, having researched student-run journals across various NLUs and other prestigious universities, along with the domains in which they operated. Initially, the focus was narrowed to Tax Law. Although the students had initiated discussions with the University administration, they encountered some resistance, particularly due to the absence of a Faculty Advisor after the Director of the Centre for Advanced Training in Taxation Laws had left. They therefore requested me to step in as the Faculty Advisor for the proposed Tax Journal.

Being fully aware of the rigour involved in starting, establishing, and—most importantly—sustaining a journal, and despite my role as Director of the Centre for Training and Research in Commercial Regulations, I was clear that I would not run a journal under my Centre. However, moved by the students' enthusiasm and their aspiration to launch the first student-run journal of MNLU Mumbai, I agreed to support their vision. Through brainstorming sessions, we realised that a journal exclusively on Tax Law would be more challenging to sustain than one on Corporate Law, which offered greater scope for thematic and special issues. This deliberation eventually led to the birth of The Journal on Corporate Law and Commercial Regulations.

The student Editorial Board proved to be highly motivated and dedicated. Although the journal experienced a brief slowdown at one stage, it was successfully revived and strengthened by the subsequent editorial teams. A key principle guiding the journal was the development of a strong second line of junior editors who could seamlessly take over when seniors graduated. We constituted a robust Advisory Board and Peer Review Panel. Submissions were rigorously scrutinised not only for content and plagiarism, but also for the use of AI. The journal has received an encouraging response from law students across India, and the inaugural Editorial Board succeeded in getting it listed with SCC.

I am pleased to note that the current student Editorial Board remains equally focused and enthusiastic in advancing scholarly publications. The present issue primarily features articles on Competition Law, all of which are well researched and carefully vetted by experts in the field, thereby adding to their academic credibility.

Revisiting these memories and witnessing the growth of both the journal and its students fills me with nostalgia. I extend my best wishes to the current Editorial Team and hope they continue to guide and inspire their juniors, carrying this legacy forward and striving for even greater achievements.

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**Dr. Kiran Rai**
*Professor*
*South Asian University*

# BEHIND THE DIALOGUE: THE STRATEGIC ROLE OF PRIVATE ESG SHAREHOLDER ENGAGEMENT IN INDIA'S RESOURCE-INTENSIVE SECTORS

*Rijul Rajan and Simran Kaur* [1]

**ABSTRACT**

*Far from headlines and sustainability reports, a quieter revolution brews, a fiduciary duty unfolds – Investors indulge in private ESG-related engagements in the shadows of boardrooms. As ESG gains prestige in shaping corporate accountability, much of the discourse centers on public disclosures and market-facing reforms, while the role of non-public shareholder engagement remains underexamined. This article reflects the untapped power of private investor influence in India's resource-intensive sectors, where tension between environmental degradation and industrial ambition is the most pronounced. It traces the rise of non-public ESG activism, further discussing the scope and nature of the engagements, measurable successes and inherent limitations of the same. It ultimately advocates for reforms and a deeper digital integration.*

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## I. INTRODUCTION

ESG has proven to be a purposeful mechanism for assessing a corporation's awareness of its sustainable practices such as climate resilience, waste-management, diversity and inclusion, ethical governance, and so on and so forth. Fascinatingly, ESG can be applied varyingly, ranging from investors screening investments to firms monitoring their long-term value creation on ESG standards.[2] A firm performing well on ESG parameters suggests a proactive and conscious board and senior management that are striving to include ESG factors in their business processes.[3] Presently, there is no globally accepted guideline/framework for ESG reporting, and organisations choose to disclose their ESG performance using standards of their preference, such as those from

[1] The authors are students at National Law University, Jodhpur.
[2] Mardi Witzel and Niraj Bhargava, 'AI-Related Risk: The Merits of an ESG-Based Approach to Oversight' (Centre for International Governance Innovation, 21 August 2023).
[3] ibid.

the Sustainability Accounting Standards Board, Global Reporting Initiative and the World Federation of Exchanges Sustainability Working Group.[4]

ESG is presented to interested stakeholders ranging from employees, regulators, investors, consumers, business partners, etc. who have increasingly grown inclined to demand access to this information. Inevitably, corporations have obliged and disclosed such information including the negative impact of their actions for ESG parameters. Investors utilise this information to transform business strategies and models for a climate resilient economy, fairer society and to support the United Nations Sustainable Development Goals ("**SDGs**").[5]

Touching upon the role of investors, this article explores and assesses their non-public involvement i.e., influencing and pushing for improved ESG management, away from the public eye, via private-letters, e-mails, etc. This scrutinisation is done with resource-intensive industries as the focal point. These industries include mining, energy, oil & gas, construction, manufacturing, and the like.[6] The World Economic Forum's Global Risks Report shows high environmental and social risks attributable to industrial activities, specifically in developing economies,[7] like India.

Against this backdrop, it is crucial to probe whether such discourses hold the key to ESG advancement and a sustainable corporate development.

## II. SHAREHOLDER ACTIVISM AND RESPONSIBLE INVESTMENTS AS PILLARS OF ESG

Earlier, personal capitalism accompanied family-run businesses with managerial structures that seem too primitive now. Gradually, the focus shifted to managerial aspects of the firm, apart from its legal and financial segments, with Berle & Means' influential outlook on corporate ownership.[8] Ownership has become dispersed among thousands of shareholders, with control consolidated in the hands of the management, leading to challenges such as collective action problems and shareholder passivity.[9] Indian corporate governance was inevitably influenced by its colonial environment, but the Satyam scandal gave impetus to the necessity of increased shareholder

[4] Economist Impact, 'The ESG Conundrum: How Investors and Companies Can Find Common Purpose in ESG' (2022).
[5] Nishith Desai Associates, 'ESG: The New Age Value Creator – Code of Governance for Start-ups' (June 2023).
[6] Certainty Software, 'ESG Risks Across Industries' (Jan. 4, 2024).
[7] World Economic Forum, 'The Global Risks Report 2024' (19th edn, 2024).
[8] Adolf A Berle & Gardiner C Means, *The Modern Corporation and Private Property* (The Macmillan Press 1932) 47.
[9] U Varottil, 'The Advent of Shareholder Activism in India' (2012) 1 *Journal on Governance* 583.

involvement in independent and effective decision-making.[10] Post-independence, Indian corporate governance had been institutionalised owing to the Companies Act and the establishment of institutions such as the Securities and Exchange Board of India ("**SEBI**").

Eventually, institutions began screening portfolios from the angle of social impact. The world realised the challenges faced by climate change, and in April 2006, the UN concretised 6 Principles for Responsible Investment ("**PRI**").

Corporate Social Responsibility ("**CSR**") is "the notion that companies are responsible not just to their shareholders, but also to other stakeholders".[11] CSR was claimed to be a social distraction from the firm's economic objective of shareholder value maximisation,[12] but has grown relevant to the extent that a firm not engaging in CSR runs the risk of negative publicity.[13]

Shareholder Activism is a set of "proactive efforts (by shareholders) to change firm behaviour or governance rules."[14] Responsible Investing involves "considering ESG issues when making investment decisions and influencing companies or assets (known as active ownership or stewardship)."[15] Therefore, corporate accountability has evolved from CSR to comprehensive social responsibility models including ESG, stewardship, shareholder activism and responsible investing.

Retracing our steps to the UN, the PRI instruct that ESG be incorporated in investment decisions, encourage ESG disclosure from investees and promote the principles across the industry, and suggests regular reporting on progress.[16] Additionally, the Organisation for Economic Cooperation and Development ("**OECD**") Report[17] guides Institutional Investors ("**IIs**") on aligning their

[10] V Gurung and C Gupta, 'A Review on Satyam Computer Failure Lessons for Corporate Governance and World' (SSRN, 11 April 2019) <https://ssrn.com/abstract=3370291> accessed 4 November 2025.
[11] ibid, n 9.
[12] M Friedman, *Capitalism and Freedom* (University of Chicago Press 1962).
[13] ibid.
[14] Bernard Black, 'Shareholder Activism and Corporate Governance in the United States' in Peter Newman (ed), *The New Palgrave Dictionary of Economics and the Law* (Macmillan 1998).
[15] PRI, 'What is Responsible Investment?' <https://www.unpri.org/introductory-guides-to-responsible-investment/what-is-responsible-investment/4780.article> accessed 7 June 2025.
[16] PRI, 'What are the Principles for Responsible Investment' <https://www.unpri.org/about-PRI/what-principles-for-responsible-investment> accessed 6 November 2025.
[17] OECD, 'Responsible Business Conduct for Institutional Investors: Key Considerations for Due Diligence under the OECD Guidelines for Multinational Enterprises' (OECD Publishing 2017).

investment activities with Responsible Business Conduct ("**RBC**"), including ESG standards, on similar lines as the UN PRI.

In the Indian context, the Companies Act, 2013 provides for an effective corporate structure along with SEBI's Regulations to enable shareholder activism. Section 135 of the Companies Act, 2013[18] provides for Corporate Social Responsibility overseen by a Committee headed by an Independent Director, and an ESG model i.e., the Business Responsibility and Sustainability Reporting ("**BRSR**") framework became mandatory for the top 1,000 listed companies through SEBI's directions only recently.[19] In 2019, the National Guidelines on Responsible Business Conduct ("**NGRBC**") were issued, in line with the UN's SDGs, and the BRSR framework is based on the NGRBC.[20]

These reforms not only institutionalised ESG consciousness within corporate governance but also empowered shareholders to increasingly contribute in shaping sustainable business practices. By combining statutory mandates with evolving ESG disclosure frameworks, India is gradually aligning shareholder rights with global sustainability norms.

## III. SOFT POWER: PRIVATE ESG ENGAGEMENT IN SHAREHOLDER GOVERNANCE

Like a lighthouse over a foggy coast, "*Stewardship*" symbolises quiet vigilance, guiding firms towards long-term value by casting distant light on the often-overlooked shores of Environmental and Social responsibility, with IIs as its keepers.

### A. The Power of Patient Capital

IIs hold considerable influence, shaped by their investment horizons, *i.e.* the duration they are willing to remain invested before realizing returns.[21] Such investors, whose ideal holding period is 'forever,' are better positioned to support enduring values. Short-term investors are generally pressurized for quicker results; hence they focus on immediate gains, but at the cost of long-term

[18] Companies Act 2013, s 135.
[19] Securities and Exchange Board of India, 'Business Responsibility & Sustainability Reporting by Listed Entities: Format (Annexure I)' (May 2021).
[20] Indian Institute of Corporate Affairs, *National Guidelines on Responsible Business Conduct* (Ministry of Corporate Affairs, Government of India, 2018).
[21] A Garel and A Petit-Romec, 'Engaging Employees for the Long Run: Long-Term Investors and Employee-Related CSR' (2021) 174 *Journal of Business Ethics* 35.

risks. Conversely, long-term investors manage more stable capital and are less concerned about momentary ups and downs; placing them in better-fit shoes to support ESG goals.

Empirical data affirms that long-term IIs positively affect corporate behaviour; their influence reduces managerial myopia,[22] and enhances decision-making through active monitoring.[23] By virtue (*vice*) of their financial involvement, they are particularly vulnerable to systemic risks of climate change, ranging from 'stranded assets' to reputational fallouts.[24] This persuades them to promote corporate innovation, defined as a high-risk tactic that drives sustained growth and competitiveness, so as address these challenges effectively and mitigate their exposure.[25] In sum, IIs play significant role in directing firms toward forward-looking, value-creating ideas.

B. How Institutional Investors Engage: Strategies and Preferences

Assessing the scope of such engagements is inherently difficult, as most interactions with corporate managers occur privately, via emails, phone calls or closed-door meetings – eluding direct observation and empirical evaluation.[26] In this segment, we turn to the available data to better understand the nature and elements of these interactions.

1. Materiality and Motive

Materiality in ESG reporting is the gravity of various environmental, social or governance issues that influence stakeholder decisions. Unlike financial reporting, ESG is highly context-specific; preferences vary by industry type, region and the investor focus. As quoted, "Materiality, like beauty, lies in the eyes of the beholder."[27] A study of a major UK-based II, spanning 1,443 engagements across 485 global firms (2005 to 2018), reflects broader trends in investor priorities. Governance issues dominate, accounting for 51% of engagements, centring on executive compensation and board structure. Environmental concerns follow, at 26%, with climate risk being

[22] B J Bushee, 'The Influence of Institutional Investors on Myopic R&D Investment Behavior' (1998) 73 *Accounting Review* 305.
[23] J Harford, A Kecskés and S Mansi, 'Do Long-Term Investors Improve Corporate Decision Making?' (2018) 50 *Journal of Corporate Finance* 424.
[24] P Krueger et al, *The Importance of Climate Risks for Institutional Investors* (ECGI Finance Working Paper No 610/2019, November 2019).
[25] ibid.
[26] J A McCahery, Z Sautner and L T Starks, 'Behind the Scenes: The Corporate Governance Preferences of Institutional Investors' (2016) 71 *Journal of Finance* 2905.
[27] A Reinstein, T R Weirich and A Akresh, 'Materiality for ESG Engagements' (*The CPA Journal* October 2023) 38.

the key theme. Social issues make up the remaining 23%, focusing majorly on health and safety of the workers.[28]

Further, to gauge the sincerity of such engagements, it is important to scrutinize the underlying motivations that compel investors to act. Investor behaviour is shaped by a combination of financial imperatives and normative considerations. For instance, from an economic perspective – climate change poses risks to long-term returns, through physical damage to assets or devaluation of carbon-intensive holdings. This intent highlights the idea of "doing well by doing good."[29] However, financial logic does not tell the full story. Investors are also guided by ethical and organizational values, regulatory scrutiny and client preferences. A recent global survey reveals no single dominant factor behind climate integration; but reputational protection (30%), moral considerations (27.5%) and legal duties (27%) emerge as the most cited.[30] These overlapping motivations suggest that stewardship is informed by both prudence and principle, thus blurring the difference.

2. The How of Engagement

Investors typically begin by engaging privately, through direct discussions with management, and turn to public initiatives, like shareholder proposals or open criticism, only when private negotiations fail.[31] Even a major investment company like BlackRock Inc. prefers private discussions viewing them as more effective and 'less confrontational.' It believes private engagement allows investors to raise concerns without dictating specific solutions and retaining credibility, unlike formal proposals that publicly demand change and often fail.[32]

In this context, a longstanding debate contrasts two principal modes of investor influence – 'voice' that is direct intervention, and 'exit' *i.e.*, divestment. In corporate governance, 'voice' refers to investors actively engaging with a company through discussions to influence its conduct. 'Exit' by contrast denotes withdrawal of investment as a signal of dissent, aiming to exert pressure through capital reallocation. While the early models focused on the corrective potential of voice, newer

[28] A G F Hoepner et al, 'ESG Shareholder Engagement and Downside Risk' (2024) 28 *Review of Finance* 483.
[29] R Bénabou and J Tirole, 'Individual and Corporate Social Responsibility' (2010) 77 *Economica* 1.
[30]Krueger and others (n 23).
[31] D Levit, *Soft Shareholder Activism* (Jacobs Levy Equity Management Center for Quantitative Finance Research Paper, 10 September 2018).
[32] J A McCahery, Z Sautner and L T Starks, n 25.

frameworks have explored the disciplining effect of exit.[33] Yet in practice, divestment is used far less frequently; majorly for addressing long-term risks, like climate change,[34] suggesting that sustained engagement may offer more meaningful influence. This could be attributed to the fact that success of an exit threat is largely contingent on multiple factors like, investors' equity stake and whether other investors withdraw for similar reasons. However, Hirschman convincingly put it, "*The chances for voice to function effectively are appreciably strengthened if voice is backed up by the threat of exit.*"[35] This indicates that far from being substitutes, voice and exit can operate as complementary forces.

Concisely, private engagements range from lower-intensity measures like letters and proxy voting to higher-touch interactions like group dialogues and in person board meetings. Although proxy voting – where shareholders delegate their voting rights – enables informed decisions, concerns regarding its reliability and potential to undermine fiduciary responsibly have attracted regulatory scrutiny.[36] Consequently, face-to-face engagements are often seen as the most credible and effective, fostering a cooperative and familial governance dynamics.

## IV. STEWARDSHIP CODES – THE INDIAN PERSPECTIVE

The preceding chapter highlighted how "soft power" is used to promote long-term corporate value. However, the effectiveness of these private efforts relies on a framework of responsibilities and mandated action. Stewardship Codes thus, formalise and enforce this "quiet vigilance" into a fiduciary duty.

SEBI released the Stewardship Code for Mutual Funds and Alternative Investment Funds ("**AIFs"**) in India in 2019.[37] The underlying principle is that IIs who have been entrusted with their client's money for investment purposes, must exercise their shareholder rights vis-à-vis the invested

[33] ibid.
[34] Krueger et al., n 23.
[35] A O Hirschman, *Exit, Voice and Loyalty: Responses to Decline in Firms, Organizations, and States* (Harvard University Press 1970).
[36] D Larcker, A McCall and G Ormazabal, *Outsourcing Shareholder Voting to Proxy Advisory Firms* (Rock Center for Corporate Governance at Stanford University Working Paper No 119, 30 October 2014).
[37] Securities and Exchange Board of India (SEBI), *Stewardship Code for all Mutual Funds and all categories of AIFs in relation to their investment in listed equities* (Circular CIR/CFD/CMD1/168/2019, 24 December 2019).

entities; akin to a fiduciary duty.[38] SEBI states it is "intended to protect their clients' wealth," and provides 6 principles, summarised as follows:

1. IIs should have and publicly disclose a comprehensive stewardship policy, review it and update it periodically.
2. They must clearly disclose how conflicts of interest are identified and managed.
3. They should exercise vigilance over their invested entities.
4. They must formulate and communicate their policies on intervening and engaging with their investee companies, and collaboration with other IIs.
5. They should maintain a well-defined policy on voting and how to disclose voting activities.
6. They should report regularly and consistently on their stewardship actions.

We observe that the norms promoted by the OECD and UN PRI (see Chapter II), are also reflected in the codes, though the credit for that goes to the United Kingdom Stewardship Code of 2012 ("**2012 Code"**). Apart from SEBI's code, the Insurance Regulatory and Development Authority and the Pension Fund Regulatory and Development Authority have their own codes, all three of which are similar to the 2012 Code. While the latter was revised in 2020 and a Stewardship Code for 2026 too has been released by the UK, the Indian Stewardship Codes continue to reflect the 2012 Code.[39] However, SEBI's code differs from the West in its approach that it is not a soft law but mandates compliance – it is not merely voluntary.

But blindly applying the UK model without regard to the prevailing context in India has earned it the title of a legal misfit, one contextual reason being that IIs are not often found to be majority shareholders in listed companies.[40] In India, shareholding structures are concentrated such as in family-run businesses, whereas the UK has a dispersed shareholding base – allowing IIs to have a

[38] G Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan* (University of Tokyo Business Law Working Paper No 2018-E-01, 19 October 2018).
[39] R Mandal, 'All That Glitters Is Not Gold: The Otiose Existence of the Indian Stewardship Codes' (2022) 23 *Business Law International* 123.
[40] D W Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense Out of the Global Transplant of a Legal Misfit* (European Corporate Governance Institute – Law Working Paper No 589/2021, 2021).

majority in the latter but not in the former. In fact, the record-low for promoter holding in the top 500 companies of India is 49.5%.[41]

While the UK's Code may be suitable for the UK, its transplantation without necessary modifications to reflect domestic corporate realities of India, especially when it is made to be a mandatory measure, has been the point of debate.[42]

## V. ESG AND INDIA'S RESOURCE-INTENSIVE INDUSTRIES

With abundant mineral resources in India, and specific richness of non-renewable sources, industries such as mining and energy form the backbone of economic development in the country. Yet, they also pose serious socio-environmental challenges. At present, resource-intensive industries are at a crossroad with a serious call for aligning economic growth with environmental stewardship.[43] Their vast scale renders them both, the greatest promoter as well as the most vulnerable victim of unsustainable development.

Resource-intensive industries heavily rely on raw materials and energy, often resulting in serious ecological consequences.[44] The cement industry, for instance, is linked to high energy consumption, $CO_2$ emissions and depletion of natural limestone.[45] Such impacts are pronounced in regions rich in natural resources, like the Central India. Furthermore, advancement in the manufacturing sectors in India, is majorly fuelled by fossil fuels, specifically coal.[46] Such burning of fossil fuels in the Indian industrial sector increased by 13.02% in 2 years in the past decade.[47] Making the sector the second biggest contributor (22%) to national greenhouse gas emissions.[48]

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[41] 'Promoter Ownership in India's Top 500 Companies Hits Record Low of 49.5%' *The Economic Times* (9 May 2025) <https://www.economictimes.com/...> accessed 17 June 2025.
[42] Sumit Kochar and Shivam Gera, 'Stewardship Code for Institutional Investors: Advancing Good Corporate Governance' (22 January 2023) <https://www.mondaq.com/india/shareholders/1264574/stewardship-code-for-institutional-investors-advancing-good-corporate-governance> accessed 18 June 2025.
[43] A U Umana, M B P Garba and J Audu, 'Sustainable Business Development in Resource-Intensive Industries: Balancing Profitability and Environmental Compliance' (2024) 8 *International Journal of Multidisciplinary Research Updates* 64.
[44] A U Umana, M B P Garba and J Audu, n 42.
[45] S Barbhuiya, F Kanavaris, B B Das and M Idrees, 'Decarbonising Cement and Concrete Production: Strategies, Challenges and Pathways for Sustainable Development' (2024) 86 *Journal of Building Engineering* 108861.
[46] D Gupta and M Pathak, 'Economic and Environmental Implications of India's Industry Transition to Net Zero' (2025) 379 *Applied Energy* 124922.
[47] Ministry of Environment, Forest and Climate Change, *India: Third Biennial Update Report to the United Nations Framework Convention on Climate Change* (Government of India, New Delhi, January 2021) <https://unfccc.int/sites/default/files/resource/INDIA_%20BUR-3_20.02.2021_High.pdf> accessed 14 June 2025.
[48] ibid.

Further, these industries operate in remote and socio-economically vulnerable areas,[49] like parts of Chhattisgarh, making the indigenous communities vulnerable to exploitation, displacement and loss of livelihood; as highlighted in the recent protests against the Adani Group's coal mining project.[50] Thus, ESG accountability in these sectors is not merely aspirational but also incumbent.

Similar observations were made in a survey encompassing 1,443 ESG engagements. Oil & Gas and Industrials were amongst the most targeted, while sectors less exposed to the environmental factors, like Telecommunications undergo relatively fewer engagements.[51]

As per a report based in 2022, Indian Companies would expectedly lose over Rs. 7.14 lakh crore if no measures are adopted over the next few years; the opposite, there could be a potential gain of Rs. 2.9 lakh crore if concerns of Environment and Society are given due considerations in addition to mere financial returns.[52]

However. in resource-intensive industries with slim profit-margins, the steep initial costs of transitioning to sustainable technology, act as an impediment to adoption.[53] Judicious engagements are thus indispensable to alleviate this financial burden and to smoothen out long-term variation.

By dint of their scale and impact, resource-intensive industries have the prospects to be the flagbearers of change, where purposeful engagement will shift the tide towards a brighter, sustainable future.

## VI. EVALUATING ENVIRONMENTAL AND FINANCIAL IMPACTS OF ENGAGEMENT

ESG engagement has proven effective in encouraging high-emission firms to adopt cleaner and more sustainable practices. In the energy and mining sectors, where carbon intensity and environmental damage are high, shareholders have successfully pressed firms to reduce carbon

[49] G Hilson et al, 'Rethinking Resource Enclavity in Developing Countries: Embedding Global Production Networks in Gold Mining Regions' (2024) 24 *Journal of Economic Geography* 95.
[50] S N Tripathy, 'Indigenous Displacement in India: A Tragic Tale of Uprooted Lives and the Battle for Hasdeo's Heart' (2024) 4 *Society & Culture Development in India* 169.
[51] A. G. F. Hoepner et al, n 27.
[52] A Sekar & R Krishnan, 'Emerging Landscape of ESG Investments in India' (2023) *The Chartered Accountant* April, 41.
[53] O B Seyi-Lande et al, 'Circular Economy and Cybersecurity: Safeguarding Information and Resources in Sustainable Business Models' (2024) 6 *Finance & Accounting Research Journal* 953.

emissions, invest in renewable infrastructure, and rehabilitate land after extraction activities.[54] These measures aid regulatory compliance while also strengthening the firm's reputation among stakeholders.

Notable trends include a shift towards renewable sources of energy as investment avenues or to conduct business operations to reduce the firms' carbon footprint,[55] adopting and capitalising on technology like artificial intelligence ("**AI**"), big data analytics etc. to improve efficiency,[56] and adopting circular economy models[57] instead of the 'take, make, dispose' model.[58] For instance, in the manufacturing sector, modular components that can be conveniently repaired, enhanced or recycled are being designed for products by firms to reduce raw material waste.[59]

Referring to the study of 1,443 engagements across 485 firms, it was found that 20.3% environmental engagements were merely raising of concerns, 40.1% were issues acknowledged by the firm, action was taken for 16.7% of the engagements and 21.8% engagements were successfully completed.[60] Empirical studies further suggest a positive relationship between ESG implementation and financial indicators such as return on equity ("**ROE**") and return on assets ("**ROA**"), highlighting the role of ESG systems in strengthening overall corporate performance.[61] Notably, in resource-intensive industries, high environmental scores are linked to better financial outcomes, as investments in environmental protection can reduce operational costs, improve resource efficiency, and drive profitability.[62] Companies in resource-intensive industries that exhibit strong sustainability performance are more likely to secure favourable financing, while

[54] P Tillotson et al, 'Deactivating Climate Activism? The Seven Strategies Oil and Gas Majors Use to Counter Rising Shareholder Action' (2023) 103 *Energy Research & Social Science* 103190.
[55] B M P Garba et al, 'Energy Efficiency in Public Buildings: Evaluating Strategies for Tropical and Temperate Climates' (2024) 23(3) *World Journal of Advanced Research & Reviews* 409.
[56] A Tuboalabo et al, 'Leveraging Business Analytics for Competitive Advantage: Predictive Models and Data-Driven Decision Making' (2024) 6(6) *International Journal of Management & Entrepreneurship Research* 1997.
[57] U.S. Environmental Protection Agency, *What Is a Circular Economy?* (EPA, 2024) <https://www.epa.gov/circulareconomy/what-circular-economy> accessed 20 June 2025.
[58] ibid, n 55.
[59] A U Umana, M B P Garba and J Audu, n 42.
[60] A. G. F. Hoepner et al, n 27.
[61] Q Li, W Tang and Z Li, 'ESG systems and financial performance in industries with significant environmental impact: A comprehensive analysis' (2024) *Frontiers in Sustainability* <https://doi.org/10.3389/frsus.2024.1454822> accessed 22 June 2025.
[62] Ibid.

firms that neglect ESG considerations may struggle to attract capital, as investors increasingly view ESG performance as a key indicator of financial resilience and long-term viability.[63]

In sum, ESG engagement in resource-intensive industries can yield beneficial environmental and financial impact. However, its success depends heavily on industry-specific realities, investor alignment, and governance frameworks. In developing economies like India, tailoring global stewardship models to local contexts can unlock the transformative potential of ESG engagement in even the most environmentally burdened industries.

## VII. LIMITATIONS AND THE FUTURE OF ESG ENGAGEMENT

While Stewardship is steadily gaining prominence, the challenge of addressing ESG related risks in a portfolio-wide manner still remains. As per a survey, only a limited percentage of investors take concrete action; 29% aim to cut down carbon emissions, 23% address stranded asset risks, and 25% hedge climate risks.[64] In this segment we explore the undercurrent for such reluctance and the way ahead.

### A. Barriers to Effective Implementation

Despite its growing value, investor engagement faces various practical limitations. *Firstly,* this process is quite resource intensive requiring endured effort, extensive and reliable data, and access to senior leadership; privileges not easily available. If an investor's stake is relatively minor, it is unlikely to grab the attention of key decision-makers, weakening the prospects of meaningful dialogue.[65] Moreover, concentrated promoter shareholding in India's corporate environment further dilutes the decision-making power.[66]

*Secondly,* there persists a demand-side inertia, as asset owners majorly operate under narrowly defined mandates that seldom emphasize active stewardship. ESG concerns remain peripheral to

[63] A U Umana, M B P Garba and J Audu, n 42.
[64] Krueger et al., n 23.
[65] E Micheler, 'Facilitating Investor Engagement and Stewardship' (2013) 14 *European Business Organization Law Review* 29.
[66] W-M Lu et al, 'Environmental, Social, and Governance, Board Gender Diversity, and Firm Efficiency: Evidence from the Global Mining Industry Pre- and Post-COVID-19 Pandemic' (2025) 32(1) *Corporate Social Responsibility and Environmental Management* 1002.

formal investment goals.[67] This bounded attention reflects hesitation in the market, where investors may be reluctant to commit to ESG in the absence of clear and verifiable evidence of financial returns.[68] This is a major repulsion since the utility is not ensured right away. The boons of focussing on long-term problems like climate change, do not always arrive quickly, especially in contemporary volatile markets. This challenge is especially profound for resource-intensive sectors where transitioning to sustainable technologies requires large investments, as discussed earlier.

*Thirdly,* owing to their heterogenous nature, ESG risks are hard to predict, and very few reliable instruments exist to deal with them - one needs to know when the risk will manifest, for how long it may last, and which investments are most vulnerable to it.[69] In the absence of such guidance, making sound decisions is tough.

*Fourthly*, since manufacturing and energy industries are environmentally invasive by design, a genuine alignment with ESG principles is commercially onerous,[70] thus intimidating companies. Social complexity, for instance land displacement, labour exploitation and community rights are hard to address via remote investor interaction and further require legitimate data, often adding up to the costs.

*Lastly,* engagements are baffled by limited transparency, especially in emerging economies like India, where data gaps and under-reporting still persist. Such incapacities further compound the barriers to effectiveness, for instance – ESG related greenwashing, i.e. data opacity can lead firms to make superficial commitments to appease investors without measurable impact.[71]

B. Prospective Avenues for Reform

[67] C Cronin and J Mellor, *An Investigation into Stewardship – Engagement Between Investors and Public Companies: Impediments and Their Resolution* (Centre for European Policy Studies, June 2011).
[68] ibid, n 64.
[69] O Boiral, M-C Brotherton and D Talbot, 'Anticipating the Unforeseeable? ESG Risk Management in Mining Companies' (2025) 106 *Resources Policy* 105628.
[70] E Ererdi and E Güneren Genç, 'Short-Term Costs and Long-Term Benefits of Environmental, Social, and Governance Performance on Corporate Credit Ratings' (2025) 14(1) *International Journal of Finance & Banking Studies* 90.
[71] E Du Toit, 'Thirty Years of Sustainability Reporting: Insights, Gaps and an Agenda for Future Research Through a Systematic Literature Review' (2024) 16(23) *Sustainability* 10750.

For resource-intensive industries, where sustainability transitions are both capital-heavy and risk-sensitive, a balanced approach combining *institutional support* and *innovation* is essential.

*Firstly,* strengthening corporate governance essentially forms the cornerstone for an effective engagement. In firms with inferior governance, investors often struggle to raise concerns and influence sustainability outcomes; strengthening governance would unlock more meaningful engagement and enhance transparency.[72] The authors believe that governance is not merely procedural, but is rather transformative; good governance can help redefine the accountability and bring tangible changes.

*Secondly,* to augment engagement efficiency, "collective stewardship," where investors pool resources and synergise to amplify their influence, seems promising. This would help fragmented investor voices to translate into coordinated concerns. However, firms need to be cautious against regulatory constraints pertaining to 'acting in concert' and insider trading.[73]

*Thirdly*, to address concerns regarding uncertain returns – investors require enhanced, forward-looking ESG data immersed in financial analysis. Regulatory interventions, including SEBI's BRSR in India and the Global Standards from the 'International Sustainability Standards Board' can help fill these gaps by refining transparency.[74] These initiatives would help bridge the *trust gap* that currently somewhat restraints investor confidence, alongside strengthening the ESG metrics.

*Fourthly,* as the frameworks evolve, the next question is, how to boost efficiency? The common academic answer to any problem today, AI and Digitalisation. Modestly, these would play a cardinal role in the present context as well. Technologies like AI, Internet of Things ("**IoT**") and advanced data analytics are refurbishing ESG commitments. Predictive tools would help enhance energy-heavy procedure by minimizing waste and anticipating failures. IoT devices monitor emissions and resource usage in real time, thus enabling smarter environmental responses.[75]

[72] O N Omonijo and Y Zhang, 'Examining the Relationship Between Technological Innovation, Environmental Social Governance and Corporate Sustainability: The Moderating Role of Green Operational Innovation' (2025) 12 *Palgrave Communications* 1.
[73] P Santella et al, 'Legal Obstacles to Institutional Shareholder Activism in the EU and in the US' (2012) 23 *European Business Law Review* 257.
[74] E Micheler, n 64.
[75] D Chen and S Wang, 'Digital transformation, innovation capabilities, and servitization as drivers of ESG performance in manufacturing SMEs' (2024) 14 *Scientific Reports* 6243.

Digital transition would also allow firms to align intimately with community and workforce needs – by internet-based feedback and review mechanisms.[76] India, with its expanding digital infrastructure and policy focus on *'Digital India'* and *'Green Technology Missions',*[77] is uniquely positioned to integrate these solutions at scale, translating technological capability into sustainable impact.

*Finally,* circular economy models that focus on reducing and reusing waste, are gaining ground in resource-intensive sectors.[78] Tech-solutions make such transitions scalable by tracking resource flows and ensuring compliance. The authors consider that embedding circularity in industrial operations would be a promising shift from reactive environmental management to preventive sustainability. In India, this shift carries particular urgency, given the dual pressures of rapid industrialisation and resource scarcity. With only 2.4% of the world's land supporting nearly 18% of its population,[79] India's move toward a low-carbon, resource-efficient model is certainly imperative. The establishment of eleven *focus committees* under NITI Aayog to develop sector-specific circular economy roadmaps, ranging from electronic waste to end-of-life vehicles,[80] signals a determined policy commitment. By directing capital toward firms that integrate circular principles, investors not only would help reduce environmental and regulatory risks but also make their engagement more meaningful.

In essence, better governance accompanied with digital transformation helps manage ESG risks more proactively. This shift is not just an upgrade, but a strategic necessity for long-term value creation.

## VIII. CONCLUSION

[76] E Du Toit, n 70.
[77] Local2030, *Digital India for Sustainable Development Goals: Pathways for Progress — People, Planet, Prosperity, Peace & Partnerships* (Local2030, 2016) <https://www.local2030.org/library/674/SDG-Vision-for-Digital-India.pdf> accessed 25 June 2025.
[78] A U Umana, M B P Garba and J Audu, n 42.
[79] India Brand Equity Foundation, *Sustainable Circular Economy in India* (May 2023) <https://www.ibef.org/research/case-study/sustainable-circular-economy-in-india> accessed 6 November 2025.
[80] Ministry of Environment, Forest and Climate Change, *Year End Review: Ministry of Environment, Forest and Climate Change – Mission LiFE, COP-27, Cheetah Re-introduction, and Ramsar Sites Expansion* (Press Information Bureau, 23 December 2022) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1886051> accessed 6 November 2025.

Private ESG engagement in India's resource-intensive sectors is a run towards sustainable governance. Non-public interactions enable to drive meaningful change without provoking reputational backlash or regulatory friction.

However, for this strategy to achieve its true potential, India needs to refine its stewardship frameworks to mirror domestic realities, address greenwashing and balance financial constraints. Furthermore, digitalization would help bridge the gap between ESG related intent and impact, by translating corporate commitments into measurable and traceable outcomes.

With the heaviest (*resource-wise*) industries do the lightest hopes lie, often considered culprits of ESG issues, they hold the greatest flair for a successful advancement.

Ultimately, private engagement is not limited to influencing boardrooms, it is about reshaping corporate motives in a resource-constrained world. For India to meet its developmental and climate goals both, investors urgently need to step up as stewards of sustainable transformation. Their voice, though behind closed-doors, must echo strikingly in corporate conscience.

# DON'T BLAME THE BEHEMOTH: SCHOTT GLASS AND THE SEARCH FOR AN OPERATIONAL EFFECTS-BASED TEST [1]

*Tanisha Brahmin and Sanskruti Madhukar Kale*[2]


## ABSTRACT

*The Supreme Court's decision in Competition Commission of India v. Schott Glass marks a watershed in Indian competition law. For the first time, the Court explicitly required an effects-based analysis for abuse of dominance under Section 4 of the Competition Act, 2002. Rejecting the Competition Commission of India's form-driven approach, the Court held that dominance is not unlawful per se and that liability requires demonstrable foreclosure or consumer harm, supported by credible economic evidence. This judgment narrows the interpretive divide between Sections 3 and 4, and aligns Indian law with global best practices. Yet, while the Court embraced the "effects-based analysis" principle, it left implementation open-ended, providing little guidance on methodology. Therefore, this article situates Schott Glass within the broader debate on dominance, tests it against international approaches, and proposes a structured framework for operationalising effects-based analysis in India to ensure overall certainty.*


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## INTRODUCTION

Competition law often walks a tightrope between punishing exclusionary conduct and preserving the rewards of market success. The line between "vigorous competition" and "abuse of dominance" is notoriously thin, but where it is drawn determines whether firms are penalised for harming rivals or celebrated for benefiting consumers. After a decade-long litigation cycle spanning a Competition Commission of India's **("CCI")** order in 2012, reversal by the Competition Appellate Tribunal **("COMPAT")** in 2014, and finally culminating in the Supreme Court's **("SC")** 2024 judgment, the long-running *CCI v. SCHOTT GLASS* saga has jolted Indian jurisprudence onto this tightrope. The Court held that dominance alone cannot be condemned and that only conduct demonstrably harmful to the competitive process should attract liability. The

[1] *This submission is the winning entry from the 2nd National Article Writing Competition, 2025 on Antitrust Laws.*
[2] The authors are students at Gujarat National Law University.

Court now requires "hard economic evidence" of foreclosure or consumer harm. This marks a clear shift from formalistic presumptions to an "effects-based standard."

This article, thus, evaluates the implications of that very shift. **[PART I]** sets out the background of the Schott Glass case and its legal trajectory. **[PART II]** analyses the SC's reasoning, situates it within global effects-based approaches, and identifies doctrinal gaps. Lastly, **[PART III]** builds on this analysis by formulating a structured model for effects-based assessment under Section 4. Here, the authors set out their original contribution, i.e., a practical framework designed to guide the CCI in applying the SC's mandate with clarity and consistency.

## Part I: BACKGROUND OF A (RATHER GLASSY) SCHOTT SAGA

The litigation in *CCI v. SCHOTT GLASS* arose from allegations of anti-competitive conduct in the Indian market for Neutral USP-I borosilicate glass tubes, a key input for pharmaceutical packaging such as ampoules, vials, cartridges, and syringes.[3] The informant, Kapoor Glass Pvt. Ltd., a downstream manufacturer of pharmaceutical containers, complained to the CCI in 2010 that Schott Glass India Pvt. Ltd. **("Schott India/Schott Glass")**, the leading domestic supplier of these tubes, had abused its dominant position.[4] Kapoor Glass alleged that Schott India imposed exclusionary volume-based rebates, offered preferential terms to its joint venture partner Schott Kaisha, compelled converters to buy both clear and amber tubes through tying arrangements, and occasionally engaged in refusal to supply.[5] These practices, it was argued, restricted market access for rival converters and strengthened Schott Kaisha in the downstream ampoules and cartridges market.[6]

Acting on the complaint, the CCI's Director General **("DG")** found Schott India in violation of Section 4 of the Competition Act, 2002.[7] In 2012, the CCI's majority order endorsed the DG's conclusions, holding that Schott India had abused its dominance.[8] The CCI imposed a penalty of ₹5.66 crore (*4% of Schott India's average three-year turnover*) and directed the company to cease

[3] *CCI v Schott Glass India (P) Ltd.,* [2025] 257 Comp Cas 1 [3].
[4] *Ibid* 257 Comp Cas 1 [2].
[5] *Ibid* (n 1).
[6] *Ibid* 257 Comp Cas 1 [11].
[7] *Ibid* Comp Cas 1 [4].
[8] *Ibid* Comp Cas 1 [14].

from the impugned conduct.[9] However, a dissenting note questioned this conclusion, suggesting that the discount schemes were commercially justified and that foreclosure had not been demonstrated.[10]

On appeal, the COMPAT set aside the CCI's order in 2014.[11] It annulled the penalty, finding that the evidentiary record did not establish abuse of dominance.[12] The Tribunal concluded that Schott India's volume-based rebates were applied uniformly, linked objectively to purchase volumes, and lacked exclusionary intent.[13] Moreover, no foreclosure was shown; converter output was rising, imports were growing, and downstream competition remained intact.[14] COMPAT also imposed costs of ₹1,00,000 on Kapoor Glass for pursuing unsubstantiated allegations.[15]

The matter eventually reached the SC of India, where the CCI and Kapoor Glass challenged COMPAT's decision.[16] In its 2024 judgment authored by Justice Vikram Nath (*with Justice Varale concurring*), the SC upheld COMPAT's order, emphatically rejecting the CCI's reasoning.[17] The Court held that Schott India's rebates were functionally justified and did not restrict rivals' output.[18] Crucially, the Court observed that "*if mere size or success were treated as an offence, and every dominant firm exposed to sanction without tangible proof of competitive harm, the law would defeat itself.*"[19]

This decision is significant because it is the first time the SC has expressly required an "effects-based" approach to abuse of dominance. *Schott Glass* rejects the CCI's form-driven reasoning and marks a shift toward a consequences-oriented framework under Section 4.

## PART II: BRINGING HOME THE "EFFECTS-BASED ANALYSIS" TEST

[9] *Ibid* (n 5).
[10] *Ibid* 257 Comp Cas 1 [23].
[11] *Ibid* Comp Cas 1 [24].
[12] *Ibid* 257 Comp Cas 1 [5].
[13] *Ibid* 257 Comp Cas 1 [77].
[14] *Ibid* 257 Comp Cas 1 [39].
[15] *Ibid* Comp Cas 1 [5].
[16] *Ibid.*
[17] *Ibid* 257 Comp Cas 1.
[18] *Ibid* 257 Comp Cas 1 [45].
[19] *Ibid* 257 Comp Cas 1 [78].

*A.What did the Court say?*

India's Competition Act prohibits abuse of a dominant position under Section 4, listing certain abusive practices. Unlike Sections 3, 5 & 6, Section 4 does not expressly require a finding of an "*appreciable adverse effect on competition*" **("AAEC").** For many years, this allowed quasi-form-based enforcement, where certain listed practices were treated as presumptively suspect when engaged in by large firms. *Schott Glass* marks a decisive departure from that approach.

In *CCI v. Schott Glass*, the SC held unequivocally that dominance alone is not unlawful, and liability under Section 4 must be grounded in an effects-based analysis. Drawing on the logic of Section 19(3) and prior precedent, the Court required the Commission to establish actual or likely harm to the competitive process with "*hard economic evidence*" of foreclosure, price effects, or other consumer-relevant harms. The Court stressed that claimed efficiencies and pro-competitive justifications must be weighed before labelling such conduct as abusive. This holding narrows the gap between Sections 3 and 4. Although Section 4 lacks an explicit AAEC clause, *Schott Glass* effectively introduces a consequences-oriented threshold, ensuring that only conduct that materially harms competition, rather than market power or vigorous competition, attracts sanction. SC Justice Vikram Nath went on to hold that an effects-based standard is "*not a mere procedural nicety*" but a constitutional safeguard against arbitrary antitrust enforcement.

*B. What have Courts abroad said?*

Schott Glass does not stand in isolation; rather, it brings India's Section 4 into line with the effect-based approaches across the globe.

For example, the EU law (Article 102 TFEU) and the UK Competition Act both forbid abuse of dominance, but dominance itself is not illegal; only conduct that harms competition is. The EU/UK regimes apply an *effects-based test*. Enforcement focuses on showing that the dominant firm's actions have exclusionary or exploitative effects on the market. For example, the UK's competition authority emphasised that it will find abuse "*only after detailed examination of the market concerned and the effects of the undertaking's conduct*"[20] Likewise, the EU Commission's draft 2024 Guidelines advocate "*a dynamic and workable effect-based approach to abuse of*

[20] Office of Fair Trading, *Competition Law: Abuse of a Dominant Position (Guideline,* December 2004) < https://assets.publishing.service.gov.uk/media/5a74c497ed915d4d83b5ecd7/oft402.pdf > accessed 26 September 2025.

*dominance*".[21] Practices can be abusive by *object,* e.g. price-fixing ties, or by *effect*. In effect-based cases, tools like the "*as-efficient-competitor*" **("AEC")** test are used. The AEC test, borrowed from U.S. economics literature, [22] asks whether a hypothetical competitor as efficient as the incumbent could profitably compete. EU courts have applied AEC analyses in predatory-pricing and rebate cases, such as Intel, Post Danmark, Google Shopping, etc., but have stressed that it is not mandatory.[23]

Similarly, Section 2 of the Sherman Act, the grundnorm of the U.S. antitrust regime, does not impose per se liability for being a monopolist. Such a violation requires wilful acquisition or maintenance of monopoly power *by improper means*, along with demonstrable harm to competition.[24] The American SC in *Trinko* held that "*the mere possession of monopoly power, and charging monopoly prices, is not only not unlawful, it is an important element of the free-market system*".[25] In practice, U.S. courts apply a "RULE-OF-REASON-LIKE" analysis for most conduct. Here, the plaintiff must show that the conduct injures consumers or competition. For example, predatory pricing claims require below-cost pricing *and* a dangerous probability of cost recovery.[26] While the Department of Justice/Federal Trade Commission guidelines do not explicitly use the term AAEC, they focus on *consumer welfare* and the "RULE-OF-REASON-LIKE" test, which is akin to the AEC concept in the EU & the UK. Thus, the U.S. law also requires proof of competitive harm in broad terms rather than condemning all dominant conduct.[27]

Likewise, the Canadian Competition Act explicitly contains a "SUBSTANTIAL LESSENING OF COMPETITION" **("SLC")** test. To establish abuse, the Competition Bureau must prove three

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[21] Ginevra Bicciolo, and others, 'As-Efficient Competitors: an analysis of the developing role for these legal creatures in assessing exclusionary conduct' (*Hausfeld*, 13 December 2024) < https://www.hausfeld.com/what-we-think/competition-bulletin/as-efficient-competitors-an-analysis-of-the-developing-role-for-these-legal-creatures-in-assessing-exclusionary-conduct > accessed 27 September 2025.

[22] Richard A Posner, 'Exclusionary Practices and the Antitrust Laws' (1973) 41 U Ch L Rev 506–535; Phillip Areeda and Donald F. Turner, 'Predatory pricing and related practices under Section 2 of the Sherman Act' (1975) 88 Harvard Law Review; Martin Mandorff and Johan Sahl, 'The Role of the "Equally Efficient Competitor" in the Assessment of Abuse of Dominance' (2013) 12 Competition LJ.

[23] Ginevra Bicciolo, and others, 'As-Efficient Competitors: an analysis of the developing role for these legal creatures in assessing exclusionary conduct' (*Hausfeld*, 13 December 2024) < https://www.hausfeld.com/what-we-think/competition-bulletin/as-efficient-competitors-an-analysis-of-the-developing-role-for-these-legal-creatures-in-assessing-exclusionary-conduct > accessed 27 September 2025.

[24] *United States v Grinnell Corp.*, 384 US 563 (1966).

[25] *Verizon Comm'ns Inc. v Law Offices of Curtis V Trinko*, LLP 540 US 398, 407 (2004).

[26] *Brooke Group Ltd. v Brown & Williamson Tobacco Corp*., 509 US 209 (1993).

[27] James Mancini, *'Abuse of dominance in digital markets: Background note by the Secretariat'* (*OECD, DAF/COMP/GF(2020)4,* 8 December 2020) < https://one.oecd.org/document/DAF/COMP/GF(2020)4/en/pdf > accessed 27 September 2025.

elements: **[1]** the firm has dominance (substantial control of a market); **[2]** it engages in anti-competitive conduct; and **[3]** that conduct "*has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.*"[28] In this framework, the third element resembles an AAEC requirement, whereby the Bureau must show significant market-wide impact, not just injury to a particular rival. Efficiencies are considered early in the analysis, i.e., if the dominant firm's conduct has a clear efficiency rationale, it may not be deemed anti-competitive at all.[29] Only if conduct is anticompetitive after accounting for efficiencies does the SLC test apply.[30] Thus, Canada's model expressly integrates an effects test and a place for efficiency justification.

### *C. What the Court left unsaid?*

Despite its endorsement of an effects-based standard, the *Schott Glass* judgment falls short in several crucial respects.

Primarily, the Court failed to articulate how "effects" are to be assessed in practice. Without interpretive scaffolding, the ruling leaves the CCI and regulated entities to operate in a doctrinal void, which will lead to an inconsistent application across benches and will create legal uncertainty for firms, which cannot reliably predict when their conduct will be deemed abusive.

One explanation may be that the Court exercised conscious judicial restraint. Given the relative infancy of India's effects jurisprudence, overly rigid doctrinal formulations from the bench could have prematurely bound the scope of analysis, limiting the CCI's capacity to experiment with economic reasoning across diverse factual scenarios. However, the Court could have, at least, laid down an *indicative* or *non-exhaustive* guidance that could have balanced flexibility with clarity.

The SC missed the following opportunities:

The Court's failure to link Section 4 with a clear evidentiary framework. Scholars such as Aditya Bhattacharjea have argued that the factors enumerated in Section 19(3) for AAEC determinations under Section 3 could serve as a template.[31] By not extending this reasoning, the Court left

[28] Mancini (n 1).
[29] *Ibid.*
[30] Mancini (n 34).
[31] Aditya Bhattacharjea, 'Oindrila De, Anti-cartel enforcement in India,' *(Journal of Antitrust Enforcement)* Volume 5, Issue 2, August 2017, Pages 166–196, < https://doi.org/10.1093/jaenfo/jnx001 > accessed 27 September 2025.

unresolved whether foreclosure, barriers to entry, or consumer benefits should be systematically evaluated under Section 4.

The second missed opportunity is that the Court did not clarify whether the effects-based standard applies equally to both exclusionary and exploitative abuses. While practices like rebates or tying lend themselves to foreclosure analysis, exploitative conduct such as excessive pricing raises more intricate issues, e.g., should it require proof of consumer harm, or can abuse be presumed from price disparities alone? By failing to maintain this distinction, the Court left open the risk of overreach in exploitative cases and underdeterrence in exclusionary ones.

Third, the Court's reliance on (out) dated European jurisprudence, particularly *Intel* and the 2009 EU Guidance, reflects another limitation. Since 2009, EU practice has evolved to adopt more structured tests, such as the AEC benchmark, which provides analytical discipline. By not engaging with the EU's 2023 Draft Guidance or adapting it to Indian realities, the Court has anchored Indian law in a transitional phase of comparative jurisprudence rather than charting a forward-looking path.

## PART III: RECOMMENDATIONS: AN OPERATIONAL EFFECTS TEST (THE AUTHORS' MODEL)

The SC's silence on operational tools risks leaving the effects-based standard adrift. To avoid uncertainty, the CCI must translate principles into practice through a structured yet flexible framework. Therefore, WE PROPOSE THE FOLLOWING MULTI-STEP FRAMEWORK:

Firstly, the CCI should define the relevant market and confirm dominance using conventional economic criteria, as the explanation to Section 4 provides.[32] Only if entities meet the legal definition of dominance, i.e., "*economic strength enabling [them] to operate independently of competitive forces*", should CCI proceed to the abuse analysis, as is the established position of law.

Secondly, the CCI should identify the challenged conduct and apply a "*competition-on-merits*" filter.[33] Drawing on the EU draft guidelines, the first inquiry is whether the dominant firm's behaviour simply reflects normal, performance-based competition, such as lower prices, better quality or innovation, etc. If so, it is lawful; otherwise, it "*deviates from competition on the merits*"

[32] Saksham Agrawal, 'Beyond Form To Effects: Analysing CCI V. Schott Glass' (*CCLE*) < https://www.icle.in/resource/beyond-form-to-effects-analysing-cci-v-schott-glass/ > accessed 27 September 2025.
[33] *In re Updated Terms of Service and Privacy Policy for WhatsApp Users* [2024] CCI Suo Motu Case No 01 of 2021, 18 November 2024.

and warrants closer scrutiny.[34] As Crowell & Moring explain, a dominant firm has a "special responsibility" not to engage in practices that would be unobjectionable from a non-dominant rival.[35] Thus, the authors suggest that only if the conduct falls outside that benign category should CCI move to the next stage.

Thirdly, the test must assess exclusionary effects. Adopting the EU two-step model, CCI should ask: *"Is the conduct capable of foreclosing competition?"*.[36] In *Schott Glass*, for example, loyalty rebates were held lawful because the evidence did not show actual foreclosure (alternative suppliers were available and rivals remained competitive). In practical terms, the Commission should determine whether the practice would raise rivals' costs, deny them sales or inputs, or otherwise alter the competitive structure to its own advantage (for example, by reducing output, innovation or choice).[37] The modern EU view is that "anticompetitive foreclosure" need not eliminate competitors outright but includes any harm to the effective competitive structure.[38] The CCI should likewise focus on consumer welfare-relevant effects, not merely a rival's exit.

Fourthly, the framework should categorise conduct with appropriate presumptions. For "naked restrictions,"[39] blatant exclusionary acts having no business justification, such as intentionally sabotaging a rival's inputs or networks, the Commission may presume illegality. Similarly, certain commonplace practices can be presumptively treated as exclusionary. For instance, exclusive supply or purchase obligations, loyalty rebates tied to exclusivity, below-cost pricing (predatory schemes), margin squeeze, and tying/bundling (where coercive) are deemed likely to foreclose an

[34] Karel Bourgeois, Karl Stas and Benjamin Geisel, 'The European Commission's Draft Guidelines on Exclusionary Abuses: Towards Stricter Enforcement?' < https://www.crowell.com/en/insights/client-alerts/the-european-commissions-draft-guidelines-on-exclusionary-abuses-towards-stricter-enforcement > accessed 27 September 2025.
[35] *Ibid.*
[36] European Commission, 'Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements' (*Communication C(2023) 3445 final*, 1 June 2023) < https://competition-policy.ec.europa.eu/system/files/2023-07/2023_revised_horizontal_guidelines_en.pdf > accessed 27 September 2025.
[37] Anna Lyle-Smythe, Claire Jeffs and Natalie Yeung, 'Competition And Regulatory Newsletter: European Commission Revises Article 102 Guidance' (*Slaughter and May*, 19 April 2023) < https://www.slaughterandmay.com/insights/importedcontent/competition-and-regulatory-newsletter-european-commission-revises-article-102-guidance/ > accessed 27 September 2025.
[38] Andriani Kalintiri, 'EU antitrust law's resilience: The Good, the Bad, and the Ugly' (2025) 43 Yearbook of European Law < https://academic.oup.com/yel/article/doi/10.1093/yel/yeae009/7953186 > accessed 27 September 2025.
[39] Lianos Ioannis, 'Naked Restrictions and Article 102 TFEU - The Emergence of an Epithet in EU Competition Law' (2025) SSRN < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5166436 > accessed 27 September 2025.

equally efficient competitor.[40] In these cases, the burden shifts to the dominant firm to rebut by showing legitimate commercial reasons or lack of actual foreclosure. This aligns with EU precedent, such as "high-potential" exclusionary conduct triggers presumptions whose probative force the dominant firm must overcome.[41]

Fifthly, for any other conduct, the CCI must prove foreclosure through a fact-driven analysis. This requires a counterfactual market analysis,[42] where the CCI should compare the real market (with the conduct) against a plausible scenario where the practice is absent. The dominant firm's conduct is abusive only if the counterfactual shows that competition would be materially more vigorous without it.[43] In doing so, CCI can employ an "as-efficient competitor" test and ask whether a hypothetical rival as efficient as the dominant could have competed profitably under the same conditions. However, it must also be noted that the EU's revised guidance treats the AEC test as "only one element" of the assessment & not a rigid shortcut.[44] Similarly, in *Unilever,* the UK Competition Commission emphasised that AEC is not mandatory in every case, but is particularly important for price-based strategies. In India's context, CCI should similarly use the AEC test cautiously, as a tool to gauge foreclosure potential, while giving weight to other indicators. For example, if a dominant firm's rebate tied to a contract effectively bars an equally efficient rival from supplying even a small but critical fraction of the market for an extended period, that outcome would support a finding of foreclosure under this test.

Sixthly, the Commission must consider efficiencies and consumer benefits at every stage. As the SC itself held, efficiency justifications, such as economies of scale, improved distribution, or quality improvements, etc, must be weighed before labelling conduct abusive. The proposed model should explicitly allow the dominant firm to rebut a presumption or avoid liability by showing net

[40] Case 85/76 *Hoffmann-La Roche & Co. AG v Commission* [1979], *ECR* 461.
[41] Case C-413/14 P *Intel Corp v European Commission* [2017].
[42] Dr. René Galle and Dr. Paul Voges, 'Damages claims for abuse of dominance – A German perspective on effective private enforcement' (*Hausfeld*, 26 June, 2025) <https://www.hausfeld.com/what-we-think/competition-bulletin/damages-claims-for-abuse-of-dominance-a-german-perspective-on-effective-private-enforcement> accessed 27 September 2025.
[43] Elias Deutscher, 'Some Thoughts on the Counterfactual Analysis in the General Court's Qualcomm Ruling' (*Competition Forum Research Paper No 0043*, 17 February 2023) < https://competition-forum.com/some-thoughts-on-the-counterfactual-analysis-in-the-general-courts-qualcomm-ruling/ > accessed 27 September 2025.
[44] Damien Geradin and Stijn Huijts, 'Abuse of dominance: has the effects-based analysis gone too far?, Oxford Review of Economic Policy' 2024 40(4) (Oxford Review of Economic Policy) <https://academic.oup.com/oxrep/article/40/4/776/7990567 > accessed 27 September 2025.

pro-competitive effects. This mirrors Section 19(3) of the Act. As Aditya Bhattacharjea suggests,[45] the analysis can adapt factors like consumer welfare, distribution improvement, and efficiencies to the dominance context.[46] For instance, a dominant firm that can document significant cost savings or new product development resulting from the conduct and link these to consumer price/quality gains, should receive credit in the analysis. The burden of proof in rebuttal should remain on the firm, but the Commission must objectively verify such claims against hard data. In short, the model should treat efficiency claims as affirmative defences, similar to the EU and US approaches,[47] requiring proof of a net benefit to offset any exclusionary harm.[48]

Finally, the outcome should be determined by proportionality and net effect. Abuse must be found only if the anti-competitive foreclosure outweighs any efficiency or compensating consumer benefit. A practical rule could be that if the dominant firm's conduct does not materially worsen consumer welfare relative to the counterfactual, then it is not abusive. This implements the EU principle that Article 102 prohibits practices that allow a firm "*to negatively influence, to its own advantage and to the detriment of consumers*" the parameters of competition.[49] Thus, trivial or ambiguous foreclosures, especially where one or more downstream competitors are merely less efficient, should be deemed competitive.

Within India, this model fills the "doctrinal void" left by *Schott Glass* by translating that case's mandate into actionable steps. The authors believe that if not this, then a similar model should be incorporated by the CCI/SC to target truly exclusionary conduct, one that materially harms competitive conditions relative to a no-conduct scenario, after accounting for any offsetting efficiencies.

## CONCLUSION

Schott Glass marks an important and welcome recalibration of India's abuse-of-dominance jurisprudence. The shift brings Indian enforcement into closer alignment with mature comparative regimes and protects dominant firms from being punished for lawful, performance-based success.

[45] Ministry of Corporate Affairs, *Report Of Competition Law Review Committee* (Government of India).
[46] *Ibid.*
[47] OECD, *Economic Analysis and Evidence in Abuse Cases* (OECD Roundtables on Competition Policy Papers No 269, OECD Publishing, Paris, 24 November 2021) < https://www.oecd.org/en/publications/economic-analysis-and-evidence-in-abuse-cases_63e6d5f0-en.html (doi: 10.1787/63e6d5f0-en) > accessed 27 September 2025.
[48] *Ibid.*
[49] European Commission, *Amending Communication - Annex: Amendment to the Guidance on the Commission's enforcement priorities in applying Article 102 TFEU* (Brussels, 27 Mar 2023), paras 1a–1b.

Yet the Court's embrace of effects is only a first, and incomplete, step. Without clear, practicable guidance on how to measure and adjudicate effects, the promise of Schott Glass risks dissolving into uneven application, legal uncertainty, and costly litigation over methodology rather than economics.

The multi-step, operational model proposed in this article, thus, seeks to fill that gap. By applying a competition-on-merits filter, assessing foreclosure through both presumptions, for naked or high-potential exclusion, and rigorous counterfactual analysis (*including the AEC lens where appropriate*), and by integrating efficiencies and proportionality throughout, the model converts an abstract effects mandate into a transparent, testable, and predictable process. The approach keeps consumer welfare, not competitor injury per se, at the centre of the inquiry.

Schott Glass correctly reorients Section 4 toward effects, but the real work now lies in turning principle into practice. A structured, evidence-driven framework, applied with methodological rigour and institutional capacity, will allow Indian competition law to walk its tightrope, deterring exclusionary conduct that truly harms competition while safeguarding the vigorous rivalry that delivers benefits to consumers.

# BEHIND THE BOARDROOM VEIL: THE STRUCTURAL FLAWS OF INDIA'S INDEPENDENT DIRECTORS

*Arzoo Kedia and Hemendra Vaishnav*[1]

## I. ABSTRACT

*The institution of Independent Directors (IDs) was established as a basis of corporate governance, with the intent to offer independent oversight, safeguard investor interest, and maintain accountability in publicly listed companies. Despite their centrality in governance structures, repeated instances of corporate misconduct have highlighted their diminishing effectiveness. The latest event of governance failure involving Gensol Engineering Ltd. and multiple others, like Stayam, IL&FS and DHFL, reflects a fundamental regulatory or structural flaw that weakens the effectiveness of IDs in India.*

*This article aims to critically analyse the systematic flaws that cause shortfalls in the operation of IDs. Promoter-controlled appointment, poor remuneration, regulatory uncertainty, and discretionary criteria of materiality are some of the reasons identified by the authors for the weakening of the independent oversight. This analysis also sheds light on the recent Gensol case, wherein IDs were unable to identify and stop the diversion of investor money, indicating a trend of ineffectiveness and ritualistic compliance. These trends are indicative of how weak structures and loopholes facilitate abuse of the institution, undermining shareholder confidence and questioning the very independence of IDs.*

*To restore credibility, the authors have suggested substantial changes to revive the institution's credibility: setting up of an Independent Director Selection Panel, execution of the dual approval mechanisms with minority stakeholders, institutional investor-nominated IDs, strict cooling-off rules, and performance-related appraisals. The article also suggests reducing the materiality threshold for related-party relationships and harmonisation of standards with global best practices, like those of the UK Corporate Governance Code and the US Sarbanes-Oxley Act, are highlighted as necessary measures to reinstate investor confidence.*

[1] The authors are students at Hidyatullah National Law University.

*Through rectifying these weaknesses, the article calls for restoring independent directorships as true watchdogs of governance that can forestall corporate misbehavior rather than validating it in the name of symbolic compliance.*

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## II. INTRODUCTION

The institution of independent directors (hereinafter referred to as "IDs") is believed to be the cornerstone of a company, particularly of a publicly listed company, as they stand at the critical juncture, wherein they have to balance the relationship with the management, while safeguarding the interests of the investors. They are the individuals within the company who uphold objectivity, ensure accountability & transparency, and establish checks and balances. More importantly, they are entrusted with protecting the investors' money and maintaining trust in the company's operations. The Uday Kotak committee underscored the importance of IDs by emphasising that;

*"The institution of independent directors forms the backbone of the corporate governance framework worldwide and in India. Independent directors are expected to bring objectivity into the functioning of the Board and improve its effectiveness. Independent directors are required to safeguard the interests of all stakeholders, particularly minority shareholders, balance the conflicting interests of the stakeholders, and bring an objective view to the evaluation of the performance of the Board and management".*[2]

The critical question that arises is: Have we been able to achieve the objective for which the institution of the IDs was originally established? The answer is a regrettable no, because numerous instances flag the ineffectiveness of the IDs in safeguarding the interests of the stakeholders, while the formal architecture of board independence and regulatory compliance projects an image of robust oversight and accountability, the realities of boardroom functioning often reveal a very different picture. IDs, who are intended to operate as neutral guardians of shareholder interests, are frequently constrained by promoter influence, structural incentives, and regulatory ambiguities that weaken their ability to act independently in practice. For instance, in Gensol Engineering Ltd. (hereinafter referred to as "Gensol") Case where the promoters diverted Rs. 262.13 crore of investors' funds for their personal expenses and to fund the other companies of promoters, highlight

[2] SEBI, '*Report of Committee on Corporate Governance*' (2017).

a systemic failure in the oversight mechanism.[3] The recurring pattern of corporate failure, ranging from the Satyam scandal,[4] DHFL,[5] IL&FS,[6] to Yes Bank,[7] exposes the deep-rooted flaws in the appointment, functioning, and accountability of IDs. Firstly, this essay will analyse the Gensol fallout and how the promoters were successful in diverting the investors' funds under the guise of the IDs. Secondly, it deals with the structural and regulatory challenges plaguing the IDs regime in India. It explores how promoters dominated appointments, inadequate remuneration, regulatory ambiguities, and lack of stringent materiality standards, coupled with the loophole in tenure regulation, have significantly compromised the independence and efficacy of IDs. Lastly, the author advocates for reforms in existing governance frameworks, such as an independent director's selection panel, enhanced minority shareholders representation, stricter cooling-off periods, and harmonised materiality standards in order to restore the intended role of IDs as true custodians of corporate governance and prevent this institution from becoming a merely ceremonial formality rather than a robust check on corporate misconduct.

## III. THE GENSOL FALLOUT AND OTHER FAMILIAR TALES

The recent development again highlights the failure of the IDs in effectively discharging their responsibilities. Wherein, the Securities and Exchange Board of India (hereinafter referred to as "SEBI") vide interim order dated April 15, 2025,[8] has prohibited Gensol and its promoters (Puneet Singh Jaggi & Anmol Singh Jaggi) from buying, selling, and dealing in securities either directly or indirectly in any manner whatsoever until further order. This order was issued owing to several fraudulent transactions that occurred in the Gensol, where the promoters had diverted Rs. 262.13

[3] SEBI, *Interim Order in the Matter of Gensol Engineering Limited* (2025) <https://www.sebi.gov.in/enforcement/orders/apr-2025/interim-order-in-the-matter-of-gensol-engineering-limited_93458.html> accessed 21 June 2025.
[4] SEBI, *Order in the Matter of Satyam Computers Services Limited* (2023) <https://www.sebi.gov.in/enforcement/orders/nov-2023/order-in-the-matter-of-satyam-computers-services-limited_79496.html> accessed 21 June 2025.
[5] SEBI, *Interim Ex Parte Order in the Matter of Dewan Housing Finance Corporation Limited* (2020) <https://www.sebi.gov.in/enforcement/orders/sep-2020/interim-ex-parte-order-in-the-matter-of-dewan-housing-finance-corporation-limited_47615.html> accessed 21 June 2025.
[6] SEBI, *Adjudication Order in the Matter of IL and FS Financial Services Limited* (2020) <https://www.sebi.gov.in/enforcement/orders/dec-2020/adjudication-order-in-the-matter-of-il-and-fs-financial-services-limited_48571.html> accessed 21 June 2025.
[7] SEBI, *Adjudication Order in the Matter of AT1 Bonds of Yes Bank Limited* (2021) <https://www.sebi.gov.in/enforcement/orders/apr-2021/adjudication-order-in-the-matter-of-at1-bonds-of-yes-bank-limited_49822.html> accessed 21 June 2025.
[8] Gensol, *supra* note 2 .

crore for their personal use out of Rs. 978 crores raised for buying electric vehicle (hereinafter referred to as "EVs"), and for diversion of funds to BluSmart from their listed solar energy company Gensol, where Anmol Singh Jaggi and Punnet Singh Jaggi were promoters. Subsequent to SEBI's interim order, the IDs of Gensol have tendered their resignation from their posts with immediate effect.[9] These resignations, while not the cause of regulatory actions, bring into focus the accountability and vigilance expected from IDs once serious governance violations surface. This related party transaction took place under the guise of the presence of IDs in the audit committee, where the majority, that is, two-thirds of the members, are IDs of the company, pursuant to the provisions of Regulation 18 of SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as "the Regulation").[10] While the immediate regulatory action was triggered by promoter-led fund diversion, such instances underscore a deeper governance failure where IDs lapsed to question manifest red flags or gave in to management narratives, thereby defeating the very rationale for their statutory narratives.

This is not a very first instance wherein a fraudulent related party transaction occurred in a listed company, under the guise of the IDs, who constitute the majority in the audit committee. Earlier instances, such as the Satyam Computer Services scandal,[11] Yes Bank FIASCO case,[12] Dewan Housing Finances Limited (DHFL) case,[13] IL&FS case,[14] and the present case, reflect the ineffectiveness of the audit committee and the failure of the IDs to safeguard the investors' money. This raises a question mark on the very presence of the IDs and the underlying objective for which they were appointed. Although, role and effectiveness of IDs in these cases is not the sole component, it is a significant one. While looking after the affairs of the company, the IDs face several critical hurdles that impair their effectiveness and hinder them from achieving their intended mandates.

## IV. STRUCTURAL AND REGULATORY CHALLENGES IN THE APPOINTMENT AND FUNCTIONING OF INDEPENDENT DIRECTORS

[9] Vasudha Mukherjee, 'Crisis Deepens as More Directors Resign amid Gensol Fund Diversion Case' *Business Standard* (New Delhi, 18 April 2025) <https://www.business-standard.com/companies/news/gensol-crisis-ev-cab-app-blusmart-director-resignation-jaggi-sebi-order-125041800363_1.html.> accessed 21 June 2025.

[10] SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, reg. 17(1)(b).

[11] Satyam Computers, *supra* note 3.

[12] Yes Bank , *supra* note 6.

[13] Dewan Housing , *supra* note 4.

[14] IL and FS Financial Services , *supra* note 5.

### A. Puppet Appointments: The Guise of Independence

In the current regime, Section 149 (4) of the Companies Act, 2013 (hereinafter referred to as "the Act"),[15] r/w Regulation 17(1)(b) of the Regulation,[16] mandates that at least one-third of the directors in a publicly listed company be IDs. Their unbiased and fair appointment becomes very crucial for the effective governance of a company and for the protection of investor interests. The vital steps involved in the appointment initiate with the constitution of the Nomination and Remuneration Committee (hereinafter referred to as "NRC").[17] The NRC is entrusted with the responsibility of evaluating and recommending suitable candidates to the board of directors of the company. Then the board of directors approves the appointment of IDs after reviewing the NRC recommendations; thereafter, the company has to seek shareholder approval through a special resolution in a general meeting.[18]

The appointment procedure of the IDs consists of various structural deficiencies, often leading to a lack of independence and ineffective foresight. As outlined in the foregoing discussion, a publicly listed company is mandated to constitute an NRC in conformity with Section 178 of the Act[19] r/w Regulation 19 of the Regulation.[20] As stipulated in these provisions,

*"The Board of Directors of every listed company and such other class or classes of companies, as may be prescribed, shall constitute the Nomination and Remuneration Committee consisting of three or more non-executive directors out of which not less than one-half shall be independent directors"*

This provision makes it mandatory to have the presence of IDs in the NRC committee. In this instance, the IDs in the committee are the ones who were appointed by the board of directors before the company went for public listing to comply with the SEBI listing requirement. Since, at the first instance, the IDs are appointed by the board of directors, often influenced or dominated by the promoters of the company, they may not be truly independent. Many of them are appointed based

[15] The Companies Act 2013, s 149(4).
[16] SEBI, *supra* note 9.
[17] The Companies Act 2013, s 178.
[18] Dinesh P, 'Procedure for Appointment of Independent Director' *(IndiaFilings*, 4 March 2024) <https://www.indiafilings.com/learn/procedure-for-appointment-of-independent-director/> accessed 21 June 2025.
[19] *supra* note 16.
[20] SEBI (Listing Obligations and Disclosure Requirements) Regulations 2015, reg. 13.

on the personal connections of the promoters rather than on objectivity or merit, undermining their independence. Afterwards, these IDs form the NRC, leading to a self-perpetuating cycle of biased and structurally influenced appointments because the NRC is dominated by the promoter's linked directors, leading to biased appointments. The Companies Act and SEBI Regulations do not explicitly lay down how the first ID should be selected in an unbiased way, which allows promoters to cherry-pick their known IDs , defying the whole purpose of independence.

Additionally, the shareholders' approval after approval from the board is a mere formality, since a promoter holding in a company is usually in the majority. As of February 2025, a total of 2,629 companies are listed on the National Stock Exchange, and 5,595 companies are listed on the Bombay Stock Exchange,[21] out of which 3,204 entities have promoters holding more than 50% of the total shareholding.[22] Shareholder approval becomes a rubber stamp, even if minority investors object, where the promoter dominates the shareholding pattern. Moreover, SEBI had also suggested a "dual approval" mechanism for the appointment or removal of independent directors, which involved two layers of consent: firstly, approval by the majority of all shareholders, and secondly, a separate majority approval from minority shareholders (excluding promoters).[23] However, this proposal was ultimately not incorporated into the SEBI (LODR) Regulations, 2015.

### B. Remuneration of Independent Directors: Hurdle to Effectiveness

The remuneration that an ID receives closely correlates with their capacity to operate independently of management. IDs are supposed to exercise impartial supervision, but if their monetary incentives hang in the balance too closely with the company or its promoters, their impartiality will be impaired. In India, the pay of IDs is predetermined and governed under Section 197 of the Act.[24] SEBI regulations disallow equity-based compensation, while Schedule V of the Act caps yearly remuneration based on a company's effective capital, subject to shareholder approval for any excess.

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[21] Rohan Rawat, 'How Many Companies Are Listed in NSE and BSE in 2025?' (*Shoonya Blog,* 19 Feb 2025), <https://blog.shoonya.com/how-many-companies-are-listed-in-nse-and-bse/> accessed 22 June 2025.
[22] *Query Results - Screener*, <https://www.screener.in/screen/raw/?sort=name&order=asc&source_id=180034&query=Promoter+holding+%3E+50&latest=on> accessed Jun. 22, 20252. INVALID CITATION
[23] SEBI*, Consultation Paper on Review of Regulatory Provisions Related to Independent Directors* (2021) <https://www.sebi.gov.in/reports-and-statistics/reports/mar-2021/consultation-paper-on-review-of-regulatory-provisions-related-to-independent-directors_49336.html> accessed 21 June 2025.
[24] The Companies Act 2013, s 197.

In FY 2022, the average compensation of IDs weakly correlates with market capitalisation and overall income, but the absolute amounts are still small. In the case of the top market capitalisation companies (over ₹95,000 crore), for example, the average total remuneration per ID was ₹7.08 lakh, an amount that might not be sufficient to draw top executive talent with the ability to manage increasingly sophisticated board duties. Regulators such as the Reserve Bank of India and Insurance Regulatory and Development Authority of India have also put a cap on remuneration annually at ₹20 lakh for directors in financial services in the interest of balance.[25] But whether these caps subvert the intention of attracting qualified professionals is open to question.[26]

Capped and exclusive compensation contributes little to the initial objective of independence. Indeed, this strict framework could discourage directors from extending themselves beyond their minimum requirement, thus preventing constructive contributions. IDs may forgo confrontation or public disagreement to preserve board harmony. This may result in a reduction of their effectiveness since they may remain silent to avoid speaking out against questionable decisions, negating their reason for being.

The Satyam Scandal is an example of this situation playing out in real time. The board, including IDs, had approved a defective acquisition involving related parties (Maytas companies, belonging to the promoter group). The Serious Fraud Investigation Office investigation brought out that the IDs had allegedly not been given full information, and later, some of them claimed that their sanction was conditional, not absolute. This indicates how limited access to full information and potential peer pressure, or lack of adequate monitoring, can defuse the effectiveness, even of well-intentioned directors. [27]

### C. Watchdogs or Bystanders? Audit Committees and Related Party Transactions

The audit committee is one of the most crucial committees in the corporate governance framework and plays a pivotal role in safeguarding investors' interests. This committee is entrusted with the responsibility of evaluating the financial statements, scrutinising loans & investments, approving

[25] RBI, *Appointment of Directors and Constitution of Committees of the Board,* (2021) <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/24CORPORATE68CA91B159A2408DB3EBC479471DD2B4.PDF> accessed 22 June 2025.
[26] Exec-Rem, *Independent Director Compensation in India* <https://www.exec-rem.com/wp-content/uploads/2023/06/independent-director-compensation-in-india.pdf> accessed 22 June 2025.
[27] R&A Associates, *Independent Directors – Analyzing Their Role and Independence* <https://rna-cs.com/independence-and-performance-of-independent-directors/> accessed 22 June 2025.

related-party transactions (hereinafter referred to as "RPT"), and monitoring fund utilisation. In accordance with the provision of Regulation 18 (1) (b) of the Regulation, it is mandated that a minimum of two-thirds of the audit committee members must be IDs in a publicly listed company.[28] When this provision was implemented by SEBI, questions were raised regarding the imposition of such wide responsibilities on individuals who are not engaged in the day-to-day affairs of the company, deviating from the actual mandates, and could lead to overburdening and reduced effectiveness.[29]

SEBI stated the rationale behind this provision by emphasising that IDs will act as a custodian of the shareholders' interest, by preventing executive overreach, and promoting transparency, integrity, and accountability.[30] SEBI believed that passive oversight had been proven to be insufficient; there is a need for active involvement of IDs in scrutinising financial and operational risks. In the same vein, SEBI mandated that with effect from January 1, 2022, all RPTs must receive prior approval from the IDs in the audit committee.[31]

Despite SEBI's efforts to curb fraudulent RPT by vesting the approving authority in IDs, there is no pause in such malpractices. In the present (Gensol Engineering Ltd.) case itself, around Rs. 262.13 crore of investors' money is siphoned off and channelled into the promoter's subsidiary companies and for their personal expenses, treating the firm like a *"personal piggy bank"*.[32] The root cause of the fraudulent RPT originates with the appointment of the promoter- linked IDs to the board, and thereafter, their placement in the audit committee, providing a safe passage to the dubious transactions. In the "Bombay Dyeing and others*"* case,[33] SEBI orders reveal a similar governance failure, where certain IDs had close ties with promoters, provided a safe passage to around Rs. 1,200 crores worth of non-arm's-length transactions routed to the promoter-linked real estate entities.

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[28] SEBI (LODR) Regulations 2015, Reg. 18(1)(b).
[29] Debanshu Mukherjee & Astha Pandey, 'The Liability Regime For Non-Executive and Independent Directors in India A Case for Reform' (*VIDHI Centre for Legal Policy,* 19 September 2019).
[30] *supra* note 22 .
[31] ibid.
[32] S N Thyagarajan, 'SEBI Cracks down on Gensol, Bars Promoters from Market' (*Bar and Bench*, 16 April 2025) <https://www.barandbench.com/news/litigation/gensol-promoters-treated-company-funds-like-their-piggybank-sebi-bars-anmol-puneet-singh-jaggi-from-market> accessed 21 June 2025.
[33] SEBI*, Final Order in the Matter of The Bombay Dyeing and Manufacturing Company Ltd.* (2022) <https://www.sebi.gov.in/enforcement/orders/oct-2022/final-order-in-the-matter-of-the-bombay-dyeing-and-manufacturing-company-ltd-_64296.html> accessed 21 June 2025.

Additionally, most of the IDs lack the sectoral knowledge and enough time required to effectively scrutinise the intricate and high-value transactions, as they often serve on multiple boards. In numerous instances, a board meeting becomes a mere procedural formality or a box-ticking exercise, wherein IDs approve the decisions or transactions without critical evaluation, mainly because of a lack of incentives or fear of being removed,[34] thereby undermining the independent oversight over the RPT and effective corporate governance.

### D. Materiality of Relationships: Absence of Harmony

The Act provides that an ID shall not have any financial or pecuniary relationship, except remuneration, which shall not exceed 10% of their total income.[35] On the contrary, the regulation does mention the term "material pecuniary relationship" but fails to provide any precise numerical threshold to determine the "materiality" of the relationship.[36]

This lack of an explicit definition led Infobeans Technology Ltd. to seek clarification from SEBI, as they wanted to appoint one of its IDs as a consultant in their U.S. branch (InfoBeans Inc.).[37] In its informal guidance, SEBI stated that, in addition to the 10% level set forth in the Act, the board of directors must subjectively evaluate such materiality on an individual basis in light of the larger framework of Regulation 16 (1) of the Regulation.[38]

SEBI, through this letter, failed to harmonise Regulation 16 of the Regulation and Section 149 of the Act. Instead, it shifted the onus on the NRC to frame criteria for independence and for the board to assess the declarations. The transfer of final decision-making authority to the board is counteractive to the very intention of the introduction of IDs.

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[34] Smriti Kashyap, 'Governance Redefined: The Role of Independent Directors in India post 2025: From Boardroom Rituals to Enabling Functional Accountability' (2025) 5(3) *IJIRL* <https://ijirl.com/wp-content/uploads/2025/05/GOVERNANCE-REDEFINED-THE-ROLE-OF-INDEPENDENT-DIRECTORS-IN-INDIA-POST-2025-FROM-BOARDROOM-RITUALS-TO%E2%80%82ENABLING-FUNCTIONAL-ACCOUNTABILITY.pdf> accessed 29 October 2025

[35] The Companies Act 2013, s 149(6)(c)

[36] SEBI (LODR) Regulation 2015, reg. 16(1)

[37] SEBI, *Informal Guidance Application Received from InfoBeans Technologies Limited Seeking Interpretation of Regulation 16(1)(b)(Iv) of the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015* (2025) <https://www.sebi.gov.in/enforcement/informal-guidance/may-2025/informal-guidance-application-received-from-infobeans-technologies-limited-seeking-interpretation-of-regulation-16-1-b-iv-of-the-sebi-listing-obligations-and-disclosure-requirements-regulations-_93935.html> accessed 21 June 2025.

[38] ibid.

Regulation 16 (1) (iv) of the Regulation does mention that the IDs shall not have any material pecuniary relationship with any director of the listed entity. Whereas Regulation 25 (9) of the Regulation provides that the board of directors shall assess the veracity of the declaration submitted by the IDs.[39] Schedule IV of the Act also contains a detailed code for IDs; as per the code, their appointment should be *'independent of the company management'.*[40] It is a given that, if an independent director is appointed with malicious intentions, his relationship with the director would not suddenly be disclosed by the said director at the final stage of assessment. This will lead to rubber-stamping due to self-interest. Additionally, SEBI directs that IDs should comply with both the Regulation and Section 149(6) of the Act. This creates a dual regime where directors may satisfy the quantitative threshold under Section 149(6) of the Act but still fall short under the ambiguous "materiality" standard in regulation 16(1) (b) (iv) of the Regulation. This dual compliance requirement creates uncertainty in practical application. For instance, under Section 149(6) of the Companies Act, an individual whose consultancy income from the company constitutes only 8% of their total annual income would still meet the quantitative independence criterion, as it remains below the prescribed 10% ceiling. However, the same individual might fail the "materiality" test under Regulation 16(1)(b)(iv) if the board or NRC considers that their consultancy role gives rise to a significant influence over company affairs or undermines perceived independence. Thus, while the Act adopts a bright-line quantitative test, the Regulation imposes a qualitative assessment of "material pecuniary relationships," which lacks a defined numerical benchmark. This incongruence establishes a dual regime where one criterion is objective and statutory while the other is discretionary and regulatory.

The lack of harmonising interpretation by SEBI will lead to subjective board decisions, which will be vulnerable to regulatory second-guessing and ultimately increased litigation and execution delays.

### E. The End of The Grandfathering Period and the Dilemma of The Board

Ten years ago, the Act established the IDs' tenure provision, under which IDs will serve on a company's board for a maximum of ten years, grandfathering those nominated prior to April 1,

[39] SEBI (LODR) Regulations 2015, reg. 25(9).
[40] The Companies Act 2013, sch IV.

2014.[41] The Grandfathering period came to an end in April 2024, which led the companies to replace the directors who had served for more than 10 years. This created a double-edged sword; although replacing such long-serving independent directors led to the loss of institutional memory, it was also necessary to ensure that long tenures don't cause loss of objectivity for IDs. The goal is to prevent boards from becoming overly exclusive, as this could lead to directors becoming overly familiar with management and jeopardising their independence. However, in actual practice, companies have devised a number of methods to replace long-serving IDs while maintaining their desire to retain familiar staff.

Group firm rotation is one such strategy being used by some firms. IDs who have worked for one company for more than ten years are joining the boards of other companies in the same "group." Questions are being raised about whether the director is really independent because of the long-standing link with the promoter group or family.[42] A report has revealed that WELCORP, Essel Mining & Industries Ltd, and Sundaram Finance Holding Ltd. are among some companies that have practised group rotation.[43]

Even board composition could not escape the clutches of nepotism. Family Association was another method used by companies like Ramco Industries Ltd and Inox Green Energy Services Ltd. to ensure familiarity within the board.[44] In a few cases, after an ID has served a lengthy term, businesses have opted to appoint a member of the same family, frequently a father-son pair.

And after all, who can be more objective than ex-employees? Long-tenured former employees are still being hired by businesses as IDs. Some of them may have finished a cooling-off period, but others have remained involved with the group after retirement by serving as board members or consultants for its companies.[45] A few businesses have also taken an abstract approach to the "cooling period" that is mandated by law before an ex-employee can be appointed as an

[41] Khusboo Tiwari, 'India Inc Set for Board Refresh as Grandfathering Period Ends Soon' *Business Standard* (Mumbai, 7 September 2023) <https://www.business-standard.com/companies/news/india-inc-set-for-board-refresh-as-10-year-grandfathering-nears-end-123090701063_1.html> accessed 21 June 2025.
[42] Directors' Institute, 'Companies Finding Innovative Ways to Rotate Independent Directors' (*Directors Institute*, 9 December 2024) <https://www.directors-institute.com/post/companies-finding-innovative-ways-to-rotate-independent-directors> accessed 22 June 2025.
[43] Institutional Investor Advisory Services, 'It's a Small World after All' (*Institutional Eye,* 7 May 2024) <https://www.iiasadvisory.com/institutional-eye/it-s-a-small-world> accessed 22 June 2025.
[44] ibid.
[45] ibid.

independent director. These former staff members have remained on the board, rising from executive director to nonexecutive director. Companies are reclassifying these former employees as IDs after they have served a three-year term as non-executive directors; this period is being considered the "cooling period." Adesh Kumar Gupta from Aditya Birla Group saw a similar fate when he was appointed as CFO after previously being a whole-time director and then immediately after as a non-executive director. Likewise, Adani Group adopted a similar strategy by continuously rotating Ameet Desai as first a non-executive director and then an executive director in Adani Power, then Executive Director in Adani Enterprises, and finally as Independent Director in Ambuja Cements.[46]

In a similar vein, certain businesses appear to have virtually allocated a seat for an ID from the same audit firm (Bansi S. Mehta & Co.) or law firm (Khaitan & Co., Sharul Amarchand Mangaldas & Co.); these are typically experts at the partner level.[47] Boards make the fictitious claim that the firm is the one that provides services to the company and the group, not the partners acting in their individual capacity. Regulations also forbid employees, partners, and owners of businesses that have business ties to the company, its subsidiaries, and affiliates from being considered IDs, provided that the transaction value exceeds the firm's 10% revenue level. This is a significant amount for big consulting and law companies, and it is rarely exceeded by a single business. As a result, boards contend that the amount of money paid to the firm is irrelevant for both the firm and the corporation. Nevertheless, investors must consider the justification for a company's devotion.

Appointments such as the ones mentioned above cast doubt on the NRC's ability to search for the ideal board director and the selection process it employed. The question arises as to whether these appointments pass a simple test, even though they do not directly violate the letter of the law. All these practices raise major concerns over the actual "independence" and objectivity of the IDs.

## V. RECOMMENDATIONS

The IDs are often believed to be the spine of effective corporate governance, not only in India but throughout the world. However, this institution is often entangled in numerous corporate

[46] Institutional Investor, *supra* note 42 .
[47] ibid.

irregularities due to multiple persisting hurdles encountered in its operation, as outlined in the foregoing section of this paper, which restrict its effectiveness. To make this institution more effective, the author proposes a set of targeted reforms aimed at strengthening the independence, accountability, and functional efficacy of IDs.

Firstly, it is essential to ensure the fair, transparent, and objective appointment of the IDs without the influence of the promoters. This can be achieved by restricting the influence of promoters during the initial stage of appointing IDs, particularly before a company proceeds for public listing. As discussed in the preceding section, such appointments are often made by boards dominated by promoters, thereby compromising the independence of the directors.

The authors advocate for the creation of a body like the "Independent Director Selection Panel", a pre-listing regulatory oversight body of the IDs, in line with Singapore's mandatory external vetting of IDs.[48] This selection panel will be acting on behalf of the SEBI and will be responsible for the approval of the initial set of IDs appointed by the board, prior to the company going for a public listing. This should be made one of the mandatory checklists of the public listing. Post public listing, the panel-approved IDs would serve the board for the first 3 years post-listing. After this period, the NRC, formed with the SEBI-vetted IDs, will be responsible for the future appointments. This appointment mechanism will break the promoter nexus with the IDs, preventing a self-perpetuating cycle of biased appointments.

Furthermore, to protect the interest of minority shareholders in the appointment, re-appointment, or removal of IDs, in addition to a special resolution, under Regulation 25(2A) of the Regulation, the "Majority of Minority' rule should be implemented alongside the special resolution for the approval of minority shareholders. Specifically, where the promoters ' shareholding is 75% or more in the listed company, ensuring that the IDs approval reflects the consent of non-promoter shareholders.

Secondly, to prevent fraudulent RPT in a publicly listed company and safeguard the shareholders' interests, specifically those of the institutional investors and minority shareholders. The authors advocate for the IDs' reservations for institutional investors and minority shareholders, in line with

[48] Dan W. Puchniak & Luh Luh Lan, 'Independent Directors in Singapore Puzzling Compliance Requiring Explanation' (2017) 65 American Journal of Comparative Law.

the UK Corporate Governance Code 2018.[49] In a publicly listed company where promoter share holdings are more than 50%, the institutional investors and minority shareholders should be allowed to elect one ID on their behalf through a separate voting class, and the voting should be limited to the non-promoter shareholders in the company. These IDs shall be entrusted with the responsibility of safeguarding investors' interests by attending all board meetings and being granted access to all relevant information, subject to limitations on their voting rights. Additionally, they shall publish a half-yearly or annual "independent report" by assessing the board's decisions. Thus, they will act as watchdogs for institutional investors and minority shareholders, without disrupting board dynamics, and will play a vital role in preventing fraudulent RPT.

Thirdly, to prevent companies from employing cunning methods to leverage loopholes and retain favourable staff on the board, the loopholes need to be eliminated. To achieve this, a group-level cap or compulsory cooling-off for group entities, similar to the UK Corporate Governance Code's focus on periodic board refresh, can be instituted.[50] In the same vein, firms have also appointed relatives of retiring IDs, evidencing issues with objectivity as well as NRC bias. Though the law remains silent on succession within the family, SEBI had issued a proposal for "dual approval" in the form of an additional clearance by minority shareholders, which has not found its way into policy.[51] A transparent scoring system for selecting directors, where minority shareholders have the power to veto, can address this gap. Another common practice is reappointing former employees as IDs after evading the cooling-off requirement under Section 149(6)(e) by temporarily reclassifying them as non-executive directors. This undermines the spirit of the provision and necessitates a more stringent cooling-off requirement, as practised in the UK with its 5-year disassociation concept for independence.

Lastly, the practice of allocating board seats to partners of associated law and audit firms persists despite SEBI's Rule 16(1)(b)(iv), which bars IDs from having material pecuniary ties with group companies, but only if such ties exceed 10% of the firm's revenue. Because large companies only infrequently cross this threshold from a single customer, a reduced threshold and materiality test

[49] Financial Reporting Council, *The UK Corporate Governance Code* (FRC 2018). UK_Corporate_Governance_Code_2018.pdf
[50] ibid.
[51] SEBI, *Consultation Paper on Review of Regulatory Provisions Related to Independent Directors* (2021) <https://www.sebi.gov.in/reports-and-statistics/reports/mar-2021/consultation-paper-on-review-of-regulatory-provisions-related-to-independent-directors_49336.html> accessed 21 June 2025.

at the individual level, along the lines of the Sarbanes-Oxley Act (US), which demands partner-level auditor independence, should be implemented.[52] These practices expose the shortfalls of the existing regulatory framework and, unless corrected, will progressively undermine independent directorships and investor confidence.

It is also recommended that directors be mandated to submit to performance reviews. The independent director's assessment report may be based on his participation and attendance at board meetings, and it may be presented to the NRC for consideration of re-appointment. In addition to helping the directors concentrate more on their areas of weakness, this process of critically evaluating their performance will help them build on their strengths and contribute to the organisation.

## VI. CONCLUSION

While independent directors were originally conceived as the guardians of corporate governance, their operational efficacy has been consistently eroded by structural loopholes, tainted appointments, and regulatory non-harmonisation. The constant corporate failures reveal the vulnerability of their independence and the imperative to reform. Unless the power of promoters is checked, performance-oriented appraisals are institutionalised, and shareholder rights are more effectively safeguarded, specifically for minority stakeholders, the function of IDs will be more ceremonial than substantive. Fortifying the bedrock of this institution is not only a regulator's compulsion but a sine qua non for rebuilding investor confidence and ensuring long-term corporate responsibility in India.

[52] Sarbanes-Oxley Act 2002.

# BUYING BRAINS, NOT BUSINESSES: ANTITRUST CHALLENGES AND POLICY SOLUTIONS FOR AI ACQUI-HIRES[1]

*Ishita Gupta and Sankalp Thakur*[2]

**ABSTRACT**

*In today's world, the control over scarce human resources is what defines market competition in the ever-growing AI economy. As a result, a phenomenon called Acqui-hires has emerged where deals are made with startups to acquire, not their products or their business models but their skilled engineers. These deals provide these dominant companies with an instant access to skilled teams capable of rapid innovation but results in diminishing competition as it destroys their potential rivals. Moreover, these deals also tend to concentrate talents and foreclose innovation which further creates artificial monopolies in the market, disincentivising entrepreneurs. Through such deals, Big Techs are able to evade traditional merger thresholds, based on turnover and ownership, thus highlighting a legal blind spot in the global competition law. These deals mirror anti-competitive impacts of killer acquisitions, but they largely go unscrutinized by the authorities due to their hybrid structure combining transfers of employment licensing of intellectual property and partial asset acquisitions.*

*This article takes reference from the already existing merger control regimes and proposes that antitrust frameworks need to be regulated and recognise human capital as an asset of competitive importance. The authors conclude by suggesting specific reforms to address existing loopholes, enhance regulatory clarity and align Indian merger control with international best practices.*

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## I. INTRODUCTION

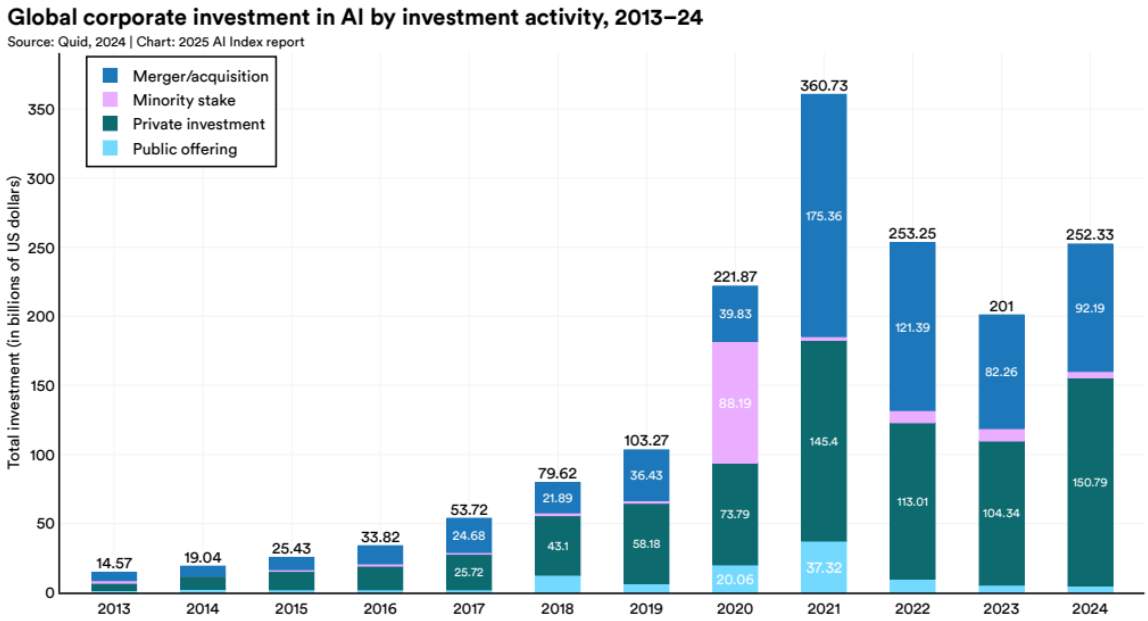
In the growing digital economy, the focal point of competition is gradually transferring from traditional indicators such as market share, assets, and distribution networks to assets such as human capital. This shift is particularly evident in the field of artificial intelligence **("AI")**, where

[1] *This submission was the runner-up entry in the 2nd National Article Writing Competition, 2025.*
[2] The authors are students at Chanakya National Law University, Patna.

the scarcity of skilled engineers and researchers has transformed talent itself into the decisive competitive asset. Unsurprisingly, Big Tech at the apex of modern capitalism has positioned itself to dominate this new frontier. Perhaps most famously, in 2010, Mark Zuckerberg claimed that "Facebook has not once bought a company for the company itself. We buy companies to get excellent people," and more broadly, skilled labour is central in the tech sector.[3]

This practice reflects a structural change in acquisition strategies; startups are absorbed not for their products or revenues, but for their teams, a practice widely known as the Acqui-hire.[4] It denotes transactions where the key economic asset involved is human capital instead of physical goods, client databases, or instant cash flow.[5] Startups, often capital-limited in an industry requiring heavy computational investments, appeal not for deliverables but for talent. By incorporating these enterprises, larger firms obtain a valuable resource while concurrently removing potential competitors. Global investment trends in AI reflect this shift (see Figure 1). Between 2014 and 2024, investment in AI surged from less than $20 billion to over $250 billion, with mergers and acquisitions ***("M&A")*** forming a significant portion of this spike. However, traditional M&A activity declined after 2021, acqui-hires became a more popular strategy for market entry.

[3] Heski Bar-Isaac, Justin P. Johnson & Volker Nocke, 'Acquihiring for Monopsony Power' (2024) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4601787> accessed 15 September 2025.
[4] John F. Coyle & Gregg D. Polsky, 'Acqui-hiring' (2013) 63 (2) DLJ <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3400&context=dlj> accessed 15 September 2025.
[5] Colleen Cunningham, Florian Ederer & Song Ma, 'Killer Acquisitions' (2023) SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3241707> accessed 14 September 2025.




Source: AI Index Report 2025, Stanford HAI
Figure 1

Fundamentally, an acqui-hire is distinct from conventional structures, while traditional M&A activities are assessed in terms of asset consolidation, efficiency, or market expansion,[6] acqui-hires treat human capital as the ultimate economic asset.[7] This blurs the line between hiring and acquiring, exploiting the fact that most competition statutes do not treat human capital as a notifiable asset. As a result, these transactions often bypass traditional notification thresholds, even while generating competitive effects akin to full-scale acquisitions.

## II. EMERGENCE AND DEVELOPMENT OF ACQUI-HIRE MODELS

The rise in acqui-hire deals is a calculated response within the tech landscape, particularly in the post-pandemic and AI-driven era. In a market where the war for talent has intensified within the Big Tech firms, acquiring an already skilled and capable team from a startup has become an efficient mechanism.[8] This is often faster and more certain than traditional hiring processes.

[6] Massimo Motta, *Competition policy: Theory and practice* (Cambridge University Press 2004)
[7] Albert Choi & George Triantis, 'The Effect Of Bargaining Power On Contract Design' (2012) 98 (8) VLR <https://virginialawreview.org/wp-content/uploads/2020/12/1665%20(1).pdf> accessed 16 September 2025.
[8] Louis Lehot, 'The Rise of "Acquihiring" in a Post-Layoff Tech Sector' (*Mondaq*, 12 August 2025) <https://www.mondaq.com/unitedstates/new-technology/1664396/the-rise-of-acquihiring-in-a-post-layoff-tech-sector#:~:text=Upon%20layoff%2C%20these%20skilled%20tech,AI%20is%20accelerating%20acquihire%20activity> accessed 14 September 2025.

These deals are recognised as strategic manoeuvres for rapid innovation and market positioning. Acqui-hires allow established firms to infuse specialised knowledge and significantly expedite product development cycles, essentially outsourcing research and development ***("R&D")*** to agile startups.[9] The trend also indicates a practical exit plan for startups facing tough fundraising conditions, making an acqui-hire an attractive alternative to a down-round or shutdown.[10] The evolution even extends to reverse acqui-hires, where a larger entity effectively cedes operational control to a smaller team's leadership to capture their innovative culture.[11]

### *A. Case Study Analysis*

In the Microsoft/Inflection transaction, nearly all of Inflection AI's employees, including its co-founders, were hired by Microsoft in March 2024, alongside a licensing arrangement for its IP. The German Federal Cartel Office (FCO) classified this type of acqui-hire in principle as a merger under German merger control regulations, as it involved the transfer of Inflection's competitively important personnel and its productive capabilities.[12] While the FCO recognised the hiring of key personnel plus IP rights as a concentration under the German Act against Restraints of Competition (ARC), it ultimately concluded that the transaction was not notifiable as Inflection had insufficient substantial economic activity in Germany.[2] From a competition policy perspective, the effect was twofold: elimination of a potential competitor in the AI assistant space and consolidation of scarce human capital into an incumbent's ecosystem.

In July 2025, Google executed a $2.4 billion acqui-hire of Windsurf, acquiring its CEO, co-founder, and core research team, along with a non-exclusive license for parts of Windsurf's technology.[13] This arrangement effectively connects personnel acquisition and IP licensing without granting Google equity or a controlling interest, thus circumventing traditional merger thresholds.

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[9] Josipa Majic Predin, 'Why Acquihires Are Reshaping Silicon Valley AI Investments' (*Forbes,* 15 July 2025) <https://www.forbes.com/sites/josipamajic/2025/07/15/why-acquihires-are-reshaping-silicon-valley-ai-investments/> accessed 19 September 2025.

[10] 'Why Has Acqui-Hiring Risen in Popularity?' (*Growthpal*, 4 May 2023) <https://www.growthpal.com/post/why-has-acqui-hiring-risen-in-popularity> accessed 19 September 2025.

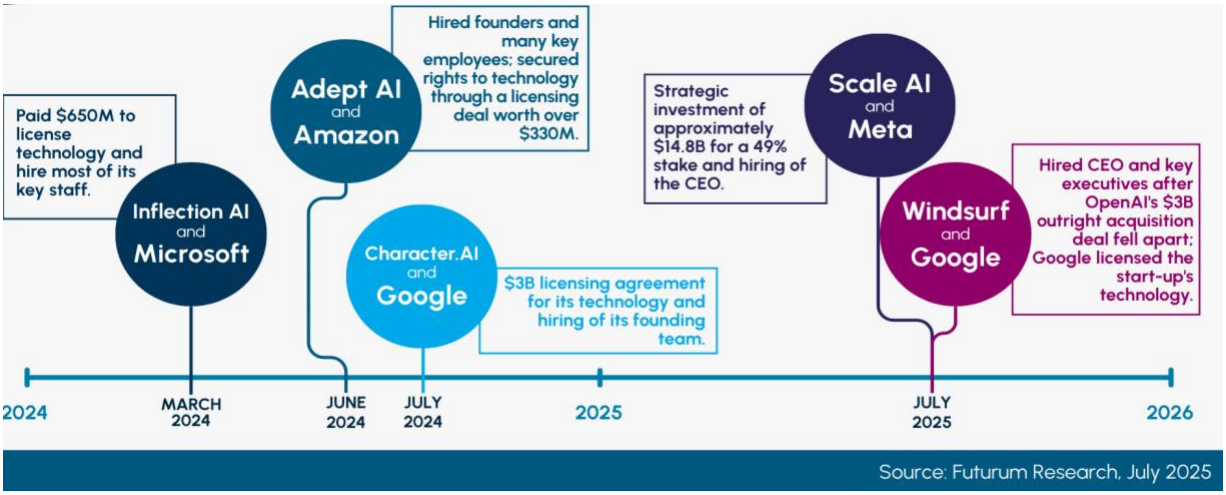
[11] Jack Arenas, 'The Rise of Reverse Acquihires' (*Stack* Trace, 18 July 2025) <https://jackarenas.substack.com/p/the-rise-of-reverse-acquihires> accessed 18 September 2025.

[12] Sarah Blazek, 'Aqui-hire: The Microsoft-Inflection Case and its Implications for Legal Practice and Legislation' (*Noerr*, 4 December 2024) <https://www.noerr.com/en/insights/aqui-hire-the-microsoft-inflection-case-and-its-implications> accessed 19 September 2025.

[13] Kenrick Cai, Krystal Hu and Kritika Lamba, 'Google hires Windsurf execs in $2.4 billion deal to advance AI coding ambitions' (*Reuters*, 12 July 2025) <https://www.reuters.com/business/google-hires-windsurf-ceo-researchers-advance-ai-ambitions-2025-07-11/> accessed 20 September 2025.

Investors obtain liquidity through the licensing payment, yet retain their ownership stakes.[14] The deal exemplifies how Big Tech firms exploit regulatory gaps: by securing engineering talent and internal development resources, incumbents diminish rivals' access to scarce human capital in rapidly evolving coding markets. As the valuations of such deals rise even when the revenues of the targets remain modest, regulatory frameworks based on turnover or ownership control prove increasingly inadequate for addressing the competitive consequences of these talent-focused acquisitions.

The development comes as tech giants, including Alphabet and Meta, aggressively chase high-profile acquisitions and offer multi-million-dollar pay packages to attract top talent in the race to lead the next wave of AI.[15]




### *B. Reverse Acqui-hiring and the HALO Framework*

The practice of acqui-hiring emerged as a transactional form in Silicon Valley, whereby, in its traditional form, the acquirer assumes ownership of the start-up entity, but the financial payout is modest, indicating the limited strategic worth of the underlying technology. The cost of internal recruitment, and training can surpass the premium paid for acquiring a team with proven collaborative capacity.

[14] 'Windsurf in Billion-dollar Acquisition Deal: Just a Talent Hunt or a Master AI Play from 3 AI Giants?'(*Gianty*, 19 July 2025) <https://www.gianty.com/windsurf-in-billion-dollar-acquisition-deal/> accessed 21 September 2025.
[15] Cai, Hu and Lamba (n 12)

Reverse acqui-hires, however, invert this logic. Rather than opportunistic acquisitions of struggling start-ups, they signify a purposeful structural design by the start-up itself. Certain companies intentionally design their business models to appeal to incumbents not by aiming for profitability through scaling, but by highlighting concentrated talent and adaptable research pipelines.[16] They position themselves on talent density believing their teams' collective knowledge holds greater value than any products they might build.[17] The purpose is not to disrupt incumbents but to position themselves as strategic complements to their operations.

Recent deals illustrate how these transactions operate in practice. In 2024, Amazon hired the co-founders and much of the staff of Adept AI while simultaneously licensing its technology. The company itself was not acquired, thereby sidestepping merger-control thresholds and limiting Amazon's exposure to regulatory scrutiny.[18] Likewise, Meta's arrangement with Scale AI's leadership combined senior talent onboarding with a $14.3 billion equity infusion for a 49% stake in the company, leaving Scale formally independent but strategically tethered to Meta's research agenda.[19] These cases reflect how reverse acqui-hires deploy a dual mechanism: (i) securing critical human capital for incumbents while (ii) preserving the legal independence of the start-up structure to avoid the formalities of concentration review.

Another refinement of these practices is the HALO model- Hire and License Out. Under HALO framework, recruit essential staff and obtain a limited, usually non-exclusive license for the start-up's products. Deals based on this model (and related partial-stake + talent hybrids) produce the same competitive effects as traditional mergers, such as the accumulation of implicit knowledge and the obstruction of competitors' access to talent, but they strategically circumvent the formal

[16] Arenas (n 10)
[17] 'All Posts Resources AI Acquihires: How Microsoft, Google, & Meta Acquire for Hire in the Talent Wars' (*Founders Forum Group,* 17 September 2025) <https://ff.co/ai-acquihires/#:~:text=Google's%20Character.AI%20acquihire%20cost,acquired%20purely%20for%20their%20talent> accessed 18 September 2025.
[18] Krystal Hu, Greg Bensinger & Jody Godoy, 'FTC Seeking Details on Amazon Deal with AI Startup Adept' (*Reuters*, 16 July 2024) <https://www.reuters.com/technology/ftc-seeking-details-amazon-deal-with-ai-startup-adept-source-says-2024-07-16/> accessed 20 September 2025.
[19] Sharon Goldman & Allie Garfinkle, 'Inside the rise of Alexandr Wang and Meta's $14 billion bet that the MIT dropout will help bring AI supremacy' (*Fortune*, 22 June 2025) <https://fortune.com/2025/06/22/inside-rise-scale-alexandr-wang-meta-zuckerberg-14-billion-deal-acquihire-ai-supremacy-race/> accessed 20 September 2025.

indicators of control that initiate ex-ante review.[20] Combining talent absorption with licensing arrangements, allows buyers to profit from technology outputs without assuming the full liabilities of the start-up.[21] These models complicate regulatory oversight, as neither licensing nor employment transfers squarely meet statutory triggers.

## III. ANTI-COMPETITIVE IMPLICATIONS OF ACQUI-HIRES

While traditional mergers take place between entities competing in the same market, acqui-hires kill startups even before they become a threat in the market Incumbents prevent independent technological developments and the potential for disruptive competition by licensing nascent IP and transferring key personnel.[22] While acqui-hires mirror killer acquisitions in its anti-competitive effect, and avoid regulatory scrutiny, acqui-hires target human capital rather than product.

### *A. Impact on the Startup Ecosystem*

Acqui-hires restructure existing startup incentives by offering entrepreneurs and investors, a profitable exit route; with easily convertible liquid assets. It also offers advantages through association with established global entities even when the startup fails to showcase commercial potential. Founders are increasingly designing startups for acquisition rather than creating long-term businesses to compete with established firms. While rank-and-file employees are left with diminished equity and reduced opportunities, executives benefit from early cash-outs encouraged by this exit-driven strategy.[23] Eventually, a transactional model where startups primarily act as supply channels for established companies replaces the entrepreneurial atmosphere that

[20] Jean-Michel Benkert, Igor Letina & Shuo Liu, 'Startup acquisitions: Acquihires and Talent Hoarding' (2025) 178 European Economic Review 105103 <https://doi.org/10.1016/j.euroecorev.2025.105103> accessed 21 September 2025.
[21] Julianne Culey, 'Reverse Acquihires' (*The Reynolds Center for Business Journalism*, 2 September 2025) <https://businessjournalism.org/2mintip/reverse-acquihires/> accessed 20 September 2025.
[22] Neha Bhargava and Vishwanath Venugopalan, 'Acqui-Hires: Revolutionizing Strategy & Transforming Organizational Structures' (2013) Wharton Mack Center for Technological Innovation <https://mackinstitute.wharton.upenn.edu/wp-content/uploads/2013/01/Bhargava-Neha-Venugopalan-Vishwanath_Final-Paper_MKTG-890-20121.pdf> accessed 20 September 2025.
[23] Marius Berger, Sara Calligaris, Andrea Greppi & Dmitri Kirpichev, 'Acquisitions and their Effect on Start-up Innovation' (2025) OECD Science, Technology and Industry Working Papers 2025/10 <https://www.oecd.org/content/dam/oecd/en/publications/reports/2025/06/acquisitions-and-their-effect-on-start-up-innovation_0fe3aec0/b4efd3ab-en.pdf> accessed 22 September 2025.

encourages sustained innovation.[24] This leads to a corrosive effect on the wider startup ecosystem, reducing independent players to internal divisions of dominant firms.

Acqui-hires, coupled with restrictive non-compete or non-solicitation provisions, restrict acquired employees from departing to establish or join new ventures.[25] The U.S. Federal Trade Commission ***("FTC")*** has identified such contractual practices as potentially unfair methods of competition under Section 5 of the FTC Act. In 2024, the FTC proposed the final rules which aimed to ban the majority of non-compete agreements.[26] Acqui-hires magnify labour market monopsony and inhibit innovation spillovers that usually result from employee mobility.[27]

### *B. Innovation Foreclosure and Market Effects*

The advanced tech landscape relies on a limited pool of talented individuals and they are particularly exposed to the concentration effects of acqui-hires. When leading firms absorb this talent, they do more than reduce the available labour supply for startups; they also diminish the sector's overall capacity for independent innovation.[28] Acqui-hires illustrates the term *talent hoarding*, whereby dominant firms tend to monopolize skilled engineers in order to block entry for potential rivals.[29]

Acqui-hires have a significant long-term influence on customers, even though they rarely raise immediate price effects. These agreements deprive consumers of the choice and quality improvements that would normally result from intense competition by reducing innovation diversity, delaying product development cycles, and blocking alternative technological pathways.[30] Acquisitions of startups in high-R&D sectors frequently stifle radical innovation,

[24] Lehot (n 7)
[25] Kah Loon Tham, Karla Perca López, Stephen Kinsella, 'The Talent Trap: Acqui-hires or Killer Acquisition?' (*Flint Global*, 30 June 2025) <https://flint-global.com/blog/the-talent-trap-acqui-hires-or-killer-acquisitions/> accessed 20 September 2025.
[26] Federal Trade Commission, 'FTC Announces Rule Banning Noncompetes' (2024) <https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes> accessed 22 September 2025.
[27] Bar-Isaac, Johnson & Nocke (n 1)
[28] Benkert, Letina & Liu (n 19)
[29] Afonso Neves, 'Acquihire: Big Tech's Secret Weapon to Dominate the Talent Market' (*Geeks Economy*, 16 June 2025) <https://www.geekseconomy.com/editors-picks/acquihire-big-techs-secret-weapon-to-dominate-the-talent-market/> accessed 21 September 2025.
[30] Berger, Calligaris, Greppi & Kirpichev (n 29)

redirecting it towards minor enhancements that align with incumbent's strategies.[31] The monopolization of general-purpose technologies is a more significant systemic concern. Once AI expertise, resources, and innovation channels are held by a small number of companies, they will not only dominate the AI market but will also exploit their influence in related sectors like healthcare, finance, and logistics. Anti-competitive impact of acqui-hires increases due to this cross-sectoral entrenchment, transforming them from mere labour-market strategies into tools of economy-wide consolidation.[32]

Dynamic efficiency is compromised by these distortions in two aspects. First, they restrict the diversity of technological innovation, as startups that might explore alternative frameworks or uses are absorbed into the priorities of established companies. Second, they weaken the competition itself by linking market entry to anticipated acquisition, thereby discouraging ambitious ventures.[33] Acqui-hires thus reflect anti-competitive tendencies that existing regulatory frameworks are ill-equipped to address.[34] The innovation ecosystem may experience protracted stagnation controlled by a small number of established firms unless competition legislation evolves to recognize human capital as a competitively significant asset.

## IV. REGULATORY BLIND SPOTS ACROSS JURISDICTIONS

Once thought to be innocuous ways to acquire talent, acquire-hires have gradually transformed into a strategic tactic to intentionally bypass merger control laws. Big-tech companies are able to consolidate essential human capital through the hybrid nature combining employment contracts, IP licensing, and restricted asset transfers. This has sparked discussions in various jurisdictions on

[31] Hitt, Michael A., Robert E. Hoskisson, R. Duane Ireland, and Jeffrey S. Harrison, "Effects of Acquisitions on R&D Inputs and Outputs' (1991) 34(3) Academy of Management Journal <https://doi.org/10.2307/256412> date accessed 22 September 2025.
[32] Trey Rawles 'The Reverse-Acquihire Revolution: How Zuckerberg's AI Talent Strategy Could Transform Healthcare M&A' (13 July 2025) <https://www.onhealthcare.tech/p/the-reverse-acquihire-revolution> accessed 22 September 2025.
[33] Marc Bourreau & Axel Gautier, 'Innovation and Startup Acquisition' (2024) CESifo Working Paper Series No 11569 <https://ssrn.com/abstract=5073378> accessed 23 September 2025.
[34] Kevin A. Bryan & Erik Hovenkamp, 'Startup Acquisitions, Error Costs, and Antitrust Policy' (2020) 87(2) U Chi L Rev <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6180&context=uclrev> accessed 22 September 2025.

whether human capital ought to be regarded as a notifiable asset in merger control[35] and how competition law should react when form diverges from substance.

### *A. How Acqui-hires Evade Antitrust Globally*

The practice of evading antitrust laws through acqui-hiring is now widely acknowledged across jurisdictions, with their regulatory evasion rooted in their form. In the United States, merger control under Section 18a of the Hart-Scott-Rodino Act[36] ***("HSR")*** is triggered by statutory size-of-person and size-of-transaction thresholds in violation of Section 7 of the Clayton Act[37]. Additionally, HSR Rule 801.90[38] provides that the economic substance of a deal, rather than its form, triggers the requirement for merging parties to file with the government. Typically, acqui-hire deals are carefully structured to fall outside this framework: start-up founders and engineers resign en masse, are immediately hired by the acquirer, and the acquirer simultaneously enters into a non-exclusive IP licensing agreement with the start-up. Because HSR only treats exclusive licenses as asset transfers, such arrangements escape notification despite having merger-like effects on innovation and labour concentration. This gap enables dominant firms to bypass the intent of Section 18a, acquiring innovation capacity while escaping ex-ante antitrust review.

The European Union ***("EU")*** is preparing to cast a sharper eye on acquihires. As Olivier Guersent, outgoing Director-General of the European Commission's ***("EC")*** competition unit, has emphasised, such transactions are unlikely to escape scrutiny in the future. Under EU merger control, the concept of concentration in Article 3 of the EU Merger Regulation ***("EUMR")***[39] is deliberately broad and not confined to traditional share or asset acquisitions. It includes rights, contracts, or any other methods through which an acquirer can exert significant control over a business. The Consolidated Jurisdictional Notice[40] ***("the Notice")*** clarifies that a person may be a natural person, provided they carry out economic activities on their own account or control at least

[35] Foo Yun Chee, 'Big Tech's Acquihire Deals Face Regulatory Scrutiny' (*Reuters,* 1 August 2025) <https://www.reuters.com/sustainability/boards-policy-regulation/big-techs-acquihire-deals-face-regulatory-scrutiny-outgoing-eu-antitrust-2025-08-01/> accessed 23 September 2025.
[36] Hart-Scott-Rodino Antitrust Improvements Act 1976,15 USC s 18a.
[37] Clayton Antitrust Act of 1914, 15 USC s 7.
[38] Hart-Scott-Rodino Rules, 16 CFR Reg. 801.90.

[39] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1 art 3.
[40] Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [2008] OJ C095/01

one undertaking. This construction makes it possible for the transfer of key employees, where they function as an economic unit with market-relevant expertise to qualify as a concentration. Additionally, the Notice highlights that concentrations may encompass portions of businesses or entire teams if their acquisition leads to a permanent alteration in market structure. In the context of acquihires, regulators can therefore assess whether the transfer of human capital and know-how amounts to conferring decisive influence comparable to traditional mergers. Guersent has also argued that a company's workforce should be treated as an asset in merger assessments, rather than merely a collection of individual hires.[41]

Despite this expansive interpretation, a structural gap remains. Many acqui-hires involve start-ups with negligible turnover, and thus fall below the notification thresholds in Article 1 EUMR[42], despite their competitive significance. While member states' national rules may lack clarity or enforceability in defining decisive influence conferred via employment and IP licensing. Scholarly work points out that employee acquisitions may fall outside formal control definitions unless regulators broaden the interpretation of undertaking and control to include tacit and relational influence over startup capabilities. This led the EC to issue new guidance on the referral mechanism under Article 22 EUMR[43], enabling Member States to request review of transactions below thresholds if they threaten competition. This policy shift has prompted calls for EU Member States to widen their enforcement toolkits, with the adoption of call-in powers emerging as the preferred reform.[44]

Acqui-hires increasingly operate as killer acquisitions in disguise, involving transactions undertaken not to integrate innovation but to neutralise it.[45] In the digital economy, the same effect is achieved through the absorption of human capital. By hiring entire engineering teams and

[41] Ruchit Patel & Rupert Phillips, 'Are Employee Acquisitions a Gap in European Merger Control?' (2024) 20(1) Competition Law International <https://awards.concurrences.com/IMG/pdf/are_employee_acquisitions_a_gap_in_european_merger_control_-_competition_law_international.pdf> accessed 23 September 2025.
[42] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1 art 1.
[43] Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (EC Merger Regulation) [2004] OJ L24/1, art 22
[44] Jeanne Lévy-Bruhl & Maëlys Duval, 'Below-Threshold Mergers: France and Other EU Countries Contemplate Call-in Powers' (*Linklaters*, 20 May 2025) <https://www.linklaters.com/en/insights/blogs/linkingcompetition/2025/may/below-threshold-mergers_france-and-other-eu-countries-contemplate-call-in-powers> accessed 20 September 2025.
[45] Cunningham, Ederer & Ma (n 3)

licensing of IP models, incumbents extinguish emerging rivals and consolidate control over future innovation pathways.[46] Indian merger control, however, is ill-equipped to address these dynamics and reveals a critical structural gap in the Competition Act, 2002 ***("the Act")***. The definition of combination in Section 5[47], read with Section 6[48], is limited to acquisitions of shares, voting rights, control, or tangible assets that meet prescribed thresholds. Neither human capital nor personnel transfers are contemplated within this framework. The Competition (Amendment) Act, 2023, introduced a Deal-Value Threshold ***("DVT")*** under Section 5(d)[49] to capture combinations exceeding ₹2,000 crore, even where the target's turnover or assets are minimal.[50] Yet, many acqui-hires are structured with low disclosed transaction values or contingent compensation arrangements that avoid triggering the DVT.[51] Moreover, the substantial business operations in India test and de minimis exemptions further dilute the regime's applicability to small, nascent tech deals.[52]

Consequently, talent-driven acquisitions often remain outside ex-ante scrutiny of the Competition Commission of India ***("CCI")***, leaving regulators reliant on ex-post enforcement under Sections 3[53] and Section 4[54] of the Act, to address collusion or abuse of dominance. Such tools may be inadequate, as by the time adverse effects emerge, the consolidation of talent is irreversible. Thus, the Indian framework reflects a deeper conceptual gap: by treating labour as an employment law

[46] Geoffrey A. Manne, Dirk Auer, & Lazar Radic, 'Merger Enforcement in India and the Competition Amendment Act of 2023' (*International Center of Law & Economics*, 25 September 2023) <https://laweconcenter.org/resources/comment-of-the-international-center-of-law-economics-concerning-merger-enforcement-in-india-and-the-competition-amendment-act-of-2023/> accessed 23 September 2025.
[47] The Competition Act 2002 s 5.
[48] The Competition Act 2002 s 6.
[49] The Competition (Amendment) Act, 2023, s 5(d).
[50] Parina Muchhala, Anurag Shah, Nishchal Joshipura & Viral Mehta, 'Deal Breaker or Deal Maker?: Deconstructing the "Deal Value Threshold" Under The Competition Act, 2002' (*Nishith Desai Associates*, 19 September 2024) <https://nishithdesai.com/fileadmin/user_upload/Html/Hotline/Deal_Talk_Sep1924-M.html> accessed 21 September 2025.
[51]Samantha Mobley, Kshaema Susan Mathew & Grant Murray, 'What do the Latest Amendments on Merger Control Mean for Dealmaking in India?' (*Baker McKenzie*, 18 November 2024) <https://www.bakermckenzie.com/en/insight/publications/2024/09/amendments-merger-control-dealmaking-india> accessed 23 September 2025.
[52] Shejal Verma, 'India's Competition Law Update: The Deal Value Threshold and its Implications for M&A' (*Nagashima Ohno & Tsunematsu*, November 2024) <https://www.noandt.com/en/publications/publication20241203-1/> accessed 23 September 2025.
[53] The Competition Act 2002 s 3.
[54] The Competition Act 2002 s 4.

concern rather than a competition asset, it systematically underestimates the competitive implications of acqui-hires in the digital economy.

## V. WAY FORWARD

The Indian merger control framework must adapt to address the structural blind spots that allow acqui-hire transactions to escape scrutiny. When the consideration paid far exceeds the target's turnover or tangible assets, the true object of the deal is often the acquisition of specialised human capital. Deal-value-to-revenue ratios can therefore serve as practical triggers. For instance, transactions where consideration per R&D employee or per senior AI researcher diverges sharply from industry medians should function as quantitative red flags, subjecting such acquisitions to mandatory notification. This aligns with recognition that deal value is often a more accurate proxy for competitive significance in dynamic, innovation-driven markets.

Drawing from international reference points, Australia's model introducing dual monetary thresholds, combining domestic turnover and global deal value, illustrates how high-value transactions can be captured even where local revenues are limited.[55] Similarly, the European Commission's reliance on Article 22 EUMR referrals allows Member States to request review of transactions below thresholds if they threaten competition.[56] India could adapt a comparable *call-in* mechanism, enabling the CCI to examine acqui-hires that cumulatively consolidate talent while evading current notification requirements.

Beyond notification thresholds, CCI should focus on substantive assessment of innovation-foreclosure risks, through systematic market studies. Relevant indicators include:

(i) The rate of dissolution of acquihired teams, post-acquisition should be tracked, not merely as evidence of attrition but as an indicator of foreclosure. If research teams are consistently disbanded after acqui-hire deals, it suggests that the acquirer's intention was to eliminate a future rival rather than integrate productive assets.

[55] Peter McDonald & Lisa Emanuel, 'Australia is Transitioning to a New Merger Control Regime' (*A&O Shearman*, 5 August 2025) <https://www.aoshearman.com/en/insights/australia-is-transitioning-to-a-new-merger-control-regime> accessed 25 September 2025.
[56] D'Amico Alessia Sophia, 'Closing the tech acquisitions enforcement gap: from article 22 to article 102' (2023) 20(1) European Competition Journal <https://doi.org/10.1080/17441056.2023.2270744> accessed 24 September 2025.

(ii) A persistent decline in R&D outputs such as patents, preprints, open-source code, associated with acquired teams would indicate harm to dynamic efficiency. This could be monitored through patent databases and citation networks, offering quantifiable evidence of lost innovation pathways.

(iii) The concentration of specialised talent post-deal can be measured through a *talent HHI* (an adaptation of the traditional Herfindahl–Hirschman Index.)[57] By assessing the distribution of specialized researchers across firms, regulators can quantify whether human capital is becoming excessively centralised within a small set of incumbents. A rising index would indicate diminished labour mobility and heightened entry barriers for startups, signalling competitive harm in the same way that a rising product-market HHI.

(iv) The cumulative effect of serial acqui-hires, which may foreclose entire lines of technological development should be assessed even if individually such transactions may appear benign.[58] Market studies should therefore adopt a longitudinal perspective, mapping how repeated acquisitions by the same firm alter industry-wide patterns of entry and innovation.

Where market studies reveal material risks, remedies should be targeted to preserve competition without outright prohibitions.[59] Licence-back obligations could ensure that acquired technologies remain accessible to rivals; behavioural remedies could mandate the continuation of research pipelines, and disclosure requirements could compel dominant firms to report all talent acquisitions above a defined scale, enabling regulators to detect patterns of cumulative consolidation.[60]

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[57] The Herfindahl–Hirschman Index (HHI) is a standard measure of market concentration, calculated by summing the squares of firms' market shares, with higher values indicating greater concentration and reduced competition: Federal Trade Commission and US Department of Justice, *Merger Guidelines* (2023) <https://www.ftc.gov/reports/merger-guidelines-2023> accessed 24 September 2025.

[58] Organisation for Economic Co-operation and Development, 'Using Market Studies to Tackle Emerging Competition Issues' (OECD Roundtables on Competition Policy Papers No 265, OECD Publishing, 2021) <https://doi.org/1f0.1787/3ff6e671-en> accessed 25 September 2025; Competition and Markets Authority, 'Market Studies and Market Investigations: Supplemental guidance on the CMA's approach' (June 2017) <https://assets.publishing.service.gov.uk/media/65cdfc4f130549000c867a9f/A._cma3-markets-supplemental-guidance-updated-june-2017.pdf> accessed 25 September 2025.

[59] Cunningham, Ederer & Ma (n 3).

[60] Organisation for Economic Co-operation and Development, 'Ex-post Assessment of Merger Remedies' *OECD Roundtables on Competition Policy Papers*, *No. 302* (Paris, 25 October 2023) <https://doi.org/10.1787/84c232b6-en> accessed 26 September 2025.

Acqui-hires, while denoted as mere talent acquisitions, are slowly evolving into structural tools for Big Tech to maintain dominance in AI markets by consolidating already scarce human capital and further foreclosing innovation pathways. These transactions turn human capital into a valuable and strategic asset while disrupting the conventional merger control. Startup ecosystems are impacted due to limited independent innovation, and entrenched market power. Additionally, their hybrid form reveals significant blind spot in competition laws whose implications extend beyond market entry and startup viability: they risk narrowing technological diversity and undermining consumer welfare. Acknowledging human capital as a vital competitive asset and monitoring its concentration within firms is therefore crucial for the AI ecosystem to remain innovative and competitive in today's digital economy.

# BEYOND THE RED HERRING: SARS, STARTUPS, AND A SMARTER DRHP REGIME IN THE INDIA IPO ECOSYSTEM

*Samvardhan Tiwari and Kamya Aggarwal*[1]

## ABSTRACT

*This essay examines the transformative impact of the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2025 (SEBI ICDR Amendments 2025), particularly focusing on the changes to Stock Appreciation Rights (SARs) in light of the dynamic Indian startup ecosystem. It analyses how these amendments have fundamentally altered the landscape for employee incentive structures during the Initial Public Offering (IPO) process, addressing the regulatory challenges that previously forced companies to either terminate or completely restructure their employee incentive structures upon going public.*

*The essay explores how these amendments present a paradigm shift that amplifies talent retention strategies and how sectors including fintech, healthtech, deeptech, and ESG-focused green energy companies stand to benefit substantially from them. The essay further highlights India's evolving approach to IPO processes and employee compensation structure through case studies illustrating practical implications and the pivotal relationship between Employee Stock Option (ESOs) and the performance of an IPO. It also delves into how these amendments will actually come into play and deal with certain unanswered questions.*

*The SEBI ICDR Amendments 2025 highlights SARs in a progressive note; however, this essay attempts to take a step further and analyse the impact of these amendments on both ends, the promoters and investors. In regard to the same, this essay suggests a Dual-DRHP Process, which incorporates some of the best financial practices like the Netherlands AFM and US SEC S-1 process, to provide a better assessment window to the investors before they invest. Towards the end, the essay attempts to answer the question of whether, in a retail-heavy economy like India, the current rising IPO rush is a boon or a bubble.*

[1] The authors are students at ILC, Faculty Of Law, University Of Delhi

## I. INTRODUCTION

The Securities and Exchange Board of India (SEBI) recently introduced ground-breaking amendments in March 2025 through the Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2025[2] (SEBI ICDR Amendments 2025), with Stock Appreciation Rights (SARs), specifically called out by the facilitating expert committee. It emphasized that the SARs are specifically recognised as a share-based employee benefit under the Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations, 2021[3] (the SBEB Regulations) and that Regulation 56 of the SEBI ICDR Regulations further allows issue of shares after the Draft Red Herring Prospectus (DRHP) is filed, given that such issuance is clearly shown in the DRHP.[4]

This key amendment has fundamentally changed the landscape for SARs in the Indian startup ecosystem as it now allows companies to maintain outstanding SARs until they file the Red Herring Prospectus (RHP), as long as these rights are granted under a SAR scheme and are fully exercised into equity shares before the RHP is filed. Such SARs that are fully exercised before the filing of RHP are also to be exempt from the mandatory 6-month lock-in period, which is applicable at the time of IPO. Addressing a critical pain point that earlier forced startups to terminate SARs and other incentive structures when filing for IPOs, it presents game-changing benefits, especially for the booming Indian start-up ecosystem, providing greater flexibility in managing employee incentives during the fundraising process.

While the SARs often lean towards workers' compensation, other stakeholders like the investors and promoters at large are also widely affected in light of the new ICDR amendments.[5] One of the key highlights of the new amendments was that they emphasised the mandatory disclosures to be made by the companies before the filing of the IPO. However, the amendments still fell short of

[2] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) (Amendment) Regulations, 2025.
[3] Securities and Exchange Board of India (Share Based Employee Benefits and Sweat Equity) Regulations, 2021.
[4] IPOs Post the SEBI ICDR Amendments 2025, Cyril Amarchand Mangaldas (September 2, 2025), https://www.cyrilshroff.com/wp-content/uploads/2025/03/Client-Alert-SEBI-ICDR-Amendments.pdf.
[5] SEBI ICDR Amendments, 2025 Key Takeaways from an IPO Perspective, Shardul Amarchand Mangaldas, https://www.amsshardul.com/wp-content/uploads/2025/03/Alert-CM-SEBI-ICDR-Amendment-Regulations-March-2025.pdf; An analysis of the September 2025 amendments to the SEBI SBEB regulations and SEBI ICDR regulations, Khaitan & Co., https://www.khaitanco.com/sites/default/files/2025-09/Ergo%20-%20Amendments%20to%20the%20SEBI%20-%20SBEB%20&%20ICDR%20Regulations%20-%2019%20September%202025.pdf.

addressing the rising concerns of the investors and the mismatch of valuations, something which Indian companies had faced before. This essay attempts to suggest a Dual-Track DRHP process as a solution to this issue, allowing the investors and promoters to have a more equitable transaction in the IPO market. Furthermore, to answer the question of whether the Indian IPO ecosystem is a boon or a bubble, towards the end, this essay conducts a short analysis of Paytm and Zomato to emphasise the need for comprehensive regulatory frameworks to sustain a transparent IPO system in the future.

## II. SARs: NEED AND RELEVANCE IN THE MODERN ECONOMY

The Indian Primary market is gearing up for an exciting 2025, with investors and companies alike paying close attention to environmental, social, and governance (ESG) issues, with technology, AI, fintech, deeptech, logistics, and healthtech to dominate the IPO landscape. These are the big trends driving market enthusiasm and shaping how businesses plan their future. The market is overflowing with budding and young companies looking to mature and go public. 26 companies have already raised ₹52,200 crore in the first half of 2025, with IPOs worth ₹1.15 lakh crore having already been greenlit by the SEBI.[6] Further, an additional ₹1.43 lakh crore of IPO plans are awaiting regulatory approval. In totality, ₹2.58 lakh crore of offerings are in the pipeline.[7]

In this fiercely competitive business world where the global workforce is expanding rapidly, procuring and sustaining top-tier talent becomes a key strategic priority worldwide, in the race for a thriving company. Since startups are mostly bootstrapped, retaining such talent becomes difficult. Thus, these businesses have turned to SARs, which serve as a dual tool for employee compensation without actual equity transfer, all while motivating them to work towards the company's growth.[8] SARs refer to an employee incentive plan where employees profit from the 'appreciation' or increase in the value of a company's share above a certain predetermined value. Employees receive proceeds either as cash or equity. These differ from traditional ESOPs as

[6] IPO Rush 2025: Boom to Continue as Rs 2.58 Lakh Crore in Offers Await Market Entry; PhonePe, Meesho, Lenskart in Line, The Times of India (September 1, 2025), https://timesofindia.indiatimes.com/business/india-business/ipo-rush-2025-boom-to-continue-as-rs-2-58-lakh-crore-in-offers-await-market-entry-phonepe-meesho-lenskart-in-line/articleshow/122855855.cms.

[7] Himadri Buch, D-St gears up for Rs 2.6 lakh crore IPO storm in H2; Tata Capital, LG, Groww among biggest issues, Economic Times (September 1, 2025), https://economictimes.indiatimes.com/markets/ipos/fpos/indias-ipo-market-set-to-soar-with-rs-2-58-lakh-crore-offerings-in-pipeline/articleshow/122847492.cms.

[8] Nikhil Kapoor, Understanding Stock Appreciation Rights (SARs) as a Tool for Compensation and Remuneration, Vidhi Centre for Legal Policy (September 1, 2025), https://vidhilegalpolicy.in/research/understanding-stock-appreciation-rights-sars-as-a-tool-for-compensation-and-remuneration/.

employees don't have to pay upfront for benefits,[9] which reduces their financial strain, and neither are they required to make any personal investments. Thus, SARs become a particularly flexible and valuable subset of fringe benefits offered to employees, presenting a sustainable incentive option for startups, where offering equity helps attract talent despite limited cash resources compared to larger firms.[10]

## III. SECTORIAL ANALYSIS AND DOMESTIC IMPACT

The Indian fintech sector, which is ranked third globally,[11] valued at $50 billion, is annually growing at a 31% CAGR (Compounded Annual Growth Rate).[12] The EY-Fintech Convergence Council further estimates the sector to reach $200 billion in revenue and $1 trillion in assets by 2030. The sector's rapid growth can be attributed to the increasing use of digital payments, online lending, and wealth management services.[13] Given this rapid growth, cut-throat competition for talent necessitates flexible compensation structures which would be strategically significant for scaling firms preparing for public listings.

A similar dynamic is visible across the broader technology sector, including e-commerce, healthtech, deeptech, and software-driven enterprises. The increasing number of new-age technology IPOs underscore the investor appetite for scalable innovation-led businesses. However, these firms often face a structural constraint i.e. the need to retain specialised employees during the critical pre-IPO phase while managing cashflows and regulatory compliance. The SEBI ICDR Amendment enables these fintech Unicorns and emerging tech companies, charged by the government's Digital India initiative, to procure and retain critical talent through equity-linked incentives without the regulatory constraints that existed earlier.[14] By permitting SARs to subsist

[9] ESOPs for Startups, Bajaj Finserv (September 3, 2025), https://www.bajajfinserv.in/esop-for-startups.
[10] Megha Gala, Designing Stock Appreciation Rights in India: A Strategic Guide, InCorp Advisory (September 2, 2025), https://incorpadvisory.in/blog/designing-stock-appreciation-rights-in-india/.
[11] India ranks third globally in fintech funding despite 33% lower infusion in 2024: Report, Economic Times (September 4, 2025), https://economictimes.indiatimes.com/tech/funding/india-ranks-3rd-globally-in-fintech-funding-despite-33-lower-infusion-in-2024-report/articleshow/117195060.cms?from=mdr.
[12] Dr. Preetinder Kaur, Dr. Ritika Grover, and Riva Gupta, *India's Fintech Landscape: Evolution and Investment Opportunities,* 6(5) IJFMR (2024).
[13]2025 IPOS: ESG, Techj &Fintech Lead the Way, India IPO (September 4, 2025), https://www.indiaipo.in/news/esg-tech-fintech-india-ipo-trends-2025.
[14] Sheri M. Markose, Ahmed Khan, Philip Kostov, Thankom Arun, and Victor Murinde, *FinTech Ecosystem Impact on FinTech Startup Performance: Perspectives from UK & India,* SSRN 5160326 (2025).

until the filing of RHP, companies can align employee incentives with long-term value creation without premature restructuring.

For example, Jupiter, India's leading consumer-based digital fintech forum, utilised SARs in a bid to reward its employees in the midst of rapid business growth and major fundraising. Increase in its valuation from Rs. 430 crores to Rs. 720 crores in January 2020 allowed employees to see its value and future potential. Recognising the efforts of the workforce, the company granted a staggering 24,386 SARs to its employees.[15] This strategic move helped foster loyalty and motivation among employees, building a sense of joint ownership (in case of equity-based SARs) and collective contribution towards the company's growth.

The amendments are further, particularly transformative for the ESG-focused and green energy companies preparing for IPOs in the wake of India's renewable energy sector targeting 500 GW non-fossil fuel capacity by 2030.[16] IPOs in agriculture, solar energy, recycling, and bio-waste are attracting increased investments with wider corporate use of renewable energy, offering significant opportunities. The ability to maintain SARs through the IPO process becomes crucial for retaining specialized talent in this rapidly growing sector.[17]

Companies transitioning to public ownership such as Ather Energy demonstrate how employee incentives (like ESOPS, and potentially SARs now post amendment) can generate both employee wealth creation and organisational resilience.[18] Similarly, Tata Power has incorporated a wide range of employee benefits like equity and value-based incentives, such as SARs, to drive retention and reward impact creation as they pursue 'green' IPOs.[19]

The SEBI amendments, additionally, by removing regulatory barriers, complement the Indian government's various schemes, which aim to supplement the booming startup ecosystem and

[15] Ashwini Thulsaram, Beyond Traditional Stock Options: The Strategic Advantage of Stock Appreciation Rights (SARs), 3one4capital (September 6, 2025), https://www.3one4capital.com/blogs/unlocking-financial-potential-stock-appreciation-rights-sars-in-india.
[16] Ministry of Power, Government of India, 500GW Nonfossil Fuel Target (Issued on September 18, 2023).
[17] Emerging Sector Outlook: Key Trends in India's IPO Market, IPO Platform (September 2, 2025), https://www.ipoplatform.com/blogs/emerging-sector-key-trends-in-india-ipo-market/160.
[18]Ajay Rag, Ather Energy's IPO to unlock Rs 530 crore for employees through Esops, Economic Times (September 3, 2025), https://economictimes.indiatimes.com/tech/technology/ather-energys-ipo-to-unlock-rs-530-crore-for-employees-through-esops/articleshow/120574957.cms.
[19] Dr. Debisree Banerjee, *Green investing: A newer avenue towards better world: A case study on Tata power company Ltd*., 6(2) INTERNATIONAL JOURNAL ON RESEARCH IN MANAGEMENT (2024).

employment initiatives in the country. This includes the PM Viksit Bharat Rozgar Yojana, aiming to create 3.5 crore jobs[20] and the $1.5 billion fund and tax incentives provided under the Startup India initiative.[21] The SARs amendment supports these initiatives by allowing startups to offer attractive incentive packages that encourage talent retention and job creation.

## IV. RELATIONSHIP BETWEEN EMPLOYEE STOCK INCENTIVES (ESOs) AND IPO PERFORMANCE

Employees are the behind-the-scenes actors and the main driving force of a company, especially a startup. Research emphasises that new public companies that grant extensive ESOs outperform companies granting fewer ESOs for two years after the IPO.[22] This demonstrates that ESOs enhance long-term market-adjusted performance, providing empirical support for SEBI's decision to facilitate these arrangements. Further, it is substantiated that stock option programs increase the survival rate of IPO firms, which is particularly relevant for the Indian startup ecosystem, where survival and growth post IPO are critical concerns.[23]

Enhancing ESOs helps improve the entrepreneurial ecosystem by increasing the amount of committed talent, a culture of innovation, and firm performance, as found by a study conducted by the European Centre for Alternative Finance.[24] It further revealed that ESOs are relatively often used in technology-intensive and venture capital-backed startups that need to attract and retain employees with technical skills. This aligns perfectly with India's tech-heavy startup ecosystem, where 74% of investment is concentrated in late-stage ventures requiring specialized talent.[25]

## V. INCULCATING ICDR RECOMMENDATIONS FOR A BETTER FUTURE

[20] Govt to roll out employment-linked incentive scheme from August 1, Economic Times (September 1, 2025), https://economictimes.com/news/economy/policy/govt-to-roll-out-employment-linked-incentive-scheme-from-august-1/articleshow/122908280.cms.
[21] Press Information Bureau, Startup India Programme (Issued on July 25, 2016).
[22] Kuntara Pukthuanthong, Richard Roll, and Thomas Walker, *How Employee Stock Options and Executive Equity Ownership Enhance Long-term IPO Performance,* 13(5) JOURNAL OF CORPORATE FINANCE (2007).
[23]Peter Roosenboom, and Tjalling van der Goot, *Broad-based Employee Stock Options Grants and IPO firms*, 38(12) APPLIED ECONOMICS (2006).
[24] Erik Stam, Ronald Kleverlaan, and Lara Spaans, Making employee ownership work in startups and SMEs, European Centre for Alternative Finance, Utrecht University (September 3, 2025), https://www.uu.nl/sites/default/files/UU_ECAF_Report_Employee_Ownership.pdf.
[25] Fakih Amrin Kamaluddin, and Kala Seetharam S, *Indian Startup Ecosystem: Analysing Investment Concentration and Performance of Government Programmes*, THE INSTITUTE FOR SOCIAL AND ECONOMIC CHANGE, BANGALORE (2021).

Unlike ESOPs, which can often continue after a company goes public, SARs have to be fully exercised before listing, usually when the RHP is filed.[26] It will be interesting to see how companies handle SARs that have not been vested yet at this stage, or how these plans are viewed earlier on during the DRHP process, especially regarding the schedule for when they vest. Another thing to watch is how many shares will need to be allocated for SARs at the DRHP stage, particularly since other share issuances might be happening at the same time, like converting convertible securities or raising funds through primary or secondary placements before the IPO.

The paragraphs mentioned above provide a detailed explanation of the aspect of SARs and their dual effect on the company and its employees. Concepts like workers' compensation have recently taken a lot of limelight, and in such turbulent times, incentives like SARs act as a huge safety net for the employees. But in addition to this, the new ICDR recommendations[27] also pave the way for both the promoters and the top-level management, and the employees and other frontline workers to have an equal and mindful say in terms of the release and purchasing of IPO in the public domain.

## VI. TRANSPARENT INVESTMENT: DUAL-TRACK DRHP FILING FRAMEWORK WITH TIERED DISCLOSURE NORMS

IPOs not only require a suitable market and an equally read audience for commencing the transactions, but also require a realistic timeline for transparent investments. As per the previous norms, companies usually were mandated to file a DRHP[28], which upon verification is published on the website of SEBI, after which the investors and purchasers had the opportunity to view and analyse it after which they could make a call on whether or not to purchase the IPO. In light of the same, the SEBI ICDR Amendment 2025 makes a progressive move by mandating compulsory disclosures and confidential filings (similar to the U.S SEC S-1 process).[29] It still allows for the

[26] Supra 1 Regulation 5(2); REPORT OF THE EXPERT COMMITTEE RECOMMENDATIONS FOR FACILITATING EASE OF DOING BUSINESS AND HARMONIZATION OF THE PROVISIONS OF ICDR AND LODR REGULATIONS;
Bharath Reddy Jain Mayank, *Amendment to Make Companies with Outstanding Stock Appreciation Rights IPO Eligible: A Few Steps Closer, but Not There Yet*, INDIA CORPORATE LAW (September 3, 2025), https://corporate.cyrilamarchandblogs.com/2025/04/amendment-to-make-companies-with-outstanding-stock-appreciation-rights-ipo-eligible-a-few-steps-closer-but-not-there-yet/.
[27] Supra 1.
[28] Securities and Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, reg. 6(1).
[29] SEC Form S-1: What It Is, How to File It or Amend It, Investopedia (September 3, 2025) https://www.investopedia.com/terms/s/sec-form-s-1.asp.

pre-filing of the DRHP, but in certain situations, it mandates filing without public disclosure to maintain commercial sensitivity.

However, the current procedure gives off a very small amount of time for the investors to assess the IPO and then make a call whether to invest in it or not. Investors can view the offer document only a few weeks before the IPO opens. This short window for assessment doesn't offer an equal playing field to the investors. In this manner, the ICDR amendments can draw inspiration from the Dutch financial system, which offers a more liberal route for investors to properly assess the companies they are investing in. The following table brings out a brief comparative analysis of the Netherlands' AFM (The Dutch Authority for Financial Markets)[30] v/s India's present regime: -

| **Aspect** | **India (SEBI ICDR)** | **Netherlands (AFM/EU Prospectus)** |
|---|---|---|
| Confidential Filing | Introduced in 2025, ICDR | Already available |
| Standardisation | Full-length DRHP + RHP | Modular URDs and Fast Track Approvals |
| Digital Access | DRHPs on SEBI's website; retail-heavy DRHPs | Fully digital, E-signatures allowed |
| ESG Mandates | Emerging trend | Advanced disclosures required |
| SME Flexibility | BSE-SME/NSE EMERGE platforms | Growth Markets with Tailored Disclosures |

Key Takeaways: -

A. The URD in the table refers to the EU Universal Registration Document. It acts as a streamlined document format for frequent users. It lessens the burden of paperwork. Article 9 of the Universal Registration Document[31] states that if a company gets its URD approved

[30] Obligation to publish a prospectus, Netherlands Authority for the Financial Markets, AFM (September 5, 2025) https://www.afm.nl/en/sector/effectenuitgevende-ondernemingen/prospectustoezicht/prospectusplicht.
[31] Prospectus Regulation: article 9, Universal registration document - Interactive Single Rulebook, European Securities and Markets Authority (September 3, 2025) https://www.esma.europa.eu/publications-and-data/interactive-single-rulebook/prospectus-regulation/article-9-universal.

once, in one financial year, then the next year's URD can be filed without needing the approval again (from AFM). It acts as a fast-track privilege for companies that seek investment from the public in a short window of time.

B. Conventionally, in India, after DRHPs verification, it is then published on SEBI's website for investors to have a look and then invest in it when the IPO opens. However, on the other hand, the Dutch system places a heavy emphasis on the aspect of standardisation. All registered documents follow the same format of URD for approval and are further attested, whether they meet the eligibility requirements of AFM or not. It can also act as a base document for future offerings (like IPOs, rights issues, etc.).

## VII. ASSESSING THE NEED OF A DUAL-TRACK DRHP SYSTEM

In the above-mentioned table, we draw a comparative analysis between the Dutch financial system and the Indian financial system. It not only points out the advanced methods of compliance that the former follows but also tells us what all can be included and added along with ICDR amendments, to make more amicable transactions in the market.

Adhering to the current system under the ICDR amendment, companies file a confidential DRHP with the SEBI, which, upon its completion, is then disclosed to the public, a few days before the IPO opens. There are multiple downsides to this system: -

a) Retail investors and analysts get very little time to understand and analyse the company.
b) Most valuations or risks come up too late.
c) There's asymmetry of information between the insiders and the public, as the RHP is released only a few weeks before the IPO opens.

A Dual-Track DRHP system can provide a middle ground to this issue of a short window of time for investors to analyse the IPO, with the help of an SIS (Simplified Investor Summary). The following table showcases a brief analysis of both frameworks with the timeframes: -

| **Metric** | **Traditional DRHP** | **(Dual-Track Model Proposed)** |
|---|---|---|
| Time To Market | 6 – 8 months (DRHP □ RHP □ IPO) | 4 – 6 months (confidential prep) |
| Retail Investor Window | 10 – 15 days before the issue | 30+ days with the SIS |

| | | |
|---|---|---|
| Under-pricing Risk | Higher due to last-minute awareness | Lower, due to gradual exposure |
| Volatility Post-Listing | High (unverified expectations) | Moderate (tempered disclosures) |
| IPO Grading Clarity | Not mandatory anymore | Can be integrated with SIS |

This Dual-Track DRHP process can operate in 2 tracks, in the following manner: -

I. Track I: Confidential Filing to SEBI (Private stage + early public SIS)

- The company files a confidential DRHP with SEBI
- SEBI starts its usual process of checking disclosures, legality, and risk verification etc.

❖ Addition of SIS (Simplified Investor Summary)

Within 10 days of confidential DRHP filing, the company must release a document publicly called as SIS. It can be a short, 2–3 page summary entailing the following information: -

- A short business description (what does the company do)
- Use of IPO money (e.g., debt repayment, expansion)
- Key financial indicators (like revenue, PAT, RoE)
- Promoter details and past ventures
- Key risk factors
- Basic ESG compliance (if applicable)

This could be made publicly available on SEBI's and the stock exchange's websites for easy convenience, even though the full DRHP is confidential.

II. Track II: Public DRHP after SEBI's Review (Public stage + IPO launch)

- After SEBI's reviews are done (with comments and changes), the full DRHP is publicly released.
- Investors can now read full details before the IPO opens

Inadequate market price discovery, grey market speculation, and compressed decision-making window timelines can give rise to numerous issues. The root cause of all these aspects lies in the very basic element of transparency, before the opening of an IPO. The above suggested approach is drawn from some of the best international practices like the U.S SEC's[32] confidential filing regime and the EU's use of the Universal Registered Document[33] (URD). The entire purpose of introducing a SIS herein is to provide an earlier and equitable access to material information, which would empower and enable the investors to make a more informed decision, before an IPO opens.

While the Indian securities market is significantly larger and more complex than that of the Netherlands, the relevance of comparative analysis in this context lies not in economic parity but in the procedural handling of information asymmetry and investor access. Transparency-enhancing mechanisms, such as staggered disclosures or simplified public summaries, address behavioural and informational market failures that are common across jurisdictions, irrespective of market size. The proposed Dual-Track DRHP model does not dilute SEBI's regulatory oversight; rather, it supplements the existing ICDR framework by introducing an intermediary disclosure layer aimed at improving investor preparedness. By focusing on *when* and *how* material information reaches the public, rather than on reducing compliance burdens, the proposal remains compatible with India's sensitivity to market stability, retail investor protection, and systemic risk, while drawing from internationally tested disclosure practices.

## VIII. CONCLUSION: IPO RUSH IN INDIA, BOON OR BUBBLE?

a) Solving The Valuation Conundrum: Case Studies of Paytm and Zomato

i. Paytm[34]

- IPO Size: ₹18,300 crore (India's largest IPO at the time)
- IPO Price: ₹2,150 per share
- Listing Day Performance: Closed at ₹1,560 — a 27% drop

[32] Supra 24.
[33] Supra 26.
[34] Nikhil Agarwal, Paytm shares crash another 9% as investors lose Rs 26,000 crore in 10 days, ETMarkets.com, Economic Times (September 7, 2025) https://economictimes.indiatimes.com/markets/stocks/news/paytm-shares-crash-another-9-as-investors-lose-rs-26000-crore-in-10-days/articleshow/107678289.cms>.

- Six-month Performance: Declined by over 70%, reaching levels below ₹600 in mid-2022[2]

Initially, the IPO was marketed on many attractive indicators like the growth rate, profitability potential; however, it stood at a net loss of 1700 crores in FY 2021. The company failed to present a clear path towards profitability, and they were not able to achieve what they had originally sought to. This mismatch between the valuations and the fundamentals was widely criticised by many investors and financial analysts. Many of these financial analysts also prompted a need for post-listing clarification from SEBI on IPO pricing disclosures.

ii. Zomato Ltd.[35]

- IPO Valuation: ₹1 lakh crore
- IPO Price: ₹76; Listed at ₹115 (51% premium)
- However, within a year, Zomato's stock price fell below its issue price, with a 52-week low of ₹40.55 in July 2022.

Despite having early enthusiasm, there were many concerns revolving around unit economics and their mismatch with what was anticipated, as there was a high cash burn. Many analysts stated that due to Zomato's high promotional discounts, to sustain its customer engagement, the valuation didn't result in something profitable.

Such a disconnect between valuation and intrinsic value, combined with herd-like retail behaviour, strongly mirrors classic boom-bust IPO cycles, such as the U.S. dotcom bubble of 2000.[36]

SEBI's ICDR Amendments[37] regarding SARs thus present a paradigm shift that addresses critical gaps in the Indian startup ecosystem, which relies heavily on specialised talent and innovative compensation structures. Allowing companies to maintain SARs through the IPO process removes significant barriers that earlier forced complex restructuring and potential talent loss. As India continues to build its position as a global startup hub, these amendments provide the regulatory

[35] Debashish Pachal, Zomato Share Price Today, July 25, 2022: Zomato shares plunge over 14% to a new lifetime low as pre-IPO investors' lock-in period ends, The Indian Express (September 4, 2025) https://indianexpress.com/article/business/market/zomato-share-price-today-july-25-2022-pre-ipo-investors-lock-in-period-8049910/.
[36] Karishma Vanjani, The Dot-Com Bubble Peaked 25 Years Ago Today. What the Crash Taught Investors, Barron's (September 4, 2025) https://www.barrons.com/articles/dot-com-stocks-bubble-anniversary-b363eabb.
[37] Supra 1.

flexibility which necessary to compete internationally while maintaining the employee alignment crucial for sustainable growth. The change represents not just a regulatory adjustment but a fundamental enhancement of the Indian startup ecosystem, positioning it for continued growth and global competitiveness.

The Indian IPO wave is neither an unreserved boon nor a predetermined bubble; it is a multifaceted phenomenon needing balanced regulation. It is a manifestation of increasing market penetration and availability of capital, but the rapid valuation enthusiasm, coupled with herd mentality and regulatory complacency, causes systemic unease. The SEBI ICDR 2025 reforms need to be complemented by concurrent safeguards so that Indian capital markets expand not only in terms of size, but of integrity and robustness.

# REGULATING MULTI-SIDED PLATFORMS: A WHITE PAPER FOR ANTITRUST REGULATORS [1]

*By Agastya Shukla* [2]

**ABSTRACT**

*Regulating multi-sided digital platforms poses unfathomed challenges because traditional competition tools often fail to capture the interplay of data, network effects, and their cross-market linkages. In India, such dissonance becomes visible in proceedings before the Competition Commission of India (CCI), where market definition and assessments of dominance remain constrained by limited evidence on actual user behaviour. This paper addresses that gap by piloting a user perception-based survey for analysing market power in major Indian platforms across different services - Ola, Zomato, Zerodha, and Hotstar. Using original survey data on pricing, switching behaviour, loyalty programmes, and service quality, the study integrates quantitative indicators such as Herfindahl–Hirschman concentration measures to reveal market concentration of the study subjects. The findings show that systematic consumer-perception studies can materially improve the CCI's assessment for defining relevant markets and detecting dominance. The paper concludes that such evidence-based regulation becomes quintessential to preserve competitive multisided markets in the Indian economy.*

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## I. DIGITAL PLATFORMS AND MARKET DYNAMICS: AN INTRODUCTION

Digital ecosystems have revolutionized market efficiency and value creation in an unparalleled manner. Unlike traditional conglomerates, which achieved efficiencies through internal operational synergies with limited cross-market value creation, digital platforms thrive on scope economies and network effects. By connecting multiple user groups such as consumers, service providers, and advertisers, major platforms generate positive externalities, enhancing consumer welfare through lower costs and improved service.[3] However, such rapid evolution of digital

[1] *This submission was a Top 5 entry in the 2nd National Article Writing Competition, 2025 on Antitrust Laws.*

[2] The author is a student at Panjab University.

[3] Oliver Budzinski and Juliane Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation? (Updated October 2022 with the Final DMA)' (Ilmenau Economics Discussion Papers vol 27, no 168,

platforms presents a fundamental dilemma: how to foster market growth and innovation while curbing monopolistic practices. These platforms democratize access to global markets, yet they also exert significant control over competition through restrictive policies, algorithmic governance, and data-driven advantages.[4] While e-commerce platforms empower small businesses, they simultaneously shape market outcomes, often extracting disproportionate value from participants.

A key aspect of digital market dynamics is vertical integration, where platforms not only facilitate transactions but also offer their own products alongside those of third-party sellers. For instance, Amazon's promotion of its private-label goods while hosting independent sellers raises concerns about anti-competitive behaviour and market fairness.[5] However, vertical integration often leads to improved logistics, fulfilment, and supply chain efficiencies, ultimately lowering costs and enhancing consumer experiences.[6] In digital markets, platforms play a crucial role in shaping competition, consumer choices, and market efficiency. Two primary types of platforms, Aggregators and Marketplaces, serve distinct functions in facilitating interactions between users, businesses, and advertisers. While aggregators focus on organizing and presenting information or services without directly handling transactions, marketplaces serve as intermediaries that enable direct commercial exchanges between buyers and sellers.[7] Therefore, this study stresses the

2002) <https://www.tu-ilmenau.de/fileadmin/Bereiche/WM/wth/Diskussionspapier_Nr_168_neu.pdf> accessed 14 March 2025.

[4] Raphael Reims, 'Can Competition Law Rein in Big Tech?' (LSE Business Review, 5 January 2022) <https://blogs.lse.ac.uk/businessreview/2022/01/05/can-competition-law-rein-in-big-tech/> accessed 14 March 2025; Agustín Carstens, 'Regulating Big Tech: Between Financial Regulation, Antitrust and Data Privacy' (Speech at the BIS Conference, 6-7 October 2021).

[5] Lina Khan, 'Amazon's Antitrust Paradox' (2017) 126(3) *Yale Law Journal* 710.

[6] Raphael Reims, 'Can Competition Law Rein in Big Tech?' (LSE Business Review, 5 January 2022) <https://blogs.lse.ac.uk/businessreview/2022/01/05/can-competition-law-rein-in-big-tech/> accessed 14 March 2025

[7] Damian Tambini and Martin Moore, 'Introduction' in Martin Moore and Damian Tambini (eds), Regulating Big Tech: Policy Responses to Digital Dominance (New York, OUP 2021) <https://doi.org/10.1093/oso/9780197616093.003.0001%20accessed%2014%20January%202025> accessed 14 January 2025; Oliver Budzinski and Juliane Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation? (Updated October 2022 with the Final DMA)' (Ilmenau Economics Discussion Papers vol 27, no 168, 2002) <https://www.tu-ilmenau.de/fileadmin/Bereiche/WM/wth/Diskussionspapier_Nr_168_neu.pdf> accessed 14 March 2025.

primary importance of data collection on consumer behaviour (the buyer side of things) to frame effective policies.[8]

In digital markets, the MOAT of any user-based service company is the visibility on a platform. If the platforms themselves engage in a practice of self-preferencing of their associated products or services, a non-associated entity's one shot at getting listed or getting visibility on a platform gets missed. This raises a question on one of the most fundamental antitrust challenges for regulators, "How do we eliminate this leverage of the big multisided platforms?", and this question further forces us to answer more specific questions on predatory and personalized pricing strategies, algorithmic disruption, and its geometric effects on the user economy. Collectively, the paper attempts to answer such nuanced questions on the abusive practices to address the growing challenges posed by digital monopolies and ensure fair market competition.[9]

Firstly, this paper examines the key concerns of antitrust regulators in digital markets; secondly, it outlines the research design and analyzes the competitive dynamics shaping these markets; thirdly, it presents an empirical survey on consumer behaviour across multisided platforms, highlighting policy challenges for antitrust enforcement; and finally, the paper concludes by proposing a holistic framework for regulating multisided platforms effectively.

## II. RESEARCH DESIGN AND METHODOLOGY

The Competition Commission of India ("CCI") has intensified its scrutiny of digital markets, targeting anti-competitive practices like price manipulation, data monopolization, and exclusionary tactics. However, regulating competition in the digital economy necessitates novel tools and analytical models. For instance, network analysis software can help visualize user

[8] Aifang Ma, 'Convergent Antitrust Regulation of the Digital Economy in China, the European Union and the United States: Mirror of an Intensifying Geopolitical Competition' (2024) 3(1) *Asian Review of Political Economy* 9 <https://doi.org/10.1007/s44216-024-00027-3> accessed 14 March 2025; Damian Tambini and Martin Moore, 'Introduction' in Martin Moore and Damian Tambini (eds), Regulating Big Tech: Policy Responses to Digital Dominance (New York, OUP 2021) <https://doi.org/10.1093/oso/9780197616093.003.0001> accessed 14 January 2025; Oliver Budzinski and Juliane Mendelsohn, 'Regulating Big Tech: From Competition Policy to Sector Regulation? (Updated October 2022 with the Final DMA)' (Ilmenau Economics Discussion Papers vol 27, no 168, 2002) <https://www.tu-ilmenau.de/fileadmin/Bereiche/WM/wth/Diskussionspapier_Nr_168_neu.pdf> accessed 14 March 2025.

[9] Ibid.

relationships and detect monopolistic tendencies driven by network effects.[10] India's competition law framework must address emerging issues like dark patterns, where platform designs manipulate users into making decisions that benefit the platform at their expense. The integration of behavioural economics is vital in identifying these subtle forms of consumer exploitation and ensuring fair competition while safeguarding consumer welfare.

This study employs a quantitative, online survey-based methodology to assess user behaviour, loyalty factors, and competitive dynamics across four prominent digital platforms in India: Ola,[11] Zomato,[12] Disney Hotstar[13] and Zerodha.[14] Primary data was collected through four online questionnaires, targeting users across diverse age groups and geographic regions. The survey focused on platform usage frequency, switching behaviour influenced by network effects, price sensitivity, and the impact of exclusive deals, such as Zomato Gold Membership or Disney Hotstar's exclusive content.

The primary limitation of this study is that the sample size of the users is very limited, but contrastingly, this also poses a new opportunity for CCI to conduct a market study on multi-sided platforms. To better assess such platforms, the market power in digital industries can be evaluated using these key metrics: natural logarithm of competitor count, market share concentration using the Herfindahl-Hirschman Index ("HHI"), and total product similarity across competitors. Therefore, the study proceeds with establishing the HHI index for the platforms under scrutiny.

| **Market** | **Platform (In Study)** | **Other Platforms** | | | **HHI Index[15]** | **Interpretation** |
|---|---|---|---|---|---|---|
| **Food Delivery Service** | Zomato[16] (57%) | Swiggy (40%) | Uber Eats (1%) | Others (2%) | 4854.00 | Highly concentrated. |

[10] Robin A Prager, 'ATM Network Mergers and the Creation of Market Power' (1999) 44 Antitrust Bulletin 349, 355.

[15] CUTS Institute for Regulation & Competition, 'HHI Index' <https://circ.in/circ_hhi.php> accessed 15 March 2025.

[16] Inc42, 'Zomato Expands Lead Over Swiggy, Has 57% Market Share in Food Delivery: Goldman Sachs' (13 March 2024) <https://inc42.com/buzz/zomato-expands-lead-over-swiggy-has-57-market-share-in-food-delivery-goldman-sachs/> accessed 15 March 2025.

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | (Duopoly-like situation) |
| **Ride Hailing Service** | Ola[17] (60%) | Uber (35%) | Rapido (4%) | Others (1%) | 4842.00 | Highly concentrated. (2large dominant players) |
| **Stock Brokerage** | Zerodha[18] (17.1%) | Groww (25.1%) | Angle One (15.1%) | Others (42.5%) | 2956.68 | Highly concentrated industry. (No dominant player) |
| **OTT Services** | Disney Hotstar[19] (26%) | Netflix (13%) | Amazon Prime (23%) | Others (38%) | 2818.00 | Highly concentrated. (No |

[13] Disney Hotstar, 'Consumer Behaviour on Multisided Platforms: A Survey' (Spreadsheet, 15 March 2025) <https://docs.google.com/spreadsheets/d/1CCyRZO6EeRIpM-SN0sK6k6ItYvpxAZeXCr_JtER_14w/edit?usp=sharing> accessed 20 March 2025.

[14] Zerodha,'Consumer Behaviour on Multisided Platforms: A Survey' (Spreadsheet, 15 March 2025) <https://docs.google.com/spreadsheets/d/1uB4kspghIW_0HLyc2a4WXuVETNN8ow9NQAanX3b5xmQ/edit?usp=sharing> accessed 20 March 2025.

[15] CUTS Institute for Regulation & Competition, 'HHI Index' <https://circ.in/circ_hhi.php> accessed 15 March 2025.

[16] Inc42, 'Zomato Expands Lead Over Swiggy, Has 57% Market Share in Food Delivery: Goldman Sachs' (13 March 2024) <https://inc42.com/buzz/zomato-expands-lead-over-swiggy-has-57-market-share-in-food-delivery-goldman-sachs/> accessed 15 March 2025.

[17] StockPe, 'Ola vs Uber' (10 March 2024) <https://stockpe.app/blog/ola-vs-uber/> accessed 15 March 2025.

[18] The Economic Times, 'Demat Accounts: Grow Market Share Crosses 25%, Zerodha Continues to Lose' (14 March 2024) <https://economictimes.indiatimes.com/markets/stocks/news/demat-accounts-groww-market-share-crosses-25-zerodha-continues-to-lose/articleshow/112518123.cms?from=mdr> accessed 15 March 2025.

[19] The Economic Times, 'Top Streaming Platforms in Content-Hungry India' (15 March 2024) <https://economictimes.indiatimes.com/industry/media/entertainment/top-streaming-platforms-in-content-hungry-india/articleshow/112864590.cms?from=mdr> accessed 15 March 2025.

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | | | Domina nt Player) |

## III. THE 'DEFINING' CHALLENGE IN MULTI-SIDED MARKETS

In the context of digital platforms, network effects play a critical role in shaping market dynamics. These effects are categorized into direct network effects, where the platform's value increases as more users join the same side of the market, and indirect network effects, where value is derived from attracting users from complementary sides or providing additional content. Direct network effects are driven by economies of scale, while indirect network effects are influenced by economies of scope.[20]

A prime example of two-sided platforms leveraging network effects is ridesharing platforms like Uber and Ola, where the interaction between drivers (sellers) and passengers (buyers) is crucial for growth and user retention. A larger driver base attracts more passengers by reducing waiting times and fares, while an expanding passenger base makes the platform attractive to drivers by minimizing idle time.[21] The surge pricing algorithm in ridesharing platforms illustrates this dynamic. During periods of high demand, dynamic pricing increases fares to moderate passenger demand and incentivize more drivers to join, thereby balancing supply and demand. This algorithm factors in real-time supply-demand dynamics, location-based data, and demand forecasts, creating

[20] Harshit Upadhyay and Sanigdh Budhia, 'Delineating Relevant Market for Multisided Platforms: Transaction vs. Non-Transaction Platforms' (IndiaCorpLaw, October 2022) <https://indiacorplaw.in/2022/10/delineating-relevant-market-for-multisided-platforms-transaction-vs-non-transaction-platforms.html> accessed 14 March 2025; Rosa M Abrantes-Metz and Albert D Metz, 'Regulating Multisided Platforms: The Case Against Treating Platforms as Utilities' (2020) Competition Policy International <https://www.competitionpolicyinternational.com/wp-content/uploads/2020/08/03-Regulating-Multisided-Platforms-The-Case-Against-Treating-Platforms-As-Utilities-Rosa-M.-Abrantes-Metz-Albert-D.-Metz.pdf> accessed 14 March 2025.

[21] Ankit Srivastava and Abhyuday Yadav, 'Nations in Platform Markets: An Indian Perspective' (2022) 3 CCI Journal of Competition Law & Policy 21 <https://ccijournal.in/index.php/ccijoclp/article/view/91/52> accessed 14 March 2025; Junic Kim and Shanghe Ahn, 'The Platform Policy Matrix: Promotion and Regulation' (2024) Policy & Internet <https://onlinelibrary.wiley.com/doi/epdf/10.1002/poi3.414> accessed 14 March 2025.

a feedback loop that enhances platform attractiveness and user behaviour.[22] Platforms aim to maximize profit from both sides, often subsidizing one side (e.g., users) to attract a critical mass while charging the other side (e.g., advertisers) a premium.[23]

In the realm of antitrust analysis, and what we can term as a 'problem of tests,' the traditional methods like the Small but Significant Non-transitory Increase in Price ("SSNIP") Test and the Hypothetical Monopolist Test have been instrumental in defining markets. However, these approaches face limitations when applied to digital markets, where factors such as data, quality, and network effects play a crucial role. The Small but Significant Non-transitory Decrease in Quality ("SSNDQ") Test aims to shift the focus to quality but encounters difficulties in measurement. Multi-sided platforms, which cater to interdependent user groups, further complicate market definition, rendering traditional single-sided approaches inadequate. Notable cases like *Visa International Service Association v. JSL Corporation*[24] and *United States v. Apple Inc.*[25] highlight these challenges, necessitating flexible regulatory frameworks that accurately capture market power.[26]

The process of defining markets in multi-sided platforms involves two key stages. The first stage, known as the exclusion criteria, identifies platforms that charge different prices to distinct user groups, where the value for each group is influenced by the participation of others, and uniform pricing is applied within each market where user groups operate. The second stage, the inclusion criteria, identifies platforms that facilitate interaction between user groups, connect users through the platform, implement a pricing structure for different user groups, and exhibit feedback effects

[22] David Evans, 'Platforms' (George Mason University Global Antitrust Institute, 2021) <https://gai.gmu.edu/wp-content/uploads/sites/27/2021/05/Session-13_Evans-Platforms.pdf> accessed 14 March 2025.
[23] Asian Development Bank, *'Digital Platform Data Economies'* (ADB, 2023) <https://www.adb.org/sites/default/files/publication/935711/sdwp-091-digital-platform-data-economies.pdf> accessed 14 March 2025.
[24] *Visa International Service Association v JSL Corporation***,** 610 F 3d 1088 (9th Cir 2010).
[25] *United States v Apple Inc*, 791 F3d 290 (2d Cir 2015).
[26] APEC, *'Policies and Tools for Improving Digital Economy and Competition in Digital Markets'* (2024) <https://www.apec.org/docs/default-source/publications/2024/3/224_desg_policies-and-tools-for-improving-digit al-economy-and-competition-in-digital-markets.pdf?sfvrsn=6033aaa0_2> accessed 14 March 2025.

where actions of one group affect others. A classic example is the newspaper industry, which connects readers and advertisers.[27]

The research demarcates the defining process of a relevant market into a step-by-step process to effectively define relevant markets; several steps are essential. First, evaluating market structure involves identifying user groups and platform services. For instance, in a search engine, the key stakeholders are users, advertisers, and content providers. Next, assessing competitive constraints entails analysing the affected side first. In an abuse of dominance case against a search engine, focusing on advertisers' alternatives, such as offline or non-search-based digital advertising, is crucial. Analysing interdependence is also vital, as strong network effects may justify a single market definition, while weak or negative effects might require defining multiple interrelated markets. Evidence-based decisions, such as consumer surveys to assess switching behaviour and preferences, further enhance the accuracy of market definitions.

Market definitions vary depending on user perception. For example, in a food delivery platform, consumers may define the market as "home food delivery," while delivery personnel may perceive it as "small package delivery." Another issue while assessing the platform is the lack of an "Independent Assessment Test." The SSNIP test, which assesses whether a hypothetical monopolist can profitably increase prices by 5-10% without losing customers to substitutes, faces challenges in multi-sided markets due to indirect network effects. For instance, increasing commission fees for drivers on a ride-hailing platform can reduce driver supply, leading to fewer users and further decreasing driver availability. This feedback loop complicates the SSNIP test, often resulting in narrow or inaccurate market definitions.

Another way we can swim through these murky waters is to apply the SSNIP test to both sides of the platform individually and independently to assess its market power.[28]However, this also falls short of a concrete assessment. Multi-sided markets often exhibit asymmetric indirect network

[27] Shubha Ojha, 'Tackling Big Tech's Data Advantage: Is the Indian Regulatory Framework Geared Up?'(2021) 6(2) Indian Competition Law Review 55–73 <http://iclr.in/wp-content/uploads/2024/03/ICLR-Volume-62-Article-5-pp-55-73.pdf> accessed 14 March 2025.

[28] Mohit Chawdhry, '*Determining the Relevant Market*' (Report, Issue No. 013,December 2021) <https://static1.squarespace.com/static/5bcef7b429f2cc38df3862f5/t/61d54d8a8c34fa297b3372ed/1641368976112/REPORT_ISSUE_013-Determining_the_Relevant_Market.pdf> accessed 14 March 2025.

effects, where one user group derives more value from the other. For instance, advertisers on social media platforms benefit more from users than vice versa. This allows platforms to implement differential pricing, such as offering free services to users while charging advertisers. The SSNIP test becomes ineffective when one side faces a "zero price." Hence, a more pragmatic alternative metric that requires an assessment of quality and costs is recommended.[29]

The SSNDQ test evaluates consumer response to reduced product quality rather than price increases. However, quality is multi-dimensional and varies across user groups, making its application complex. Despite these challenges, this approach enhances market analysis by considering network effects, cross-subsidization, and quality factors.[30]

In India, market delineation differs for transaction and non-transaction platforms. In *FHRAI vs. MakeMyTrip*,[31] The Competition Commission of India (CCI) focused solely on hoteliers' perspectives. However, in the BookMyShow case,[32] The CCI acknowledged feedback effects, defining the market as "online intermediation services for booking movie tickets in India." For non-transaction platforms, cases like *Matrimony.com v. Google*[33] and *Umar Javeed v. Google*[34] saw the CCI defining separate markets without recognizing the platform's multi-sided nature.[35]

In *Ohio v. American Express*,[36] the anti-steering clause in Amex's agreements was challenged for being anti-competitive. The court adopted an unconventional approach, recognizing Amex

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[29] David S Evans and Richard Schmalensee, *'The Antitrust Analysis of Multi-Sided Platform Businesses'* (NBER Working Paper No. 18783, February 2013) *National Bureau of Economic Research* <https://www.nber.org/system/files/working_papers/w18783/w18783.pdf accessed 14 March 2025.

[30] Patrick Rey and others, '*The Activities of a Monopoly Firm in Adjacent Competitive Markets: Economic Consequences and Implications for Competitive Policy* (21 September 2001) (unpublished manuscript, on file with *Yale Journal of Regulation*).

[31] *FHRAI v MakeMyTrip & Ors* (2019) CCI Case No. 14 of 2019.

[32] *Vishal Gupta & Anr v Big Tree Entertainment Pvt Ltd* (2022) Competition Commission of India Case No 41 of 2021.

[33] *Matrimony.com Ltd v Google LLC & Ors* (2018) Competition Commission of India Case No. 07 & 30 of 2012.

[34] *Umar Javeed v Google LLC & Ors* (2022) Competition Commission of India Case No. 39 of 2018.

[35] Christian Ahlborn, David S Evans and Jorge Padilla, '*The Antitrust Economics of Tying: A Farewell to Per Se Illegality'* (forthcoming, Summer 2003) *Antitrust Bulletin*.

[36] *Ohio v American Express Co* (2018) 138 S Ct 2274.; Michael Katz and Jonathan Sallet, *'Multisided Platforms and Antitrust Enforcement'* (2019) 128 *Yale Law Journal* 2168 <https://www.yalelawjournal.org/pdf/KatzSallet_ieayvf51.pdf> accessed 14 March 2025; David Evans and Richard

as a transaction-based platform, which required an integrated market definition. For non-transaction platforms, distinct but connected markets were defined due to different typologies.

Internationally, authorities rarely apply the SSNIP test in multi-sided markets. The German Competition Authority rejected it in CTS Eventim.[37] and opted for user surveys. The U.S. Federal Trade Commission emphasizes qualitative factors, such as product quality reduction, in merger guidelines. However, this might not be the case in the context of CCI. The CCI's market definition often depends on the complainant's perspective. For instance, in *FHRAI vs. MakeMyTrip*,[38] It focused on hoteliers' constraints while neglecting consumer-side dynamics. In totality, the regulatory intervention often misses the point when it is presented with the lack of empirical evidence for substitutability assessments, and that often leads to inconsistent decisions.[39]

## IV. A PILOT ON 'USER PERCEPTION'

Platforms under study are: Ola, Zomato, Zerodha, and Disney Hotstar ('JioHotstar'), which leverage dynamic pricing and strategic models to attract consumers and establish market dominance. Price clustering, influenced by factors like demand surges and regional events, allows platforms to tailor pricing strategies. For instance, Ola adjusts fares based on peak hours and traffic conditions, and Zomato offers discounts and cashback during meal times to attract price-sensitive customers.

Strategic pricing enables platforms to balance customer acquisition and profitability. Disney+ Hotstar leverages bundled packages with telecom providers and tiered subscription models to

Schmalensee, '*The Antitrust Analysis of Multi-Sided Platform Businesses*' in Roger D Blair and D Daniel Sokol (eds), *The Oxford Handbook of International Antitrust Economics, vol* 1 (Oxford University Press 2014) 404.

[37] CTS Eventim/FKP Scorpio (2017) German Federal Cartel Office (Bundeskartellamt) Case No B6-35/17.

[38] *FHRAI v MakeMyTrip* (n 30).

[39] Jonathan B Baker, Jonathan Sallet and Fiona Scott Morton, '*Introduction: Unlocking Antitrust Enforcement*' (2018) 127(7) *Yale Law Journal* 1742 <https://www.yalelawjournal.org/feature/introduction-unlocking-antitrust-enforcement> accessed 10 March 2025; Global Platform, '*Global Platform Specification*' <http://intemational.visa.com/fb/paytech/productsplatforms/globalplatform.jsp> accessed 8 March 2025.

target different consumer segments, while Zerodha maintains stable brokerage fees through real-time market data, enhancing transparency and customer trust.[40]

The survey was conducted across four multisided platforms, viz. Ride-hailing, food delivery, OTT streaming services, and stock brokerage platforms. This offers key behavioural insights. Specifically, for the ride-hailing sector, with a focus on Ola, the data highlights consumer preferences, switching behaviour, and platform loyalty, aiding regulatory watchdogs in understanding market dynamics and potential anti-competitive practices. Further, each infographic represents the percentage share of the colour-coded choices, and as an explanation to the figure, a perspective on the regulatory scrutiny is highlighted in the explanation following every figure.

***Ola: 154 Responses***

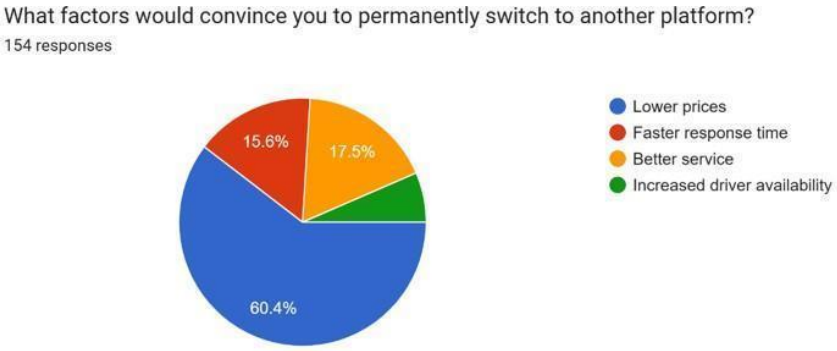


**FIGURE 3: LOWER PRICE AS A CRUCIAL FACTOR IN RIDE HAILING PLATFORMS**

The survey indicates that majority of the users prioritize lower prices as a key factor influencing their choice of service. This raises significant antitrust concerns about the business practices of ride-hailing platforms. Specifically, while consumers benefit from reduced fares, it prompts the critical question of who absorbs the increased operational costs of the platform. If not the consumers, could it be the drivers who bear the financial burden through reduced earnings or unfavourable contractual terms? This imbalance highlights a potential area for regulatory scrutiny to ensure fair treatment across all stakeholders within the platform's ecosystem.

[40] Accredian,'The Zerodha Phenomenon: How They Secured India's Market ?' (Medium) <https://medium.com/@accredian/the-zerodha-phenomenon-how-they-secured-indias-market-fbc91d47a68> accessed 7 March 2025.


**FIGURE 4: PRICE FLUCTUATIONS IN RIDE-HAILING SERVICES**

The survey reveals that 92.9% of respondents have observed variations in ride-hailing prices depending on the time of day, while only 7.1% reported no such difference. This dynamic pricing model raises concerns about affordability and transparency for consumers. While surge pricing helps balance supply and demand, it also poses questions about fairness, particularly for users who rely on these services for daily commuting. Additionally, it underscores the need for regulatory oversight to ensure that pricing strategies do not exploit consumer dependence or disproportionately impact certain user groups.

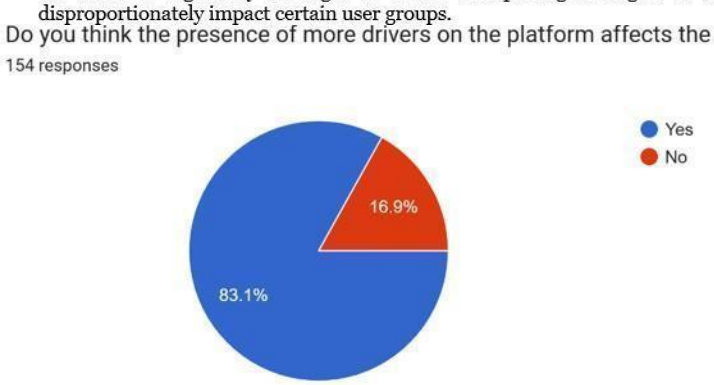


**FIGURE 5: IMPACT OF DRIVER AVAILABILITY ON RIDE WAITING TIME**

The survey indicates that 83.1% of respondents believe that an increase in the number of drivers on a ride-hailing platform reduces waiting times, while 16.9% think it has no significant effect. This highlights how competition among drivers can enhance consumer experience by lowering wait times. However, from an antitrust perspective, excessive driver supply without fair compensation mechanisms may create a power imbalance, benefiting the platform while leaving drivers vulnerable to reduced earnings. Regulatory oversight is essential to ensure that platforms do not exploit workforce competition in ways that undermine fair labour practices.

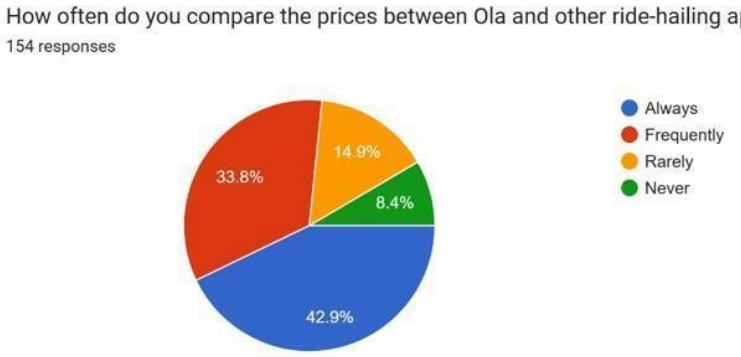


**FIGURE 6: PRICE COMPARISON IN RIDE-HAILING SERVICES**

The survey reveals that 42.9% of respondents always compare prices between Ola and competitors like Uber, while 33.8% frequently do so, 14.9% rarely, and 8.4% never. This suggests that consumers are highly price-conscious, driving competition among platforms. From an antitrust standpoint, such price-checking behaviour highlights the importance of preventing anti-competitive practices like price fixing or predatory pricing. If platforms manipulate fares in ways that reduce genuine competition, regulatory oversight becomes crucial to ensure fair pricing and consumer choice.

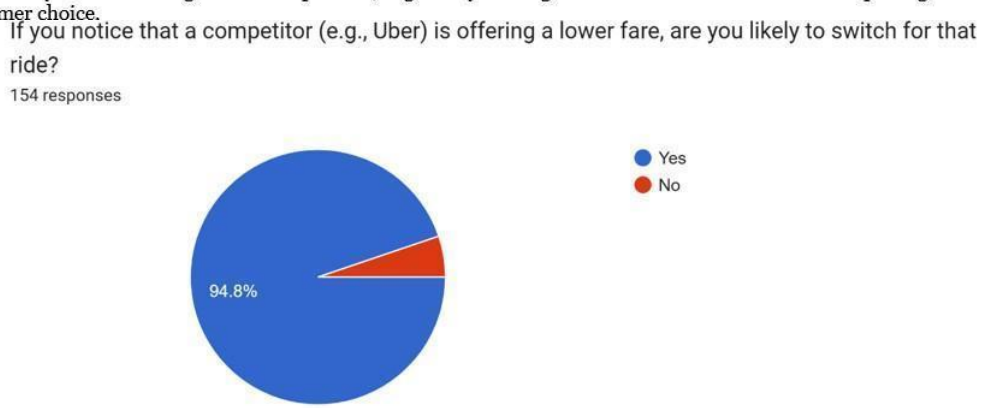


**FIGURE 7: CONSUMER SWITCHING BEHAVIOUR IN RIDE-HAILING SERVICES**

The survey indicates that 94.8% of respondents would switch to a competitor offering a lower fare for a ride, while the remaining 5.2% would stay with their current platform. This strong price-driven switching behaviour underscores the competitive dynamics in the ride-hailing market. From an antitrust perspective, it highlights the importance of maintaining a level playing field where platforms compete fairly on pricing without engaging in predatory pricing tactics to eliminate rivals. Regulators must ensure that price competition remains healthy and does not evolve into monopolistic practices that ultimately harm consumer choice.

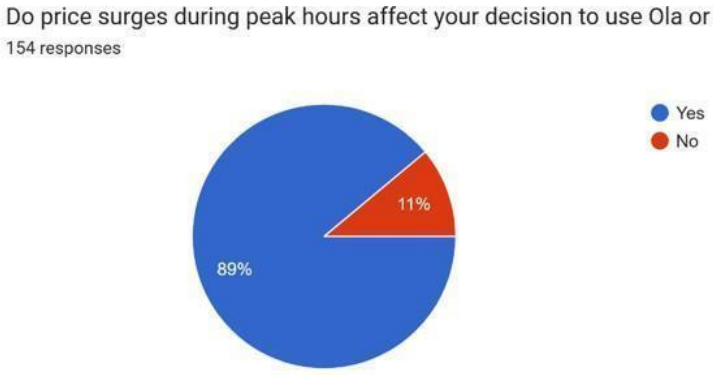


**FIGURE 8: IMPACT OF PRICE SURGES ON CONSUMER DECISIONS**

The survey reveals that 89% of respondents consider price surges during peak hours when deciding whether to use Ola or switch to another ride-hailing app, while 11% remain unaffected. This demonstrates how dynamic pricing influences consumer choices and platform competition. While surge pricing helps manage demand, it also raises concerns about affordability and transparency. If platforms leverage price fluctuations in a way that limits consumer options or creates dependency, it could impact market fairness and require closer scrutiny to ensure pricing remains competitive and reasonable.

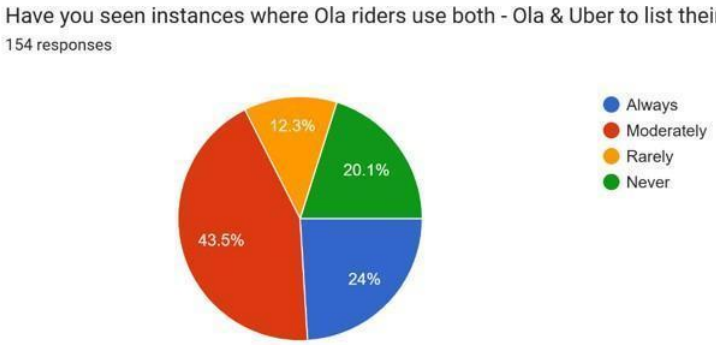


**FIGURE 9: DRIVERS LISTING SERVICES ON MULTIPLE PLATFORMS**

The survey shows that 24% of respondents always see Ola riders listing their services on both Ola and Uber, 43.5% observe this moderately, 12.3% rarely, and the rest never. This suggests that many drivers operate across multiple platforms to maximize earnings and reduce dependency on a single service. While this enhances competition and flexibility, it also raises questions about platform policies that may restrict or penalize such behaviour. Ensuring that drivers have the freedom to participate in a fair and competitive marketplace without facing restrictive contracts or exclusivity clauses is essential for a balanced ride-hailing ecosystem.

## ***Zomato: 159 Responses***

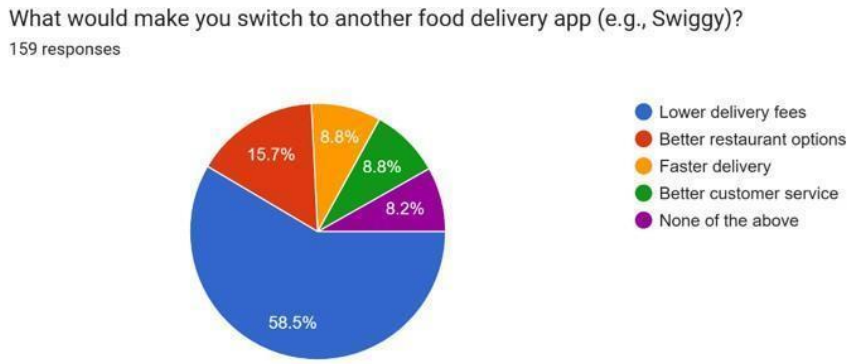


**FIGURE 10: FACTORS INFLUENCING CONSUMER SWITCHING IN FOOD DELIVERY APPS**

The survey reveals that 58.5% of Zomato users would switch to another food delivery app, such as Swiggy, for a lower delivery fee. Other key factors include 15.7% seeking better restaurant options, 8.8% preferring faster delivery, and another 8.8% valuing better customer service, while 8.2% would not consider switching. This highlights the competitive nature of the food delivery market, where pricing remains the dominant factor driving consumer choices. However, if platforms engage in aggressive pricing strategies to outcompete rivals, it could impact restaurant partnerships, delivery personnel earnings, and long-term market stability. Maintaining a fair and competitive environment ensures that users benefit from cost-effective services without unintended market distortions.

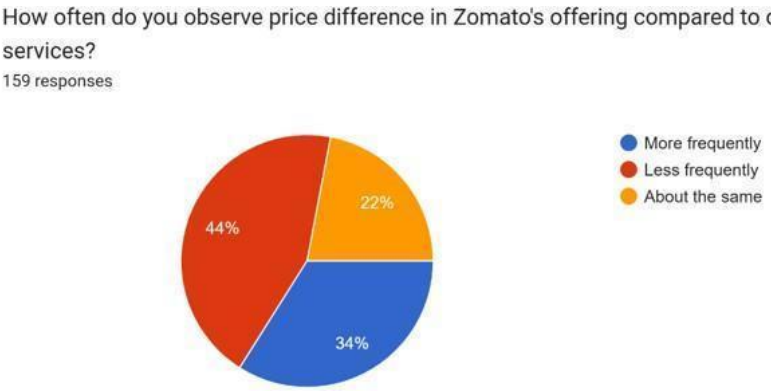


**FIGURE 11: OBSERVED PRICE DIFFERENCES IN FOOD DELIVERY SERVICES**

The survey indicates that 34% of respondents notice price differences in Zomato's offerings more frequently compared to other food delivery services, while 44% observe them less frequently, and 22% find them about the same. This suggests that pricing variations are a common consumer experience, potentially influenced by platform-specific discounts, surge pricing, or restaurant partnerships. While competition encourages dynamic pricing, it also raises concerns about transparency and consistency. Ensuring that platforms do not engage in pricing practices that confuse or mislead consumers is key to fostering a fair and competitive marketplace.


**FIGURE 12: FREQUENCY OF FOOD ORDERS ON ZOMATO**

The survey reveals that 39% of respondents order food from Zomato weekly, 30.2% do so monthly, 25.2% rarely, and the remaining order daily. This indicates that a significant portion of users rely on the platform regularly, making affordability and service quality crucial factors in retaining customer loyalty. While frequent orders suggest strong consumer engagement, it also underscores the importance of fair pricing and sustainable business practices. Ensuring that platforms do not leverage market dominance to impose unfavourable terms on restaurants or delivery partners is essential for maintaining a balanced and competitive ecosystem.

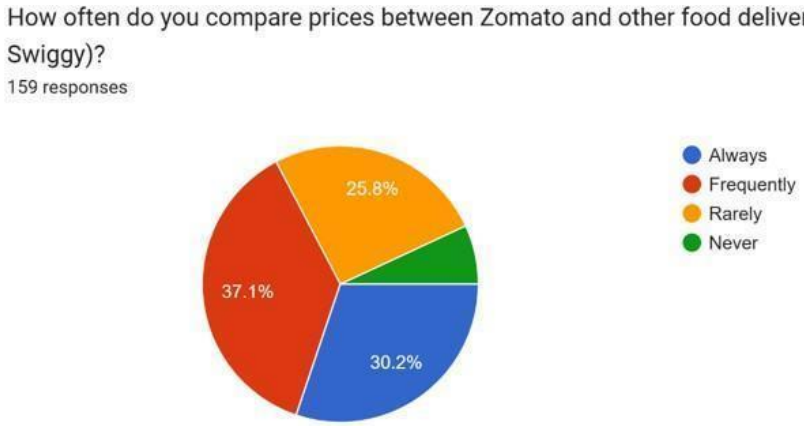


**FIGURE 13: CONSUMER PRICE COMPARISON BETWEEN ZOMATO AND OTHER PLATFORMS**

The survey shows that 37.1% of respondents frequently compare prices between Zomato and other food delivery services like Swiggy, while 30.2% always do so, 25.8% rarely, and the rest never. This highlights the price-sensitive nature of consumers, with a majority actively seeking the best deals. While competitive pricing benefits users, it also raises questions about how platforms adjust their pricing strategies to maintain an edge. Ensuring that such competition remains fair and does not lead to practices that disadvantage restaurants or delivery personnel is crucial for a well-functioning market.

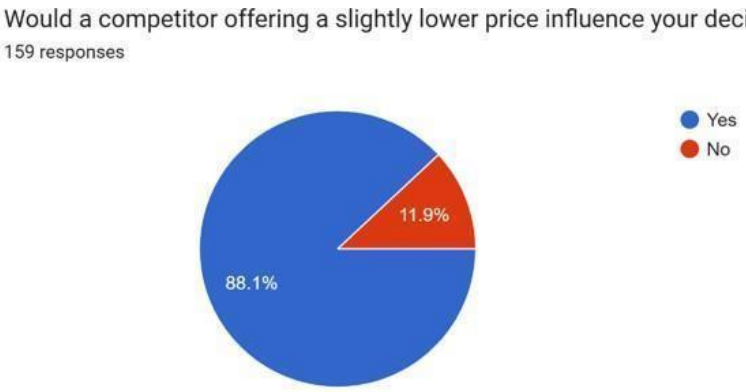


**FIGURE 14: IMPACT OF COMPETITIVE PRICING ON CONSUMER SWITCHING BEHAVIOUR**

The survey reveals that 88.1% of respondents would switch to a competitor offering a slightly lower price, while the remaining 11.9% would not. This strong price-driven behaviour underscores the intense competition among food delivery platforms, where even minor cost differences can influence consumer choices. While such competition benefits users through lower prices, it also raises concerns about sustainability—whether platforms can maintain fair wages for delivery workers and equitable terms for restaurants while competing aggressively on price. Ensuring that price competition does not lead to practices that harm long-term market stability is essential for a fair and balanced ecosystem.

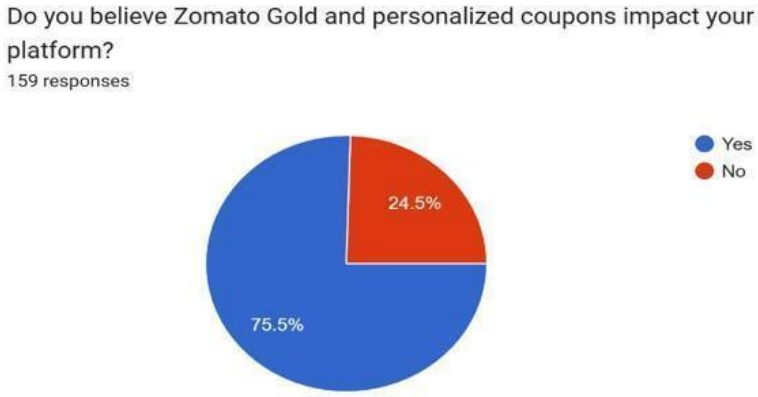


**FIGURE 15: INFLUENCE OF ZOMATO GOLD AND PERSONALIZED COUPONS ON CONSUMER CHOICE**

The survey indicates that 75.5% of respondents consider Zomato Gold and personalized coupons as influential factors in choosing a food delivery platform, while the remaining 24.5% do not. This highlights the role of loyalty programs and targeted discounts in shaping consumer preferences. While such incentives drive engagement and platform stickiness, they also raise concerns about whether smaller competitors can afford similar strategies. Ensuring that promotional offers do not create unfair advantages or distort market competition is key to maintaining a healthy and diverse food delivery ecosystem.

***Hotstar:143 Responses***

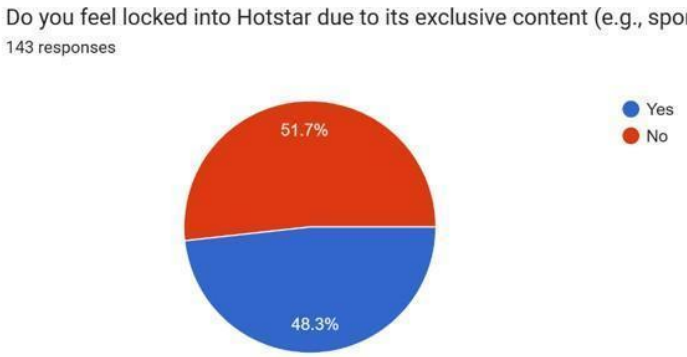


**FIGURE 16: CONSUMER PERCEPTION OF EXCLUSIVITY IN STREAMING SERVICES**

The survey reveals that 48.3% of respondents feel locked into Hotstar due to its exclusive content, such as sports and certain TV shows, while the remaining 51.7% do not. This highlights how exclusive licensing agreements influence consumer choices, often making it difficult for users to switch platforms without losing access to desired content. While such exclusivity drives subscriptions, it also raises concerns about market competition and content accessibility. Ensuring that exclusive deals do not limit consumer choice or create unfair advantages for dominant players is crucial for fostering a competitive streaming landscape.

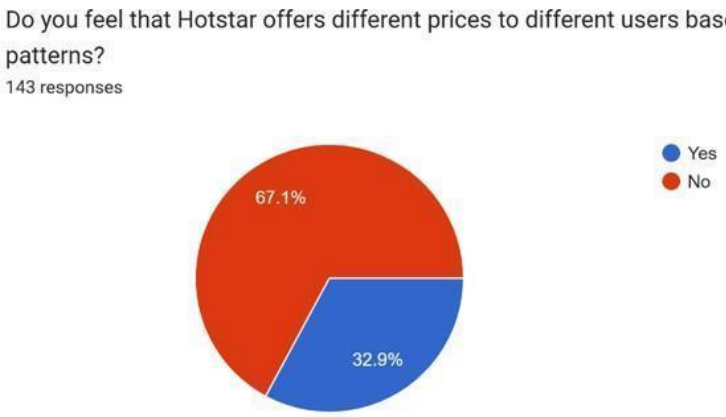


**FIGURE 17: PERCEIVED PRICING VARIATIONS IN HOTSTAR SUBSCRIPTIONS**

The survey indicates that 32.9% of respondents believe Hotstar offers different prices to users based on location or viewing patterns, while 67.1% do not share this perception. This suggests that while most users see pricing as uniform, a significant portion suspects variation influenced by factors such as geographic region, user engagement, or algorithmic pricing. While personalized pricing strategies can maximize platform revenue, they also raise concerns about transparency and fairness. Ensuring that such pricing models do not disadvantage certain users or create unfair market conditions is essential for maintaining consumer trust and competitive balance.

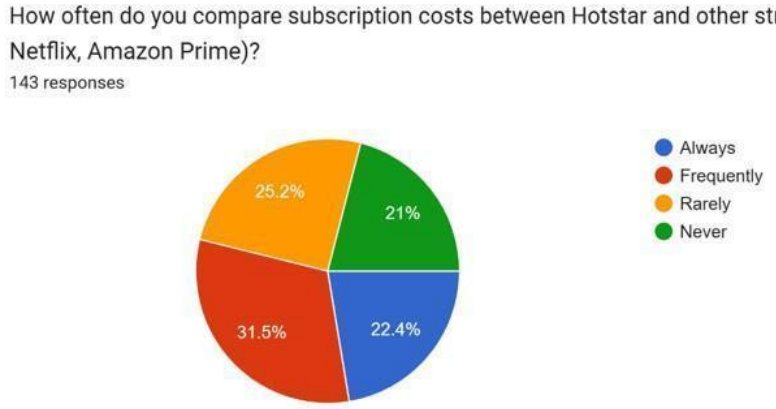


**FIGURE 18: CONSUMER COMPARISON OF STREAMING SUBSCRIPTION COSTS**

The survey reveals that 22.4% of respondents always compare subscription costs between Hotstar and other streaming platforms like Netflix and Amazon Prime, while 31.5% do so frequently, and 25.2% rarely. This suggests that a majority of consumers actively evaluate pricing before committing to a platform, highlighting the competitive nature of the streaming industry. While price competition benefits users, it also raises questions about whether platforms engage in pricing strategies that limit long-term consumer choice. Ensuring transparency and fair competition in subscription pricing is key to fostering a balanced and consumer-friendly streaming market.

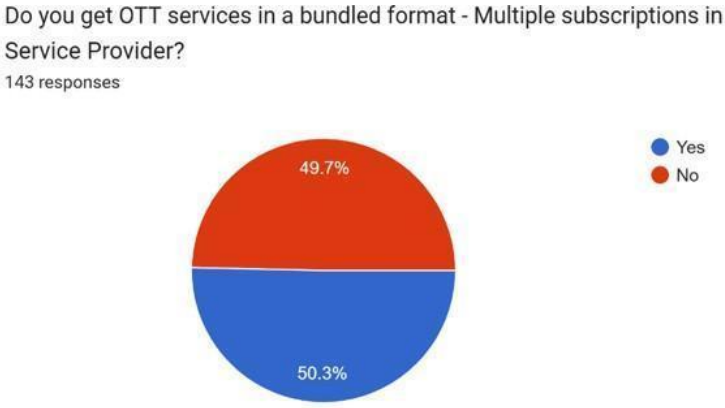


**FIGURE 19: PREVALENCE OF BUNDLED OTT SUBSCRIPTIONS**

The survey indicates that 50.3% of respondents receive OTT services in a bundled format—multiple subscriptions in one package—while 49.7% do not. This near-equal split highlights the growing trend of subscription bundling, which can offer cost savings and convenience for consumers. However, such bundling may also influence competition by making it harder for smaller or standalone platforms to attract subscribers. Ensuring that these packages promote fair market competition without restricting consumer choice or locking users into specific ecosystems is essential for maintaining a diverse streaming landscape.

## ***Zerodha: 99 Responses***

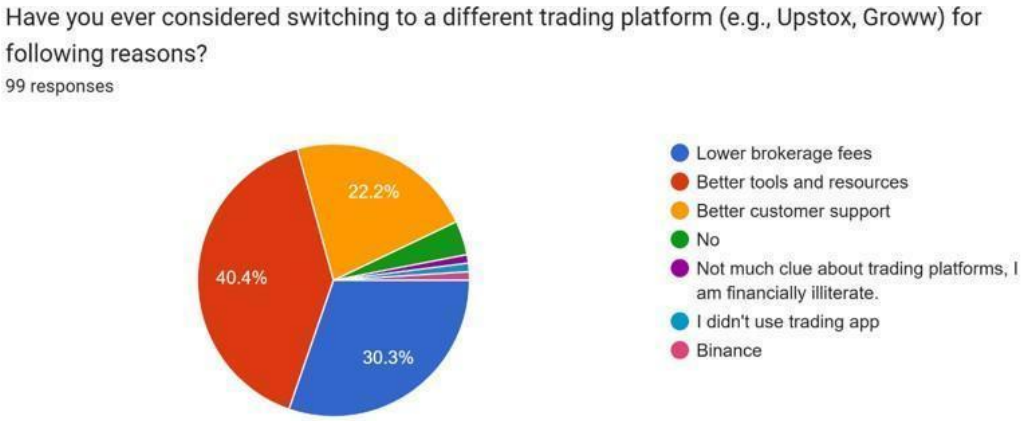


**FIGURE 21: FACTORS INFLUENCING CONSUMER SWITCHING IN TRADING PLATFORMS**

The survey indicates that 40.4% of respondents consider switching to a different trading platform for better tools and resources, 30.3% for lower brokerage fees, and 22.2% for better customer support. The remaining respondents cite reasons such as not using a trading app, financial illiteracy, or preference for platforms like Binance. This highlights the competitive nature of the trading platform market, where users prioritize advanced features and cost efficiency. While competition drives innovation and better services, ensuring transparency in fee structures and fair access to trading tools is essential for maintaining an open and balanced financial ecosystem.

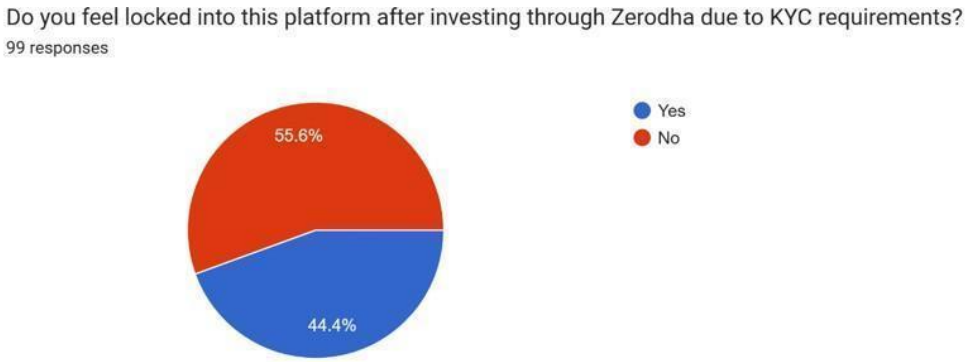


**FIGURE 22: PERCEIVED LOCK-IN EFFECT OF KYC REQUIREMENTS IN TRADING PLATFORMS**

The survey reveals that 44.4% of respondents feel locked into Zerodha after investing due to KYC requirements, while 55.6% do not share this concern. This suggests that while a majority believe they can switch platforms without significant hurdles, a substantial portion perceives regulatory and administrative barriers as limiting their mobility. While KYC requirements are essential for security and compliance, overly cumbersome transfer processes may discourage competition and consumer choice. Ensuring that investors can switch platforms without excessive friction is crucial for maintaining a fair and competitive trading ecosystem.

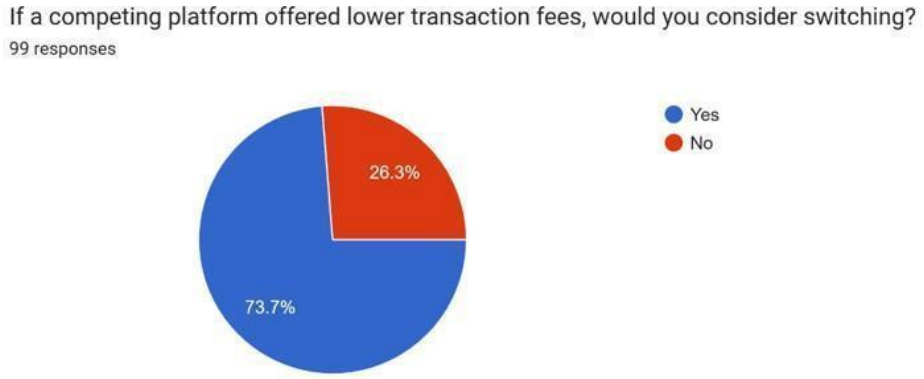


**FIGURE 23: IMPACT OF LOWER TRANSACTION FEES ON CONSUMER SWITCHING**

The survey indicates that 73.7% of respondents would consider switching to a competing trading platform if it offered lower transaction fees, while the remaining respondents would not. This highlights the strong influence of cost on platform choice, suggesting that pricing plays a crucial role in user retention. While lower fees benefit traders, aggressive under-pricing strategies could create market distortions, potentially disadvantaging smaller players or leading to long-term pricing inefficiencies. Ensuring that platforms compete fairly on transaction costs while maintaining service quality is key to a balanced and sustainable trading environment.

## V. CONCLUSION: A NOTE FOR REGULATORS

As digital markets continue to evolve, regulatory frameworks must adapt to the unique challenges posed by dominant platforms, including data collection, privacy concerns, and self-preferencing. Traditional antitrust tools often become insufficient in addressing these complexities, necessitating a more comprehensive approach that combines innovation incentives and sector-specific regulations. Digital platforms operate globally, making cross-border regulatory collaboration essential. Anti-competitive practices in one jurisdiction often ripple across international markets, necessitating coordinated efforts among regulators. Regulators should work towards harmonizing digital competition laws across jurisdictions to prevent regulatory arbitrage, sharing data on market concentration and algorithmic practices, and coordinating enforcement actions to ensure consistent penalties and deterrents for anti-competitive conduct.

The CCI could implement cross-elasticity analysis by gathering data on user behaviour and platform interactions among different user groups (e.g., advertisers and end-users on a social media platform). Cross-elasticity can be calculated by assessing how price or quality changes

for one group impact demand and engagement on the other side. This analysis enables the CCI to identify indirect effects that might harm competition and further pushes for more 'user perception tests' and surveys. For example, if increased ad pricing leads to a decrease in user engagement, the platform may be exploiting its dominant position with advertisers. The accurate way of assessing such exploitation is to test consumer patterns, conduct surveys, and consider the consumer as the primary stakeholder while assessing the platform-based markets.

The author has placed heavy reliance on conducting consumer behaviour surveys to regulate the multi-sided platforms, and this specific white paper on the issue is an inception point of getting the discourse started on the interplay of how consumers perceive the platforms and their regulation. Antitrust regulators must ensure that digital firms operate transparently, preventing exploitative practices, manipulation through algorithms, and unfair competitive advantages gained through excessive data collection,[41] and should focus on value creation, with policies that meet three criteria: first, enhancement of value creation; second, ensuring fair distribution of the created value; third, reducing incentives for anti-competitive conduct. The future of digital markets must not resemble a marketplace with hegemonic platforms and rigged tactics; antitrust enforcement must be the lighthouse guiding the industry towards a shore of equitable and transparent growth. The research presses on a very specific notion, that as the discourse on platform regulation evolves, continuous engagement with all stakeholders, and most importantly, "the consumers", is quintessential in shaping policies of competition fairness and long-term economic resilience, and thus, it sets a base for future discourse on involving consumers as the most primary stakeholder for Antitrust intervention.

[41] Ma, 'Convergent Antitrust Regulation' (n 14); Tambini and Moore, 'Introduction' (n 19); Budzinski and Mendelsohn, 'Regulating Big Tech' (n 5).

# THE M&A MIRAGE: REGULATING MEGA ACQUI-HIRES IN THE DIGITAL SECTOR UNDER INDIAN COMPETITION LAW

*Supragya Singh and Saumyaa Narayan*[1]

**ABSTRACT**

*The Competition Act of 2002 was enacted in India with the objective of regulating market forces that foster healthy competition and balance consumer satisfaction. Markets have constantly undergone a systematic change in how forces of competition persist and how they are impacted. The changing dynamics in the digital era, particularly those related to artificial intelligence, warrant attention to this consideration. Human resources provide a distinct competitive edge to rivals in the digital market, as these markets thrive on specialised skills and 'know-how' that its key employees possess. This has given rise to the trend of acqui-hire, where larger enterprises acquire target companies or hire key employees through structured deals with the primary aim of having skilled talent on board. Big-tech enterprises have utilised this as a means to strengthen their market presence. This is manifested in mega acqui-hires where these enterprises acqui-hire promising innovative startups to accelerate innovation in their products and services. These have competitive concerns that competition authorities around the globe are taking note of. However, a gap exists in their regulatory preparedness to regulate these mega acqui-hire deals.*

*The article analyses the competition concerns of mega acqui-hires by focusing on their impact on 'removal of existing competitor' and 'barriers to entry for new entrants'. It analyses the evolving competition law jurisprudence in other jurisdictions to argue for the regulation of these deals as combinations under the Indian competition law regime.*

## I. INTRODUCTION

The Competition Act of 2002 ('**Act**') was enacted with the objective of regulating competition in the Indian market by preventing practices that have an adverse impact on competition, promoting

[1] The authors are students at Ram Manohar Lohiya National Law University.

and sustaining competition, ensuring freedom of trade, and protecting the interests of consumers and other stakeholders. It is the process of competition that is cardinal to the competition law. An ideal theoretical market is one in which market forces determine the quality or quantity of choices a consumer can make. However, in the practical world, it is implausible for markets to replicate an ideal theoretical market. This gives rise to instances where a few enterprises hold the power to control the prices of goods or services, as well as other market factors, ultimately influencing consumer choices.

Enterprises seek to engage in practices that manipulate market factors to enhance their profitability, thereby restricting competition in the market. There is no limit to the number of ways in which enterprises may attempt to undermine competition. Thus, the regulatory mechanism to counter anti-competitive elements must constantly evolve. Moreover, concerns have become numerous with the hunt for talent in digital markets, especially in Artificial Intelligence ('**AI**'). Digital markets require specialised skills for innovation and market contestability. Employee mobility assumes greater importance in this light and is an essential aspect of healthy competition. It is important not only in the context of no-poach agreements but also in terms of concentrated labour in the hands of a few enterprises, where niche skills or talent are not easily replaceable in ordinary or plausible scenarios. Ultimately, human resource is a crucial factor that drives the success of a product or service and determines the level of innovation in markets. It gives a competitive edge to an enterprise in expanding its market power.

The term 'acqui-hire' has gained popularity in the digital industry and sectors that require specialised skills. The term was coined by Rex Hammock as a blend of two terms – 'acquire' and 'hire'.[2] An acqui-hire transaction entails that either the acquiring entity acquires the target company with the primary aim of having its talent on board, or hiring a substantial number of skilled or talented employees through a structured deal to involve them in projects of the acquiring entity. In the former case, the deal may still be regulated under the relevant merger and competition law provisions; however, the latter case is much more likely to evade regulatory scrutiny from the competition regime across jurisdictions. The absence of regulatory scrutiny in the latter case,

[2] Jaclyn Selby and Kyle J Mayer, 'Startup Firm Acquisitions as a Human Resource Strategy for Innovation: The Acqhire Phenomenon' (*The Mack Institute for Innovation Management*, April 2013) <https://mackinstitute.wharton.upenn.edu/wp-content/uploads/2013/04/Selby-Jaclyn-Mayer-Kyle_Startup-Firm-Acquisitions-as-a-Human-Resource-Strategy-for-Innovation-The-Acqhire-Phenomenon.pdf> accessed 2 October 2025.

particularly in mega acqui-hires, might pose significant competition concerns. Mega acqui-hires can be defined as high-value strategic consolidations by big tech enterprises, such as Google and Microsoft, of promising innovative startups to accelerate innovation in products or services within the acquiring enterprise.[3]

In 2019, 13% of all mergers and acquisitions ('**M&A**') in India were that of acquihires, an increase from 10% in 2018.[4] More than 22% of these were deep-tech startups, thus representing the evolving landscape of the digital industry, which places special value on 'talent' or 'skill' acquisitions. The growth of AI may lead to an increase in the frequency of such transactions. This article examines the recent trend of mega acqui-hires and their potential impact on competition. In this light, it analyses the relevant provisions of the Act to understand their applicability to such transactions currently. It makes an analysis of comparative jurisprudence on the regulation of these transactions to propose suggestions for the Indian competition law regime.

## II. ADAPTING TO MARKETS: THE EVOLUTION OF COMPETITION LAW IN INDIA

The Monopolies and Restrictive Trade Practices Act, 1969, was the precursor to the Act. The wave of liberalisation, privatisation, and globalisation led to the Indian economy shifting from a government-dominated market to one dominated by the private sector. M&A became a routine strategy for enterprises to dominate the market. In the background of the changing reality of the Indian market, the Act was enacted with the objective of fostering competition and restricting anti-competitive practices.

The Act regulates the following anti-competitive conduct: anti-competitive agreements, abuse of dominance, and Combinations. The Competition Commission of India ('**CCI**') does not have *ex-ante* powers in relation to anti-competitive agreements and the abuse of dominant position; however, it has the power to conduct ex-ante assessments in cases involving combinations. The CCI seeks to regulate combinations that cause or are likely to cause appreciable adverse effect on competition ('**AAEC**') concerns in the market,[5] by giving due regard to factors listed in Section

[3] Jonathan Tower, 'The Rise of The Mega Acqui-hire' (*Medium*, July 2025) <https://jtower09.medium.com/the-rise-of-the-mega-acqui-hire-719bd84a2901> accessed 29 September 2025.
[4] 'What Makes Acqui-Hiring an Effective Talent Acquisition Strategy' (*Zinnov*, June 2023) <https://zinnov.com/global-talent/what-makes-acqui-hiring-an-effective-talent-acquisition-strategy-blog/> accessed 25 September 2025.
[5] The Competition Act 2002, s 6.

20(4).[6] Combinations are M&A of enterprises that meet the turnover or asset thresholds specified in the Act.[7] Acquisition under the Act refers to the direct or indirect acquisition of, or an agreement to acquire, shares, voting rights, or assets, or control over the management or assets of an enterprise.[8] As per the Act, an enterprise can also include a person who is or has been engaged in any specified activity, either directly or through one or more of its units, divisions, or subsidiaries.[9] A 'person', as per the Act, includes an individual, a company, and a firm.[10] Any person or enterprise entering into a combination is obligated to notify the CCI in the prescribed form within thirty days of the approval of the merger or amalgamation proposal by the board of directors of the concerned enterprises, or the execution of any agreement or other document for the acquisition or acquisition of control.[11] Any such combination must not come into force before two hundred and ten days from the date of notice or the date of the order if the CCI has passed orders in the matter.[12]

Over time, the limitations of using the threshold of turnover or assets in mergers, acquisitions, or amalgamations to assess anti-competitive effects were realised, and the threshold was deemed inefficient in light of changing market patterns. There was growing recognition of 'killer acquisitions' in acquiring market dominance, specifically in the digital sector. A killer acquisition implies that a nascent startup is acquired by an established enterprise with considerable market power, thereby eliminating a potential future competitor.[13] With the growth of the Indian economy, the asset and turnover threshold allowed for an escape for many 'killer acquisitions' having anti-competitive effects from the evaluation by the CCI. This was fueled by the *De Minimis* notification, which excluded the acquisition of small targets that did not meet the requisite threshold of the value of assets being acquired.[14] Thus, nascent potential competitors could be acquired freely as the acquirer could claim the said exemption.

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[6] The Competition Act 2002, s 20(4).
[7] The Competition Act 2002, s 5.
[8] The Competition Act 2002, s 2(a).
[9] The Competition Act 2002, s 2(h).
[10] The Competition Act 2002, s 2(l).
[11] The Competition Act 2002, s 6.
[12] ibid.
[13] Siddh Sanghavi, 'Killer Acquisitions and Data Monopoly: Safeguarding Consumer Rights in the Digital Industry' (*RFMLR*, September 2025) <https://www.rfmlr.com/post/killer-acquisitions-and-data-monopoly-safeguarding-consumer-rights-in-the-digital-industry> accessed 1 October 2025.
[14] 'Notification regarding (a) de minimis exemption; (b) relevant assets and turnover in case a portion of an enterprise or division or business is being acquired, taken control of, merged or amalgamated with another enterprise: SO 988(E), 989 (E)' (*Competition Commission of India*, March 2017) <https://www.cci.gov.in/combination/legal-framwork/notifications/details/9/0> accessed 30 September 2025.

This limitation in Sections 5 and 6 of the Act was addressed by the Competition (Amendment) Act of 2023, which introduced another parameter of ex-ante assessment– the Deal Value Threshold ('**DVT**').[15] Accordingly, transactions exceeding the deal value of Rs. 2000 Crore or $240 million with the target company having substantial business operations in India shall be notified to the CCI. Substantial business operations for the digital sector imply that the number of business or end users in India is 10% or more of its total global number of such users.[16] Thus, the competition law regime has been constantly evolving to address novel and non-traditional market patterns that impact market competition. Mega acqui-hires in the digital sector present yet another novel concern for competition authorities, whereby dominant enterprises in the digital sector concentrate power and influence consumer choices, raising anti-competitive concerns.

## III. MEGA ACQUI-HIRES: A NEW APPROACH TO MARKET CONSOLIDATION

Acqui-hires, in contrast to traditional recruitments, allow enterprises to recruit skilled talent faster and usually, in a single transaction. The initial stage in most acqui-hire deals involves identifying the company's talent needs to achieve its strategic goals, such as entering a new market or bolstering existing capabilities. After identifying the need, the acquiring company typically surveys the startup ecosystem to determine its desired talent pool.[17] The financial success of the target enterprise is not particularly relevant; what truly drives the transaction is the value of its human capital. These deals are often structured as stock or asset sales, with the purchase price calculated on a 'per head' basis, based on talent's perceived value. Retention packages are central, including monetary incentives like signing bonuses, accelerated vesting of equity, and employee stock ownership plans ('**ESOP**') in the acquiring entity, often declared as capital gains for tax advantage. Such transactions often include agreements absolving the buyer from hiring-related claims and defensive Intellectual Property ('**IP**') licenses, and usually require board and shareholder approval.

[15] The Competition (Amendment) Act 2023, s 6.
[16] 'The Competition Commission of India (Combinations) Regulations, 2024' (*Competition Commission of India*, September 2024) <https://www.cci.gov.in/combination/legal-framwork/regulations/details/12/0> accessed 1 October 2025.
[17] Kenrick Cai, Krystal Hu and Kritika Lamba, 'Google Hires Windsurf Execs in $2.4 Billion Deal to Advance AI Coding Ambitions' (*Reuters*, July 2025) <https://www.reuters.com/business/google-hires-windsurf-ceo-researchers-advance-ai-ambitions-2025-07-11/> accessed 25 September 2025.

Globally, major tech companies frequently engage in mega acqui-hires, specifically with respect to AI startups. In 2023, the global giant Microsoft, along with Nvidia, substantially invested in Inflection AI, an AI startup with its own AI chatbot model named 'Pi'.[18] This was followed by Microsoft hiring the cofounders of the Inflection AI – Mustafa Suleyman, who was also the co-founder of DeepMind and Karen Simonyan, and almost all its employees in a $650 million deal in March 2024.[19] Inflection could reimburse its investors through the said deal amount.[20] The hired employees were inducted to work in Microsoft's consumer AI division. Microsoft gained access to use Inflection's IP rights on non-exclusive terms through the said deal. The deal raised alarms for regulatory authorities across jurisdictions. The German Federal Cartel Office ('**FCO**')[21] initiated an investigation into the deal under its merger control regime. The deal also came under the regulatory sight of the United Kingdom's ('**UK**') Competition and Markets Authority ('**CMA**')[22] and European Union Merger Regulations ('**EUMR'**). The above-mentioned regulatory authorities concluded that the transaction constituted a 'concentration'. However, Microsoft did not face any action despite the regulatory alarms that were raised due to Inflection's low domestic user base in the concerned jurisdictions.

Recently, Google stepped in with a $2.4 billion deal to acquire-hire the employees of Windsurf after the failure of Windsurf's $3 billion potential deal with OpenAI.[23] Google did not take any stake or controlling interest in the target company; however, the deal allowed it to hire Windsurf's founder & CEO, Varun Mohan, co-founder Douglas Chen, and key talents from the research and

[18] Vinay Dwivedi, 'AI Startup Inflection Raises $1.3 Billion from Microsoft, Others' (*The Economic Times*, June 2023) <https://economictimes.indiatimes.com/tech/funding/ai-startup-inflection-raises-1-3-billion-from-microsoft-others/articleshow/101372651.cms?from=mdr> accessed 25 September 2025.
[19] Krystal Hu and Harshita Varghese, 'Microsoft Pays Inflection $650 Mln in Licensing Deal While Poaching Top Talents, Source Says' (*Reuters*, March 2024) <https://www.reuters.com/technology/microsoft-agreed-pay-inflection-650-mln-while-hiring-its-staff-information-2024-03-21/> accessed 25 September 2025.
[20] ibid.
[21] 'Taking over employees may be subject to merger control in Germany – Bundeskartellamt not competent to review Microsoft/Inflection transaction as Inflection has no substantial operations in Germany' (*Bundeskartellamt*, November 2024) <https://www.internationale-kartellkonferenz.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/29_11_2024_Microsoft.html> accessed 2 October 2025.
[22] 'Microsoft Corporation's Hiring of Certain Former Employees of Inflection and its Entry into Associated Arrangements with Inflection' (*Competition and Markets Authority*, September 2024) <https://assets.publishing.service.gov.uk/media/6719ff5f549f63039436b3c8/__Full_text_decision__.pdf> accessed 25 September 2025.
[23] Kenrick Cai, Krystal Hu and Kritika Lamba, 'Google Hires Windsurf Execs in $2.4 Billion Deal to Advance AI Coding Ambitions' (*Reuters*, July 2025) <https://www.reuters.com/business/google-hires-windsurf-ceo-researchers-advance-ai-ambitions-2025-07-11/> accessed 25 September 2025.

development (‘**R&D’**) staff. It also acquired licensing rights to the target’s AI model under non-exclusive terms. The hired employees were inducted to work in Google’s DeepMind AI division. The licensing fee of the deal had to be utilised towards the liquidity for Windsurf’s investors while they retain their stake in the AI startup. The remainder of Windsurf’s IP, product, brand and remaining employees were acquired by another company named Cognition AI. Google, in fact, in another transaction, acqui-hired Character AI’s co-founders, Noam Shazeer and Daniel De Freitas, along with its key talents that accounted for approximately 20% of Character AI’s employees. The hired employees were inducted to work in Google’s DeepMind’s research team. The $2.7 billion deal also granted Google a non-exclusive license to its large language model technology, while Character AI received additional funding as part of the agreement. The Character AI deal came under the scrutiny of the United States’ (‘**US**’) Department of Justice (‘**DOJ**’)

In 2024, Amazon entered into a deal valued at over $330 million with Adept, an AI startup. Much of the deal’s amount was to be used towards repaying the amount the startup had raised through investments.[24] Amazon acqui-hired Adept’s Chief Executive & founder, David Luan, along with its key researcher, who built Adept’s AI technology, while teams working on product, sales, and other areas remained with Adept. Amazon can use some of Adept’s technology on non-exclusive terms as part of the deal. It also offered a $100 million retention bonus to the hired employees. The hired employees were primarily inducted to work on Amazon’s Artificial General Intelligence, while others joined the team developing Amazon's devices and other services. The said deal has come under scrutiny by the Federal Trade Commission, which has sent Amazon a list of questions to answer, requesting more details about the deal.

## IV. MEGA ACQUI-HIRES AND MARKET POWER: ASSESSING THE COMPETITIVE IMPACT

The competition authorities are concerned with regulating transactions or mergers that may have anti-competitive effects. Mega-acquihires often evade regulatory scrutiny on technical grounds, such as a low user base of the target enterprise in the concerned jurisdiction, and difficulty in identifying talent acquisitions as traditional acquisitions. While mega acqui-hires may not be inherently anti-competitive, regulatory oversight can give safe clearance to their overarching anti-

[24] Reed Albergotti, ‘Investors in Adept AI Will Be Paid Back after Amazon Hires Startup’s Top Talent’ (*Semafor*, August 2024) <https://www.semafor.com/article/08/02/2024/investors-in-adept-ai-will-be-paid-back-after-amazon-hires-startups-top-talent> accessed 25 September 2025.

competitive effects. This section examines two significant anti-competitive concerns emanating from mega acqui-hires: the removal of existing competitors and the creation of barriers to entry for new entrants, as well as the circumstances under which such effects can be balanced against their pro-competitive justifications.

### *A.* Removal of Existing Competitor

An enterprise can be termed as an existing competitor if it exerts appreciable pressure through its market share, innovation capabilities, capacity to expand, and poses a threat to its rivals in the relevant product or geographic market.[25] Removal of existing competitors is recognised as an anticompetitive concern across jurisdictions.[26] Specific factors help in assessing the competitive effect of a transaction or combination to determine if it has resulted in the removal of an existing competitor. These factors include the level of concentration, the acquirer's post-combination market share and growth,[27] the likelihood of parties to the combination being able to significantly and sustainably increase prices or profit margins,[28] constraints exerted by competitors,[29] and a lack of incentive to innovate further.[30] These indicate whether an existing competitor has exited the relevant market. The defence of a failing business serves as a clear counter to the contention of 'removal of an existing competitor.[31] The defence must fulfil specific requirements with respect to the target enterprises, such as a grave probability of business failure, no prospects of reorganisation, and the non-availability of an alternative acquiring enterprise that poses a lesser threat to competition.[32]

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[25] 'Roundtable on the Concept of Potential Competition- Background Note' (*Organisation for Economic Co-operation and Development*, June 2021) <https://one.oecd.org/document/DAF/COMP(2021)3/en/pdf> accessed 2 October 2025.
[26] The Competition Act 2002, s 20(4)(i); Siemens/Alstom, Merger Procedure Regulation (EC) 139/2004.
[27] The Competition Act 2002, s 20(4)(h).
[28] The Competition Act 2002, s 20(4)(e).
[29] 'Notice under Section 6 (2) of the Competition Act, 2002 given by PVR Limited' (*Competition Commission of India*, May 2016) <https://www.cci.gov.in/images/caseorders/en/1652523636.pdf> accessed 6 October 2025.
[30] ibid.
[31] The Competition Act 2002, s 20(4)(k); 'Notice under Section 6 (2) of the Competition Act, 2002 given by Tata Steel Limited' (*Competition Commission of India*, April 2018) <http://164.100.58.95/sites/default/files/Notice_order_document/Order%20-%2025.04.2018.pdf> accessed 3 October 2025.
[32] '3 Rebuttal Evidence Showing That No Substantial Lessening of Competition Is Threatened by the Merger' (*Antitrust Division US DOJ*, December 2023) <https://www.justice.gov/atr/merger-guidelines/rebuttal-evidence> accessed 1 October 2025; 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings' (*EUR-Lex*, February 2004) <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=oj:JOC_2004_031_R_0005_01> accessed 1 October 2025.

In the case of Microsoft-Inflection deal, Microsoft's acqui-hired Inflection's founders and most employees, including the R&D staff.[33] R&D in AI, though constant, requires years to develop a new model. Inflection AI, prior to the acqui-hire transaction, played an essential role as a competitor in the consumer AI market, and the deal raised competitive concerns, as illustrated by two points: 1) Inflection's consumer AI model exerted constraints on competitors in the consumer AI market, and 2) Microsoft's advanced market concentration in the AI market. To illustrate the first point, the AI market is dominated by a few tech giants like Google, Microsoft, and Nvidia, among others. Inflection played an important role as a competitor in such a market. Inflection AI had announced the latest version of Pi in November 2023 and raised over $1.3 billion through investments. The start-up was valued at $4 billion with millions of weekly users in 2023. According to reports, in March 2024, the site had more than one million daily active users.[34] Inflection was not a 'failing business' in the consumer AI market. Post the deal with Microsoft, in March 2024 itself, Inflection announced the shift of its business focus from its personal chatbot Pi to catering to the enterprise customers with 'Inflection for Enterprise'.[35] The startup's primary focus is now on its enterprise clients.

To address the second point, Microsoft has been significantly expanding its AI market share for quite some time. It has heavily invested in generative AI startups, and its acqui-hire deal with Inflection is a part of its sustained efforts to strengthen its AI market power. Microsoft has made substantial investments in OpenAI since 2019 and currently holds nearly half of the startup's stake.[36] Microsoft provides OpenAI with Azure, its cloud infrastructure, while OpenAI has preferential rights to integrate its models into Microsoft's commercial software.[37] It has also made a $1.5 billion investment in an UAE-based AI firm, G42,[38] whereby the startup will be using

[33] Krystal Hu and Harshita Varghese, 'Microsoft Pays Inflection $650 Mln in Licensing Deal While Poaching Top Talents, Source Says' (*Reuters*, March 2024) <https://www.reuters.com/technology/microsoft-agreed-pay-inflection-650-mln-while-hiring-its-staff-information-2024-03-21/> accessed 25 September 2025.
[34] ibid.
[35] Maxwell Zeff, 'Inflection AI CEO Says It's Done Trying to Make Next-Generation AI Models' (*TechCrunch*, November 2024) <https://techcrunch.com/2024/11/26/inflection-ceo-says-its-done-competing-to-make-next-generation-ai-models/> accessed 30 September 2025.
[36] Aditya Soni, 'Microsoft's AI Edge under Scrutiny as OpenAI Turns to Rivals for Cloud Services' (*Reuters*, July 2025) <https://www.reuters.com/business/microsofts-ai-edge-under-scrutiny-openai-turns-rivals-cloud-services-2025-07-29/> accessed 29 September 2025.
[37] ibid.
[38] Chris Metinko and Chris Metinko, 'Microsoft, Nvidia Lead in Investing in AI Startups, but Others Close Behind' (*Crunchbase News*, November 2024) <https://news.crunchbase.com/ai/msft-nvda-lead-big-tech-startup-investment/> accessed 30 September 2025.

Microsoft's cloud services for its AI applications. Microsoft, with its venture arm 'M12'[39] made a total of twenty-one investments in AI-related startups in 2023-2024. In this manner, Microsoft has expanded its market power in the consumer AI and cloud computing market. The CMA, in its investigation of the Microsoft-Inflection deal, has reported identifying an interconnected web of more than ninety partnerships and strategic investments with startups involving the same big tech companies.[40] Thus, the concerned transaction is a part of a larger phenomenon of market concentration by big tech companies that fall short of any notification requirement.

It can be argued that mega acqui-hires may themselves create conditions for a firm to 'fail' due to the talent squeeze, with its lucrative offer to the employees. This creates a self-fulfilling prophecy: the startup loses its core innovative capacity, and its product stagnates. And its growth falters, which can be later used as a 'proof' for the startup failing. If Inflection struggled to remain afloat in the consumer AI market,[41] despite having raised substantial investments and having built a chatbot with millions of daily users, it highlights the broader concerns that the concentration of market power in the hands of the few big tech companies eliminates a level playing field for startups to compete.

Thus, these mega acqui-hires in the digital sector remove the existing competitor by leaving them as a shell through the hiring of a substantial number of employees, such that the target enterprise post-transaction struggles to compete in the same market. The acquiring enterprise, through the concentration of market power, further exerts pressure on existing competitors, thereby diminishing the incentive to innovate.

### *B.* Barriers to Entry for New Entrants

Barriers to entry are a foundational concept in competition law, as they serve as a primary determinant of a market's contestability and the ability of incumbent firms to exercise market power.[42] Entry, in a competition law regime, for most of the time, is not understood as a mere hit-

[39] ibid.
[40] 'Microsoft Corporation's Hiring of Certain Former Employees of Inflection and its Entry into Associated Arrangements with Inflection' (*The Competition and Markets Authority*, September 2024) <https://assets.publishing.service.gov.uk/media/6719ff5f549f63039436b3c8/__Full_text_decision__.pdf> accessed 25 September 2025.
[41] Gary Rivlin, 'How Microsoft Lured Inflection AI's Staff to Abandon the Startup' (*Bloomberg*, March 2025) <https://www.bloomberg.com/news/articles/2025-03-20/how-microsoft-lured-inflection-ai-s-staff-to-abandon-the-startup> accessed 2 October 2025.
[42] The Competition Act 2022, s 20(4)(b).

and-run occurrence; rather, it is construed as a 'committed entry', which involves considerable sunk cost and a long-term goal to make a profit.[43] They enable an incumbent to sustain supra-normal profits without competitive pressure (Bain) or impose disproportionate costs on new entrants (Stigler).[44] Barriers can be structural, strategic, and regulatory.[45] This section will analyse the role of mega acqui-hires in imposing entry barriers in relation to sunk costs, vertical integration, and control over essential resources.

Sunk costs are those costs that enterprises cannot recover by withdrawing from the market. They often arise from investments in both fixed physical assets and human capital.[46] Soft assets, including knowledge produced by R&D, are an essential component of sunk costs.[47] Similarly, costs related to human resources, such as education, training, recruiting, and screening of employees of an enterprise, are also associated with the sunk costs of an enterprise. High sunk costs act as a structural barrier to new entrants for two primary reasons: firstly, they represent a high cost of exit. Secondly, the huge sunk costs of incumbents are 'bygones' and need not be paid by them; but for a new entrant to succeed, its prices must fall below the incumbents' daily running costs, not just its overall costs.[48] Therefore, high sunk costs act as a deterrent for new entrants.

Specifically, in the field of AI, significant sunk costs are invested in R&D, typically requiring a substantial amount of investment. The cost to train a large language model has grown exponentially. This can be seen in the example of ChatGPT, as the training of OpenAI's GPT-2 model in 2019 cost around $50,000, which grew to a whopping $4.6 million for its successor, GPT-3.[49] R&D staff costs constitute a substantial share of this overall expenditure, ranging from 29% to 49%, and in some cases, account for nearly half of the total.[50] These costs include salaries and

[43] 'Barriers to Entry: Key findings, summary and notes' (*Organisation for Economic Co-operation and Development*, March 2006) <https://www.oecd.org/content/dam/oecd/en/publications/reports/2006/03/barriers-to-entry_2ca9e70b/8bb30107-en.pdf> accessed 25 September 2025.
[44] David Harbord and Tom Hoehn, 'Barriers to Entry and Exit in European Competition Policy' (1994) 12 Intl Rev of Law and Econ 411.
[45] ibid.
[46] Thomas W Ross, 'Sunk Costs as a Barrier to Entry in Merger Cases' (1993) 27 U Brit Colum L Rev 75.
[47] ibid.
[48] C Eaton and R Lipsey, 'Exit Barriers are Entry Barriers: The Durability of Capital as a Barrier to Entry' (1980) 11 Bell J Econ 721.
[49] 'OpenAI's GPT-3 Language Model: A Technical Overview' (*Lambda Blog*, June 2020) <https://lambda.ai/blog/demystifying-gpt-3> accessed 25 September 2025.
[50] Ben Cottier and others, 'How Much Does It Cost to Train Frontier AI Models?' (*Epoch AI*, June 2024) <https://epoch.ai/blog/how-much-does-it-cost-to-train-frontier-ai-models> accessed 25 September 2025.

equity compensation of researchers, engineers, and managers in the project.[51] The exorbitantly high investment in advanced technologies, such as generative AI, along with the compensation paid to employees, results in high sunk costs for an enterprise. Given the growing trend of mega acqui-hires, particularly in the AI domain, new entrants will face uncertainties when making a significant investment in their project and its operations.

Compounding these challenges, strategic practices like vertical integration further deter entry by consolidating control over critical resources echelons. Vertical integration is a strategy in which an enterprise expands its operations to take control of various stages of its own supply chain. This brings upstream and downstream assets and production under unified ownership and control. It can be forward (when a firm produces and distributes the final goods) and backward (producing material or capital goods which in turn produce the final output). This can take place through internal growth or a merger between two or more enterprises. Apple is a prime example of a vertically integrated company, as it controls many aspects of the iOS ecosystem, from the development of raw components for iPhones to the development of the iOS operating system. The cost and complexity of a new player entering an industry significantly increases when the established players are vertically integrated.[52] It can give rise to a monopoly of power, limit the bargaining power of the rival, and raise the rival's costs.[53] In Indian jurisdiction, it was recognised as an entry barrier in the case of CCI vs Schott Glass India Pvt. Ltd by the Supreme Court.[54]

Vertical integration must be viewed as a strategic move to secure the most critical inputs in the AI race. Since generative AI is dependent heavily on the quality of data, talent, expertise, and financial resources, it gives a cutting edge to enterprises that are vertically integrated across the entire technology 'stack'.[55] An AI stack typically comprises a chip, cloud, model, and application. For example, Google develops and uses its own specialised AI chips for powering its sophisticated

[51] Ben Cottier and others, 'The rising costs of training frontier AI Models' (*arXiv preprint*, May 2024) <https://arxiv.org/abs/2405.21015v2> accessed 25 September 2025.
[52] Staffan Canback, 'When does vertical integration make sense' (*Tellusant Paper*, March 2017) <https://tellusant.com/repo/paper/Tellusant_Paper_Vertical_Integration.pdf> accessed 25 September 2025.
[53] Michael H Riordan, 'Competitive Effects of Vertical Integration' (*Columbia University*, February 2005) <https://www.columbia.edu/~mhr21/papers/Competitive_Vert_Int.pdf> accessed 6 October 2025.
[54] *CCI v Schott Glass India Pvt Ltd* [2025] 5 SCC 443.
[55] 'NVIDIA's Power Play: How Vertical Integration is Redefining AI Competition' (*Kristal AI*, June 2024) <https://www.kristal.ai/post/nvidias-power-play-how-vertical-integration-is-redefining-ai-competition> accessed 25 September 2025.

models, such as Gemini.[56] To build and maintain dominance across each layer, a company needs a constant supply of top-tier talent. Acqui-hire becomes a key strategic tool in such cases, as already discussed. Instead of pursuing a traditional M&A approach to establish dominance in each layer, they tend to employ key personnel from the desired startup. This vertical integration allows them to optimize their cost and increase their profit by disengaging independent enterprises at each layer. This modern manifestation of vertical integration is a formidable barrier to entry that extends beyond a simple monopoly of parts, instead involving the control of a self-reinforcing, data-driven ecosystem.

Mega acqui-hires may also erect barriers to entry for new entrants by restricting rival competitors' access to essential resources.[57] Essential resources are those which do not have an alternative but are essential for rivals to enter the relevant market.[58] In the AI market, this may translate to restricting rival firms' access to expertise, data, and know-how,[59] and computational models.[60] It is the human capital, expertise, and know-how that an acqui-hire transaction provides big tech enterprises like Google or Microsoft as they expand their market power into the AI market. As discussed above, to develop an AI model, substantial investments are made in R&D, a significant portion of which is allocated towards staff costs. The availability of a skilled AI workforce is scarce; therefore, there are no readily available alternatives for this essential resource.[61] Mega acqui-hires restrict rival firms from accessing this essential resource, which is crucial for competing effectively.[62]

Therefore, in the AI industry, the combination of immense sunk costs and sophisticated strategies, such as vertical integration and acqui-hiring, significant control over essential inputs, creates a

[56] Aashna Kumar, 'Vertical Integration in the AI Tech Stack' (*Medium*, June 2025) <https://medium.com/@aashnakumar/vertical-integration-in-the-ai-tech-stack-d45e4a424ebe> accessed 25 September 2025.
[57] Christophe Carugati and Nicole Kar, 'Assessing the Competitive Dynamics of AI Partnerships' (*Elgar Online*, March 2025) <https://www.elgaronline.com/view/journals/clpd/9/1/article-p3.xml> accessed 28 September 2025.
[58] *Red Lion Medical Safety, Inc & ors v Ohmeda Inc* [1999] 63 F Supp 2d 1218.
[59] B Kogut and U Zander, 'Knowledge of the Firm and the Evolutionary Theory of the Multinational Corporation' (1993) J Intl Bus Stud 625.
[60] Christophe Carugati and Nicole Kar, 'Assessing the Competitive Dynamics of AI Partnerships' (*Elgar Online*, March 2025) <https://www.elgaronline.com/view/journals/clpd/9/1/article-p3.xml> accessed 28 September 2025.
[61] 'UST AI Report: 93 per Cent of Large Companies View AI as Essential to Success, but More Than Three-Quarters Face a Severe Talent Shortage' (*UST*, August 2024) <https://www.ust.com/en/who-we-are/ust-newsroom/ust-ai-report-93-percent-of-large-companies-view-ai-as-essential-to-success-but-more-than-three-quarters-face-a-severe-talent-shortage> accessed 25 September 2025.
[62] ibid.

formidable wall that shields incumbents from new rivals. It can also limit consumer choice and innovation in the long run. Ultimately, such a market risk shifts from the competitive arena to a structure dominated by entrenched incumbents.

### *C.* A Delicate Equilibrium

Efficiencies are to be weighed against any potential anti-competitive effect arising from the conduct of an enterprise. Efficiencies may be defined as improvements in the market that serve public interest and benefit society at large, though an exhaustive definition is elusive.[63] The Indian competition law regime, in fact, provides that the country's economic development should be taken into consideration as a factor in merger reviews.[64] Efficiencies may include cost savings, more intensive use of existing capacity, economies of scale or scope, or demand-side efficiencies such as increased network size or product quality.[65] Even pro-competitive changes resulting from combined complementarities in R&D activities of two businesses, which increase incentives to invest in product development in innovation markets, may also be efficiencies.[66] These efficiencies are utilised across jurisdictions,[67] primarily as part of their substantive assessment of a merger, while some efficiencies also act as a defence or immunity from the assessment process. The CCI may approve a combination that has AAEC concerns if suitable modifications are made to it, such that the concerns are eliminated.[68] Thus, efficiencies are duly considered in the assessment of a combination.

Components of efficiency can be broadly classified into allocative, productive, dynamic, and transactional categories.[69] Specifically, productive efficiency involves higher production with

[63] Kaushal Sharma and others, 'Economies (Efficiencies) – As Essential Consideration in Merger Analysis' (*Competition Commission of India*, February 2011) <http://164.100.58.95/sites/default/files/presentation_document/Final_Efficiency_Article01-Feb-2011.pdf?download=1> accessed 26 September 2025.
[64] ibid.
[65] 'ICN Merger Guidelines Workbook' (*International Competition Network*, April 2006) <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_MergerGuidelinesWorkbook.pdf> accessed 26 September 2025.
[66] Kaushal Sharma and others, 'Economies (Efficiencies) – As Essential Consideration in Merger Analysis' (*Competition Commission of India*, February 2011) <http://164.100.58.95/sites/default/files/presentation_document/Final_Efficiency_Article01-Feb-2011.pdf?download=1> accessed 26 September 2025.
[67] The Competition Act 2002, s 20(4)(n).
[68] The Competition Act 2002, s 31(3).
[69] Kolasky, William J, and Andrew R Dick, 'The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers' (2003) 71 (1) Antitrust Law Journal 207.

existing or fewer inputs, while dynamic efficiency implies gains achieved through innovation, which ultimately fuel competition. Mega acqui-hires of AI startups may lead to dynamic efficiencies through increased productivity by combining the acquirer's existing resources with the skilled talent from the acqui-hired startup.[70] Thus, there is a likely possibility that the end product or service resulting from the combined capabilities in acqui-hire is of more value in terms of innovation and benefits accruing to the end consumers. The case of Android is notable in this regard; prior to its acquisition by Google in 2005, it had fewer than 10 employees and no tangible product. However, presently Android is the most widely used mobile operating system.

Further, vertical integration in the AI stack can lead to optimisation between the infrastructure at each stage, while also leading to cost reduction.[71] Acqui-hires provide a means for an enterprise to vertically integrate itself. Vertical integration at each stage of the AI stack may also lead to faster innovation due to greater coordination among the various levels of the stack. For example, the structured feedback on an AI application can be more efficiently used to enhance AI model development. The acqui-hired employees of Inflection may be better placed to produce the end products more efficiently due to such integration.

There may be doubts as to the non-speculative nature of these efficiencies. For instance, in mega acqui-hire of AI startups, concentration of two or more innovative firms may not result in dynamic efficiencies, as the scarce IPs are monopolised in the hands of a few.[72] If the acqui-hire is that of an innovative startup that has its own product or provision of services, the consumer choice is diminished, resulting in a loss of consumer surplus.[73] It is the overall consumer welfare, and not the welfare of the consumers of the acquiring enterprise, that is up for consideration.

The act directs CCI to consider efficiencies directly in its assessment of a combination, without laying any explicit bar for an efficiency to offset the AAEC concerns. However, the Act provides

[70] 'Acqui-Hire vs Killer Acquisitions: Competition Law Risks' (*Flint Global*, September 2025) <https://flint-global.com/blog/the-talent-trap-acqui-hires-or-killer-acquisitions/> accessed 25 September 2025.
[71] Michael H Riordan, 'Competitive Effects of Vertical Integration' (*Columbia University*, February 2005) <https://www.columbia.edu/~mhr21/papers/Competitive_Vert_Int.pdf> accessed 6 October 2025.
[72] Kaushal Sharma and others, 'Economies (Efficiencies) – As Essential Consideration in Merger Analysis' (*Competition Commission of India*, February 2011) <http://164.100.58.95/sites/default/files/presentation_document/Final_Efficiency_Article01-Feb-2011.pdf?download=1> accessed 26 September 2025.
[73] Jean-Michel Benkert, Igor Letina and Shuo Liu, 'Startup Acquisitions: Acquihires and Talent Hoarding' (*arxiv preprint*, June 2025) <https://arxiv.org/pdf/2308.10046> accessed 25 September 2025.

that the efficiencies must outweigh the competitive concerns.[74] On the other hand, the US DOJ merger guidelines require efficiencies to be merger-specific, verifiable, prevent a reduction in competition, and not be anti-competitive for the merged firm's trading partners.[75] Similarly, the EU Commission requires an 'efficiency' to be merger-specific, verifiable, and that the benefits are actually passed to the end consumers.[76]

Acqui-hires also provide an exit to the target startup. An exit in the startup world is how founders and investors eventually realise returns on their investment and thus convert their share in the startup into cash or liquid assets.[77] Although acquisitions are a common method of exit, startups are increasingly resorting to ESOPs, whereby the founders of the startup transfer ownership to its employees.[78] A good exit option provides founders, employees and investors of the startup with favourable outcomes, such as higher income for the founders, minimal loss for the startup and a favourable future for the startup.[79] Acqui-hires can be a good exit option for a startup, whereby the founder and acqui-hired employees receive a significant increase in their income, as a substantial portion of the deal value in such transactions is allocated to the acqui-hired employees. Investors also tend to be compensated out of the deal value amount. Thus, acqui-hires may be a viable option, thereby potentially enabling a cycle of innovation.[80] They provide a safety net for the startup world, allowing entrepreneurs to take risks and innovate new products freely. It may even incentivise investments into startups, as investors have a potential avenue to recover the amount of their investments. However, it is worth noting that mega acqui-hires tend to benefit the founding team and investors of the target enterprise, while the remaining employees of the startup do not achieve anything concrete with certainty.

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[74] The Competition Act 2002, s 20(4)(n).
[75] '3 Rebuttal Evidence Showing That No Substantial Lessening of Competition Is Threatened by the Merger' (*Antitrust Division US DOJ*, December 2023) <https://www.justice.gov/atr/merger-guidelines/rebuttal-evidence> accessed 1 October 2025.
[76] 'Efficiencies in Mergers: Balancing Competition and Innovation' (*European Commission*, May 2025) <https://competition-policy.ec.europa.eu/document/download/6fc7afe7-4c20-4922-94e9-200b46e230f0_en?filename=Topic_F_Efficiencies.pdf> accessed 27 September 2025.
[77] Ruben Dominguez, 'How to Evaluate a Startup Exit: Signs, Metrics & Red Flag' (*The VC Corner*, June 2025) <https://www.thevccorner.com/p/startup-exit-strategy-guide> accessed 28 September 2025.
[78] ibid.
[79] Luca Barrie, 'How to Exit Your Startup - Republic Europe Academy' (*Republic Europe Academy*, January 2024) <https://europe.republic.com/academy/how-to-exit-your-startup> accessed 25 September 2025.
[80] 'Acqui-Hire vs Killer Acquisitions: Competition Law Risks' (*Flint Global*, September 2025) <https://flint-global.com/blog/the-talent-trap-acqui-hires-or-killer-acquisitions/> accessed 25 September 2025.

Another related concern to be weighed against regulating such transactions is that of employees' rights. Competition authorities around the world have encouraged freedom in the labour market, thereby preventing no-poach or wage-fixing agreements through regulations. Employees exercise their right to choose their employer[81] in acqui-hire transactions. Acquiring entities also allot specific benefits to the hired employees, such as retention bonuses, as talent is the primary focus in such transactions.

While mega acqui-hires raise significant competitive concerns, they may also lead to efficiencies through increased innovation, providing consumers with high-quality end products or services. Employees may also benefit from mega acqui-hires through increased incentives and the free movement of labour. Thus, mega acqui-hires pose a complex case for regulators to tread carefully in weighing the competitive concerns arising while also ensuring that innovation is not hampered, consumer welfare is not undermined, and employees' rights are respected.

## V. SCOPE AND SUGGESTIONS FOR REGULATING ACQUI-HIRE TRANSACTIONS IN INDIA

The growing trend of mega acqui-hires in digital markets has drawn the attention of competition regulators worldwide. CCI chairperson Ravneet Kaur has flagged the recent trend of larger players hiring staff from small startups in the digital sector and said that although such events have not been observed in India, if the situation arises where companies attempt to intentionally evade notification liability, it will need to be monitored.[82] With respect to these transactions, Jonathan Kanter, former assistant attorney general for antitrust at the US DOJ, highlighted his guiding principle of 'substance' and not the 'form' in their scrutiny, regardless of whether the currency exchanged is equity or an employment contract.[83] CCI has jurisdiction to look across competition matters across all sectors.[84] It addresses matters based on complaints filed by individuals, the government, the state, or on a suo motu basis.[85] CCI also has an extraterritorial jurisdiction,[86]

[81] The Constitution of India 1950, art 21; The Indian Contract Act 1872, s 27.
[82] 'CCI looking at killer, creeping acquisitions in digital market: Ravneet Kaur' (*The Economics Times*, December 2024) <https://economictimes.indiatimes.com/news/company/corporate-trends/cci-looking-at-killer-creeping-acquisitions-in-digital-market-ravneet-kaur/articleshow/116211337.cms?from=mdr> accessed 2 October 2025.
[83] Jonathan Kanter, 'Billion-Dollar acqui-hires are bad for competition' (*Financial Times*, August 2025) <https://www.ft.com/content/1d7075d4-12f3-404e-8667-7ef42e715a4e> accessed 6 October 2025.
[84] Yogesh Rai and Dr Taru Mishra, 'An Analysis of Extra-territorial Jurisdiction of Competition Commission of India' (2024) 4 (11) Journal of Emerging Technologies and Innovative Research <https://www.jetir.org/papers/JETIR2404087.pdf> accessed 25 September 2025.
[85] The Competition Act 2002, s 7.
[86] The Competition Act 2002, s 32.

which enables it to take cognisance of all conduct taking place outside India but having an adverse effect on competition within the Indian market.[87]

It is worth noting that similar cases have been brought before the CCI relating to 'predatory hiring'. Unlawful predatory hiring occurs when talent is acquired not for the purpose of utilising it, but for the purpose of denying it to a competitor.[88] In the case of Air India v. InterGlobe Aviation Ltd.,[89] the CCI dismissed Air India's contention of predatory hiring, stating that it is more of an employment issue than a competition issue. In the case of Kapoor Glass v. Schott Glass,[90] a similar issue was raised, where CCI clarified that labour mobility should be unrestricted from employer to employee. In both cases, the CCI took a different stance and refused to delve into the discussion of the connection between predatory hiring and antitrust.

However, predatory hiring and acqui-hire have a necessary difference of 'intent' and structure between them. In an acqui-hire, the primary intent is to acqui-hire talent for the benefit of the acquiring firm, while in predatory hiring, the intent is to deny it to the competitor, despite its non-use. Acqui-hires usually involve a legal transaction, structured as a stock or asset sale along with the purchase of IP. Predatory hiring, on the other hand, is a series of individual hiring decisions and often involves enticements to employees in the form of above-market salaries. Due to a lack of a structured deal, difficulty in proving intention, and the involvement of individual employees, the regulation of predatory hiring is met with skepticism. However, more jurisdictions are increasingly proactive in regulating mega acqui-hires, considering their related competition concerns, and have equated mega acqui-hires with a relevant merger situation or a concentration (akin to 'combinations' under the Act).

In the UK, the CMA termed the Microsoft-Inflection deal to qualify as a 'relevant merger situation' even in the absence of a traditional transfer of assets or ownership rights.[91] This was based on its

[87] 'Case No 07 of 2020' (*Competition Commission of India*, October 2022) <https://www.cci.gov.in/images/antitrustorder/en/order1666696935.pdf> accessed 2 October 2025.
[88] Richard J Braun and Michael A Williams, 'Predatory Hiring as Exclusionary Conduct: A New Perspective' (2013) 7(1) The Journal of Business, Entrepreneurship & the Law <https://core.ac.uk/download/pdf/71935143.pdf> accessed 2 October 2025.
[89] 'Case No 108 of 2015' (*Competition Commission of India*, February 2016) <https://cci.gov.in/images/antitrustorder/en/10820151652352564.pdf> accessed 26 September 2025.
[90] 'Case no 22 of 2010' (*Competition Commission of India*, March 2012) <https://cci.gov.in/antitrust/orders/details/877/0> accessed 2 October 2025.
[91] 'Microsoft Corporation's Hiring of Certain Former Employees of Inflection and its Entry into Associated Arrangements with Inflection' (*Competition and Markets Authority*, September 2024)

guidelines, which state that a transfer of a group of employees along with their relevant 'know-how' (an intangible asset) is sufficient to constitute an enterprise, as their 'know-how' enables the business activity to continue.[92] The European Commission ('**EC**') has taken a similar stance on acqui-hires, stating that such transactions can constitute a reviewable merger even if the turnover threshold is not met, if they involve a structural change in the market through the transfer of key personnel, IP, and associated agreements.[93] EC has also found that natural persons can be considered an 'undertaking' under Article 101 of the Treaty on the Functioning of the European Union.[94] Similarly, the German FCO noted that such transactions can result in 'de facto' takeover of the target undertaking, and such transactions are ultimately about the transfer of the competitive potential of the target company to the buyer.[95] It will take time for such jurisprudence to develop in India. However, combinations can surely be interpreted to include the transfer of employees along with key IP rights as an acquisition of an enterprise, taking inspiration from developed jurisdictions. Furthermore, when evaluating the efficiencies in mega acqui-hires, the CCI can employ a similar mechanism to that provided in the US DOJ's merger guidelines,[96] which require the benefits arising from the transaction to be merger-specific, verifiable, and beneficial to consumers.

It is worth noting that in the mega acqui-hires, including those discussed in this article, the deal values typically exceed the DVT of the relevant jurisdiction. However, in transactions where the deal value is strategically set below the DVT threshold, or the deal does not involve or includes only a minimal transfer of any traditional asset, they can successfully evade regulatory scrutiny. This can happen for two primary reasons: difficulty in recognising employees as 'assets', hence

<https://assets.publishing.service.gov.uk/media/6719ff5f549f63039436b3c8/__Full_text_decision__.pdf> accessed 25 September 2025.

[92] ibid.

[93] 'Commission takes note of the withdrawal of referral requests by Member States concerning the acquisition of certain assets of Inflection by Microsoft' (*European Commission*, September 2024) <https://ec.europa.eu/commission/presscorner/detail/en/ip_24_4727> accessed 2 October 2025.

[94] *Lietuvos notarų rūmai and others v Lietuvos Respublikos konkurencijos taryba* [2024] (C-128/21) ECLI:EU:C:2024:43.

[95] 'Taking over employees may be subject to merger control in Germany – Bundeskartellamt not competent to review Microsoft/Inflection transaction as Inflection has no substantial operations in Germany' (*Bundeskartellamt*, November 2024) <https://www.internationale-kartellkonferenz.de/SharedDocs/Meldung/EN/Pressemitteilungen/2024/29_11_2024_Microsoft.html> accessed 2 October 2025.

[96] '3 Rebuttal Evidence Showing That No Substantial Lessening of Competition Is Threatened by the Merger' (*Antitrust Division US DOJ*, December 2023) <https://www.justice.gov/atr/merger-guidelines/rebuttal-evidence> accessed 1 October 2025.

the inability to prove any acquisition, and difficulty in assigning a 'value' to the employees.[97] Although the CCI retains the authority to intervene ex post facto under provisions dealing with anti-competitive agreements and abuse of dominance, which is not limited to combinations, such intervention offers little practical utility in the context of acqui-hires. By the time such scrutiny is initiated, the integration of employees, technology, and know-how is already complete, rendering any remedial action largely symbolic. Thus, reliance on ex-post mechanisms in these cases fails to serve the preventive purpose of competition law, underscoring the pressing need for a calibrated ex-ante framework.

Specific suggestions may be employed in regulating mega acqui-hires, taking inspiration from the proposed Draft Digital Competition Bill, 2024 ('**Bill**'). The bill has emerged in response to the developed understanding that ex post facto assessment is inefficient for fast-moving digital markets, which are driven by strong network effects and tend to integrate quickly, leading to a 'winner-takes-all' situation. The bill identifies Systemically Significant Digital Enterprises ('**SSDE**') in regulating their practices in providing core digital services. The core digital services encompass a vast range of services, including online search engines, social networking services, video-sharing platform services, interpersonal communications services, operating systems, web browsers, and cloud services.[98] SSDEs are to be designated based on financial[99] and user-based thresholds.[100] The user-based threshold is met if the SSDE is achieved among at least one crore end users in India or ten thousand business users in India.[101] The bill empowers CCI to designate an enterprise as an SSDE, even if it does not meet either of the two thresholds, if the enterprise has a significant presence in core digital services.[102]

The designation of SSDE is an effective mechanism through which mega acqui-hires can be regulated in core digital services, as it acknowledges the importance of the user base threshold in the digital sector. The approach to user-based threshold in the bill is more suitable, as it specifies the number of users required for the threshold to be met, in contrast to the approach with respect

[97] Ruchit Patel and Rupert Phillips, 'Are employee acquisitions a gap in European merger control?' (*Concurrence*, March 2024) <https://awards.concurrences.com/en/awards/2025/academic-articles/killer-acquisitions-reexamined-economic-hyperbole-in-the-age-of-populist> accessed 4 October 2025.
[98] The Draft Digital Competition Bill 2024, Schedule I.
[99] The Draft Digital Competition Bill 2024, s 3(2)(a).
[100] The Draft Digital Competition Bill 2024, s 3(2)(b).
[101] ibid.
[102] The Draft Digital Competition Bill 2024, s 3(3).

to DVT,[103] where the user-based threshold is expressed in percentage form, which may lead to innocuous transactions being subjected to regulatory scrutiny. However, the user-based threshold in the bill may be deemed too low, which may lead to over-regulation. Thus, it would be appropriate if the same is effectively revised to a higher threshold by policymakers, given that the CCI already has the power to designate an enterprise as SSDE even where neither of the financial or user-based thresholds is met.

Lawmakers can consider regulating such transactions as combinations where any SSDE, through a single transaction or a series of linked transactions, hire a substantial percentage of key personnel, such as the R&D staff, of the target enterprise operating in the same or adjacent core digital services within a rolling period that can be extended up to 12 months. They can also consider shifting the burden of proof on the acquiring SSDEs in cases of mega acqui-hires, implying that such SSDEs will be required to prove the absence of any anti-competitive concerns. This is well-suited for the fast innovation-driven digital sector, where the anti-competitive concerns are not apparent at the time of the transaction. However, the CCI may have to tread carefully as proving a negative assertion is not easy in ordinary circumstances, thus, it may also result in curbing acqui-hire deals where the efficiencies outweigh the anti-competitive concerns.

## VI. CONCLUSION

Digital markets witness mega acqui-hires as a novel strategy for market consolidation. A lack of regulation of these transactions would create a structural asymmetry in the market where incumbents accumulate a pool of expertise while rivals are foreclosed from meaningful participation in innovation markets. Such asymmetry distorts competition and gradually reshapes the very contour of market contestability. The Indian Competition regime stands at an inflection point. While the introduction of the DVT and the bill indicate a willingness to adapt, the underlying regulatory philosophy must be one that examines the systemic effects of talent consolidation. Ultimately, the regulation of acqui-hires cannot be reduced to a binary choice between over-regulation and laissez-faire. The key task is to design a framework that protects the vibrancy of startup ecosystems while preventing innovation from being absorbed and controlled by a handful

[103] 'The Competition Commission of India (Combinations) Regulations, 2024' (*Competition Commission of India*, September 2024) <https://www.cci.gov.in/combination/legal-framwork/regulations/details/12/0> accessed 1 October 2025.

of dominant firms. This calls for a flexible legal interpretation, which treats acqui-hires not as a rare exception, but as an emerging trend that reshapes the contours of competition in the digital market.

# INTERIM ORDERS AS A STOP-GAP: REFORMING SECTION 33 TO PROTECT COMPETITION IN DIGITAL MARKETS[1]

*Neil Patwardhan and Yazhini Gautham* [2]

**ABSTRACT**

*This paper argues that India's Competition Act, drafted for slower-moving markets, is ill-equipped to address the rapid and irreversible harms common in digital markets. It shows that interim orders under section 33, although crucial, are underutilised due to high doctrinal and procedural thresholds. Drawing on Indian case law and comparative regimes, the paper proposes recalibrating these thresholds toward a proportionate, two-step test supported by safeguards and independent expertise. Such reform, it contends, is necessary to preserve competition, deter opportunistic conduct, and maintain contestability until a specialised legislative framework for digital markets is enacted.*

## I. INTRODUCTION

In digital markets, harm moves at the speed of code. Regulation, on the other hand, moves at the speed of paper. In recognition of this the Ministry of Corporate Affairs in 2024 released a draft "Digital Competition Bill" ("*Draft Bill*"), tailored to address competition and anti-trust issues in an increasingly digital economy and largely ex ante in nature. The Draft Bill was met with heavy criticism from scholars, experts, and industry bodies such as the Internet and Mobile Association of India, and was withdrawn in August of 2025.[3] Today, the fate of a competition legislation focused on digital markets remains uncertain. Some sources predict that any future legislation will not be ex ante but will remain ex post, like the Competition Act, 2002 ("*the Competition Act*").[4]

[1] *This submission was a Top 5 entry in the 2nd National Article Writing Competition, 2026.*
[2] The authors are students at National Law Institute University, Bhopal and School of Excellence in Law, Chennai, Tamil Nadu Dr. Ambedkar Law University, respectively.
[3] Manu Kaushik, 'Govt to withdraw Draft Digital Competition Bill' *Financial Express* (New Delhi, 10 August 2025) <https://www.financialexpress.com/business/industry-govt-to-withdraw-draft-digital-competition-bill-3942328/> accessed 23 September 2025
[4] Priyansh Verma, 'Government mulling to drop 'ex ante' regulations from revised Digital Competition Bill amidst concerns of stifling innovation' *MoneyControl* (New Delhi, 11 August 2025)

While the precise contents and timing of such legislation hang in the balance, the need for a regime capable of addressing anti-competitive conduct in digital markets is not in doubt.

This uncertainty raises a pressing question: what happens to anti-trust issues in digital markets while such legislation remains on the drawing board? Will these issues go unaddressed? Is the Competition Act, as a stand alone regulatory mechanism, sufficient to address these issues? This Paper, therefore, seeks to answer precisely these questions, through a thorough analysis of comparable competition law regimes, with a particular focus on the powers of the Competition Commission of India ("*the Commission*") to pass interim orders, as these kinds of orders assume heightened importance in the context of markets where competitors can have already entrenched dominance while a case is still pending under the contemporary competition framework, such as digital markets, and the potential of these powers to effectively combat and address anti-trust issues in digital markets.

It argues that interim relief can serve as a crucial stop-gap mechanism for preserving competition until a specialised legislative framework for digital markets is enacted. This Paper, therefore, is structured as follows. First, it examines the distinctive nature of digital markets that necessitates a revision of the regulatory framework governing anti-trust issues, followed by an examination of the law governing the use of the Commission's interim powers. It then analyses the actual utilisation of these powers by the Commission, the relationship between that utilisation and the Supreme Court's decision in *Competition Commission of India v. Steel Authority of India Ltd.*,. Finally, it argues that interim orders can and should be used to ensure that anti-trust issues in digital markets do not go unaddressed in the intervening period until specific legislation takes effect, subject to certain modifications to the current framework, and it makes recommendations as to these modifications.

## II. THE UNIQUE NATURE OF DIGITAL MARKETS

<https://www.moneycontrol.com/news/business/government-mulling-to-drop-ex-ante-regulations-from-revised-digital-competition-bill-amid-concerns-of-stifling-innovation-13431472.html> accessed 23 September 2025

The contemporary challenge facing competition law enforcement is fundamentally structural, and is rooted in the unique characteristics of digital markets. These markets are characterised by their reliance on the internet, and may be defined as markets relating to the provision of goods, services, data, or data records, over the internet. The unique nature of these markets, however, is not based on their reliance on the internet, but based on underlying economic forces that accelerate concentration and render the traditional enforcement mechanisms in the Competition Act largely ineffective.

Chief among these forces are strong network effects, wherein the value of a service to any user increases exponentially with every additional user, and substantial economies of scale and scope, allowing a platform to expand into adjacent services at near-zero marginal cost.[5] The confluence of these factors means that a market can rapidly reach a "tipping point," transitioning from competitive contestability to effective consolidation within a short span of time, often making regulatory intervention years later little more than a post-mortem.[6] Practically speaking, these forces may be demonstrated with the example of an online website providing the service of a marketplace for persons generally. In this example, if the marketplace itself prefers certain sellers over others, and displays products sold by these sellers at a higher, more convenient location than other products, it is incredibly likely that these certain preferred sellers will cease to be competitors alone, but will become dominant in the market more rapidly than if they were competing in a more typical market.

The question, therefore, that arises is how the existing competition framework, primarily designed for the slower dynamics of industrial and traditional economies, can adequately cope with this velocity. The core problem that exists in respect of the existing competition framework lies in the time taken by the Commission to conclude a full investigation, which, even when initiated with diligence, may stretch over several years.[7] This protracted timeline presents an existential threat to nascent competitors, who are often extinguished or acquired long before a final remedy can be

[5] Ramya Chandrashekhar, 'The Growing Necessity of Interim Measure to Preserve Competition in Rapidly Changing Digital Markets' [2021] 17 (2) Indian Journal of Law and Technology <https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1109&context=ijlt> accessed 24 September 2025

[6] ibid

[7] Konark Bhandari, 'Assessing the Need for a New Draft Digital Competition Bill in the Indian Context' (*Carnegie Endowment*, 19 February 2025) <https://carnegieendowment.org/research/2025/02/assessing-the-need-for-a-new-draft-digital-competition-bill-in-the-indian-context?lang=en> accessed 25 September 2025

imposed.[8] This consensus underscores the inadequacy of the current toolkit when faced with anti-competitive practices that cause rapid, irreparable harm.

As such, in essence, the core problem with digital markets lies in their dynamic and fast paced nature, which results in the existing framework under the Competition Act being unable to effectively combat anti-trust issues in digital markets, as irreparable and irreversible damage is often already done by the time an order is passed under the existing framework. This fact, as recognised by the Committee on Digital Competition Law, necessitates an examination of the existing competition framework, and necessitates a revision of the existing framework. This revision may be done in two ways, either through the creation of a new legislation focussed on digital markets specifically, or through the revision of provisions in the existing framework, such as, particularly, the provisions relating to interim orders.

## III. THE LAW GOVERNING THE PASSING OF INTERIM ORDERS BY THE COMMISSION

The power of the Commission to pass interim orders finds its seat in the Competition Act, but its contours have been shaped by and large by decisions of the Supreme Court of India ("*the Supreme Court*"). The Competition Act, therefore, empowers the Commission to temporarily restrain conduct that is alleged to contravene, or is alleged to be about to contravene the prohibitions in Section 3(1), Section 4(1) or Section 6.[9] Such restraint, the Competition Act provides, may be ordered without prior notice to the affected party if the Commission deems it necessary.[10]

In view of the fact that the Competition Act confers a power to make orders without notice, courts have required that the power be exercised with caution and for reasons directly connected to the statutory purpose. As such, the Supreme Court's seminal pronouncement in the case of *Competition Commission of India v Steel Authority of India Ltd.* ("*the SAIL Case*") is the touchstone for how that caution must be expressed. In that case, and in the context of interim

[8] Government of India, 'Report of the Committee on Digital Competition Law' [2024] <https://prsindia.org/files/parliamentry-announcement/2024-04-15/CDCL-Report-20240312.pdf> accessed 25 September 2025
[9] Competition Act 2002, s. 33
[10] ibid

orders, the Court considered whether the Commission may pass *ex parte ad interim* restraint orders - and if so - what standards should govern the exercise of the power.

The Court in SAIL distilled a practical threefold compass which has become the working template for interim applications. Borrowing the vocabulary long familiar to courts in civil injunction matters, the Court explained that the Commission must be satisfied, on the material before it, of a prima facie case; it must weigh the balance of convenience; and it must be persuaded that refusal of interim relief would occasion irreparable injury that cannot be adequately remedied by a final decision, and that an interim order is necessary.[11] Further, the Court underlined that the informant's case, at the interim stage, must ordinarily be stronger than a bare *prima facie* case before *ex parte* relief is granted.[12]

This insistence on mandatory reference to the threefold test by the Court was on the basis of the reasoning that interim orders can have serious civil and commercial consequences, often altering market arrangements and imposing immediate burdens on enterprises even before the allegations have been fully tested and adjudicated upon. By importing the tripartite standard the Court sought to prevent arbitrary restraint, ensure that the Commission's extraordinary power is used sparingly, and preserve predictability and certainty for the subjects of the Competition Act. The Court further reasoned that conditioning interim relief on this threefold test protects against frivolous or strategic use of complaints to disable competitors, and that it strikes a balance between the Commission's public duty to safeguard competition and the fundamental fairness owed to those accused of contraventions.

## IV. THE ACTUAL UTILISATION OF THE POWER TO PASS INTERIM ORDERS

Interim orders under S. 33 of the Competition Act can be incredibly useful in ensuring that anticipated irreversible harm is not caused to a market player, and that harm that has already been caused does not continue to be caused, and therefore cause irreparable harm.[13] Its utilisation by the Commission, however, is startlingly low. In a ten year period from 2014 to 2024, a total of 749

[11] *Competition Commission of India v Steel Authority of India Ltd. (2010) 10 SCC 744*
[12] ibid
[13] Konark Bhandari, 'Assessing the Need for a New Draft Digital Competition Bill in the Indian Context' (*Carnegie Endowment*, 19 February 2025)

cases came before the Commission.[14] Out of them, only in 31 cases was an interim order passed - which means that out of all the cases filed before the Commission in a ten year period from 2014 to 2024, only in 4.1% of cases was an interim order passed, as may be observed from Table 1.[15] As for the cases filed in 2025, it remains to be seen whether any interim orders will be passed, as until the date of writing this paper, no interim order has been passed by the Commission.

***Table 1***

| ***Period*** | ***Number of interim orders passed*** |
|---|---|
| 2014 -2015 | 8[16] |
| 2015 - 2016 | 3[17] |
| 2016 - 2017 | 1[18] |
| 2017 - 2018 | 1[19] |
| 2018 - 2019 | 3[20] |
| 2019 - 2020 | 1[21] |
| 2020 - 2021 | 3[22] |
| 2021 - 2022 | 4[23] |

[14] ibid
[15] ibid
[16] Competition Commission of India, 'Annual Report 2017 -18' [2018] <file:///C:/Users/HP/Downloads/annual-report-2017-181652253434.pdf> accessed 25 September 2025
[17] ibid
[18] ibid
[19] ibid
[20] Competition Commission of India, 'Annual Report 2020 - 21' [2021] <file:///C:/Users/HP/Downloads/20-211665122051.pdf> accessed 25 September 2025
[21] ibid
[22] ibid
[23] Competition Commission of India, 'Annual Report 2023 - 24' [2024] <file:///C:/Users/HP/Downloads/annual-report-2023-241734695318.pdf> accessed 25 September 2025

| | |
|---|---|
| 2022 - 2023 | 4[24] |
| 2023 - 2024 | 3[25] |

## V. THE RELATIONSHIP BETWEEN THE UTILISATION OF THE POWER TO PASS INTERIM ORDERS AND THE JUDGMENT IN THE SAIL CASE

The Supreme Court's decision in the SAIL Case, this Paper argues, exerted an outsized influence on how S. 33 of the Competition Act is understood and practised. The Court's choice to adopt a threefold test was not merely an exercise in doctrinal fashioning. The Court reasoned that extraordinary relief such as interim orders must be tethered to clear, recorded satisfaction on a prima facie case, balance of convenience and irreparable injury so that the Commission's power is not exercised on flimsy or tactical foundations. This concern for avoiding arbitrary regulatory interference is explicit in the judgment.[26]

The threefold test propounded by the Supreme Court borrowed from common principles of law relating to interim injunctions. Normally, speaking, these are not standards that are unreasonable. In the context of the cases before the Commission, however, these common principles become difficult and the standard high. The core reason for this is the fact that in the context of cases before the Commission at the *prima facie* stage, the Commission often lacks information that is not provided by the Parties themselves. That is; the Commission lacks information provided by a neutral party, and therefore finds it difficult to pass reasoned orders and examine the balance of convenience and necessity. Fundamentally, there exists an informational imbalance at the *prima facie* stage. The same informational imbalance also makes it difficult for the Commission to make findings as to whether conduct does, or is likely to do irreparable harm to the other party, and as to whether there exists a definite apprehension that the conduct will have an appreciable adverse effect on competition in the market.

[24] ibid
[25] ibid
[26] *Competition Commission of India v Steel Authority of India Ltd. (2010) 10 SCC 744*

Empirical and doctrinal studies, as well as practitioner notes, identify *SAIL* as a principal reason why the Commission has historically exercised Section 33 sparingly and with caution.[27]

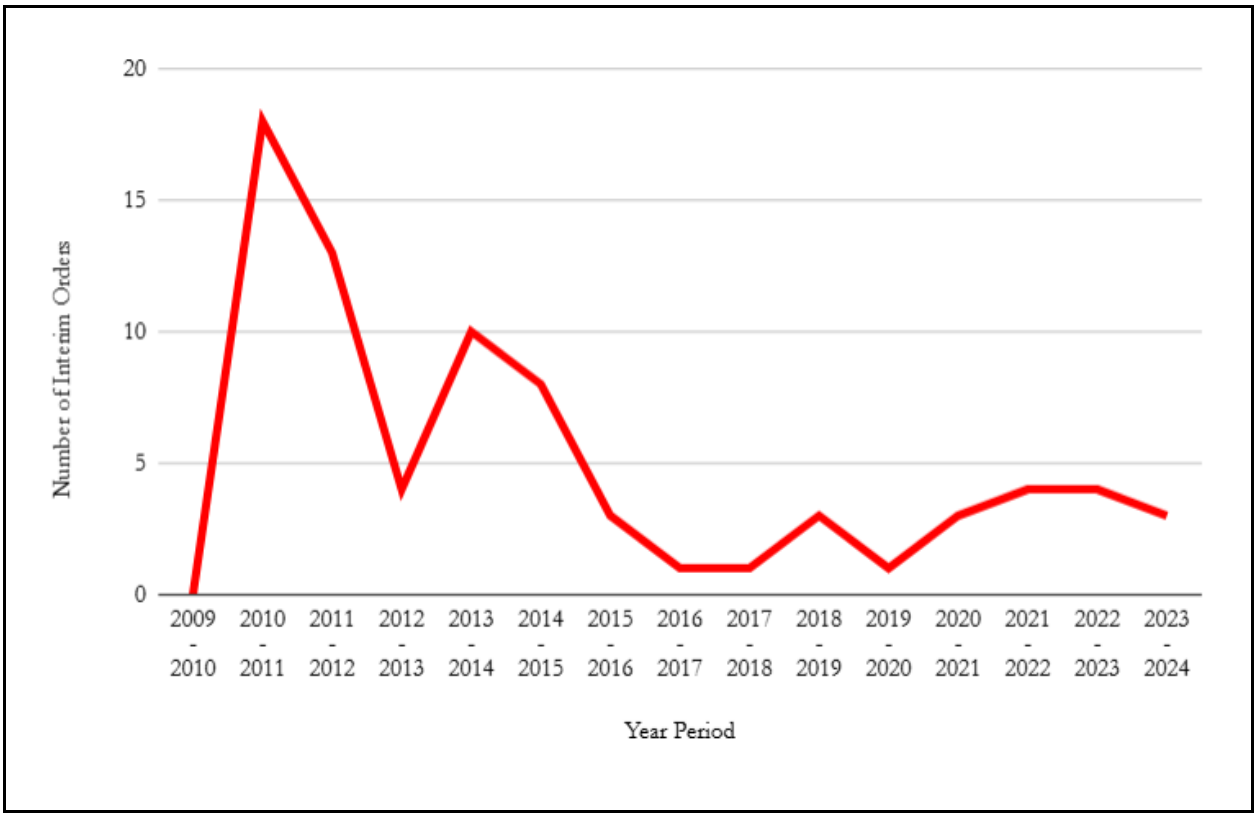
The Judgment in the SAIL Case was passed in 2010. In 2010, 18 interim orders were passed. In 2011, the amount of interim orders passed fell by nearly 30%, and continued to fall in the years after that.[28] The number of interim orders in the years after 2011 never touched the amount passed in both 2011 as well as 2010, as shown in Table 2.

As such, therefore, there exists a strong presumption in favour of the analysis that the SAIL Case, that the threefold test laid down in that case created a strong hurdle in the Commission's ability to pass interim orders, and that it had a severe negative effect on the willingness of the Commission to pass interim orders.

***Table 2***

[27] Ramya Chandrashekhar, 'The Growing Necessity of Interim Measure to Preserve Competition in Rapidly Changing Digital Markets' [2021] 17 (2) Indian Journal of Law and Technology

[28] Competition Commission of India, 'Annual Report 2017 -18' [2018] <file:///C:/Users/HP/Downloads/annual-report-2017-181652253434.pdf> accessed 25 September 2025




## VI. THE POTENTIAL OF INTERIM ORDERS IN RESOLVING ANTI-TRUST ISSUES IN DIGITAL MARKETS

Interim relief is not an adjunct to competition enforcement in digital markets. It must, therefore, be treated as such; as an indispensable instrument for preserving the conditions in which meaningful competition can continue to exist while a full inquiry proceeds. As earlier established, digital platforms are prone to rapid and self-reinforcing dynamics. Network effects magnify small advantages, such as algorithmic or contractual tweaks, into market tipping, which essentially refers to the immediate reallocation of flows of users. Because harm in such markets often crystallises quickly and becomes structurally embedded, a regulatory architecture such as the contemporary competition law framework, that reserves corrective intervention only for the end of a long investigation risks allowing the competitive process itself to be extinguished before any remedial order can take effect. The nature of digital competition therefore makes swift, carefully calibrated

interim intervention not merely desirable but sometimes essential to ensure that eventual relief is not illusory.

The practical forms of harm that interim orders can prevent are concrete and varied, and include the delisting or exclusion of rival suppliers from a multi-sided platform, the sudden modification of platform interfaces or search algorithms that downgrade competitive offerings, the imposition of discriminatory access terms to critical data or application programming interfaces, and the consummation of acquisitions that eliminate nascent competitors. Interim measures can preserve evidence, prevent destruction or alteration of algorithmic logs, and maintain the market status quo so that a full investigation can assess competitive effects on the merits.

Beyond preservation of evidence and the market status quo, interim orders perform two complementary institutional functions that are especially significant in the context of digital markets. First, they provide an operative buffer that keeps markets contestable while fact finding proceeds. Second, they have a signalling effect that disciplines borderline conduct by dominant firms, thereby enhancing deterrence without tipping into overreach. The combination of these protective and deterrent effects makes interim relief a discrete and powerful tool in the regulator's arsenal for maintaining the dynamic competition that digital markets require.

Notwithstanding the concrete and definite arguments in favour of utilising interim orders more frequently in cases of digital markets, however, the current procedural framework governing interim relief requires careful reassessment. The Supreme Court's exposition in the SAIL case applied the familiar threefold test for the exercise of the power under S. 33, and emphasised that ex parte intervention ordinarily requires more than a bare prima facie showing.

This approach sought to calibrate the Commission's preventive authority against the constitutional guarantee of the freedom to carry on business in Article 19(1)(g). While well intentioned, however, the effect of the Court's holding has been to transpose a test designed for private civil disputes into a context in which the regulator is required to form evaluative conclusions about systemic market harm at a stage when evidence is typically scarce and largely partisan.[29]

[29] Konark Bhandari, 'Assessing the Need for a New Draft Digital Competition Bill in the Indian Context' (*Carnegie Endowment*, 19 February 2025)

For these reasons, therefore, while it would be in the interests of competition to more frequently utilise the power to pass interim orders, particularly in the context of digital markets, such increased frequency cannot possibly arise in the context of the contemporary framework governing the use of interim orders, as it makes the usage of such a power particularly difficult. Therefore, a reworking of this framework is warranted.

## VII. REWORKING THE CONTEMPORARY FRAMEWORK ON INTERIM ORDERS

A reworked framework for interim orders under the Competition Act, therefore, must begin from the recognition that the power under Section 33 sits at the intersection of two competing constitutional values: the need for fairness and proportionality on the one hand, and the need for timely intervention to preserve competition on the other.

In this regard, the first modification must lie in softening the threshold standard. Instead of requiring satisfaction of all three elements of the *SAIL* test, the Commission should be guided by a two-step standard;

a. whether there exists a serious and credible concern that the alleged conduct could cause substantial distortion of competition if allowed to continue during the pendency of proceedings, and;

b. whether the interim measure proposed is proportionate, meaning it is the least restrictive way to prevent such harm.

Procedural safeguards, additionally, are essential to ensure that such a power remains constitutionally valid and resistant to abuse. Every interim order, therefore, should contain reasons explaining why ordinary proceedings are insufficient to prevent harm, so that judicial review can meaningfully assess whether the order was arbitrary.

Further, *ex parte* orders should be confined to cases of demonstrable urgency, and even then, must be revisited in a short, fixed period, by an appellate body such as the National Company Law Appellate Tribunal after hearing the affected party. This approach ensures that urgent market harms

are addressed without delay, while preserving constitutional safeguards through the availability of prompt, reasoned review. Parties must also have the express right to seek modification or revocation upon showing a change in circumstances.

In addition, with regards to the challenges arising from information imbalances, the Commission should be empowered to call upon independent experts at the *prima facie* stage for rapid, sector-specific assessments. Similarly, the Commission should be empowered to issue disclosure directions to both informants and opposite parties, obliging them to provide limited but critical market data that can illuminate whether imminent harm exists. By building such mechanisms into the process, the Commission would be better placed to make reasoned determinations without being paralysed by informational imbalances.

Further, with regards to remedies, interim orders should be carefully tailored, and must avoid imposing sweeping restraints that risk paralysing business operations, and instead must be carefully fashioned so as to directly address the apprehended harm. Narrowly tailored remedies would also be more defensible in constitutional terms, as they minimize the intrusion on the right to trade.

Comparative experience lends further support to this proposed recalibration. In the European Union, the competition authority is authorised to order interim measures, which allows it to act where there is prima facie evidence of infringement and where serious and irreparable damage to competition is likely.[30] The European Union framework has been notable for its flexibility. In the United States, the threshold is not as onerous as the Indian threefold test, and courts typically require a likelihood of success on the merits and a demonstration that irreparable harm is probable, but they balance this with the public interest in preserving competition.[31] Both jurisdictions thus emphasise proportionality, flexibility, and the public interest over rigid doctrinal hurdles.

[30] Council Regulation (EC) No 1/2003, Art. 8

[31] Organisation for Economic Co-operation and Development, 'Interim Measures in Antitrust Investigations' [2022] <www.oecd.org/daf/competition/interim-measures-in-antitrust-investigations2022.pdf.> accessed 25 September 2025

India's framework, therefore, if recalibrated along these lines, would enable the Commission to act with greater confidence in fast-moving markets, especially digital ones, without abandoning constitutional safeguards.

## VIII. CONCLUSION

Digital markets, as such, have transformed the speed, scale and nature of anti-competitive conduct, yet the legal tools for controlling such conduct remain rooted in a slower, more static era. This paper has shown that interim orders under S. 33 of the Competition Act are not a marginal or optional device but a critical mechanism for preserving competition until a full investigation can run its course and, ultimately, until a specialised legislative framework for digital markets is enacted. It has also demonstrated that the present doctrinal and procedural configuration, particularly following *Competition Commission of India v Steel Authority of India Ltd.*, has constrained the Commission's ability to deploy this power at precisely the moment when it is most needed.

Comparative experience from other jurisdictions and the economic realities of platform markets together suggest that recalibrating the threshold and process for interim relief can reconcile constitutional safeguards with timely, proportionate intervention. Without such reform, the Act's preventive promise will remain largely theoretical, and digital markets will continue to tip and consolidate before any remedial order can take effect. With it, however, interim measures can serve as a bridge that maintains contestability, deters opportunistic conduct, and preserves the possibility of effective final relief, until a new, more tailored regulatory regime for digital competition emerges.

# REGULATING DIGITAL DOMINANCE: THE NCLAT'S APPROACH TO ALPHABET'S ANTITRUST APPEAL

*Aparna Prakash*[1]

**ABSTRACT**

The NCLAT judgment in *Alphabet Inc. v. Competition Commission of India (2025)* marks a significant development in India's digital competition law. This paper examines the NCLAT's approach to addressing abuse of dominance in digital markets, with an emphasis on the adoption of the effect-based analytical framework. The most pivotal aspect of this judgment is the rejection of the "gatekeeper" designation in the absence of statutory authority for an *ex-ante* regulatory framework in India. The NCLAT underscored proportionality and economic fairness by recalculating the penalty based on the principle of relevant turnover. This judgment highlights the need for an *ex-ante* regulatory framework that is suited to India's unique digital ecosystem and capable of addressing the emerging gaps in regulating digital dominance. However, the broader conundrum of regulating abuse of dominance in the digital markets still persists as the appeal against the NCLAT's judgment remains pending in the Supreme Court of India. The paper employs an effect-based analysis to evaluate the decision's reinforcement of ex-post regulation amid digital market challenges, highlighting regulatory gaps and the need for legislative reforms like the withdrawn Digital Competition Bill, 2024, which aimed at SSDE obligations for fairer digital ecosystems. Following the withdrawal of the proposed Digital Competition Bill, 2024 by the Indian government, the judgment has assumed increased significance in shaping legislative reforms concerning ex-ante regulatory mechanisms in India. This paper analyses the potential of the NCLAT ruling to influence reforms in the framework governing digital competition law in India and draws comparative insights from global digital competition frameworks to contextualize India's regulatory trajectory. Therefore, this paper situates the NCLAT judgment within the broader legal discourse and underscores its implications for defining the future trajectory of competition law in India's dynamic digital economy.

[1] The author is a student at Campus Law Centre, University of Delhi.

## I. INTRODUCTION

India's digital economy grapples with platform dominance exemplified by Alphabet Inc.'s Android ecosystem, prompting scrutiny under the Competition Act, 2002. The judgment in *Alphabet Inc. v. Competition Commission of India (2025)* by the National Company Law Appellate Tribunal ("**NCLAT**") has shaped India's digital competition jurisprudence. Alphabet Inc. (**"Appellant"**), parent company of Google, appealed to the NCLAT against the decision of the Competition Commission of India ("**CCI**") which imposed a penalty of ₹936 crore on the Appellant for abusing dominance in violation of Section 4 of the Competition Act, 2002 ("**Competition Act"**). The CCI conferred the designation of 'Gatekeeper' and issued cease-and-desist directions, allowing the use of third-party billing system and no "anti-steering provisions" on software application ("**App"**) developers, providing for a transparent policy of data collection.[2] The Appellant contested the decision on the grounds that the CCI had committed errors in market definition, findings of abuse of dominance, disproportionate penalty computation, and imposing ultra vires *ex-ante* remedies.

In this appeal, the NCLAT examines the abuse of dominance in the digital ecosystems and emphasize an effect-based analysis approach for determining the abuse of dominance. The NCLAT assessed the determination of relevant market on the basis of substitutability and agreed with the CCI on identification of market of UPI apps as relevant market. The NCLAT rejects the conferment of Gatekeeper status as an *ex-ante measure* and cautions regulatory authorities against applying foreign laws lacking statutory backing in India. This judgment exposes regulatory gaps in India's current competition regime based on *ex-post facto* regulation and calls for policy actions to address these gaps. The modification of the penalty by the NCLAT based on the principle of relevant turnover has emphasized proportionality in enforcing the competition regulation. It raises pressing questions about the adequacy of current competition laws, the role of corporate governance for dominant entities in digital market, and the regulatory protections necessary for digital startups struggling within the digital ecosystems. Amid calls for reform that was exemplified by the Digital Competition Bill, 2024 (**"DCB"**) proposing ex-ante rules to prevent self-preferencing and anti-steering, the ruling exposes limitations of the current ex-post

[2] Press Information Bureau, 'CCI imposes a monetary penalty of Rs. 936.44 crore on Google for anti-competitive practices in relation to its Play Store policies' https://pib.gov.in/PressReleasePage.aspx?PRID=1870819, accessed on 4 April 2025

framework in dynamic digital markets. The judgement reveals the pressing need for legislative reforms to manage platform bottleneck power in digital markets. The judgement is call for action to introduce a forward-looking and balanced regulatory framework in Indian digital competition regime that restricts the tendency of abusive conduct by dominant entities even before the misconduct actually materializes. The judgment, though under challenge in the Supreme Court of India and awaits determination of final contours on abuse of dominance in digital markets, has far reaching implications for competition law reforms for effectively regulating digital dominance.

## II. Determination of the Relevant Markets

The CCI identified the following relevant markets under Section 2(r) of the Competition Act[3]:

- "Market for licensable OS for smart mobile devices in India" (**"Market for OS"**);
- "Market for App stores for Android smart mobile OS in India" (**"Market for App Stores"**);
- "Market for Apps facilitating payment through UPI in India" (**"Market for UPI Apps"**).

The Appellant contested that determination of the Market for UPI Apps was narrow, as all digital modes of payment i.e., wallet, UPI, net-banking, credit cards and debit cards are substitutable from customers' as well as from merchants' perspective. However, the NCLAT observed that UPI Apps provide several value-added features that are not offered by any other digital modes of payment. These features distinguish UPI-enabled digital payment system eliminating substitutability between payments made through UPI Apps and other digital modes of payments like wallet, net banking and etc. Therefore, the NCLAT held that the CCI had correctly identified relevant market as the Market for UPI Apps.

## III. Abusive Conduct by Dominant Enterprises

The activities by dominant enterprises in the Relevant Market that result in any scenarios mentioned under Section 4(2) of the Competition Act are an abuse of dominance. NCLAT upheld several core findings of CCI on abuse of dominance by Google:

[3] *XYZ v. Alphabet Inc*. [2022] SCC OnLine CCI 63.

➢ Unfair Condition in the Purchase or Sale of Goods or Services

Section 4(2)(a)(i) of the Competition Act provides that the imposition of an unfair or discriminatory condition in the purchase or sale of goods or services by a dominant entity leads to abuse of dominance. The NCLAT observed that it was mandatory to enter into a Developer's Distribution Agreement to list their Apps on the Google Play Store. This requires in-App purchases ("**IAP"**) and accept the Google Play Billing System ("**GPBS"**) only for making payments for the same. This was not adopted to meet the competition in the relevant market and cannot be exempted under the Explanation to Section 4(2)(a) of the Competition Act. Therefore, the NCLAT upheld the CCI's decision that the Appellant violated Section 4(2)(a)(i) of the Competition Act by mandating use of GPBS for App developers.

➢ Leveraging Dominance in a Relevant Market to Enter or Protect Another Market

Section 4(2)(e) of the Competition Act provides that leveraging of dominant position in one relevant market to enter into another relevant market is an abuse of dominance. The Appellant forces users to use only GPBS with respect to the Play Store, and every transaction on the Play Store proves advantageous for Google Pay. The Appellant acts as a gateway to Android devices owing to its dominant position in the Market for OS and the Market for App Stores. Therefore, the NCLAT upheld the CCI's decision that the Appellant violated Section 4(2)(e) of the Competition Act by using its dominance for promoting its own UPI Apps.

NCLAT has reversed CCI's finding on abuse of dominance with respect to the denial of market access, technical growth and pricing in the relevant markets.

➢ Imposition of Unfair Prices on the Purchase or Sale of Goods or Services

As per Section 4(2)(a)(ii) of the Competition Act imposition of unfair prices is an abuse of dominance. The NCLAT observed that YouTube is the Appellant's App. The revenue generated by YouTube belongs to the Appellant. There is no component of sale in relation to the revenue of

YouTube and the Appellant has not fixed a price for such sale.[4] The company does not earn revenue from itself, so service fees of 15–30% were inapplicable. Therefore, the NCLAT set aside the CCI's decision that the Appellant charging service fee

of 15–30% from apps while exempting its own YouTube is a violation of Section 4(2)(a)(ii) of the Competition Act.

➢ Limitation on Production and Technical Growth of Goods or Services

As per Section 4(2)(b)(ii) of the Competition Act, the limitation or restriction of technical or scientific development to the prejudice of consumers is an abuse of dominance. The NCLAT observed that the payments under the GPBS with respect to the Play Store are less than 1% of the Market for UPI Apps. Payment through the UPI has been growing and more than 99% of the Market for UPI Apps is open and available.[5] Therefore, the NCLAT set aside CCI's decision that the Appellant has violated Section 4(2)(b)(ii) of the Competition Act.

➢ Causing Denial of Market Access

Section 4(2)(c) of the Competition Act provides denial of market access is abuse of dominance. The Appellant is a buyer of payment processing service and the choice of payment processors reflects the Appellant's right to choose its service and service provider. Payment through GPBS is 1% of payment through UPI which implies more than 99% of the Market for UPI Apps is open for payment processors. Therefore, NCLAT reversed the CCI's decision that Appellant violated Section 4(2)(c) of the Competition Act by denying market access to the payment processors and aggregators.

## IV. Effect-based Analysis of the Appellant's Conduct in the Relevant Markets

The NCLAT affirmed that the CCI had conducted an effect-based analysis by considering both

[4] M. Sharma, Google Gets Some Relief in Google Play Billing Case in Appeal: NCLAT's Reduces Penalties and Rejects Ex-Ante Regulation by CCI, (CompetitionLawyer.in, March 30, 2025), https://www.competitionlawyer.in/google-gets-some-relief-in-google-play-billing-case-in-appeal nclats-reduces-penalties-and-rejects-ex-ante-regulation-by-cci/ accessed August 22, 2025

[5] *Alphabet Inc. v. Competition Commission of India,* [2025] SCC OnLine NCLAT 604.

actual and likely effects of Appellant's conduct for determining the violation of Section 4 of the Competition Act. Effect-based analysis refers to the approach that the regulating authority shall look into the conduct of a dominant entity which has caused or is likely to cause an anti-competitive effect on the market.[6] The NCLAT referred to the judgment of the Competition Appeal Board of Singapore in Re. Abuse of a Dominant Position by SISTIC.com Pte. Ltd.[7] which held abuse of dominance is established sufficiently by showing the practice is likely to have an adverse effect on competition even though an actual effect on competition is not established.

Therefore, the NCLAT held that a conduct by a dominant entity likely to restrict competition can be examined by the CCI to assess abuse of dominance. The NCLAT laid a caveat that effect-based analysis applies to abusive conduct that has already happened, ensuring that it rests on concrete evidence of anti-competitive impact. The NCLAT had further noted that the CCI has emphasized on indulgence by the Appellant in abusive conduct as per Section 4(2) of the Competition Act for determining the violation of the Competition Act. Therefore, the NCLAT held that this emphasis reflects that the CCI has conducted effect analysis in its decision.

## V. GOOGLE AS GATEKEEPER: THE ISSUE OF EX-ANTE REGULATION

A Gatekeeper is an entity controlling access to online services critical to reach a large user base.[8] The CCI directed the Appellant to align its policies with the principles of fairness associated with the responsibilities of a gatekeeper in the Android ecosystem.[9] The NCLAT held that the CCI has no power to issue *ex-ante* (before the event) direction by terming the Appellant as 'Gatekeepers'. *Ex-ante* regulations refer to regulating the entities before occurrence of the default.[10] Casting special responsibilities upon them is against Section 27 of the Competition Act, which outlines e*x-post facto* (after the event) measures as it empowers to CCI to issue orders after action that contravenes the Competition Act. This empowers CCI to intervene only after the actual Violation

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6 Ansruta Debnath & Aditi Sinha, 'An Effects-Based Approach to Abuse of Dominance' Centre for Research in Competition Law & Policy https://crclp.nliu.ac.in/an-effects-based-approach-to-abuse-of-dominance/ accessed 21 April 2025.

7 *Re Abuse of Dominant Position by SISTIC.com Pte Ltd*, [2010] CCS/600/008/07

8 Mili Buddhiraja, 'India's Tussle with Digital Gatekeepers'(2021) Indian Review of Corporate and Commercial Laws https://www.irccl.in/post/india-s-tussle-with-digital-gatekeepers accessed 7 April 2025.

9 *XYZ v. Alphabet Inc.* [2022] SCC OnLine CCI 63

10 Saket Sharma, 'Competition Through Evolution, Not Pre-Selection: A Case Against Ex-Ante Regulations in India' (2024) National Law School Business Law Review (2024) https://www.nlsblr.com/post/competition through-evolution-not-pre-selection-a-case-against-ex-ante-regulations-in-india accessed on 8 April 2025

of Section 4 of the Competition Act. The NCLAT discouraged overstepping in favour of anticipatory regulation.

## VI. Proportionality of the Penalty Based on Relevant Turnover

The NCLAT significantly modified the penalty imposed on Google, reducing it from ₹936 crore to ₹216.68 crore by applying the "relevant turnover" principle. The relevant turnover refers to the turnover in respect to the good or service related to the violation of the Competition Law.[11] Section 27(b) of the Competition Act empowers the CCI to penalize the contravening party up to 10% of average turnover or income of the three preceding financial years.

The Hon'ble Supreme Court **in Excel Crop Care Ltd. vs. Competition Commission of India & Anr.**[12] expressed that the criteria of relevant turnover for the penalization will be more in tune with the ethos of the Competition Act. This implied the penalty must not be merely punitive but fair, proportionate, and effective deterrence against anti-competitive conduct. The principle of proportionality prevents excessive or punitive fines that could stifle legitimate business activity and innovation in order to target the specific anti-competitive harm caused. The NCLAT's order affirmed that the abusive dominant entity must only be penalized proportionally to the market where the anti-competitive practices were conducted. The Appellant has abused its dominant position in the Relevant Market, violating Section 4(2)(a)(i) and 4(2)(e) of the Competition Act, and shall be penalized on the basis of the relevant turnover. Therefore, the NCLAT modified the penalty imposed by the CCI and substituted it with penalty of ₹216 Crore as penalty @ 7% of the relevant turnover, as per the turnover of last three preceding Financial Year i.e., 2018-19, 2019-20 and 2020-21, for preventing disproportionate penalties unjustifiably threatening business viability.

## VII. The Conundrum Post NCLAT Ruling

This landmark judgment was followed by a rectification order by NCLAT to reinstate CCI directions obligating Appellant to disclose data policies and remove advantages for GPBS.

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11 Arjun Krishnan, 'The Excel Crop Case and Relevant Turnover in the Competition Act 2002'(2015) 27 National Law School India Review 125 https://repository.nls.ac.in/cgi/viewcontent.cgi?article=1200&context=nlsir accessed 8 April 2025.

12 *Excel Crop Care Ltd. v. Competition Commission of India & Another* [2017] 8 SCC 47

NCLAT viewed this as a rectification of an 'inadvertent error' in its original ruling. The Appellant contested it as an 'impermissible review' of its own ruling, beyond the scope of the NCLAT.[13]

The Appellants have appealed in the Supreme Court of India, challenging both the findings of abuse of dominance and the legality of the rectification order.[14] This conundrum underscores a broader tension in India's competition framework that is balancing judicial oversight with regulatory autonomy in the evolving digital economy. The Supreme Court has admitted the appeal and is set to determine the final contours of the competition regulatory framework in India's digital markets and clarify the scope of control over dominant digital platforms.

## VIII. ANALYTICAL DISCUSSION

This judgment shapes the evolution of jurisprudence on the issue of abuse of dominance in digital markets along with effect-based analysis and *ex-ante* directives issued by the CCI.

### *A. Examination of Abuse of Dominance in Digital Markets Through Effect-Based Analysis*

The NCLAT upheld that Appellant abused its dominance by mandatory and discriminatory imposition of the GPBS on app developers, as leveraging market dominance to restrict alternatives is impermissible even in digital market.[15] However, the NCLAT set aside findings of limiting innovation and denying market access as the wider UPI payment market is open. The NCLAT approach affirmed that the examination of abuse of dominance hinges on the analytical effect-based analysis to focus on the actual or likely abuse of dominance. This underscored that CCI regulatory interference is justified by market realities rather than hypothetical scenarios and emphasizes the likelihood of effect.

### *B. The Designation of Gatekeeper: The conundrum and Roadmap of Ex-Ante Regulation in*

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13 S N Thyagarajan, 'Google Moves Supreme Court Against NCLAT Ruling in Play Store Dominance Case' *Bar & Bench* (July 22, 2025), https://www.barandbench.com/news/litigation/google-moves-supreme-court-against nclat-ruling-in-play-store-dominance-case.

14 'Google moves SC against NCLAT order on Play Store billing practices' *The Economic Times,* (July, 24, 2025), https://economictimes.indiatimes.com/tech/technology/google-moves-sc-against-nclat-order-on-play store-billing-practices/articleshow/122885371.cms.

15 World Economic Forum, *Competition Policy in a Globalized, Digitalized Economy* (2023), https://www.weforum.org/reports/competition-policy-in-a-globalized-digitalized-economy accessed 5 November 2025

A pivotal aspect of the judgment is the explicit rejection of *ex-ante* remedies of conferring 'Gatekeeper' status by the CCI as overstepping its powers. The NCLAT cautioned against assessing anti-competitive conduct through pre-emptive regulations based on foreign concepts. The judgement highlights ongoing regulatory uncertainty and the need to build governance structures that manage dependence on dominant platforms and adapt to evolving competition laws. However, the decision of the CCI to issue *ex-ante* directions conferring 'Gatekeeper' status on the Appellant was not contrary to the spirit of competition law and reveals the need of statutory reforms. The NCLAT ruling connects competition law enforcement with wider corporate regulatory concerns around market fairness, transparency, and innovation. It signals a need for legislative reform to harmonize corporate governance norms with competition policy in digital markets by encouraging governance innovation to meet the complexities of multi-sided digital platforms and fostering a balanced regulatory regime for India's digital economy.

The essential facility doctrine propounded in the Oscar Bronner[16] case is applied in traditional markets to ensure that a dominant entity having indispensable resources is obligated to share them reasonably with other players for healthy competition. With the emergence digital era, some entities held a bottleneck position in digital markets and became an unavoidable gateway for other enterprises seeking sustainable survival.[17]

In response, a common theme has emerged to regulate the dominant entities enjoying a bottleneck position in any digital market through imposition of 'gatekeeper' status, implying obligation to deal with other players in the digital markets fairly.[18] The gatekeeper status is part of the *ex-ante* regulation that many jurisdictions have adopted, making gatekeepers responsible to ensure that they are not skewed to gain an undue advantage from the business users that depend on them. The European Union's Digital Markets Act (**"DMA"**) establishes 'Gatekeeper' criteria based on size,

16 *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG* [1998] Case C-7/97, 1998 E.C.R. I-7791

17 Tobias Tombal, 'Ensuring Contestability and Fairness in Digital Markets Through Regulation: A Comparative Analysis of the EU, UK, and US Approaches' (2022) 18 European Competition Journal 468 https://doi.org/10.1080/17441056.2022.2034331 accessed 5 November 2025.

18 Cornerstone Research Connects, 'Taming Gatekeepers–But Which Ones?' (2021) 15 National Law Review https://natlawreview.com/article/taming-gatekeepers-which-ones#google_vignette accessed 3 April 2025)

user base, and entrenched market power, casting obligations like data portability and interoperability.[19] It lays down harmonized rules aimed at regulating the behavior of digital platforms acting as gatekeepers between business users and their customers in the European Union.[20] In Germany, the 10th Amendment of the Act against Restraints of Competition allowed designating entity with 'paramount cross-market significance', enabling *ex-ante* measures.[21] The 10th amendment clarified that the essential facilities doctrine applies to not only physical assets but also digital assets. The 11th Amendment of the Act against Restraints of Competition in Germany empowered the Federal Cartel Officer to impose structural remedies, independent of an abuse of dominance, when significant continuous or repetitive distortion of competition is revealed during a sector inquiry.[22] The amendment's provisions align with the DMA. These paradigm shifts in the regulatory framework targets systemic distortion of competition by dominant digital platforms before their abusive conduct materializes.

These frameworks signals shift towards *ex-ante* regulatory framework that explicitly contrast with India's current *ex-post* facto framework that limits intervention of authorities only after anti-competitive conduct occurs. The NCLAT judgement restricts *ex-ante* directives and reveals a cautious regulatory approach that prioritizes strict statutory backing over proactive market intervention. While this approach respects legislative boundaries and avoids premature imposition of compliance costs, it may also delay addressing entrench competitive disadvantages for newer entrants. This highlights the need of an *ex-ante* regulatory framework tailored to India's dynamic digital market.

The Committee on Digital Competition Law (**"CDCL"**)[23] recommended the *ex-ante* framework

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19 European Commission, 'The Digital Markets Act: Ensuring Fair and Open Digital Markets' (2020), 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 2 May 2025

20 European Parliamentary Research Service, 'Digital Markets Act' [2022] https://www.europarl.europa.eu/RegData/etudes/BRIE/2021/690589/EPRS_BRI(2021)690589_EN .pdf accessed 5 November 2025.

21 White & Case 'New Competition Law in Germany - 10th Amendment to German Act Against Restraints of Competition (GWB)' (2021) https://www.whitecase.com/insight-alert/new-competition-law-germany-10th amendment-german-act-against-restraints-competition accessed 4 November 2025

22 Romina Polley, Janine Discher, Miroslav Georgiev and Hendrik Wendland 'Digital Markets Regulation Handbook: Germany' (2024) https://www.clearygottlieb.com/-/media/files/rostrum/dmrh/dmrh-germany_r1 accessed 5 November 2025.

23 Committee on Digital Competition Law, '*Report of the Committee on Digital Competition Law*' (Ministry of Corporate Affairs, Government of India, 27 February 2024) https://prsindia.org/files/parliamentry announcement/2024-04-15/CDCL-Report-20240312.pdf accessed 21April 2025

for regulating competition in the digital age and drafted the DCB. Its proposals empowered the CCI to set out transparent criteria to designate gatekeepers and enforce an *ex-ante* regulatory framework. It emphasizes identification as Systemically Significant Digital Enterprises for the application of obligations. CDCL recommends establishing a specialized Digital Markets Unit to build expert capacity for effectively regulating competition in digital markets and imposing monetary penalties capped at 10% of the global turnover of the designated enterprise for non-compliance.[24]

However, the withdrawal of DCB means the Indian competition regime still lacks the authority to prevent anticipatory anti-competitive practices in digital markets.

The doctrinal tension between *ex-ante* and *ex-post* regulatory paradigms is a recurrent theme in contemporary competition jurisprudence. Critics of ex-ante regulation argue it risks restricting innovation by imposing rigid compliance obligations on dynamic markets, while its proponents highlight its necessity to address dominating bottleneck entities inherent in digital markets. Indian scholars and policy commentators have similarly debated the merits of adopting an ex-ante framework, emphasizing the need for administrative capability, clear legal standards, and balanced enforcement measures that do not stifle competition or innovation. Policymakers shall introduce resilient reforms in the regulatory framework, drawing inspiration from the CDCL report on the DCB and international regulatory models. The proposed regime must establish objective criteria for identifying dominant digital entities, implement obligations to curb unfair practices proactively, and enable timely regulatory intervention. A forward-looking ex ante regulatory framework will empower India to effectively regulate its digital markets.

*C. The Approach of Proportional Penalization Under the Relevant Turnover Principle*

The modification of the penalty based on the relevant turnover principle emphasizes proportionality in adherence to the Competition Act. This modification is in line with the CCI's (Determination of Monetary Penalty) Guidelines, 2024, authorizing a penalty of up to 30% of the

[24] Taxmann, '[Analysis] Draft Digital Competition Bill 2024 – A New Era of Regulation for Systematically Significant Digital Enterprises' (2024), https://www.taxmann.com/post/blog/analysis-digital-competition-law

average relevant turnover or income.[25] The application of these guidelines for the penalty reflects an analytical assessment of anti-competitive conduct and the entity's financial capacity. This method mirrors global best practices where penalties are calibrated to market impact.[26] The NCLAT affirmed the Monetary Penalty Guidelines and implemented it in the right spirit. This methodical approach ensures that penalties reflect both statutory intent and economic realities within India's evolving competition law landscape.

## IX. CONCLUSION

The NCLAT's judgment marks a significant development in the Indian competition law in the context of digital markets. While NCLAT upheld the CCI's findings that the Appellants abused its dominant position, it recomputed the penalty on the basis of the principle of proportionality based on relevant turnover. The judgment recognized the validity of effect-based analysis to oversee the conduct likely to cause a harmful effect on competition, but not an *ex-ante* framework without statutory backing in India. It reinforces the principle that digital market dominance must not translate into anti-competitive conduct. However, the NCLAT judgment reveals the inefficiency of the existing *ex-post facto* framework in regulating the digital market competition. The CCI's inability to act pre-emptively against structural gatekeepers leaves startups and smaller enterprises vulnerable to entrenched platform power. This signals the pressing need for legislative reform introducing a uniquely Indian *ex-ante* regulatory framework in Indian competition regime grounded in due process, market realities, and periodic review to offer the optimal path empowering regulators to proactively prevent anti-competitive harm while preserving market growth. Effective *ex-ante* regulatory framework must be supported by data expertise, procedural clarity, and institutional coordination between regulatory authorities so that early intervention does not risk excessive compliance burdens or inconsistent enforcement.

Therefore, the NCLAT judgment stands as a landmark judgment shaping the jurisprudence of the Indian competition law. The judgment is more than a legal precedent that provides clarity on applying an effect-based analysis, reinforces the proportionality of penalties, and calls for

[25] Competition Commission of India, '*Determination of Monetary Penalty Guidelines, 2024'* (6 March 2024) https://www.cci.gov.in/legal-framwork/regulations/92/0 accessed 30 April 2025

[26] Nileena Banerjee, 'From "Relevant" To "Global" Turnover: An Analysis Of Penalty Under The Competition (Amendment) Act, 2023' (2024) TCCLR https://www.tcclr.com/post/from-relevant-to-global-turnover-an analysis-of-penalty-under-the-competition-amendment-act accessed 1 May 2025

legislative reforms that lead to the evolution of competition law suited to the ongoing digital transformation.

# ORBITAL BOTTLENECKS AND THE ESSENTIAL FACILITIES DOCTRINE: SAFEGUARDING COMPETITION IN INDIA'S LEO BROADBAND ERA[1]

*Shrijan Verma and Sparsh Tiwari*[2]

**ABSTRACT**

*Deployment of new technologies involving Low-Earth-orbit (LEO) constellations such as Starlink, OneWeb, and Jio-SES are set to expand high-speed internet in India, especially in rural and remote regions. Yet these networks depend on scarce orbital slots, spectrum bands, and domestic gateway earth stations—inputs that function as potential bottlenecks. This paper examines whether India should treat such bottlenecks under the essential facilities doctrine (EFD), a competition law principle obliging dominant firms to provide fair access to indispensable infrastructure. Drawing on U.S., EU, and global jurisprudence, the paper highlights the cautious but significant role of EFD in regulating access to critical utilities. It then analyses India's emerging framework: the Competition Act's abuse-of-dominance provisions, the 2023 Telecom Act's administrative spectrum allocation, and TRAI's gateway licensing rules. Case law and regulatory precedents, such as non-discriminatory access to submarine cable landing stations, suggest a foundation for applying EFD to satellite broadband. The paper argues that India's strategy—moderate spectrum fees, short licence terms, and gateway coordination—balances innovation incentives with competition safeguards, but risks of monopolization remain. It recommends explicit access obligations for gateway facilities, fair and flexible spectrum policy, infrastructure sharing, and regulatory vigilance aligned with global reforms. India's "Starlink era" demands a nuanced application of competition and telecom law to ensure that satellite broadband fosters inclusive connectivity rather than replicating legacy monopolies.*

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## INTRODUCTION

The rise of low-Earth-orbit (LEO) satellite constellations, notably SpaceX's Starlink, Amazon's Project Kuiper, and others, promises to transform broadband connectivity in India, especially in

[1] This submission was a Top 5 entry in the 2nd National Article Writing Competition, 2025.
[2] The authors are students at Hidayatullah National Law University.

remote areas. In April 2023, India's new Space Policy explicitly opened the door to LEO/MEO operators, authorizing non-government entities to deploy satellites and related ground infrastructure[3]. This policy allows SpaceX, OneWeb, Jio-SES, and others to establish end-to-end broadband networks (satellites, earth stations, control centers) subject to IN-SPACe guidelines[4]. Yet the legal framework for how scarce orbit/spectrum resources and ground gateways are allocated raises competitive issues. Incumbent telecom firms (Reliance Jio, Bharti Airtel) have already urged regulators to ensure *"fair competition"* in the satellite internet market, warning against distortions if spectrum fees or licensing regimes unduly favour one player[5]. In particular, because satellites require licensed spectrum and a small number of ground gateways, exclusive control over these bottleneck facilities could grant dominant firms an outsized advantage.[6] This essay explores how the essential facilities doctrine, a principle in competition law obliging access to critical inputs, might apply to LEO bottlenecks (satellite spectrum, orbits, and gateways). We first describe these LEO bottlenecks, then survey EFD theory and practice in the US, EU, and elsewhere, and finally analyse India's legal framework (Competition Act and telecom law) as it begins to grapple with the Starlink era.

## ORBITAL BOTTLENECKS IN LEO

LEO satellite networks differ from traditional (GEO) systems in being highly dynamic and distributed, but they still face scarce resources that can bottleneck competition. Orbital "slots" and spectrum bands are regulated internationally, and satellite operators must coordinate frequencies and orbits through the International Telecommunications Union (ITU)[7]. In practice, the capacity for new entrants is limited: once spectrum and orbital capacity are allocated, newcomers may find no room. One analyst likens LEO slots to a parking lot: "once the parking lot is full, there are no

[3] Gagandeep Kaur, 'India introduces Space Policy 2023 to allow satellite-based broadband' (*Light Reading*, 25 April 2009)<https://www.lightreading.com/satellite/india-introduces-space-policy-2023-to-allow-satellite-based-broadband> accessed 22 September 2025.
[4] ibid.
[5] Rimjhim Singh, 'Jio, Airtel seek fair satellite spectrum rules as Starlink eyes India entry' (*Business Standard*, 05 March 2025)<https://www.business-standard.com/industry/news/jio-airtel-seek-fair-satellite-spectrum-rules-as-starlink-eyes-india-entry-125030500843_1.html> accessed 23 September 2025.
[6] Competition Commission of India, *Market Study on the Telecom Sector in India: Key Findings & Observations* (22 January 2021) <https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf> accessed 24 September 2025.
[7] Kalpak Gude, 'Sustainable space: Cooperation on satellite orbits' (*The UN Agency for Digital Technologies*, 25 September 2025)<https://www.itu.int/hub/2025/09/sustainable-space-qa-cooperation-on-satellite-orbits/#:~:text=ITU%20has%20a%20longstanding%20role,encourage%20responsible%20deployment%20and%20operation> accessed 21 September 2025.

spaces left," meaning the rapid proliferation of LEO constellations makes each orbital slot and frequency band increasingly valuable[8]. The ITU similarly emphasizes that orbital space is a shared global resource and that "spectrum coordination and orbital slot management" require ongoing international cooperation[9]. Thus, satellite carriers compete not just for customers but for finite spectrum blocks and coordination priorities; any advantage in securing these rights could tip the market balance.

Equally critical are ground segment bottlenecks. A LEO broadband operator needs a network of earth-station gateways to link satellites to the terrestrial Internet. These gateways are limited by cost, licensing, and geography.[10] In India, regulation mandates that all satellite traffic terminate in Indian earth stations, foreign-bound links must transit domestic "Satcom gateways"[11]. Starlink's planning illustrates this: the company has identified only about ten gateway sites (with Mumbai as its central hub) to cover India[12]. Each licensed gateway thus becomes a chokepoint. If one firm controls the prime landing sites or relevant spectrum, rivals cannot reach customers. Spectrum licensing itself is a bottleneck: under the Telecom Act, satellite spectrum is assigned administratively (with a fee) rather than auctioned[13]. Incumbent telcos warn that unequal pricing or licensing could distort competition between satellite and terrestrial operators[14].

- **Finite orbits and spectrum:** LEO satellites share limited frequency bands and orbital corridors managed by the ITU[15]. Without careful allocation, first-movers can congest the "parking lot" of spectrum and orbits, leaving little access for others[16].

[8] Cassandra Shand, 'The Low-Earth Orbiting Satellite Race Needs More Than A First Place Victor' (*The National Interest*, 20 July 2023)<https://nationalinterest.org/blog/techland/low-earth-orbiting-satellite-race-needs-more-first-place-victor-206656#:~:text=Earth%E2%80%99s%20lower%20orbit%20has%20limited,there%20are%20no%20spaces%20left> accessed 24 September 2025.
[9] Gude (n 5).
[10] CCI, Market Study on the Telecom Sector (n 4).
[11] Danish Khan, 'Musk's Starlink gets provisional spectrum to start trial satellite broadband service in India' (*Money Control*, 04 September 2025)<https://www.moneycontrol.com/news/business/companies/starlink-gets-provisional-spectrum-to-start-trial-satellite-broadband-service-in-india-13521319.html#:~:text=These%20rules%20mandate%20that%20all,Indian%20traffic%20outside%20the%20country> accessed 23 September 2025.
[12] ibid.
[13] Singh (n 3).
[14] ibid.
[15] Gude (n 5).
[16] Shand (n 6).

- **Ground gateways:** Indian rules require satellite service providers to use local earth stations and prohibit offshoring data. Starlink's plan to deploy only ~10 base-station sites in India (with Mumbai as a hub) shows how each station is a critical network node. Restricting gateway licenses to a few locations can create localized monopolies over access.
- **Regulatory exclusivity:** Satellite broadband requires specific licenses (GMPCS, Satcom gateway authorizations). India's new regulations are evolving, TRAI's satellite spectrum recommendations and space policy aim to encourage entry[17], but until broad authorization is granted, limited license winners can enjoy "first mover" bottleneck power.

Although LEO space itself cannot be owned (the Outer Space Treaty bars national appropriation), the physical and regulatory features of LEO networks create de facto choke points. If a dominant provider refuses access to a gateway or essential spectrum, rivals may be effectively shut out. This raises the question whether competition law should step in: could these "orbital bottlenecks" be treated as essential facilities?

## ESSENTIAL FACILITIES DOCTRINE: THEORY AND GLOBAL PRACTICE

The essential facilities doctrine (EFD) is a competition law principle that a monopolist controlling a "facility" crucial for competition may be obliged to grant access to competitors. Massadeh explains the concept succinctly: *"The essential facilities doctrine requires a monopolist or a dominant firm to provide access to a facility that the monopolist controls and that is deemed necessary for effective competition."*[18]. In practice, EFD claims have arisen in industries from telecom to utilities and software. Examples in the U.S. include ***Aspen Skiing Co. v. Aspen Highlands Skiing Corp.***[19], where a ski resort monopolist unlawfully stopped selling lift tickets to a rival[20], and ***Otter Tail Power Co. v. United States*** [21], where an electricity utility had to sell

[17] Kaur (n 1); Singh (n 3).
[18] Ali A. Massadeh, 'The Essential Facilities Doctrine Under Scrutiny: EU and US Perspective' (2011) UEA Law Working Paper No. 2011-AM-1 <https://ssrn.com/abstract=1738326> accessed 25 September 2025.
[19] 472 U.S. 585 (1985).
[20] 'Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act' (*U.S. Department of Justice Archives*, 18 March 2022) <https://www.justice.gov/archives/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-7#:~:text=Twelve%20years%20later%20in%C2%A0Aspen%20Skiing,13%29%C2%A0and%20its> accessed 22 September 2025.
[21] 410 U.S. 366 (1973).

wholesale power to municipalities[22]. These cases reflected courts forcing a monopolist to share key infrastructure.

Nevertheless, the jurisprudence of the US Supreme Court has been prudent. In *Aspen Skiing,* the Court noted liability was "at or near the outer boundary of § 2 of the Sherman Act", i.e., the facts were extreme. Subsequent high court decisions stressed the general right of firms to refuse deals absent special justification. In ***Verizon Comm. v. Trinko*** [23], the Court refused to expand EFD beyond narrow confines, noting that compelling a monopolist to share "may lessen the incentive…to invest in those economically beneficial facilities," and warning that judges lack the expertise to set sharing terms[24]Commentators observed that *Trinko* "placed [the doctrine] about where it should be," limiting liability for unilateral refusals to deal[25]. In effect, U.S. antitrust today allows refusal-to-deal claims only in rare circumstances (e.g., MCI v. AT&T articulated a four-part test, requiring that the facility be truly indispensable and sharing be feasible). Without such factors, courts will not mandate access.

In contrast, the European Union more readily invokes EFD under Article 102 TFEU. A dominant firm must sometimes share access to networks or platforms to avoid excluding competition in a secondary market. Seminal cases like *Magill* [26] and *IMS Health* [27] held that refusal to license copyrighted TV listings or insurance databases could be abusive if customers have no alternative sources. EU law today sets out a general exception: a refusal can be an abuse if it "prevents the appearance of a new product" for which there is potential demand (as in the *Magill* criteria). Recent EU cases underline a willingness to apply EFD in specialized contexts (for example, ***Huawei v. ZTE****[28]* suggests that an SEP holder refusing a FRAND licence might be abusing dominance). Yet commentators note that even in the EU, "formal application [of the doctrine] has been relatively limited," because courts carefully parse when a facility is truly "essential".

[22] ibid.
[23] *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 US 398 (2003).
[24] *Aspen Skiing* (n 17).
[25] Herbert Hovenkamp, 'Unilateral Refusals to Deal, Vertical Integration, and the Essential Facility Doctrine' (2008) University of Iowa Legal Studies Research Paper No. 08-31 <https://ssrn.com/abstract=1144675> accessed 26 September 2025.
[26] *Radio Telefis Eireann (RTE) & Independent Television Publications Ltd. v. Commission, Joined Cases* C-241/91 P & C-242/91 P, 1995 E.C.R. I-743.
[27] *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG*, Case C-418/01, 2004 E.C.R. I-5039.
[28] *Huawei Techs. Co. Ltd v. ZTE Corp. & ZTE Deutschland GmbH*, Case C-170/13, ECLI:EU:C:2015:477.

Globally, the doctrine exists but is applied cautiously. It typically requires satisfying strict conditions: the facility must be controlled by the dominant firm, competitors must be unable to duplicate it practically, denial of access would eliminate competition, and sharing must be technically feasible. As Hovenkamp summarizes, there is "no independent justification" for a standalone EFD apart from these refusal-to-deal analyses, and modern courts emphasize narrow application[29]. Nonetheless, in regulated industries (e.g., telecom, utilities), many jurisdictions explicitly compel the sharing of networks. The trend in competition law scholarship is to treat EFD as a tool that can "ensure competition and consumer welfare" by addressing bottlenecks that raw antitrust analysis might miss[30].

## INDIAN LEGAL FRAMEWORK: COMPETITION AND TELECOM

India's **Competition Act, 2002,** prohibits abuse of dominance but does not expressly codify an "essential facilities" rule. Section 4 bars refusals to deal only if they amount to an "abuse" in a dominant market. In practice, the Competition Commission of India (CCI) has gradually grappled with EFD issues through case law. Early on, the CCI was reticent; in ***Arshiya Rail Infrastructure Ltd. v. Ministry of Railways*** [31], it observed that the doctrine should be invoked only when certain conditions are met (technical feasibility, inability to replicate the facility, likely competitive harm, and possibility of sharing on reasonable terms)[32]. In *Arshiya,* the CCI found no abuse because competing freight operators could, in theory, build their own terminals.

Since then, Indian authorities have become more "enthusiastic" about imposing duties on dominants to share. The CCI has repeatedly emphasized that a firm in a dominant position owes a "special responsibility" towards other players[33]. For example, in ***Shri Shamsher Kataria v. Honda Siel Cars & Ors.*** [34], the Commission closely examined refusals to license spare parts and technical know-how by powerful automotive-component suppliers. It has also signalled that spectrum and network assets (like broadcasting frequencies) may warrant EFD-like treatment to keep markets

[29] ibid.
[30] Kalyani Singh, 'The Resurrection of Essential Facilities Doctrine and Its Applicability in India' *(Competition Policy International*, 14 March 2016) <https://www.competitionpolicyinternational.com/wp-content/uploads/2016/03/The-Resurrection-of-Essential-Facilities-Doctrine.pdf#:~:text=,5> accessed 24 September 2025.
[31] 2012 SCC OnLine CCI 53.
[32] ibid.
[33] *MCX Stock Exchange Ltd. v. SEBI*, 2012 SCC OnLine Bom 397.
[34] 2015 SCC OnLine CCI 114.

competitive.[35] Notably, the CCI stated in one case that a refusal doctrine is "invoked only in certain circumstances," echoing the EU approach[36]. While Indian courts have not squarely adopted EFD, the CCI's recent reasoning suggests it would not lightly permit a dominant space-infra firm to deny access to gateways or spectrum if competition would otherwise be foreclosed. Indeed, despite some setbacks (e.g., the CCI recently declined to treat an airport terminal as essential in an MRO probe[37]), the trend is toward using the Act's broad abuse provisions to police chokepoints.

On the telecom side, a new regulatory regime is taking shape for satellite services. India's Telecom Act and ITU-aligned policies now distinguish satellite from terrestrial spectrum. Under this law, satellite spectrum is administratively allocated (for a fee) instead of auctioned. Incumbent telecoms have protested this disparity, urging that satellite providers pay fees "comparable" to terrestrial operators to prevent market distortions. TRAI is formulating detailed licensing guidelines: it has received input suggesting that satellite earth-station gateways be licensed simply under the Telegraph Act with minimal fees[38]. Meanwhile, companies like Starlink have begun securing Indian licenses. Starlink won a GMPCS license and now holds provisional Ka/Ku-band spectrum for trials; it must build its mandatory 10 ground stations with strict security compliance[39]. Critically, all satellite data must transit these licensed Indian gateways, meaning control over gateway approvals could become a competition issue. 2025 discussions on satellite spectrum pricing (TRAI has floated a 4% AGR charge) further highlight how regulators must balance promoting LEO connectivity with preventing anti-competitive bias.

India's legal framework is catching up with the "Starlink age". Applying EFD principles would align with India's broader policy to spur digital inclusion (e.g., the National Digital Communications Policy) and ensure that key orbital and ground nodes remain accessible to all qualified operators. A nuanced approach is needed: gatekeeping rules should prevent a dominant satellite provider from monopolizing shared resources but also preserve incentives for innovation.

[35] CCI, Market Study on the Telecom Sector (n 4).
[36] ibid.
[37] Charles McConnell, 'CCI Overrules Investigative Unit on Essential Facilities Argument' (*Global Competition Review*, 17 September 2025) <https://globalcompetitionreview.com/article/cci-overrules-investigative-unit-essential-facilities-argument#:~:text=India%E2%80%99s%20Competition%20Commission%20has%20rejected,an%20abuse%20of%20dominance%20probe> accessed 25 September 2025.
[38] Letter from Bharati Airtel Ltd. to Shri Syed Tausif Abbas, Advisor (F&EA) Telecom Regulatory Authority of India (12 December 2021).
[39] Khan (n 9).

As in global practice, Indian authorities will likely require a strong showing that an input is truly indispensable before mandating sharing. But given the finite nature of orbits and spectrum[40], an essential-facilities lens could prove vital to maintaining competition in India's emerging LEO broadband sector.

## LEO Gateways and Ground Infrastructure

LEO satellite constellations rely critically on terrestrial gateway earth stations to link space networks with India's fibre and data infrastructure. These "gateways" (essentially large ground station facilities) serve as hubs where satellite signals are converted and carried into the terrestrial Internet backbone. Because they must be located at specific strategic sites (often with secure power and fibre access), they can become bottlenecks if only a few firms control the key sites. For example, industry reports indicate Starlink has identified 17 locations (planning 20 gateways) across India for its ground stations[41], while OneWeb plans only 2 gateways in India out of 40 globally[42]. With just a handful of potential gateway operators, any one firm could, in practice, lock out rivals from necessary infrastructure access.

This situation resembles the classic essential facility scenario. In fact, India's telecom regime already treats certain communications hubs as bottleneck facilities. In 2007, for instance, the Department of Telecom amended licence conditions to require mandatory non-discriminatory access to submarine cable landing stations, then deemed a public-utility facility. Similarly, a LEO gateway, if monopolized, would effectively deny competitors entry into the satellite broadband market. Indian cases (such as *Arshiya* on rail containers) suggest that truly indispensable infrastructure should be shared on fair terms. Absent multiple independent gateway operators, a dominant satellite provider could unilaterally control pricing or deny traffic, stifling competition.

Even beyond pure antitrust, policymakers recognize the need for coordination. TRAI's recent recommendations explicitly urge licensed satellite firms to *"coordinate among themselves in good*

[40] Gude (n 5); Shand (n 6).
[41] Gagandeep Kaur, 'Starlink Eyes Satellite Broadband Rollout by Year-End in India – Reports' (*Light Reading*, 25 September 2025) <https://www.lightreading.com/satellite/starlink-eyes-satellite-broadband-rollout-by-year-end-in-india-reports> accessed 26 September 2025.
[42] Letter from OneWeb India Communications Private Limited to Shri Syed Tausif Abbas, Advisor (Networks, Spectrum & Licencing), Telecom Regulatory Authority of India (20 December 2021).

*faith"* when establishing earth-station gateways[43]. This means providers like Starlink, OneWeb, and Jio-SES should jointly plan locations and spectrum use. If voluntary coordination is unsuccessful, regulators may have to enforce open-access requirements. In line with India's essential-facilities framework, ground stations deemed critical (such as the sole high-capacity teleport in an area) should be categorized as bottlenecks, requiring operators to publish fair access terms or permit competitor equipment to co-locate. In the absence of such measures, India risks allowing new satellite services to devolve into networks dominated by monopolies, jeopardizing the very connectivity aims that LEO broadband seeks to achieve.

## SPECTRUM ALLOCATION AND COMPETITION

The Indian government has opted for administrative assignment rather than auction, a move defended as necessary for this nascent market. As Telecom Minister Scindia noted, satellite spectrum is "shared, and cannot be auctioned", a position that many international entrants (Starlink, Amazon Kuiper, etc.) support, arguing that auctions would raise costs and slow rural deployment[44]. Indeed, Deloitte projects India's satellite broadband market to grow at 36% annually to about $1.9 billion by 2030[45], especially driven by remote areas, a key reason global players urge *"affordable pricing"* and predictability.

Domestic telcos, however, fear an uneven playing field. They pressed for auctions to allow them to bid out existing spectrum advantages, and generally sought short licence tenures (3–5 years) so the government can revisit terms as the market evolves[46]. By contrast, Starlink has lobbied for 20-year licences to amortise its massive constellation investment. The resulting compromise mirrors TRAI's recommendations: spectrum for NGSO FSS will be allotted for five years (extendable two

[43] PIB Delhi, 'TRAI releases Recommendations on 'Terms and Conditions for the Assignment of Spectrum for Certain Satellite-Based Commercial Communication Services' (*Press Information Bureau*, 09 May 2025) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2127866#:~:text=For%20establishment%20and%20operation%20of,among%20themselves%20in%20good%20faith> accessed 26 September 2025.

[44] Gagandeep Kaur, 'Indian Government's Move to Allocate Satcom Spectrum to Benefit International Players' (*Light Reading*, 30 October 2024) <https://www.lightreading.com/regulatory-politics/indian-government-s-move-to-allocate-satcom-spectrum-to-benefit-international-players> accessed 24 September 2025.

[45] Danish Khan, 'Elon Musk's Starlink, Amazon Kuiper Bat for 'Predictable Policy', Low Spectrum Price for Satcom Services' (*Money Control*, 18 October 2024) <https://www.moneycontrol.com/news/business/elon-musks-starlink-amazon-kuiper-bat-for-predictable-policy-low-spectrum-price-for-satcom-services-12844930.html#:~:text=Starlink%20operates%207%2C000%20satellites%20in,9%20billion%20by%202030> accessed 26 September 2025.

[46] Reuters, 'TRAI Plans to Limit Satellite Permits to Five Years, Defying Musk's Starlink' (*The Economic Times*, 13 March 2025) <https://economictimes.indiatimes.com/industry/telecom/telecom-policy/trai-plans-to-limit-satellite-permits-to-five-years-defying-musks-starlink/articleshow/118968945.cms?from=mdr> accessed 25 September 2025

more)[47], with licence terms (and pricing formulas) only revisited after the initial period. This middle path reflects India's 2023 Telecom Act, which explicitly allows non-auction allocation for satellite bands, marking a departure from the auction-mandate cases of the 2G era[48].

Nevertheless, spectrum charges have been kept modest. TRAI proposes a revenue share of just 4% of adjusted gross revenue, plus a small per-subscriber fee in urban areas[49]. Importantly, rural regions are largely exempt from subscriber fees to incentivize coverage of the unserved. This encourages providers to focus on low-density areas: as Amazon Kuiper's Asia head explained, high fees would "compel [us] to target urban, connected customers" and neglect remote users. In sum, India's approach, administrative allocation with light fees and relatively short terms, seeks to balance competition with growth. The emerging licensees (Starlink, OneWeb/Eutelsat, Jio-SES) will each hold spectrum rights under the same regime[50], but future entrants should face similar conditions to ensure no operator gains a de facto monopoly on spectrum.

## GLOBAL COMPARISONS

India's strategy can be illuminated by other jurisdictions. In the European Union, regulators are actively levelling the field for satellite broadband. The proposed EU Digital Networks Act calls for harmonized spectrum authorisation and even explicit *"spectrum sharing arrangements aligned with competition law principles,"* alongside rules for a *"satellite level playing field"*[51]. The EU's draft Space Act aims to create a single market for space services, with the industry lobby GSOA praising its emphasis on *"fair competition"* and a common regulatory framework to avoid

[47] McConnell (n 35).
[48] Abhijeet Kumar, 'Explained: How Auction differs from Administrative Allocation of Spectrum' (*Business Standard*, 16 October 2024) <https://www.business-standard.com/industry/news/explained-how-auction-differs-from-administrative-allocation-of-spectrum-124101600767_1.html> accessed 24 September 2025.
[49] McConnell (n 35).
[50] PIB Delhi, 'Satellite Internet in India: The Future of Internet Above Us' (*Press Information Bureau*, 23 September 2025) <https://www.pib.gov.in/PressReleasePage.aspx?PRID=2170091#:~:text=Marking%20a%20major%20step%20in,license%20for%20providing%20such%20services> accessed 26 September 2025.
[51] Directorate-General for Communications Networks, Content and Technology, European Commission, *How to master Europe's digital infrastructure needs?* (White Paper, Cm 81, 2024); Rory Coutts & Anthony Rosen, 'EU Telecoms Reform: What to Expect from the Digital Networks Act' (*Bird & Bird*, 27 June 2025) <https://www.twobirds.com/en/insights/2025/eu-telecoms-reform-what-to-expect-from-the-digital-networks-act#:~:text=,constellations%20accessing%20the%20EU%20market> accessed 25 September 2025.

fragmentation[52]. The message in Europe is clear: as novel satellite players emerge, cross-border uniformity and open access will be enforced.

The United States offers another parallel. Traditionally, the FCC has auctioned spectrum and permitted private deployment, but it is now reassessing legacy rules. In mid-2025, the FCC launched a notice for proposed rulemaking to "modernize spectrum sharing" between geostationary and non-geostationary satellites[53]. In practice, U.S. policy has favoured ecosystem cooperation (e.g., Starlink's planned use of T-Mobile's licensed spectrum for direct-to-cell services) over pure exclusion. Moreover, U.S. law classifies submarine cable landing stations as common carriers, effectively mandating third-party access. Europe's telecom law likewise permits national regulators to impose wholesale access obligations on any "significant market power" operator (as with incumbent local loops). By analogy, a dominant satellite or gateway provider could similarly be bound by access regulation under EU competition law if it foreclosed rivals.

These examples illustrate the global trend: satellite resources (both spectrum and infrastructure) are increasingly seen as public resources requiring careful allocation and sharing. India's move to admin-allocate spectrum aligns with practices in many countries. The challenge is ensuring that, as regulators elsewhere are doing, India's policies include safeguards, whether through telecom licensing rules or competition oversight, so that new satellite networks complement, rather than replicate, the exclusionary pitfalls of old telecom monopolies.

## REMEDIES AND POLICY RECOMMENDATIONS

To prevent the emergence of "orbital bottlenecks," India should adopt a multi-pronged strategy. First, **access obligations** should be imposed on any firm controlling indispensable facilities. By precedent, India has mandated non-discriminatory sharing of critical infrastructure: the 2007 Cable Landing Station Regulations require CLS owners to publish access terms and allow other operators

[52] 'EU Space Act' (*European Commission*, 25 June 2025) <https://defence-industry-space.ec.europa.eu/eu-space-act_en> accessed 27 September 2025; Rachel Jewett, 'European Commission Introduces Proposal for EU Space Act' (*Satellite Today*, 25 June 2025) <https://www.satellitetoday.com/government-military/2025/06/25/european-commission-introduces-proposal-for-eu-space-act/> accessed 24 September 2025.

[53] Federal Communications Commission, *In the Matter of Modernizing Spectrum Sharing for Satellite Broadband*, Notice of Proposed Rulemaking, 40 FCC Rcd. 3389 (4) (2025) FCC-25-23 <https://docs.fcc.gov/public/attachments/FCC-25-23A1_Rcd.pdf> accessed 26 September 2025.

equal use. License terms for satellite operators should explicitly forbid refusal to interconnect or co-locate gateways where needed. Where voluntary coordination (as TRAI encourages) breaks down, the Competition Commission should be prepared to find abuse of dominance under Section 4 if an incumbent gateway or spectrum holder denies fair access. CCI might clarify that a gateway with no reasonable substitute is an "essential facility" if used to foreclose competition, much as Western regulators have done in telecom contexts.

Second, **spectrum policy** must remain fair and flexible. TRAI's suggestion to keep fees low (4% of revenue, with urban-only subscriber charges) is sensible to promote uptake. The government could consider additional incentives, waivers, or subsidies for rural terminal equipment to ensure that pricing policies do not discriminate against serving remote customers. Assignment durations should continue to be adaptable: the five-year sunset with extension provides a checkpoint to adjust rules as the market matures.

Third, **promoting multiple infrastructures** will mitigate bottlenecks. Authorities might require each major satellite concessionaire to deploy multiple, geographically dispersed gateways (as a condition of license) to avoid any one point of failure. They should also encourage civil infrastructure sharing: for instance, fibre operators and data centers could be mandated or incentivized to offer equal access to all satellite players, not just affiliated telcos. This would mirror existing tower and duct-sharing rules in telecom, extended into the satellite domain.

Lastly, **regulatory vigilance and international alignment** are vital. The Satcom market needs constant monitoring via TRAI and CCI. CCI could consider issuing guidelines on essential facilities in the digital economy, including satellite networks, to signal how it will handle refusals to deal. At the same time, India can learn from global reforms: it should watch the EU Space Act and FCC rules for ideas on governing spectrum sharing and network access, adapting them to local needs.

A failure to act could entrench an incumbent satellite carrier or terrestrial partner as an insurmountable gatekeeper. Indian regulators have begun addressing these issues; TRAI's gateway

coordination[54] and spectrum rules are steps in the right direction[55], but further policy care is needed to prevent bottlenecks from constraining this new frontier of connectivity.

## CONCLUSION

India stands at the threshold of a new connectivity era. The entry of Starlink, OneWeb/Eutelsat, and Jio-SES into the market promises to leapfrog vast swathes of the country onto high-speed Internet. But that promise comes with competition risks. Just as India's regulators once declared submarine cable landing stations to be bottleneck facilities requiring open access, we must now scrutinize whether LEO gateways, spectrum blocks, or ground-network nodes have become "essential facilities" in the satellite age. The emerging framework, administrative spectrum licenses, moderate fees and licence durations, and coordination guidelines, are broadly aligned with global practice, yet they cannot guarantee competitive outcomes by themselves. Without careful enforcement, a dominant satellite ISP (or allied telecom partner) could replicate the old digital divide, using control of gateways or spectrum to raise rivals' costs or limit entry.

Going forward, India's competition and telecom authorities must be proactive. In the words of one observer, grappling with these questions will *"pave the way for antitrust jurisprudence in India"*[56]. By leaning on competition law principles and targeted regulation, India can ensure that the "Starlink age" produces a vibrant, inclusive broadband ecosystem, rather than simply replacing one monopoly with another.

[54] McConnell (n 35).
[55] ibid.
[56] Sundar Ramanathan, 'The Destiny of Essential Facilities in India' (*Lakshmikumaran & Sridharan)* <https://www.lakshmisri.com/Media/Uploads/Documents/L&S_Web_Competition_Law_Article.pdf#:~:text=In%20the%20coming%20days%2C%20the,will%20pave%20the%20way%20for> accessed 25 September 2025.

# MANDATING THE ESTABLISHMENT OF ESG COMMITTEES: A PATH FORWARD

*Subhasish Kumar Sahoo and Avanish Gupta*[1]

**ABSTRACT**

*This paper focuses on enshrining the importance of Environmental, Social and Governance (ESG) standards in today's contemporary world highlighting the necessity to mandate the institutionalisation of ESG committees within companies to comply with the mandatory disclosures warranted upon them. This topic suffers from a neglect in discussion as it is barely been addressed and deliberated upon in India due to which there has been no regulations or laws pertaining to the establishment of an ESG committee. Thus, this paper endeavours to shed light on the importance of ESG committees and its difference from the workings and functioning of Corporate Social Responsibility (CSR) committees which are used by companies to avoid setting up ESG committees. Venturing further, this paper deals with comparing India with multiple countries in the world – developed and emerging economies from which inferences are drawn from their laws which govern a better situation than the Indian laws about the set-up of ESG committees. Subsequently, the consequences of creating an ESG committee is the inevitable boost in the economics of the corporate entity. In all, this paper makes an effort to enlighten an area which is hardly talked about in the corporate world but still remains a paramount matter due to the rising sustainability awareness worldwide.*

## I. INTRODUCTION

Although the term 'ESG' was formally articulated in 2004 by the United Nations, its conceptual foundations can be traced to earlier debates in corporate governance and stakeholder theory.[2] The need for such a notion has repeatedly been highlighted by several remarkable events such as in the debate between Professors Adolf Berle and Merick Dodd, during the founding of the terminology of corporate social responsibility and with the evolution of corporate governance inclining towards

[1] The authors are students at KIIT School of Law, KIIT-DU.
[2] Joseph L Weiner, 'The Berle-Dodd Dialogue on the Concept of the Corporation' (1964) 64 Columbia Law Review 1458.

the welfare of stakeholders emphasising on the duties of corporate directors.[3] The role of corporations in addressing social and environmental concerns has long been debated in corporate law scholarship, particularly through the shareholder–stakeholder discourse.[4] The United Nations, since its inception in 1947, has been concerned with this subject matter and urged itself to act towards this direction but was unfortunately obstructed by the Cold War phenomenon preventing it from entering into the arena of market and economy regulation.[5] Thus after a period of six decades in 2004, the United Nations attempted to formalise the concept of ESG under the leadership of the then Secretary-General of United Nations, Mr. Kofi Annan by the issuance of an innovative initiative titled *"Who Cares Wins"* by inviting several renowned companies such as Goldman Sachs, Morgan Stanley, Credit Suisse Group and many more.[6]

The escalating concerns for sustainability and the simultaneous increasing importance of the Sustainable Development Goals (SDGs) has caused a significant outburst in complying with ESG standards in contemporaneous times. International initiatives, including the UN Sustainable Development Goals and climate commitments articulated at COP26, have reinforced the relevance of ESG considerations in corporate decision-making.[7] While the significance of ESG has been acknowledged for decades, it has assumed critical importance today as climate change and deteriorating corporate governance have exceeded sustainable thresholds.[8] From a pragmatic perspective, companies may derive reputational and risk-management benefits from integrating ESG considerations into their governance frameworks.[9] Empirical studies suggest that companies with integrated ESG governance structures tend to attract greater investor confidence, particularly among institutional investors concerned with long-term risk management.[10]

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[3] Elizabeth Pollman, 'THE MAKING AND MEANING OF ESG'(2022) 114(5) Iowa Law Review, 1491.
[4] Elizabeth Pollman, *The History and Revival of the Corporate Purpose Clause,* (2021)99 TEx. L. REV. 1423
[5] Pollman (n 2).
[6] International Finance Corporation, *Who Cares Wins, 2004–08: Issue Brief* (IFC Advisory Services in Environmental and Social Sustainability, Washington DC, 2009).s
[7] M S Khamisu and R A Paluri, *Emerging trends of environmental social and governance (ESG) disclosure research* (2024) 7 Cleaner Production Letters.
[8] Jyoti G.H, *Corporate Governance and Sustainable Development in India – An ESG Perspective* (2024) 12(3) International Journal of Law and Management 45.
[9] Lucy Pérez and Vivian Hunt, Hamid Samandari, Robin Nuttall, and Krysta Biniek, Does ESG really matter—and why? (2022).
[10] Yaoyao Song and others, 'How ESG Performance Shapes Institutional Investor Preference? The Mediating Role of Scale Efficiency' (2025) 86 Finance Research Letters 108446.

The evolution of such an expansive and comprehensive model ever since has led to the rise of several demands and compliances that a company is required to adhere to, which ranges from numerous survey submissions to drafting of reports. The paradigm of ESG is an all-encompassing genus bringing under its gamut close to everything that is connected with the corporate affairs of a company. While ESG norms have evolved globally through a combination of regulatory and market forces, India's engagement with ESG has been comparatively recent and predominantly disclosure-oriented. Specifically in the Indian context, the Securities and Exchange Board of India (SEBI) was responsible for the popularity of ESG by laying down the Business Responsibility and Sustainability Reporting (BRSR) framework and following it up with various Consultation Papers and mandates concerned with ESG disclosures.[11] SEBI's step of amending Regulation 34(2)(f) of the Listing Obligations and Disclosure Requirements (LODR), integrating the BRSR framework, mandating the top 1000 listed companies to file BRSR as part of their annual report caused an immense uproar regarding the significance of ESG. Prior to this, ESG while being a subject of strong emphasis worldwide was neglected by the Indian laws but India has gently begun to realise its compelling relevance and has started to gradually reinforce the concept of ESG in the Indian jurisprudence as well. SEBI's integration of the BRSR framework into the LODR Regulations significantly expanded ESG disclosure obligations for listed companies, thereby intensifying compliance demands without prescribing corresponding internal governance mechanisms.

Against this backdrop, this paper examines whether India's disclosure-centric ESG framework is institutionally incomplete in the absence of mandated ESG committees at the board level. While such committees were not required earlier because the quantity of disclosures and compliances needed to be done were close to none but progressively both the prominence and the compliances have risen tremendously. This highlights the necessity of establishing a dedicated committee in companies which specifically cater to ensuring the compliance of ESG regulations. Indian corporate practice often conflates ESG governance with Corporate Social Responsibility compliance, leading to the delegation of ESG-related functions to CSR committees. Thus, the distinction between ESG and CSR needs to be strained upon first.

[11] Bose Varghese, Faraz Alam Sagar, Pallavi Choudhary, 'SEBI's ESG Disclosure Mandates: Unveiling the Value Chain' (*Dispute Resolution Blog*, 29 April 2024) <https://disputeresolution.cyrilamarchandblogs.com/2024/04/sebis-esg-disclosure-mandates-unveiling-the-value-chain/> accessed 21 August 2025.

Accordingly, this paper first distinguishes ESG from CSR to clarify the conceptual error in existing governance practices. It then examines India's current ESG regulatory framework, followed by a comparative analysis of selected jurisdictions. The paper concludes by evaluating the corporate performance implications of ESG committees and proposing a regulatory pathway for India.

## II. The Misconception of CSR and ESG Being Interchangeable Terms

Before examining the regulatory case for ESG committees, it is necessary to clarify the conceptual distinction between Corporate Social Responsibility (CSR) and Environmental, Social, and Governance (ESG). In corporate practice, CSR and ESG are frequently treated as interchangeable, despite serving distinct governance and accountability functions.[12] CSR primarily operates as a compliance-driven framework focused on mandated social expenditure, whereas ESG functions as an evaluative governance framework that measures a company's environmental impact, social responsibility, and governance practices through structured disclosures and metrics.[13] Both the concepts come under the umbrella of sustainability but differ significantly in their natures. It can be inferred that ESG as a framework for evaluation incorporates CSR within its ambit as one of the key elements for calculating a company's orientation to contribute to the idea of sustainability ensuring long-term value creation.

This conceptual distinction is critical to understanding why delegating ESG responsibilities to CSR committees results in inadequate governance and superficial compliance. The creation of a CSR committee in companies has been strongly enforced by section 135 of the Companies Act, 2013 and the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 in which it is mandatory to establish a CSR committee if a certain given threshold is passed. In the absence of a statutory mandate for ESG committees, many companies assign ESG-related responsibilities to CSR committees or other mandatory board committees, such as audit or risk management committees.[14] This practice risks reducing ESG compliance to a formalistic exercise, thereby increasing the potential for greenwashing, where disclosures are prioritised over substantive

[12] Poznań University of Economics and Business and Magdalena Kaźmierczak, 'A Literature Review on the Difference between CSR and ESG' (2022) 2022 Scientific Papers of Silesian University of Technology. Organization and Management Series 275.
[13] Poznań University of Economics and Business and Magdalena Kaźmierczak, 'A Literature Review on the Difference between CSR and ESG' (2022) 2022 Scientific Papers of Silesian University of Technology. Organization and Management Series 275.
[14] Rahul Matta, Harsh Purohit and Debasis Mohanty, 'Impact of CSR Committee on ESG Reporting Quality: Evidence from India' (2022) 43 Orissa Journal of Commerce 174.

governance reforms.[15] Many companies even delegate the work to Audit or Risk Management committees - also mandated by the Companies Act and SEBI Regulations which demonstrates the behaviour of companies towards truly embracing the idea of ESG into their mission and statement. The absence of dedicated ESG oversight mechanisms highlights a regulatory gap, which strengthens the case for mandating ESG committees to ensure accountability, expertise, and substantive compliance.

The conceptual distinction between CSR and ESG demonstrates that while CSR focuses on limited statutory compliance, ESG requires continuous governance oversight across environmental, social, and governance dimensions. Treating the two as interchangeable undermines the effectiveness of ESG frameworks and exposes the limitations of relying on CSR committees for ESG governance. This misalignment becomes particularly significant when examining India's existing legal framework, which mandates CSR committees but remains silent on ESG-specific governance mechanisms.

## III. The Existing Legal Framework in India

As things stand, India does not have any provision of law mandating the establishment of ESG committees in any company but SEBI is readily compelling a specific set of companies to make disclosures pertaining to the subject of ESG. SEBI, through its unique framework of Business Responsibility and Sustainability Report (BRSR) enacted in 2021 has solely been responsible for laying down the groundwork and pathway of making the perception towards ESG populous in India which was a notion oblivious to the Indian dynamic. The BRSR framework replaced the Business Responsibility Report (BRR) enacted in 2015 and introduced the idea of sustainability aligning it with the Sustainable Development Goals, the 'Respect' pillar of the UN Guiding Principles on Business and Human Rights, and the Paris Agreement making the framework at par with the globally accepted standards.[16] The BRSR Core demands disclosures based on the enumerated nine principles or Key Performance Indicators (KPIs) of the 'National Guidelines on Responsible Business Conduct' (NGBRCs) relating to sustainability practices and SEBI has mandated a total of top thousand listed entities to comply with the BRSR Core provisions by the

[15] Sushobhan Sensharma, Manish Sinha and Dipasha Sharma, 'Do Indian Firms Engage in Greenwashing? Evidence from Indian Firms' (2022) 16 Australasian Business, Accounting and Finance Journal 67.
[16] Sangeeth Selvaraju, 'Promoting a Transition with Inclusion in India': (2025) Observer Research Foundation (ORF) Issue Brief No. 642.

financial year 2026-27. SEBI has put a compulsion on the companies to provide 'reasonable assessment' with any data of disclosures that has been provided by the companies to comply with the BRSR Core framework emphasising upon its importance.[17]

The peculiarity behind the BRSR framework is that even though it compels such high-end compliances requiring 140 questions to be answered and disclosures to be made and verified as per the 'reasonable assessment' standards, it absolutely omits to mention anything about ESG committees. This is particularly odd because SEBI through BRSR has repeatedly emphasised on the quantity and quality of ESG disclosures by increasing the number of companies over the years and enforcing the acceptable standards, yet no discussions pertaining to ESG committees has been deliberated upon by SEBI.

Subsequently, the BRSR framework has been subjected to being dynamically altered constantly by SEBI, refining and reinforcing it through the publishing of its Consultation Papers.[18] This warrants more attention to the correctness of the disclosures being made, ensuring good compliance of the BRSR guidelines which can be made proper through the institution of ESG committees within companies itself. Additionally, such frameworks are prone to the act of greenwashing by the companies, looked at with only the eyesight of compliances and nothing beyond that, effecting the quality of disclosures and even sometimes the management falsifying them to protect their interests, misleading the investors.[19]

It is also necessary to situate India's ESG framework within the broader international regulatory context deliberating on the legal boundaries applicable on the Indian jurisdiction as the notion of ESG has originated directly from the Sustainable Development Goals (SDGs) laid down by the United Nations General Assembly in 2015. Moreover, the entirety of BRSR model enacted by SEBI has been drafted in consonance with the international standards and agreements recognised worldwide to facilitate global commerce and trade and investments which further forces us to place greater emphasis on international laws. Thus, the establishment of an ESG committee proves the

[17] '140 | SEPTEMBER 2023 CHARTERED SECRETARY' (ICSI, September, 2023).
[18] KPMG Assurance and Consulting Services LLP, First Notes – SEBI introduces certain key changes in BRSR reporting (23 December 2024)<https://kpmg.com/in/en/insights/2024/12/aau-accounting-and-auditing-update-december-2024.html>accessed 21 August 2025.
[19] Hang Yang, 'Environmental, Social, and Governance (ESG) Committees and Corporate ESG Information Disclosure: From the Perspective of Organizational Information Processing' (2025) 617 E3S Web of Conferences 03012.

seriousness of the company's devotion towards sustainability practices which creates or enhances the goodwill of the organisation and makes it more presentable and willing to the other party to likely to come into an agreement under profitable and negotiable terms. This process increases the investments from foreigners catering to the norms of international laws and regulations as well as boosts the FDI growth, spikes in the FPI investments in the Indian market. India has been a part of several international agreements such as the Paris Agreement adopted in 2015 which lay emphasis on the importance of ESG, its disclosures and the need to properly discharge the ESG compliances.

## IV. ESG RATING PROVIDERS AND NEGATIVE IMPACT

The growing reliance on ESG ratings by investors has positioned ESG Rating Providers (ERPs) as influential intermediaries in capital markets, capable of materially affecting corporate reputation, valuation, and access to capital.[20] ESG Rating Providers assess and score corporate entities based on environmental, social, and governance indicators, and their ratings are increasingly relied upon by institutional investors for investment screening and risk assessment. Normally, the rating demonstrates the willingness of a corporate entity to adhere to the ESG standards which a potential investor uses to make an informed decision.[21] Favourable ESG ratings may be associated with lower cost of capital and enhanced market valuation, reflecting investor perceptions of reduced long-term risk.[22] Given the material impact of ESG ratings on corporate valuation and investor confidence, internal governance mechanisms are necessary to ensure the accuracy, consistency, and credibility of ESG-related disclosures that inform such ratings. At present, the establishment of ESG committees remains largely voluntary, with companies adopting such structures primarily as a reputational or strategic measure rather than in response to a legal mandate.

Literature and regulatory bodies have highlighted concerns regarding the reliability and comparability of ESG ratings, noting significant divergences in methodologies and outcomes across rating providers.[23] SEBI has acknowledged these concerns by proposing a regulatory

[20] IOSCO, *Environmental, Social and Governance (ESG) Ratings and Data Products Providers* (Final Report, 2021).
[21] Maithili Dhuri, Ritu Sinha and Smita Shukla, ESG Ratings in India: Assessing Their Reliability for Investment Decisions (2024) 14 European Economic Letters 2731.
[22] Bikmetova N, Pirinsky, C A, *Do ESG Rating Agencies Improve ESG Performance?* (2025) J Bus Ethics.
[23] Maithili (n 15).

framework for ESG Rating Providers, aimed at addressing methodological inconsistencies and enhancing transparency.[24] Further SEBI has encouraged ERPs through its Consultation Papers by easing ERPs procedures of doing business and strengthening of ERPs which raises concerns over the actual true and fair reporting of ratings provided by such ESGs. A pressing urgency to establish ESG committees become an essential part of the parcel to continue safely with the goodwill and reputation of the company. Board-level ESG committees can play a critical role in coordinating ESG strategy, verifying disclosures, and ensuring internal consistency, thereby reducing the risk of adverse or inconsistent ESG ratings arising from fragmented or inaccurate information. studies documenting divergence among ESG ratings demonstrate that inconsistent assessments can expose firms to reputational and valuation risks, reinforcing the need for internal governance oversight over ESG data and reporting.[25]

The growing influence of ESG Rating Providers, combined with methodological inconsistencies and regulatory uncertainty, exposes firms to reputational and financial risks that cannot be mitigated through disclosure obligations alone. Dedicated ESG committees offer an internal governance solution by institutionalising oversight, accountability, and verification of ESG information. This underscores the inadequacy of relying solely on external ratings and voluntary compliance, strengthening the case for mandating ESG committees within corporate governance frameworks.

## V. Comparison With the Legal Framework of Other Countries

The question pertaining to mandating the setting up of ESG committees is stretched globally as not a single nation for the time being makes it a compulsory regulation to be complied with. Even though there is no provision of law making the institution of such a committee mandatory, corporations across multiple nations have shown a progressive attitude towards accepting that an ESG committee is the need of the hour and several leading companies (by market capitalisation) from various countries have already done so. Hong Kong, the United States and South Africa have been selected as representative jurisdictions for their three distinct approaches to ESG governance – exchange driven regulation, market and investor driven discipline and statutory committee-based

[24] Securities and Exchange Board of India, *Consultation Paper on Draft Circular on "Strengthening of ESG Rating Providers (ERPs)"* (13 February 2025).
[25] Florian Berg, Julian F. Koelbel & Roberto Rigobon, *Aggregate Confusion: The Divergence of ESG Ratings* (2022) 23 Review of Finance 1315.

oversight respectively. The comparative analysis has been undertaken to assess the limitations of India's disclosure-centric model and whether elements from these respective models can be adopted to inform the evolution of India's regulatory approach towards ESG governance.

Within the jurisdiction of Hong Kong, it is considered that the laws therein impose a *de facto* obligation on the companies to establish ESG committees owing to the plethora of ESG disclosures they have to comply with, as accordance to the Listing Agreement of Hong Kong Exchanges and Clearing Ltd.[26] Hong Kong's laws regarding ESG disclosures are injected pervasively into every listed company deeply by its Listing Agreement which lays such stringent provisions that a company would be compelled to establish an ESG committee to properly comply with such a broad framework. Consequently, solely for this reason, over 90% of the companies in Hong Kong has set up an ESG committee at the board level to prevent any lapse of compliance and simultaneously to increase the effectiveness and quality of disclosures that are made.[27] Hong Kong by implementing stringent listing disclosure requirements achieves a high concentration of ESG committees in their corporate entities while India's framework focuses on voluntary disclosures and self-reporting which lacks the compulsiveness of the companies in to take this subject-matter seriously. Adopting the Hong Kong's implicit imposition model would lead to providing an acute and reformative ESG oversight without having to introduce an explicit statute. Thus, SEBI or the Stock Exchanges shall as the regulatory authorities adopt this tactic by legislating stern and rigorous disclosures which indirectly would compel the corporates to dedicate a workforce, i.e., establishing an ESG committee to comply with as done by the Hong Kong Exchange.

The Hong Kong model demonstrates that stringent disclosure obligations, even in the absence of an explicit statutory mandate, can indirectly compel companies to institutionalise ESG oversight through dedicated committees. This approach is particularly relevant for India, where SEBI already imposes extensive ESG disclosures under BRSR but has refrained from mandating internal governance structures to support compliance

Pertaining to the United States, the ESG committees are quite prevalent among the companies as well but the cause of the creation of such committees differs from that of Hong Kong. In Hong Kong, the compulsion of setting up an ESG committee was driven by the stiff regulations

[26] Hong Kong Exchanges and Clearing Limited, *Appendix C2* (HKEX Code of Conduct, January 2025).
[27] Spencer Stuart, *Hong Kong Spencer Stuart Board Index* (February 2024).

implemented by the Hong Kong Exchange's Listing Agreement, whereas in the United States, the motivation by the institutional investors paved the path for the creation of ESG committees in the leading companies. The idea behind this stems from the theory of stakeholder capitalism in which the recognition of long-term value has been realised, thus the investors think that companies which follow the ESG standards are better prepared for uncertainties making them less risky to invest in.[28] Prominent investment firms such as BlackRock and State Art demand serious ESG governance due to the fact that a majority of institutional investors reported that investing in companies which have a focus in ESG yield higher returns which have intrigued the investors enough to develop certain expectations regarding a company's attention to ESG.[29] Empirical evidence from S&P 100 companies indicates a growing trend towards the establishment of ESG committees, largely driven by institutional investor expectations rather than statutory compulsion. In comparison, the institutional investors are inert in their nature of interaction and rarely participate in the company affairs and its decision making. The institutional investors here seldomly engage with the ongoing corporate affairs of the company and refrain from actively participating in its investee's workings and decision-making, a practice which is frowned upon.[30] The prevalence of promoter-controller companies in India inhibits such initiatives and arrow towards the possibility that governmental regulations are required first before market-driven discipline can take place. Thus comparatively, it can be noted that India lacks the ecosystem and environment like the United States where the promotion of sustainability is driven by the market and its participants, and for any encouragement regarding this subject-area, the regulatory authorities have to first initiate the movement. Unlike the United States, where dispersed shareholding enables institutional investors to exert governance pressure, Indian corporate structures are predominantly promoter-controlled. This structural difference limits the effectiveness of market-led ESG governance, thereby necessitating regulatory intervention to mandate ESG committees

[28] Matthew Bell, EY Global Climate Change and Sustainability Services (CCaSS), 'Why ESG Performance Is Growing in Importance for Investors' <https://www.ey.com/en_in/insights/assurance/why-esg-performance-is-growing-in-importance-for-investors> accessed 21 August 2025.
[29] PricewaterhouseCoopers, 'ESG-Focused Institutional Investment Seen Soaring 84% to US$33.9 Trillion in 2026, Making up 21.5% of Assets under Management: PwC Report' (*PwC*) <https://www.pwc.com/id/en/media-centre/press-release/2022/english/esg-focused-institutional-investment-seen-soaring-84-to-usd-33-9-trillion-in-2026-making-up-21-5-percent-of-assets-under-management-pwc-report.html> accessed 21 August 2025.
[30] Manya Srivardhan, 'Role of Institutional Investors in Corporate Governance' [2009] SSRN Electronic Journal <http://www.ssrn.com/abstract=1391803> accessed 21 August 2025.

In reference to South Africa as one of the emerging economies across the globe, it showcases a better acknowledgement towards enforcement of ESG standards. The Social and Ethics Committee (SEC) is a model which is recommended and mandated by the country's law to be incorporated into companies through various statutes such as the Companies Act, 2018 and the Johannesburg Stock Exchange Listing Rules which mandates following the principles laid down in King IV Report on Corporate Governance. The functions of the Social and Ethics Committee substantially mirror ESG oversight, encompassing environmental impact, social responsibility, ethical governance, and stakeholder accountability. The SEC's activities are concerning social and economic development, good corporate citizenship, the environment, health and public safety, consumer relationships, and labour and employment matters which essentially comes under the ambit of ESG matters. While South Africa has codified ESG responsibilities through a statutory committee at a board level and as a mandatory board function is severely lacking on India's part of legal framework. While India too lays emphasis on the subject matter of ESG through its BRSR framework, it focuses only on the material disclosures which are made by the company and remains silent on the topic of any essential committees pertaining to ESG matters which are needed to be framed and institutionalised for better sustainability and recognition of long-term value of the companies.

South Africa's statutory committee-based model illustrates how ESG considerations can be embedded within corporate governance architecture through mandatory board oversight, offering a viable template for India to move beyond disclosure-based compliance. Thus, adopting a hybrid approach of combining the statutory oversight of South Africa with India's framework of disclosures could help bridge the substantial gap between compliance and genuine ESG integration.

The comparative analysis reveals that while jurisdictions differ in their mechanisms for ESG governance, each model recognises the necessity of institutionalised oversight beyond disclosures. Exchange-driven compulsion (Hong Kong), investor-led governance (United States), and statutory committees (South Africa) all underscore the inadequacy of voluntary compliance. India's existing ESG framework, focused predominantly on reporting obligations, would benefit from integrating a mandatory ESG committee structure to bridge the gap between disclosure and governance.

## VI. Corporate Performance Linkage to ESG Integration

Empirical research increasingly indicates that firms with structured ESG governance mechanisms, including board-level oversight, tend to exhibit improved risk management and investor perception.[31] Studies suggest that institutional investors increasingly factor ESG governance into investment decisions, particularly where such governance signals long-term risk mitigation and accountability.[32] The presence of a dedicated ESG committee can enhance corporate credibility by institutionalising oversight, which may positively influence reputation and investor engagement. Adopting a stellar and infallible mechanism for ESG disclosures is a concern which beholds a high degree of paramountcy leading to increasing a company's reputation by showcasing a level of commitment to ethical and sustainable values attracting numerous investors in the process.[33]

Integrating ESG considerations into corporate governance structures has been associated with improved operational resilience and stakeholder engagement, extending beyond mere regulatory compliance.[34] While adopting an ESG framework proves to add a surplus of advantages to a company, on the contrary, choosing to not implement an ESG framework acts counteract to the company's corporate health as investors are attracted towards companies showcasing sustainability practices imbued within them whereas investors express scepticism who neglect to adopt such mechanisms because the investors suspect the company may be marked with traces of heightened risks and unsustainability. A comprehensive meta-analysis of over 2,000 empirical studies finds that the majority report a non-negative, and often positive, relationship between ESG performance and corporate financial performance.[35] Illustratively, public disclosures by companies such as Infosys indicate a strategic emphasis on ESG governance, which has been associated with sustained investor confidence and market positioning.[36]

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[31] Bruno Buchetti, Francesca Romana Arduino and Salvatore Perdichizzi, 'A Literature Review on Corporate Governance and ESG Research: Emerging Trends and Future Directions' (2025) 97 International Review of Financial Analysis 103759.

[32] 'Why ESG Performance Is Growing in Importance for Investors | EY - Global' <https://www.ey.com/en_gl/insights/assurance/why-esg-performance-is-growing-in-importance-for-investors> accessed 21 August 2025.

[33] Securities and Exchange Board of India: Role of SEBI in Promoting Environmental, Social and Governance (ESG) in India *by Amit Singh*[a]

[34] Ahmed A Elamer and Mounia Boulhaga, 'ESG Controversies and Corporate Performance: The Moderating Effect of Governance Mechanisms and ESG Practices' (2024) 31 Corporate Social Responsibility and Environmental Management 3312.

[35] G Friede, T Busch and A Bassen, *ESG and financial performance: aggregated evidence from more than 2000 empirical studies* (2015) 5 Journal of Sustinable Finance & Investment 210.

[36] P Biswas and S K Dwivedi, *ESG Reporting and Its Impact on Investment: A Case Study on Infosys* (2025) 25 Asian Journal of Economics, Business and Accounting 333.

Albeit, it should be cautioned that entities driven solely by disclosure requirements risk devolving into formalism, thereby increasing the potential for greenwashing in the absence of substantive governance mechanisms.[37] Companies which inherently embrace and indulge themselves into adopting the framework of ESG to its full extent, aligning themselves with the spirit of sustainability and development are the only the ones who are able to excel in their corporate performance. Short-term profit maximisation strategies may disincentivise meaningful ESG integration, whereas ESG frameworks are typically oriented toward long-term value creation and risk management.

The linkage between ESG integration and corporate performance does not imply automatic financial gains; rather, it underscores the governance value of structured oversight. ESG committees play a critical role in translating ESG commitments into operational practice, reducing the risk of superficial compliance and aligning corporate strategy with long-term value creation. This reinforces the argument that disclosure-based ESG frameworks, without corresponding governance mechanisms, remain institutionally incomplete.

## VII. Conclusion

As environmental, social, and governance (ESG) considerations become increasingly critical to corporate performance and societal welfare, mandating the establishment of ESG committees within company boards is both timely and necessary. Globally, regulators and investors are recognizing that structured ESG oversight is essential for long-term value creation and risk management. In the Indian context, this need is even more pronounced. India's rapid economic growth, social diversity, and environmental vulnerabilities demand that businesses embed ESG considerations into their governance structures in a deliberate and sustained manner.

Mandating ESG committees would provide a formal platform within companies to address complex ESG issues with expertise and accountability. It would help ensure that ESG risks and opportunities are systematically integrated into business strategies, beyond voluntary disclosures or peripheral initiatives. For India, where regulatory frameworks such as SEBI's Business Responsibility and Sustainability Reporting (BRSR) are already pushing companies toward ESG

[37] Manuel C Kathan and others, 'What You See Is Not What You Get: ESG Scores and Greenwashing Risk' (2025) 74 Finance Research Letters 106710.

transparency, the logical next step is to require dedicated board-level ESG committees. This would not only deepen the seriousness with which ESG factors are addressed but also standardize oversight mechanisms across sectors, promoting consistency and comparability.

Given India's unique challenges—such as environmental degradation, social inequality, and governance issues—a mandated ESG committee framework can encourage companies to prioritize region-specific concerns like water management, renewable energy transition, diversity and inclusion, and ethical governance. However, the mandate must be thoughtfully designed to allow flexibility, recognizing the diversity of companies in terms of size, industry, and resource availability. A tiered approach, where larger listed companies are required to establish ESG committees first, could ensure a pragmatic and effective rollout.

While critics may argue that an additional compliance layer would burden businesses, particularly in India's dynamic market environment, the benefits far outweigh the challenges. Proactive ESG governance will not only future-proof companies against regulatory, reputational, and operational risks but will also enhance their global competitiveness, particularly as international investors increasingly favour companies with strong ESG credentials.

In conclusion, mandating ESG committees is not just a regulatory formality—it is a strategic necessity for India’s corporate sector. It aligns corporate India with global best practices while addressing the country’s distinct environmental, social, and governance imperatives. A well-structured mandate can foster resilient, responsible businesses that contribute meaningfully to India’s sustainable development goals. By taking this bold step, India can lead by example in building a more sustainable, inclusive, and prosperous economic future.

# SECURITIZATION IN INDIA: STRENGTHENING INVESTOR SAFEGUARDS THROUGH RISK RETENTION, DISCLOSURE AND CREDIT RATING OVERSIGHT

*Arjun Bhardwaj and Utkarsh Srivastava*[1]

**ABSTRACT**

*The Indian financial market is growing and with increasing financial literacy, progressive government policies, and technological advancements, investors are moving away from the classic fixed deposit to the share market, systematic investment plan, mutual fund, and other return-based investments. A notable facet of this shift is the growing preference for diversified portfolios, reflecting a sophisticated approach to risk management and wealth accumulation. Expanding investment options necessitates robust regulatory frameworks and stringent oversight mechanisms to safeguard public investments. Ensuring investor protection and market integrity remains critical to sustaining confidence and promoting the long-term stability of the financial sector.*

*Today, investing in asset-backed securities is one of the most lucrative and preferred investment opportunities. The investors buy securities from the pool of asset-backed securities in exchange for interest rates, since the securities are backed by assets that can be liquidated to pay off the investor in case of a default or systemic failure, effectively making it a risk-free investment. However, many a times external attributes often fail to reflect underlying worth. While the Securities Board of India has framed a robust regulation to regulate the securitisation process, the critical question arises: Does mandating a minimum risk retention requirement for originators enhance accountability and strengthen the governance framework within the securitisation process? Furthermore, is dependency on ratings specified by credit rating agencies sufficient to assess the risks associated with investment in securitised debt instruments? The nuances of securitization need a closer look at the welfare of investors.*

## I. INTRODUCTION: SECURITIZATION

[1] The authors are students at Law Centre-II (Faculty of Law, University of Delhi) and Christ (Deemed to be University) Bangalore, respectively.

Securitization provides a replacement to traditional forms of financing like loan or equity issuance. It also helps diversify the pool of financial resources. The essence of securitization lies in the transfer of credit risk attached with underlying assets to investors, those buying the securities backed by the assets.

In India, Securitization refers to formation and allocation of debt securities, or bonds, whose payments of principal and interest are extracted from cash flows resulting from various pools of assets.[2] Loans generally form the bulk of financial assets that banks, or other institutions use to instantly realize the value of cash-making assets.

In India, the originator of the assets foretells a systematic stream of payments, by putting such assets together, and the same payment channels are utilized for supporting interest as well as principal payments on securities purchased. In most cases of securitization, SPV is established to hold the title to assets underlying securities pooled.[3] Thereafter, the originator, generally the bank, which holds the assets, sells the existing or future assets to SPV, then SPV raises funds with assistance of the arranger/investor banker by furnishing securities that have been positioned with the investors. In this whole arrangement, the originator earns through the sale of securities that are pooled in the SPV.

The roots of securitization date back to the 1970s, when in America, it was used as an instrument for converting loans granted to multiple borrowers into immediate cash flow, by converting financial assets into marketable securities. In simple words, securitization entails two stages.

In the initial phase of securitization, an originating entity (known as "originator"[4]) that holds loans or other forms of income-generating assets identifies specific assets it intends to eliminate from its balance sheet and consolidates them into reference portfolios.[5] This portfolio is subsequently

[2] Sumit Agarwal, Jacqueline Barrett, Crystal Cun & Mariacristina De Nardi, The Asset-Backed Securities Markets, the Crisis, and TALF, 34 ECON. PERSPS. 101" (2010).
[3] "Securities & Exchange Board of India, *Corporate Funding & Listing in" Stock Exchange* (2020).
[4]SEBI (Public Offer and Listing of Securitized Debt Instrument) Regulation, 2008, section 2(1)(m).
[5]Mufti Faraz Adam, *Measuring Shariah Compliance in Senior & Subordinate Bonds* (Shariya Rev. Bureau, May 2018). See also, Andreas A. "Jobst, *What is Securitization*? FIN. & DEV., Sept. 2008, at 48, https:// www.imf.org/external/pubs/ft/fandd/2008/09/pdf/basics.pdf"

transferred to an insurer, commonly referred to as a 'Special Purpose Vehicle' ('SPV'), which is specifically established, often by a financial institution, for acquiring these assets and administer them independently for legal accounting purposes. Fundamentally, securitization entails the aggregation of comparable illiquid assets, which are then transformed into marketable securities and distributed to investors.

In the second stage, the formed SPV raises funds to buy the pooled assets by issuance of interest-bearing securities tradable in capital market. The investors who purchase these securities receive either the fixed or variable payments, which are made from a trustee account supported by cash flow made from asset pool.[6]

## II. SECURITISATION UNDER SEBI REGULATIONS AND THE SARFAESI ACT: A CONTEXTUAL DISTINCTION

The paper focuses primarily on securitization as regulated under the SEBI Regulations which governs market-based securitisation aimed at the capital formation, risk distribution and investor participation in the securities market. However, given the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002[7] ("SARFAESI Act") is among the earliest Indian legislation to expressly recognise and operationalise the concept of securitization within India's within the India's broader legal framework. The inclusion of SARFAESI securitization in this paper becomes integral for contextual and comparative purposes.

Securitization under the SARFAESI Act is structured as a recovery oriented mechanism rather than a market driven financing tool. Section 2(1)(z)[8] conceptualizes securitisation as the acquisition of financial assets by a securitisation company or reconstruction company from an originator[9], can be understood as the owner of a financial asset acquired for the purpose of securitisation or asset reconstruction. These assets are typically distressed, or non-performing loans transferred by banks or financial institutions seeking balance-sheet resolution.

[6] *Id.*
[7] Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 200.
[8] *Id.*
[9] *supra* note 6 at § 2(1)(r)

The acquisition of such financial assets in financed through the issuance of security receipts[10] ("SR") under section 7 of the SARFAESI Act. A security receipt is issued by a securitisation or reconstruction company to Qualified Institutional Buyer[11] (QIB) pursuant to a scheme and represents an undivided right, title or interest in the underlying financial asset. QIBs include banks, financial institutions, insurance companies, asset management companies investing on behalf of mutual funds, registered securitisation or reconstruction companies and foreign institutional investors, among others specified by the Board. The restricted investor base reflects the inherently higher risk associated with distressed asset securitization.

A defining feature of SARFAESI securitisation is the statutory empowerment granted to securitization and reconstruction companies to enforce security interests without court intervention. Acting in a trustee like capacity, these entities are authorised under section 13[12] to take possession of secured assets, manage them or effect their sale to recover dues from the obligor[13] to discharge obligation in respect of a financial asset, including the borrower. This enforcement centric framework enables the conversion of illiquid non-performing assets into recoverable instruments and serves as a critical tool for expeditious debt recovery.

In contrast, securitisation under SEBI framework is fundamentally market orientated. It involves the pooling of performing financial assets and the issuance of securitised debt instruments to investors with the primary objective of liquidity generation, risk transfer and capital market participation. While the SARFAESI securitisation prioritises asset recovery and financial stability, SEBI regulated securitisation focuses on transparency and efficient capital allocation. The distinction underscores India's dual regulatory approach to securitization, one rooted in recovery and resolution and the other in market development and investor confidence.

## III. SEBI AND SECURITIZATION

[10] *supra* note at 6 at § 2(1) (zg)
[11] *supra* note at 6 at § 2(1) (u)
[12] *supra* note 6
[13] *supra* note 6 at § 2(1)(q)

Banks generally sanction loans to a customer after the customer furnishes some kind of security to the bank, it is termed as secured loan also known as asset –backed mortgages. This security can be enforced in case of any default on the part of the borrower in repaying the loan. The receivables in the form of loan borrowers account are collateralised as security for issuing securitized debt securities to investors via "special purpose distinct entity (SPDE)". This helps the bank eliminate assets from its balance sheet, freeing up capital for more lending. It also offers an innovative method to raise funds as compared to traditional methods of fundraising. To streamline entire procedure of securitization and bring this entire process into a regulatory framework, "Securities Exchange Board of India (SEBI)" introduced SEBI (Issue and Listing of Securitised Debt Instruments and Security Receipts) Regulation 2008[14] ("2008 Regulation") considering the market needs, disclosures requirements of the parties to the transaction while securing the interest of the investors.

In the process of securitization, firstly an SPV is established for upholding legal title to assets underlying security, then originator[15] sells the assets to SPV and afterwards the SPDE issues securities to investors assisted by investment bankers and finally the SPDE pays back the originator from the proceeds of issue of securities.

## IV. MANDATING THE ORIGINATOR TO DIP THEIR TOES IN THE SAME WATER AS INVESTORS

### A. 2008 Market Collapse – Start of Risk Retention & Investor Safeguard

In the aftermath of the 2008 market collapse, the United States introduced a provision regarding minimum risk retention in the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act") for ensuring that the originators have their own economic stake in the issue of asset-backed securities. To realise this safeguard, Section 941 of the Dodd-Frank Act[16] provides that originators who pool loans and sell them as asset-backed securities must withhold at least five

[14]Securities and Exchange Board of India (Issue and Listing of Securitised Debt Instruments and Security Receipts) Regulations, 2008.
[15] Matthias Haentjens, Pierre Gioia Carabellese, European Banking and Financial Law 2e 176, (2020).
[16]Dodd-Frank "Street Reform and Consumer Protection Act, 2010 (United States of" America).

percent of any asset that they sell unless it meets certain quality standards.[17] The section further provides that if the asset is not a qualified residential mortgage, meaning that it does not meet high underwriting standards, securitizer/originator must keep a minimum of 5% of risk. This minimum rendition rule ensures that originators retain some exposure to losses, persuading them to pool securities that in probability of right market forces will yield profits.

### B. SEBI's partial attempt to Minimum Risk Rendition

Regulation 19 of 2008 Regulation provides for the maximum holding requirement of the originator at 20% of all securitized debt instruments offered by the unique special purpose entity in a certain scheme.[18] This cap, while only applicable to public issuance or listed securitised debt instruments[19] ("SDIs"), serves an important foundational purpose that is limiting originator concentration to promote asset liquidity and facilitate rapid capital formation – a core objective behind regulated security markets. Even though this is only mandated for public issues or in case of listed SDI, specifying an upper limit on the originator holding is important to maintain the object for which the regulation was made, to convert the illiquid assets into quick capital.

The 20% maximum cap is appreciated, but what is equally essential is to have a minimum requirement of holding equity in the securitisation process by originators for the investor's security. The current, 'no minimum cap' indicates no regulatory requirement for originators to hold a minimum level of risk in the issue of their own SDI. This regulatory gap creates vulnerabilities that may undermine both investors protection and market stability. The lack of 'minimum cap or minimum holding' can have various drawbacks such as:

- When originators are permitted to offload their entire exposure, they forfeit any meaningful economic risk, potentially echoing the incentive misalignment that contributed to the 2008

[17]U.S "Office of the Federal Register, Federal Register, Vol. 76, No. 110 (June 8, 2011") ( Washington DC.: U.S.G.P.O.) available "at Federal Register, Volume 76, Number 110, June 8, 2011, Pages 33121-33612 - UNT Digital Library"
[18]Abir Roy & Vjaypak Desai, SEBI Allows Listing of Securitized Debt Instruments, Corpse Hotline ( June 25, 2008), Nishith Desai Associates.
[19]*supra* note 6, Regulation 2(1)(s).

subprime crisis in the USA in 2008. In such a case, originators may give loans to borrowers indiscriminately, focusing on volume rather than creditworthiness, since any resulting default will not directly affect them. This exemption from consequences erodes the discipline required for prudent lending and exposes investors to heightened default risk.

- Additionally, with the lack of pecuniary interest of the originators to retain a baseline equity stake in their own SDI issuance might diminish governance standards. Originators with no retained stake may adopt lax operational processes and forgo rigorous diligence, confident that their liabilities are limited once the assets are securitized.
- If the originators know that they can offload their loans, they may compromise their standards for documentation and borrower screening could consequently suffer, impairing the transparency and reliability of underlying assets.
- This regulatory gap can lead to an erosion of investors' confidence as they might lose confidence due to inadequate oversight and risk assessment, particularly if diligence is not enforced by a direct financial stake of the originator. Sustained scepticism in the securitization market may ultimately lead to a lower capital inflow and in adverse scenarios, systematic withdrawal from SDI investments, jeopardizing long-term market sustainability. Having a lack of responsibility on the originators may lead to decrease in investor's confidence in the issue as there is no harmony of interest between the originators and the investors, which is not an ideal scenario for securities market and it may cause a lot of damage in the long run as, if investors start losing their confidence in the underlying loans they may start to pull of their money from the securitisation market.

International experience underscores the relevance of minimum risk rendition. For instance, RBI (Securitisation of Standard Assets) Directions, 2021[20] ("2021 RBI Directions") has mandated minimum risk retention for originators with the aim to require originators to retain a lasting interest in how securitized assets perform, encouraging thorough vetting of loans chosen for securitization**.** However, the unfortunate fact is that the said direction only applies to prescribed financial entities such as small finance banks, scheduled commercial bank, "non-banking financial companies

[20]Reserve Bank of India (Securitization of Standard Assets) Directions, 2021.

(NBFCs)".[21] Thus, the 2021 RBI Directions do not apply to any other entity making an offer of securitised debt instruments, which means that, for any other entity making an offer of SDI, there is no regulatory provision about minimum risk retention by originators.

Given the crucial role of originator's equity stake, an amendment in the current SEBI regulation, introducing a mandated provision for originators to hold a minimum equity in the issue of securitised debt instruments will ensure the accountability of the originators which will drive them to make decisions, prioritising investors interest such as in case of promoters holding in SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018,[22] wherein minimum requirement is mandated for promoters to retain a certain level of equity stake in the listed entity, ensuring that promoters take decisions which benefits the listed benefits listed entity and also pushes for greater governance measures by the top management. By mandating a minimum cap for originators in case of a securitisation process will lead to better multifield beneficial outcome: it would elevate loan origination and diligence standards, reinforce investors trust and promote efficient allocation of credit. Thus, fostering broader market integrity and facilitating steady growth in the securitization sector.

## V. TRUSTEE: THE CUSTODIAN OF THE INVESTOR'S INTEREST

Another crucial authority that warrants attention in the securitization framework is the trustee, as governed under the SEBI 2008 Regulations. The trustee serves as a vital intermediary safeguarding the interest of investors and ensuring compliance with the terms of issuance. In the US, the Trust Indenture Act of 1939[23] ("1939 Act"), read with the Securities Act of 1933[24] ("1933 Act"), provides provisions regarding the nomination of a trustee and specifies the duties, liabilities, and powers of

[21]Intercreditor Agreement, Among the Banks, Financial Institutions & Other Lenders set out in Schedule I (India), Cyril Amarchand Mangaldas (2019) https://idbitrustee.com/wp-content/uploads/2019/08/ICA.pdf .
[22]"Securities and Exchange Board of India (Issues of Capital and Disclosure Requirements) Regulations, 2018", Gazette of India, (Sept. 11, 2018).
[23] Trust Indenture "Act of 1939, (United States of America").
[24] Securities "Act of 1933, (United States of America)".

trustees. Section 315 and other applicable provisions of the 1939 Act provides for the duties of trustees. The duties of trustees are divided into two major categories namely:

- Duties prior to default include Notice of defaults,
- Duties of the trustees in case of defaults include collecting payments and any such other responsibility as prescribed.

Duties prior to default are largely precautionary and supervisory in nature. They include monitoring compliance, issuing notices of potential defaults and enduring that the trustee's actions remain within the boundaries stipulated in the trust indenture. Trustees are not held liable for matters beyond the express terms of the indenture. However, once a default occurs, their duties acquire a more active character, the trustee is required to give a notice to all security holders of known defaults within a period of 90 days from occurrence of default, unless the default is being cured or withheld in the interest of security holders. After the default occurs, the trustee is required to perform all the powers and rights given by the indenture and handle them with the same care a reasonable person would use in their own personal matters. Further, the law also provides that the indenture cannot contain any provision that provides for the protection of the trustee from liability arising from the trustee's own negligence and misconduct.

In India, the provision relating to eligibility criteria, power, and duties of the trustee with respect to the securitisation process has been enumerated in the Regulation 11 of the 2008 SEBI Regulation. Trustees are mandated to ensure that security interests are duly created for securitized debt instruments and to take appropriate steps to safeguard investors rights and address complaints effectively. The duty extends beyond mere documentation. The trustee must verify that securitised debt instruments are redeemed or repaid in accordance with the terms of issue. Furthermore, trustees act as coordinators between originators and credit rating agencies, by transmitting relevant reports and certificates for ongoing evaluation of assets performance.

Trustee also have the added responsibility to ensure that the securitised debt instruments have been redeemed or repaid in accordance with the terms at which it was offered to investors. Trustee also acts as a coordinator between the originator and the credit rating agency ("CRA"), which involves

providing reports and certificates received from the originators to the CRA. Obligations of trustees also extend to calling meetings of investors on requisition made by a certain prescribed number of investors in writing. Additionally, trustees are also obliged to call for periodic reports from originators regarding performance of the underlying asset pool on a quarterly basis.

While both the US and Indian law contain provision for trustees to secure the stake of the investors. Comparison between the two reveals SEBI's prudence takes a lead in protecting interest of the investor, as under US laws, there is no stated provision for redressal of grievances of investors, whereas under SEBI regulation, the trustees are empowered to take all the required actions to redress investor grievances in the best possible manner. When it comes to the monitoring responsibility, Indian laws take the lead as they are more detailed and specific as compared to US laws, for instance SEBI regulation requires trustees to regularly monitor the asset pool and take required action as per the regulation whereas there is no such duty cast upon the trustee neither under the 1939 Act nor the 1933 Act.

## VI. TRANSPARENCY EQUALS SAFEGUARD: SEBI'S DISCLOSURE REQUIREMENT

Examining SEBI (Listing Obligation and Disclosures Requirement) Regulation, 2015[25] provides for proper disclosures to the investors of SDI with an objective to make investors fully aware of the securities in which they are making the investment. This ensures that the investors are not left clueless about the performance of their investment as well as to update them about any key development with respect to securities. Chapter VIII, which provides for the obligation of a listed entity having listed its SDIs, mandating disclosures that are necessary to be made by the listed entity to stock exchanges on which it is listed and to the investors of the securities.[26]

With regard to the intimation of information to stock exchanges, listed entity is obliged to inform stock exchange regarding any of its plan to issue new securities as well as to intimate the exchange in advance about assembly of its board of trustees with respect to issue of new securities, this

[25]Securities and Exchange Board of India, SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015.
[26] *Id.*

ensures that stock exchanges are being kept updated regarding the issue process so as to ensure transparency in market and guard the interests of current investors as issue of new SDI can also impact the current investors; advance notice ensures that investors are not caught off guard and can react accordingly. Further, the listed entity is required to give reports, statements on a periodical basis to the stock exchange with respect to the listed securities, this helps in building trust while maintaining market integrity.

To prevent insider trading and ensure that no individual gains an unfair advantage through undisclosed information, a listed entity must promptly disclose to the stock exchange all details that could affect its performance or constitute price-sensitive information.[27] Concerning the requirement of credit rating, it is mandated that every credit rating obtained needs to be reviewed by the credit rating agency, preferably once a year and the same is mandated to be communicated to the investors. This helps investors to better assess the credibility of the listed entity. Regulation 86[28] provides for the terms of SDIs and prohibits any material modification in structure of securitised debt instruments with respect to coupon payment, recovery or else without obtaining authorization of stock exchange, this prevents listed entity to alter the terms of issue which are against the investors interest and to allow stock exchange to ensure that investors interest is not affected due to the modification in any manner.

## VII. CREDIT RATING AGENCIES: REAL INFLUENCERS OF THE INVESTMENT MARKET

Since the 2008 financial crisis, there have been a lot of divergent opinions on the function of CRAs in the United States in causing the subprime loans crisis. Some even argue that credit rating agencies were at the centre of the subprime loan crisis. Before 2008, the credit rating firms in the United States worked mainly unregulated. Top credit rating firms like "Moody's, S&P Global Ratings (S&P), and Fitch Group", or 'Big Three', are still criticised for giving inflated ratings to securities, which in turn boomed the market space for mortgage-backed securities and similar financial products.

[27] *Id.*
[28] *supra* note 18

The main reason for giving inflated credit ratings such as 'AAA' to SDI was a shift from 'investor pay' principal to 'issuer pay' principal that started around the 1970s creating direct conflict of interest.[29] Even today, this conflicting interest has not been resolved. To understand the problem and come up with a solution, a closer look is required by regulatory authorities regarding the functioning of credit rating companies.

a. **Roles & Responsibilities**

Credit rating is put as informed opinion "on relative degree of risk associated with timely payment of interest and principal on debt instruments"[30] . To put it simply, it is the wisdom of an acknowledged entity on the creditworthiness of a company or security.[31] In India, Credit Rating Agencies ("**CRAs**") are governed by SEBI (Credit Rating Agencies) Regulation, 1999[32]. With the market of SDIs growing more complex, the efficiency of the current regulation and circulars under it have come into question. CRAs are contracted by the issuers seeking credit rating. Although the "Rating committee" that determines rating is composed of expert professionals that do not directly engage with the company seeking rating for its SDI, publication of such rating requires company's approval as CRAs are paid by the companies or the issuers. The whole series of operations suffers from various conflicts of interest, 'issuer pays' conflict being the most apparent one. Moreover, the CRAs make their judgment based on the information that the company provides.

One report went through 248 companies of the "Bombay Stock Exchange (BSE)" and came to the conclusion that a discrepancy persisted in relation to credit rating issued to various companies and their financial ratios. This raises suspicion about the transparency of the ratings.[33] Another report

[29]Lawrence J. White, *Markets: The Credit Rating Agencies*, 24 Journal of Economics Perspectives 211, 213-214 (2010) https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.24.2.211
[30] Ministry of Finance, Capital Markets Davison, *Report of the Committee on Comprehensive Regulation for Credit Rating Agencies*, (2009).
[31] "Shreya Prakash, Aditya Ayachit and Shreya Garg, Regulation of Credit Rating Agencies in India, Vidhi Legal Centre for Legal Policy, (2017)" https://vidhilegalpolicy.in/wp-content/uploads/2020/06/170731_CRAReport.pdf
[32] Securities "and Exchange Board of India, 1999, Gazette of India", (July 7, 2018).
[33]Krishna "Kant, *How Reliable Are Companies' Credit Rating ?*, Bus. Standard (Mumbai), Aug. 27, 2014 http://www.business-standard.com/article/companies/how-reliable-are-companies-credit-ratings-114082600845_1.html (accessed" 30 August 2025).

hinted that drawbacks could have accelerated the non-performing assets ("NPA") crisis of India.[34]Instances like these call for better CRAs regulation in India.

Though SEBI has imposed one of the most extensive regulation in form of strict restrictions to regulate CRAs, such as :

- Promoter of credit rating companies to have experience in the field of rating or promoter to mandatorily have a net worth exceeding 100 Cr.[35]
- CRAs are obliged to conform to Code of Conduct endorsed by SEBI, meaning requiring them to perform their functions with integrity, professionalism, independence, and secrecy.[36] In addition to this, CRAs are required to frequently monitor rating, and changes thereof, and make a periodic review of the rating given by the respective CRA.[37]
- To minimize conflict of interest, credit rating agencies are prohibited from rating securities issued by their own associates or promoters.[38]
- In an attempt to keep the system transparent and CRAs accountable, CRAs must have an internal audit[39], and give records to SEBI as and when required[40], and be close to examination and inquiry by SEBI.[41]

However, the dilemma of choosing between 'issue pay' or 'investor pay' is weakening the spine of the whole credit rating system.

b. **Eliminating Conflict of Interest: Nucleus of the CRAs issue**

Even though the purpose of CRAs is to serve investors, through rating, indicating worthiness and soundness of securitized debt instruments, CRAs are compensated by issuer, not investor. This

[34] "Praveen Chakravarty, The Silent Role of Credit Rating in India's Bad Loan Crisis', Bloomberg Quint (31 Aug, ,2025)https://www.bloombergquint.com/opinion/2016/07/08/the-silent-role-of-credit-ratings-in-indias-bad-loan-crisis
[35] Securities and Exchange Board of India Act,1992, section 11"(2)(ab).
[36]Securities and "Exchange Board of India (Credit Rating Agencies) Regulations, 1999, Regulation 13".
[37]*Id.* regulation 15, 16.
[38]*Id.* chapter IV.
[39]*Id*. regulation 22.
[40]*Id*. regulation 19.
[41]*Id.* chapter V.

clearly indicates, "there are incentives for credit rating agencies to issue complacency ratings on the issuer in order to secure a long-standing business relationship in order to guarantee revenues or to secure additional work and revenues."[42]

Limited market competitions permit CRAs to keep a well-grounded relationship with the issuers.[43] Licensed employees of CRAs may become overly familiar with the company, which could lead to errors in fair evaluation. Instead of being the 'watchdog' and removing information asymmetry in the market for the investors, CRAs develop long-term relations with the companies they rate.

That is why rotation of CRAs is necessary for preventing partnerships between companies and CRAs. To do this, ("European Union") EU in 2009 made it mandatory for CRAs to set-up a rotation system in respect of rating analysts and people responsible for sanctioning ratings.[44] Even in the U.S.A., section 939 of the Dodd-Frank Act mandates SEC (Securities and Exchange Commission), counterpart of SEBI in the USA, for commenting on the viability of establishing assignments of particular CRAs to issuers for deducting ratings of the securities.[45]

Rating shopping is another issue hampering working for CRAs; rating shopping occurs when an issuer solicits ratings from several credit rating agencies but ultimately pays and discloses the highest rating(s).[46] A report explains the rationale behind such action, "When assets are simple, agencies ratings are similar and the incentive to ratings shop is low. When assets are sufficiently complex, ratings differ enough that an incentive to shop emerges. Thus, an increase in the complexity of recently issued securities could create a systematic bias in disclosed ratings, despite

[42]Regulation "(EU) No 462/2013 of the European Parliament and of the Council,2013 (Official Journal of European Union")
[43]Jennifer Payne, The Role of Gatekeepers, Paper No 22/2014 University of Oxford Legal Research Paper Series, 5-8 (2014) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428121 .
[44]Regulation (EC) No. 1060/2009 of the European Parliament and of the Council of 16 September 2009 on Credit Rating Agencies, O.J. (L 302) 17 Nov. 2009, at 1-31.
[45]*supra* note 10, section 939F.
[46]Patrick "Bolton, Xavier Freixas & Joel Shapiro, *The Credit Ratings Game*, NBER Working Paper No. 15045 ( Nat'l Bureau of Econ. Research 2009)," https://www.nber.org/papers/w15045

the fact that each ratings agency produces an unbiased estimate of the asset's true quality. Increasing competition among agencies would only worsen this problem."[47]

Article 10 of the EU Regulation stipulates that even if the issuers do not complete the final contracts with the CRAs for the final rating, the CRAs are still mandated to provide rating outlooks and particulars about the set-up or in debt instruments that were submitted to them by the issuers for preliminary ratings. EU has also created a common website set-up by the European Securities Market Authority that mandates all ratings, except for investor-paid, to be made available on the website.[48] United States in 2014, made amendments to the Security Exchange Act, 1934's General Rule and Regulation, requiring CRAs to make public any rating works taken by them. Rating action includes projected or provisional credit rating for security, borrower, or money market instrument prior to issuing the official preliminary credit rating. Even SEBI, through its circular, has made it obligatory, even for the non-public issuers, for the CRAs to reveal their rating even when they are not accepted by their client.[49] Such regulations ensure that entities adhere to the ratings assigned, rather than engaging in rating shopping. However, the other side of these regulations compels issuers not to be transparent enough with the financial status of their company or the security, which in turn results in CRAs giving ratings that might not be based on a true and actual picture of the company or the securities being issued.

### c. **Making CRAs Accountable**

Credit rating Agencies have a "significant impact on investment decisions",[50] They are obliged by the moral duty to the investors to make sure that their ratings were "independent, objective and of adequate quality".[51] The United States, post 2008 financial crash, became among the first countries to put CRAs under civil liability. EU also followed the step by implementing the notion

[47]Vasiliki "Skreta & Laura Veldkamp, Ratings Shopping and Asset Complexity : A Theory of Ratings Inflation, N.Y. Univ. Stern Sch. Of Bus., (2009) https://www.nber.org/system/files/working_papers/w14761/w14761.pdf ".
[48] Recital 31, Council Regulation (EU) "462/2013 of 21 May 2013 amending Regulation (EC) No 1060/2009 on credit rating agencies [2013] OJ L146/1".
[49]SEBI "Circular No SEBI/HO/MIRSD/CIR/P/2016/119, Enhanced Standards for Credit Rating Agencies (CRAs), (Nov. 1, 2016)".
[50]*Supra* note 39.
[51]*Id.*

of civil liability on CRAs employing Article 35a of the EU Regulation[52] in the year 2013. Article 35a lists down situations wherein civil liability will be imposed, such as in case of gross negligence or violation of obligations listed in the directives, resulting in financial damage to the investor.

Financial complexityComplexity and transparency does not always grow together which brings the need for making CRAs legally liable to investors and the market in general just like auditors or merchant bankers. However, this would be difficult as this kind of act means putting "liability in an indeterminate amount, for an indeterminate time, to an indeterminate class"[53] As CRAs do not give opinions to commit capital to a security, they only give "a thorough review of the financial condition of the issuer and the terms of his offer, based on a comprehensive analysis of facts."[54]

## VIII. INVESTOR SAFEGUARDS IN SECURITISATION: THE EVOLVING REGULATORY LANDSCAPE

SEBI's evolving securitisation framework reflects a conscious shift towards embedding investors' safeguards directly into the design rather than relying solely on post-issuance disclosure. One such safeguard is Regulation 19A of the 2008 Regulation[55] which introduces an obligor[56] concentration cap of twenty-five percentage of the total asset pool at the time of issuance. By restricting exposure to any single obligor, the regulation ensures that a default by one borrower does not disproportionately disrupt the cash flow servicing securitised debt instruments. This diversification requirement significantly mitigates concentration risk, thereby stabilising investor return and insulating investors from idiosyncratic borrower failures.

From an assessment perspective, a diversified pool of obligors also enhances the reliability of credit rating. Credit rating agencies are better equipped to evaluate pooled risk across multiple borrowers than the bespoke risk of a single dominant obligor. Regulation 19A of the 2008 Regulation therefore indirectly strengthens rating accuracy and reduces the likelihood of risk being

[52] *Id.*
[53] Ultramares Corp. v Touche, 174 N.E. 441, 444 (New York 1931)
[54] Matthias Lehmann, Civil liability of rating agencies – an insipid sprout from Brussels, 11 Capital Markets Law Journal 60, 71-74 (2016) https://deicl.univie.ac.at/fileadmin/user_upload/i_deicl/Lehmann/Publikationen/Lehmann_2014_Civil_Liablity_Rating_Agencies.pdf .
[55] *supra* note 13
[56] *supra* note 13 at Reg. 2(1)(k)

concealed within large and opaque transactions. It further compels trustees and credit rating agencies to conduct a more granular and comprehensive review of the underlying asset pool, preventing the masking of substandard assets within a single high value exposure.

Another critical investor safeguard is the three-year operational track record requirement under Regulation 19A(d) and Regulation 19A(e) of the 2008 Regulation[57] applicable to both the originator and obligor. This requirement ensures that securitised assets arise from established business operations with verifiable financial histories rather than speculative or newly originated ventures. By filtering out untested borrowers and lenders, the regulation protects investors from exposure to unstable or high-risk debt structures.

Additionally, Regulation 30C[58] of the 2008 Regulation which prescribes 'minimum holding period' (MHP) operates as a pre-securitised quality control mechanism. By mandating that originators retain loans on their balance sheet for a specified seasoning period, the regulation ensures that assets demonstrate baseline repayment performance before being transferred to investors. This significantly reduces the risk of 'originate-to-distribute' moral hazard and protects investors from acquiring low-quality and short-lived debts.

Finally, the requirement for quarterly disclosures by the SPDE and trustee[59] to SEBI establishes a continuous surveillance framework.[60] Ongoing reporting enables early detection of stress in the asset pool, facilitates regulatory intervention where necessary and reassures investors that their interest is being monitored beyond the point of issuance. Collectively, these safeguards reflect a regulatory intent to embed investor protection into the lifecycle of securitisation transactions, reinforcing market confidence and systemic stability.

## IX. WAY FORWARD

In light of the complex nature of the Securitisation process, there is a need for the introduction of certain key measures for safeguarding the interests of all stakeholders who are involved in this

[57] *supra* note 13
[58] *Id*.
[59] *supra* note 13 at Reg.2(1)(w)
[60] *supra* note 13 at Reg. 11(b)

process. One of them is to mandate the originators to hold a minimum percentage of issued securitised debt tools for harmonizing the interests of originators with investors and mitigating moral hazard risks. Another is to enhance the role of CRAs through stricter regulatory oversight and greater disclosure norms. Bringing identical regulations on CRAs as other jurisdictions might be counterproductive. Best way forward would be drawing inspiration from our own regulation such as section 35 of the Companies Act[61] which makes the company or the individual liable for misstatements in prospectus. The section gives investors a civil remedy against any independent expert for false statements as well as omission of any essential information. Accordingly, section 2(38) of the Act[62] can be amended to include CRAs under the definition of experts. The only point here is to consider whether or not ratings by the agencies can be called just statements because they are not only statements of facts but also a judgment, it has been contemplated that ratings aren't at all statements and hence don't fall within the purview of the current section.

One solution that seems feasible for India right now is to minimize conflicts of interest, and the Reserve Bank of India ("RBI") did put forward a way wherein CRAs for rating activity would be chosen by the RBI itself and not issuers. Moreover, payment to CRAs would be made out of the fund set up by RBI for such purpose. This method could re-adjust the interest of CRAs and investors, even though such a method has not been implemented in any jurisdiction. SEBI could make a few modifications to the regulation to assess the effectiveness of this method in the long run.

Under Section 11 of the SEBI Act,[63] SEBI has been granted legislative authority to register and regulate "the functioning of depositories, participants, custodians of securities, foreign institutional investors, credit rating agencies, and any other intermediaries that the Board may specify through notification". It is essential that there is a central database for information and rating activities undertaken by CRAs and clearly establishing single regulating authority for CRAs. Amendments are needed to more extensively define rating activities to comprehensively regulate the CRAs. In practice, robotic reliance on CRAs should be reduced, as pushing compulsory ratings could

[61] Companies Act, 2013 (India)
[62] *Id.*
[63] Securities and Exchange Board of India Act, 1992 (India).

increase misleading ratings. America, to minimize dependency on rating agencies, brought in section 939A of the Dodd-Frank Act,[64] which calls for "total elimination of the credit ratings from regulations and legislative frameworks." However, this is easier said than done but pushing for other credit evaluation and making sure that credit loses its prime value in the financial market, could compel investors to get improved comprehension of the financial markets, and this might lead them to make an independent decision. The financial literacy that will come out of this will be from the perspective of investors, leading to better investment and overall welfare of the investors.

[64] *supra* note 10, section 939A.

# DATA AS AN INSOLVENCY ASSET IN THE DIGITAL AGE

*Pranjal Verma and Ipsa Mittal*[1]

*Without data, you're just another person with an opinion.*

*– W. Edwards Deming*

## ABSTRACT

*When a coffee shop goes out of business, its properties are sold to cover the losses. The furniture, expensive coffee, barista equipment and everything else is sold at an auction or put up for a sale. Somehow the losses were excessive. Now the only thing left with the shop is the data regarding customers, their preferences, daily orders, addresses, mail IDs and phone numbers. Can this humongous amount of data collect save the owners by covering their losses? Could the owners have saved the coffee shop before by selling this data? Can the data even be sold? Will this selling of data violate the rights related to data privacy? Whether customers consented to resell their data?*

*These situations raise essential questions regarding the treatment of data in the modern world. With ever evolving technology, it is precedented that the law will always remain antecedent to technology. The 3rd industrial revolution saw an influx of data being produced; to regulate this data and protect individual rights it took the law makers 20 years to come up with legislations. The 4th revolution has begun whereas the law makers are still coping up with the changes brought due to 3rd industrial revolution The nature of the data and the pertaining rights of an individual are evolving rapidly, which the lawmakers seem unable to be able to catch up to.*

*Ever since the businesses emerged, data has been considered an essential asset for corporations. Over the years, people started recognizing the importance of the correct usage of data in analysis to maximize their profits. This was not something novel but with adapting society and emerging*

[1] The authors are students at NLIU Bhopal.

*trends, data started being referred to as intangible assets.[2] Immediately with the rise of the digital age, data became a crucial aspect to determine assets in more than one way.*

*While the businesses have integrated the data in their core operations, such as customer profiling or algorithmic decision making, the lacunae in the law are being exposed. For instance, when a business goes bankrupt, during the insolvency process, this particular data raises corporate distress. When a company enters insolvency, its assets are evaluated for liquidation or revival depending on the circumstances. The assets earlier were in tangible form making the process easier and simpler. Presently, the assets are in intangible form, a prime example would be the consumer data present with the businesses. Even though this data holds a significant economic value, there exists no framework or precedent to guide its treatment under Insolvency and Bankruptcy Code, 2016 (IBC).*

*IBC was introduced to India in 2016, to lay down the principles and foundations to streamline the dissolution or revival of economically stressed corporations. Its mandate under the Corporate Insolvency Resolution Process (CIRP) is to maximize assets in a timely manner.[3] However, how would data be classified as an asset under this mechanism? Will data also be sold through bidding? What will happen to the rights of the individuals whose data is being sold or used in a manner other than what they had consented to? Where do data privacy laws stand on this? The challenge is creating a balance, maximizing the asset and the right to data privacy.*

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## DATA AS AN INSOLVENCY ASSET: OPPORTUNITIES AND CHALLENGES

With the growing regime of digital age, it becomes imperative to understand the classification of data as an asset under the IBC. While majorly emphasizing on the understanding of data in the context of asset identification and valuation. Under Indian Insolvency laws, a resolution professional (RPs) is appointed to facilitate and smoothen the operations for the insolvents. According to section 18(f) of the IBC,[4] the interim resolution professional appointed has to take control and custody of any asset over which the corporate debtor has ownership rights as recorded

[2] Feng Xiong, Maoyue Xie, 'Recognition and Evaluation of Data as Intangible Assets' (*Sage Journals,* 26 April 2022) https://journals.sagepub.com/doi/10.1177/21582440221094600 accessed 15 June 2025.

[3] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) Preamble.
[4] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 18(f).

in the balance sheet of the corporate debtor or with information utility or the depository of securities or any other registry that records the ownership of assets.

Further the section in sub clause 18(f)(iv),[5] elaborates that this ownership of assets includes intangible assets including intellectual property. Wherever, unlike trademarks, patents, copyrights, the data does not have a formal recognition structure making its position under section 18(f)(iv) ambiguous. While intellectual property is expressly included under the scope of intangible assets, the treatment of the data for the same remains unregulated and unclear. However, given the role and the nature of the data in the business such as, the algorithmic decision making and customer profiling, makes it an essential economic asset for the businesses. Following the mandate set by the preamble in the IBC, data should be considered as an intangible asset to provide maximization of the assets.

Additionally, the Supreme Court in a recent judgement of *Mobilox Innovations Private Limited* of 2017,[6] has cited the key legislative principle behind enactment of the IBC was to help the corporate debtor and balance out the interests of the key stakeholders while complying with evolving societal norms as well. Further, it affirmed that legislative intent says that restricted access to the assets of the corporation would lead to difficult and complex insolvency proceedings. The court also observed that before the enactment of the act, the value of the assets would completely erode.

There exists no present framework for the reception of data as an insolvency asset yet. Even if data is recognized as a legitimate insolvency asset, finding its valuation still remains tricky. This poses a big challenge as the majority of the crucial data present remains unstructured and unlabeled. It is context specific and not standardized to give one factor for evaluating its worth.

In India, for valuation of an asset during insolvency, regulations from Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016,[7] are followed. The regulation 35,[8] from these regulations provide for Fair Value and Liquidation Plan. It mandates two valuers for asset valuation, who use methods like market, income and cost to

[5] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 18(f)(iv).
[6] *Mobilox Innovations Private Limited v Kirusa Software Private Limited* 2017 INSC 975.
[7] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016.
[8] Insolvency and Bankruptcy Board of India (Insolvency Resolution Process for Corporate Persons) Regulations, 2016 Regulation 35.

evaluate the worth of an asset. There is no prescription for valuation of the digital assets such as data used for customer profiling or algorithmic decision-making techniques.

For instance, in the Yahoo-Verizon deal in 2017,[9] the key asset in the transaction was the $4.48 billion worth of user data. Due to several cyber-attacks, the valuation for the data fell by $350 million. This shows the vulnerable and volatile yet essential role is played by the data. This deal further raised the ethical concerns regarding the privacy of the users, whose data has been sold without their consent. While the economic relevance of the data as an insolvency asset is evident, this treatment of assets cannot be separated from the obligation of the lawmakers and the corporations to balance between asset maximization and data privacy laws.

## RECONCILING DATA PRIVACY WITH INSOLVENCY GOALS

The promise of data as an insolvency asset under India's IBC, is tempered by stringent privacy obligations imposed by the Digital Personal Data Protection Act (DPDP), 2023. As RPs leverage data to maximize creditor recovery during the CIRP, they face a delicate balancing act that is adhering to privacy laws while fulfilling IBC's mandate to realize asset value within the 330-day timeline.[10] This tension is not unique to India; global frameworks like the EU's General Data Protection Regulation (GDPR), Nigeria's Data Protection Act (NDPA), 2023 and Luxembourg's GDPR-aligned regime highlight similar challenges. Reconciling these competing priorities requires navigating legal constraints, learning from global practices and addressing ethical concerns.

Under the DPDP Act, RPs handling personal data during CIRP must comply with rigorous obligations. Section 5 mandates data minimization, requiring that only necessary data be processed,[11] while other demands explicit consent from data principals for data use.[12] The act restricts processing to lawful purposes,[13] and imposes robust security measures to prevent

[9] Anjali Athavaley, Verizon Yahoo 'Yahoo agree to lowered $ 4.48 billion deal following cyber attacks' (*Reuters*) https://www.reuters.com/article/business/verizon-yahoo-agree-to-lowered-448-billion-deal-following-cyber-attacks-idUSKBN1601EK/ accessed 25 June 2025.

[10] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 12.
[11] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 5.
[12] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 6.
[13] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 7.

breaches.[14] Section 33 further deters non-compliance with penalties up to ₹250 crore.[15] These provisions clash with IBC's requirements, particularly Section 29, which mandates RPs to prepare an Information Memorandum that may include personal data (e.g., customer databases or employee records) to attract resolution applicants.[16] Disclosing such data risks violating DPDP Act's consent and purpose limitation principles, potentially delaying CIRP or exposing RPs to legal liabilities. For instance, sharing customer analytics with prospective buyers could breach Section 8 which prohibits unauthorized data processing undermining the IBC's goal of asset maximization.[17]

The global data protection regimes offer valuable insights. GDPR emphasizes principles like lawfulness, fairness and transparency while it requires unambiguous consent for data processing. In the insolvency context, the UK case *Southern Pacific Personal Loans Ltd.*, 2014,[18] clarified that Involvency Practitioners (IPs) are not always data controllers reducing their liability when handling personal data for statutory duties. However, this precedent is not directly applicable in India where RPs are explicitly responsible for data under the IBC.[19] Nigeria's NDPA mandates data protection principles similar to GDPR and requires Data Protection Impact Assessments (DPIAs) for high-risk processing, a practice absent in India's insolvency framework. Luxembourg as a data-hub enforces GDPR's cross-border data transfer rules,[20] complicating international insolvency cases involving data sales. These frameworks underscore the need for India to integrate privacy safeguards into CIRP without compromising efficiency.

Furthermore, the Yahoo acquisition illustrates the risks of neglecting privacy in insolvency. Yahoo's user data including email and search history was a key asset in its USD 4.48 billion acquisition by Verizon. This can be a lesson for India where the DPDP Act violations could similarly devalue data or deter resolution applicants. The ethical dilemma of balancing creditor recovery with data subject rights remains unresolved, as Yahoo's sale proceeded without clear user consent raising questions about fairness.

[14] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 8.
[15] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 33.
[16] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 29.
[17] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 20.
[18] *Re Southern Pacific Personal Loans Ltd.*, 2014 CH 246.
[19] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 18.
[20] General Data Protection Regulation (GDPR), 2016 Chapter 5, Art 44-50.

To reconcile these tensions, India must adopt proactive measures. A novel solution is to mandate DPIAs for RPs under IBC aligned with Section 10 of the DPDP Act which allows assessments for significant data processing. DPIAs would require RPs to evaluate privacy risks before including personal data in the Information Memorandum, ensuring compliance with DPDP Act while advancing CIRP objectives. Additionally, Insolvency and Bankruptcy Board of India (IBBI) could issue guidelines clarifying RPs' data-handling responsibilities, drawing inspiration from Section 30 of Nigeria's NDPA.[21] Such measures would mitigate legal risks, enhance stakeholder confidence and maintain data's economic value positioning India as a leader in ethical insolvency practices.

## OWNERSHIP AND ETHICAL USE OF DATA IN INSOLVENCY

The question of who owns data related Intellectual Property Rights in insolvency poses significant legal and ethical challenges under India's IBC and DPDP Act. It can be owned by the company, data subjects or third parties, however the same is not clear. As data becomes a critical asset for settling creditor claims, ownership disputes and ethical considerations complicate its use.

Section 36 of the IBC defines the liquidation estate including intangible assets like databases but does not explicitly address data ownership.[22] Databases may qualify as intellectual property under the Copyright Act, 1957 vesting ownership with the corporate debtor. However, Section 4 of the DPDP Act recognizes the rights of data principals over their personal data creating ambiguity when RPs attempt to liquidate data assets to satisfy creditors.[23] For instance, customer databases or proprietary analytics could be sold to maximize recovery but without data subjects' consent, such actions risk violating Section 6 of the DPDP Act. Third party complications such as data storage on cloud platforms further muddy ownership as providers may claim rights under licensing agreements.

Globally, GDPR's Article 15 grants data subjects' access and control rights potentially overriding creditor claims in insolvency. Section 28 of Nigeria's NDPA similarly prioritizes data subject rights requiring controllers to justify data processing. Luxembourg's strict GDPR compliance complicates cross-border data sales as seen in multinational insolvencies. In India, the Supreme

[21] Nigeria Data Protection Act, 2023 s 30.
[22] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 36.
[23] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 53.

Court's *Innoventive Industries v ICICI Bank,*[24] reinforced IBC's focus on creditor primacy but did not address data ownership leaving a regulatory gap. The *Vijay Kumar Jain v Standard Chartered Bank,*[25] case clarified RPs' access to corporate data for CIRP but personal data's status remains unresolved.

Ethically, using data to pay creditors raises concerns about exploiting data subjects for financial gain. Yahoo's case showed how prioritizing asset sales over user consent eroded trust reducing data's value. In India, RPs risk similar reputational and legal consequences if DPDP Act obligations are ignored. A novel solution is to amend Section 36 of the IBC to explicitly include personal data in the liquidation estate only with data subject consent aligning with Section 6 of the DPDP Act. This would ensure ethical use while allowing data to contribute to creditor recovery. Additionally, IBBI could mandate transparency in data sales requiring RPs to disclose how personal data is used in CIRP inspired by GDPR's transparency principle[26].

Integrating these safeguards would address ownership disputes and uphold ethical standards. By prioritizing consent and transparency, India can balance IBC's economic goals with DPDP Act's privacy protections learning from Yahoo's missteps and global best practices.

## A HARMONIZED FRAMEWORK FOR DATA IN INSOLVENCY

The interplay between India's IBC and the DPDP Act underscores the need for a harmonized framework that balances data's economic potential as an insolvency asset with its ethical and legal constraints. As data fuels the CIRP through asset mapping and trade while raising privacy and ownership concerns with DPDP Act's privacy protections, [27] a structured approach is essential to align IBC's goal of maximizing creditor recovery.[28] Drawing on global lessons from the EU's GDPR, Nigeria's NDPA and the Yahoo acquisition, this section proposes a novel framework to ensure ethical data governance in insolvency enhancing efficiency and stakeholder trust.

The proposed framework comprises four actionable components. *First*, a standardized data valuation model should be integrated into IBBI (Liquidation Process) Regulations, 2016

[24] *Innoventive Industries v ICICI Bank* (2018) 1 SCC 407.
[25] *Vijay Kumar Jain v Standard Chartered Bank* AIR 2019 SC 2477.
[26] General Data Protection Regulation (GDPR), 2016 Chapter 5, Art 44-50.
[27] The Digital Personal Data Protection Act, 2023 (22 of 2023) ss 4-9.
[28] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 20.

Regulation 35 which governs asset valuation. Unlike tangible assets, data's value fluctuates based on its type (e.g., customer databases, proprietary analytics) and compliance costs under Section 9 of the DPDP Act (data security). The model must factor in privacy risks such as potential penalties for breaches upto INR 250 crore,[29] and ethical considerations like user trust erosion. By quantifying compliance costs, RPs can accurately assess data's net value ensuring fair creditor recovery without legal overreach.

*Second*, a centralized data repository under the IBBI, empowered by Section 196 of IBC would streamline data access during CIRP. Currently, RPs rely on fragmented sources like the Ministry of Corporate Affairs or National e-Governance Services Limited (NeSL) often delaying the 330-day CIRP timeline.[30] A secure IBBI-managed repository compliant with the security mandates of Section 9 of DPDP Act would centralize financial and customer data enhancing efficiency. The *Vijay Kumar Jain v. Standard Chartered Bank,*[31] case affirmed RP's rights to incorporate data supporting the feasibility of such a system provided privacy safeguards are embedded.

*Third*, mandatory DPIAs should be incorporated into IBC for RPs handling personal data. Inspired by Section 30 of Nigeria's NDPA and Section 10 of DPDP Act, DPIAs would require RPs to evaluate privacy risks before including in the information memorandum,[32] or selling it to resolution applicants. This addresses the conflict between Section 18 of IBC (data collection) and Section 6 of DPDP Act (consent requirements) ensuring compliance without stalling CIRP. The *Southern Pacific Personal Loans Ltd.*,[33] a UK case where IPs were partially exempt from GDPR liabilities suggests DPIAs could clarify RPs' responsibilities reducing legal risks.

*Fourth*, mandatory consent mechanisms for data subjects aligned with Section 6 of DPDP Act and Article 7 of GDPR would ensure ethical data use. Requiring RPs to obtain explicit consent before liquidating personal data,[34] would protect data principals' rights,[35] while allowing data to

[29] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 33.
[30] The Insolvency and Bankruptcy, 2016 (31 of 2016) s12.
[31] Id n 26.
[32] The Insolvency and Bankruptcy, 2016 (31 of 2016) s39.
[33] Id n 17.
[34] The Insolvency and Bankruptcy Code, 2016 (31 of 2016) s 20.
[35] The Digital Personal Data Protection Act, 2023 (22 of 2023) s 4.

contribute to creditor recovery. Luxembourg's GDPR-aligned cross-border data rules,[36] emphasize consent in international insolvencies reinforcing this approach's global relevance.

This framework offers multiple benefits like enhancing CIRP efficiency ensuring the compliance of DPDP Act and mitigating ethical risks. By integrating the global best practices such as NDPA's DPIAs, GDPR's consent focus and Luxembourg's cross-border rigor, India can position itself as a leader in responsible insolvency practices. The *Essar Steel India Ltd. case,*[37] prioritized creditor value but a harmonized framework ensures data's economic potential is realized ethically fostering trust and maximizing recovery.

## CONCLUSION

Data's emergence as an insolvency asset under India's IBC presents both opportunities and challenges requiring a delicate balance between economic maximization and ethical governance under the DPDP Act. This essay has explored how data fuels CIRP by mapping assets, its trade potential, privacy constraints and ownership disputes drawing on global frameworks. Case laws serve as a cautionary tale that while user data is a valuable asset, privacy breaches and ethical lapses reduce its worth underscoring the need for robust safeguards.

The proposed framework which includes standardized data valuation, a centralized IBBI repository, DPIAs and consent mechanisms, addresses these challenges. By integrating economic valuation with ethical safeguards, it ensures compliance, efficiency and trust. Yahoo's case illustrates the cost of neglecting privacy while global practices provide a roadmap for reform. India stands at a crossroads; it can lead in ethical insolvency by amending IBC to clarify data's status and prioritize data subject rights.

This harmonized approach positions India as a global model for responsible data use in insolvency balancing creditor recovery with ethical governance. Policymakers must act swiftly to implement these reforms ensuring data remains a viable asset without compromising trust. By learning from Yahoo's missteps and global best practices, India can redefine insolvency in the digital age fostering a framework that is both economically robust and ethically sound.

[36] Id n 27.
[37] *Essar Steel India Ltd. v Satish Kumar Gupta,* (2019) 2 SCC 1.

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