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UNDER THE AEGIS OF MAHARASHTRA NATIONAL LAW UNIVERSITY MUMBAI

VOLUME I ISSUE II

FOREWORD BY MR SANDEEP PAREKH

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TESTIMONIALS

"The inaugural issue of the Journal represents an important step in nurturing and academically enriching the next generation of regulatory and corporate lawyers. The breadth of issues and perspectives covered in the Journal are reflective of the academic rigor and excellence at the Centre and at MNLU. Following Dr N. L. Mitra's foreword, certain practitioners have inked the necessary foundation. I earnestly look forward to reading further editions of the journal and would highly recommend the same to peers and colleagues."

Mr Sumit Agarwal
Founder & Partner, Regstreet Law Advisors

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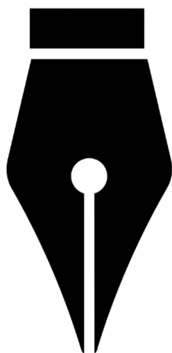

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TABLE OF CONTENTS

Foreword 8

Preface.. 10

From the Desk of Faculty Advisor 12

Note from the Student Editorial Board 13

ARTICLES

Shouldering the Load: The Board of Directors' Joint Accountability for Corporate Governance

- *Sahil Kanuga and Maulin Salvi 17*

Investing In Greener Future: Navigating Green Bonds Regulations

Abir Lal Dey, Pranay Bhattacharya and Shaivi Shah 31

A Decade of the Posh Act: Supreme Court's Continued Commitment from Paving the Way for Enactment to Strengthening Implementation of the Posh Act

- *Sheetal Mishra and Shloka Jain.. 64*

Regulating digital lending in India: analysing policy options for financial inclusion and consumer protection

- *Ayush Gorana.. 79*

From Trend to Turmoil: A Comprehensive Framework to Regulate Financial Influencers

- *Tarun Mishra and Annika Mittal 104*

Navigating Property Investment: Transitioning to Conclusive Land Titling in India
- *Rishi Raj Rai* *139*

Arguments for Poison Pill Mechanisms in India: An Antidote to Hostile Takeovers
- *Samrudh Kopparam* *153*

Advent of Res Judicata in Competition Law Regime
- *Sakshi Sharma* *176*

SEBI's Regulatory Measures For Insider Trading In India
- *Saksham Gadia and Lavanya Malani* *196*

India's Tryst with Cross-Border Insolvency: A Crooked Choice between Territorialism and Universalism
- *Aditi Singh* *226*

Analysing SEBI's Regulatory Crackdown On Finfluencers
- *Adv. Aadit Ved and Vidhi Chouradia* *250*

Motive Of Insider Trading? Analysing The Role Of *Mens Rea* In Light Of Insider Trading
- *Jay Shah and Simran Shrivastava* *273*

Data Privacy Issues Through Big Data-Driven Mergers And Competition Policy In India
- *Prince Pathak* *290*

FOREWORD

Over the years, the state of legal and regulatory architecture has evolved in response to industry and market developments, spanning innovative business models, emerging technologies and often the challenges and unintended outcomes arising out of existing regulations. The past year witnessed amendments paving way for direct listing of domestic shares on international exchanges, execution only platforms for direct investment in mutual funds, enhanced disclosures by foreign portfolio investors, proposed regulation of finfluencers, among several others. The remarkable pace of transformation in the financial landscape calls for contemplation, by industry professionals, researchers, academia, and the student community, in equal part. One cannot emphasize enough the importance of legal research and scholarship in comprehending and analysing the shifting industry dynamics and legal paradigms, using critical thought and diverse perspectives.

The corporate and financial domain is rife with opportunities for novel ideas and inter-disciplinary research. The Maharashtra National Law University Mumbai has made significant progress in promoting intellectual rigour and quality legal education, and providing an excellent forum for the publication of innovative ideas. The present issue of the Journal on Corporate Law and Commercial Regulations (CLCR), like its previous edition, comprises of insightful, well-researched and enriching contributions, representing contemporary thought and discourse on corporate law, and serving to challenge conventional wisdom and inspire new approaches. I congratulate the Editorial Board for selecting the published pieces from diverse subject matters and sincerely commend the efforts and contributions of the individual authors.

In an era where legal frameworks are being constantly re-imagined in the face of technology and innovation, regulation needs to take on a more adaptive role. This invariably creates opportunities for multidisciplinary research to drive deeper engagement with policy makers and regulatory authorities. We all need to think deeply about new laws and regulations and not be trigger happy to solve the last problem. The jurisprudential foundation is important and research and publications which deepen and widen the foundation are to be welcomed. I invite all readers to engage with the diverse perspectives and ideas presented in these pages.

Sandeep Parekh

Managing Partner,

Finsec Law Advisors

PREFACE

I am honored to announce the release of the second edition of the Journal on Corporate Law and Commercial Regulations (CLCR) from the Maharashtra National University Mumbai's Centre for Training & Research in Commercial Regulations (CTRCR). This edition represents a significant milestone in MNLU Mumbai's ongoing commitment to advancing pioneering research on contemporary legal issues. The collective contributions of our esteemed faculty members and dedicated students have been instrumental in shaping the insightful content of this journal, reflecting their unwavering dedication to exploring and addressing the complexities of commercial law and related fields. Their tireless efforts and scholarly insights have truly enriched the scholarly discourse in this domain, and I am deeply appreciative of their invaluable contributions.

The Centre's vision to serve as a pivotal platform for discussion, training, and research in commercial law has been resoundingly realized through a series of successful workshops, conferences, and certificate courses. This journal stands as a testament to the Centre's unwavering dedication to advancing scholarly pursuits in the realm of commercial regulations. The release of this second edition not only reaffirms the Centre's commitment to produce high-quality academic literature dedicated to commercial laws, but also represents a source of immense pride and delight for all those involved in its publication, showcasing the collective commitment to excellence and the pursuit of knowledge. As we celebrate this achievement,

it is important to recognize the significant challenges inherent in the publication process.

Therefore, I urge the entire team to continue their hard work and uphold the calibre and credibility of this publication, knowing that their dedication and perseverance are crucial in ensuring the continued success and impact of this journal. I have unwavering faith in the team's ability to make this edition a valuable resource of the finest calibre, and I look forward to the insightful perspectives and scholarly contributions that will undoubtedly enrich the academic landscape in this field. I extend my heartfelt congratulations to the Editorial Board of the Journal, the Director of CTRCR and the Chief Editor of CLCR, Dr. Kiran Rai, the entire team at CTRCR and CLCR, Advisors, and all our esteemed readers for their unwavering support in bringing this journal to life. I eagerly anticipate their continued enthusiasm and expertise in future editions and am confident that the journal will continue to serve as a beacon of knowledge and a platform for scholarly exchange in the years to come.

Prof. (Dr.) Dilip Ukey
Vice Chancellor,
Maharashtra National Law University Mumbai

FROM THE DESK OF FACULTY ADVISOR

The journal on Corporate Laws and Commercial Regulations is taking its baby steps. The second issue has been brought to you with another set of quality researches from contemporary fields of Data privacy to Finfluencers. The ever important issue of corporate governance is the main crux of this issue.

The number of articles received has substantially increased which made our task of selection a bit difficult. I am grateful to the reviewers for their valuable time and insight which helped the researchers to smoothen a few rough surfaces.

Our journal is now indexed Manupatra and SCC. With the support of student editors and guidance from Members of the Editorial Board, we will go from strength to strength.

Happy Reading!

Kiran Rai

Chief Editor

Journal on Corporate Law and Commercial Regulations

NOTE FROM THE STUDENT EDITORIAL BOARD

Dear Readers,

It gives us immense pleasure to present before you the second issue of the first volume of the student-run, double-blind, peer-reviewed, bi-annual periodical, 'Journal on Corporate Law and Commercial Regulations'. Building on the success of its previous edition, this journal aims to delve into commercial law and related areas, contributing to research on current developments and analysing longstanding issues. In light of the same, we are extremely proud to announce that we have been indexed on both SCC OnLine and Manupatra.

We extend our sincere gratitude to the contributors for their invaluable submissions, which have been instrumental in bringing this issue to its fruition. Our heartfelt thanks go to the Hon'ble Patron for this Journal, Prof. (Dr) Dilip Ukey Sir, for his unwavering support. We are also thankful to Dr. Kiran Rai, the Chief Editor of the Journal, for her persistent encouragement and guidance. We appreciate the eminent Board of Advisors for providing guidance to the team. Additionally, we are grateful to the Editorial Board for meticulously shaping the submissions according to the best literary standards.

The 2nd Edition of CLCR has received submissions addressing a wide ambit of developments in the field of commercial law. Mr. Sahil Kanuga

and Mr. Maulin Salvi kickstarted this edition by discussing the pivotal role of the Board of Directors in corporate governance, with special emphasis being given to their collective responsibility in their article '***Shouldering the Load: The Board of Directors' Joint Accountability for Corporate Governance'.*** Mr. Abir Dey, Mr. Pranay Bhattacharya and Ms. Shaivi Shah discuss the risks associated with issuance of green bonds and propose suggestions for navigating such risks in their article '***Investing In Greener Future: Navigating Green Bonds Regulations***'. Ms. Sheetal Mishra and Ms. Shloka Jain, in their article '***A Decade of the POSH Act: Supreme Court's Continued Commitment from Paving The Way for Enactment to Strengthening Implementation of the POSH Act'*** outlines recent landmark judicial reforms that fall under the ambit of workplace sexual harassment.

Mr. Ayush Gorana argues that aspects such as balancing innovation, stability, and consumer protection should be at the forefront with respect to digital lending in his article '***Regulating Digital Lending in India: Analysing Policy Options for Financial Inclusion and Consumer Protection'.*** Mr. Tarun Mishra and Ms. Annika Mittal in their article '***From Trend to Turmoil: A Comprehensive Framework to Regulate Financial Influencers'*** have opined that there is a compelling need for robust regulatory measures that can effectively counter the tactics employed by finance influencers to safeguard the financial market. Mr. Rishi Raj Rai examines the necessity of transitioning from presumptive land titles to conclusive land titling in India in his article '***Navigating***

Property Investment: Transitioning to Conclusive Land Titling in India.' Mr. Samrudh Kopparam his article '***Arguments for Poison Pill Mechanisms In India: An Antidote To Hostile Takeovers'*** heaps praise on the "poison pill" defence mechanism and urges its implementation in India to serve as an antidote to hostile takeovers.

Ms. Sakshi Sharma examines the potential predicaments that the antitrust regime in India might face if the 'res judicata' under the Draft Competition (Amendment) Bill, 2020 is entirely implemented in her article '***Advent of Res Judicata In Competition Law Regime'***. Mr. Saksham Gadia and Ms. Lavanya Malani in their article '***SEBI's Regulatory Measures for Insider Trading in India'*** have, as the name suggests, analysed and delivered their insights into the effectiveness of SEBI's regulatory framework in preventing insider trading. Ms. Aditi Singh has examined territorialism and universalism as two distinct concepts with cross-border insolvency tying them together with respect to contrasting insolvency regimes in her article '***India's Tryst with Cross-Border Insolvency: A Crooked Choice between Territorialism and Universalism.'*** With a quick trip down memory lane, Adv. Aadit Ved and Ms. Vidhi Chouradia have analysed SEBI's regulatory mechanisms put in place to protect investors and market integrity from financial influencers in their article '***Analysing SEBI's Regulatory Crackdown on Finfluencers'***.

Mr. Jay Shah and Ms. Simran Shrivastava analyse the need for amendment in the existing legal standards in India with respect to insider trading by

delving into the position of law on the aforementioned area in multiple jurisdictions in their article ‘***Motive of Insider Trading? Analysing the Role of Mens Rea In Light Of Insider Trading.’***

For this Journal, the students have been the backbone, meticulously devoting their time and efforts enabling this Journal to see the light of day. There is always scope for improvement and we look forward to implementing your feedback as the Journal progresses and achieves greater heights. Bearing this in mind, we welcome the readers for an insightful reading experience.

SHOULDERING THE LOAD: THE BOARD OF DIRECTORS' JOINT ACCOUNTABILITY FOR CORPORATE GOVERNANCE

- *Sahil Kanuga*[*] *and Maulin Salvi*[**]

ABSTRACT: *This paper explores the pivotal role of the Board of Directors in corporate governance, emphasizing the significance of their collective responsibility. It underscores the challenges faced by the corporate in governance, particularly in the aftermath of the financial crisis, and raises a critical, yet underexplored question: whether fiduciary liability should be assessed individually or collectively. The paper while highlighting its role in decision-making, risk mitigation, transparency, accountability, and stakeholder confidence also discusses the legal framework, especially the Companies Act, 2013.*

The narrative unfolds to address concerns related to potential drawbacks of collective responsibility, such as deterring experienced directors from joining boards due to personal liability fears. The paper asserts that effective corporate governance is crucial for a company's success and sustainability. It advocates for a balanced approach between individual accountability and

[*] Co-head, International Dispute Resolution and Investigations Practice, at Nishith Desai Associates.
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collective responsibility, emphasizing the need for continuous assessment and adaptation of regulations. The collaborative efforts of stakeholders are deemed vital for upholding transparency, integrity, and ethical behaviour, ultimately contributing to the organization's success and societal impact.

KEYWORDS: *collective responsibility, fiduciary duty, Board of Directors, Companies Act, 2013, corporate governance.*

I. INTRODUCTION-

The Board of Directors ("**the Board**") plays an important role in corporate governance. The composition of the board is incredibly important because it serves as the cornerstone for its core functions, such as making decisions for the company, overseeing and monitoring operations, preventing opportunistic behaviour by executives, and providing advice to decision-makers to improve business management. The recent financial crisis has highlighted issues with corporate governance, including difficulties in creating strong corporate structures, ensuring transparency and accountability, and building resilience during crises. Furthermore, the ability to establish a clear chain of accountability within organizations has emerged as a crucial aspect of governance.

In the realm of corporate law, fiduciary duty stands as one of the most contested arenas, drawing substantial scholarly attention. Surprisingly, a

crucial question has remained largely unexplored – Should the assessment of fiduciary liability be conducted individually, subjecting directors to individual scrutiny for compliance, or collectively, where the overall conformity of the board takes precedence? This choice holds significant implications, potentially determining a director's liability or release, influencing board dynamics, and contributing valuable insights to the broader fiduciary duty discourse.

Section 166[1] of the Companies Act, 2013 ("**the Act**") establishes uniform fiduciary duties for all directors as a collective entity. Notwithstanding this provision, our legal history has witnessed instances where Managing Directors, Executive Directors[2], or auditors have been held liable for breaches of this duty. This prescription extends to all directors, encompassing non-executive, non-independent directors as well. In the *Rolta India Limited* v. *Venire Industries*[3], the Bombay High Court held that every director's fiduciary duty towards the company attains primacy. Thus, any director serving on the Board is bound by a fiduciary duty to act exclusively in the company's best interests.

II. WHAT IS COLLECTIVE RESPONSIBILITY?

[1] Companies Act, 2013, §166.
[2] Sunil Bharti Mittal v. CBI, (2015) 4 SCC 609.
[3] Rolta India Limited v. Venire Industries, 2000 (2) Bom CR 241.

Collective responsibility, in the context of directors or corporate governance, refers to the shared accountability and liability of a group of individuals who serve on a board or committee overseeing an organization. This concept acknowledges that decisions and actions taken by a board are not the sole responsibility of individual directors but are instead the collective result of their collaboration and decision-making as a group. It implies that all directors, as a collective entity, share the consequences, both positive and negative, of the board's choices and actions.

One of the fundamental aspects of collective responsibility among directors is the idea that they act as a unified body in pursuit of the organization's objectives. This means that even if a decision is primarily proposed by one director, once it is accepted and acted upon by the board as a whole, all the directors are considered collectively responsible for its outcomes. This approach aims to promote a sense of cohesion and unity within the board, emphasizing the importance of collective decision-making and discouraging individual directors from distancing themselves from the board's actions, especially in the face of negative outcomes.

III. WHY FOCUS ON COLLECTIVE RESPONSIBILITY AND LIABILITY?

Section 2(10)[4] of the Act, defines "**Board of Directors**" or "**Board**", in relation to a company means the "collective" body of directors of a

[4] *Supra* 1, §2(10).

company. This collective body of individuals is entrusted with the authority to make decisions and operate in unison, with the primary objective of safeguarding the welfare of stakeholders to the best possible extent. The Act consistently portrays the Board as a unified entity, a consortium of individuals working together. However, a recurrent observation reveals that in instances of breaches in fiduciary duty or non-compliance with corporate governance standards, individual directors often bear responsibility in their personal capacity.

It is pertinent to note that the regulatory architecture provides a safe harbour provision to independent directors, non-executive directors, and directors who are not Key Managerial Personnel under Section 149(12) of the Act[5]. This provision grants them equivalent grounds for immunity. Importantly, the vicarious liability clauses under various statutes that address offenses committed by companies place all directors on an equal footing. They share equal and joint liability for all acts or omissions committed by the company, and they cannot shield themselves by claiming they were merely acting on behalf of the majority shareholder.

In this regard, it is interesting to note that in a recent judgment, the Madras High Court held that even non-executive directors of a pharmaceutical company (who are not involved in the day-to-day management of the company) would be liable under the Drugs and Cosmetics Act, 1940, in the

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[5] *Supra* 1, §149(12).

event of production of sub-standard drugs by a company[6]. The judgment held that:

> *"The offences and the offenders in the case of this nature is manufacturing and distribution of sub-standard drugs by a Company which is managed by its Board of Directors. The decision to manufacture the drugs is the collective decision of the Board of Directors. Therefore, the Directors cannot claim that they are not directly involved in the product of the drugs, when the decision to produce the drugs, itself is the outcome of their decision."*

A drawback arising from this sense of 'collectiveness', accentuated by the concept of 'joint liability', is its potential to dissuade independent and other expert directors from assuming positions on the Board. Studies reveal that proficient directors are more prone to step down, resulting in a decline of 1.16% in firm value.[7] Essentially, individuals of high repute may be disinclined to join the Board as independent directors, who are the advocates of transparency, fairness, and corporate governance. This reluctance is rooted in the burden of personal liability that hangs over them. However, the situation is not entirely negative, as historical data indicates that directors' liability is directly tied to their involvement in a scandal, not merely their position[8]. They are not held liable if appointed after the

[6] Vikas Rambal v. State, 2022 SCC OnLine Mad 4822, ¶ 24.
[7] S. Lakshmi Narayanan, Kasper Meisner Nielsen, *Does personal liability deter individuals from serving as independent directors,* Vol. 140 Ed. 2 J. FINAC. ECON., 621-643 (2021).
[8] Sayanti Sen v. SEBI, SAT Appeal no 163/2018.

initiation of the breach.[9] In fact, the Supreme Court in *Sunil Bharti Mittal* v. *CBI & Ors.*[10] held that a director can only be prosecuted if there exists substantial evidence of his active role or where the statutory regime attracts the doctrine of vicarious liability. Hence, the concept of collective responsibility can potentially alleviate these pressures and provide relief to independent directors.

Moreover, to further underscore the significance of "*Why focus on collective responsibility*" cause the fears of majority rule and the promoter nominated directors, or the managing director, taking all the decisions without due consideration to the stakeholders and corporate governance principles, would be diminished to a great extent by collective responsibility. It will also diminish the assumed 'free-hand rule', which is an anti-thesis to collective responsibility[11]. The Supreme Court in *Tata Consultancy Services Ltd* v. *Cyrus Investments Pvt. Ltd. & Anr*[12], held:

> "*We have not found any merit in the argument that Majority Rule has taken back seat by introduction of corporate governance in the Act, it is like corporate democracy is genesis, and corporate governance is species. They are never in conflict with each other; the management is rather more accountable to the shareholders under the present regime.*

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[9] Dr. Uppal D. Kumar v. SEBI, SAT Appeal no. 220/2017.
[10] *Supra* 2.
[11] Cyrus Investments Pvt. Ltd. & Anr vs. Tata Sons Ltd. & Ors, 2018 SCC OnLine NCLT 24460, ¶581 (i).
[12] Tata Consultancy Services Ltd v. Cyrus Investments Pvt. Ltd. & Anr., (2021) 9 SCC 449, ¶43.

Corporate governance is collective responsibility, not based on assumed free-hand rule which is alien to the concept of collective responsibility endowed upon the Board."

A. Implications of Collective Responsibility:

The concept of collective responsibility carries several significant implications, especially in contexts like corporate governance or group decision-making processes. Here are some of the key implications:

i. **Decision-Making:** The board of directors' acts as a collective entity when making important decisions. This prevents undue influence or the dominance of a single director's perspective, resulting in more balanced and well-considered judgments.

ii. **Risk Mitigation**: Directors share the responsibility for identifying and managing risks that the company may face. This encourages thorough risk assessments and the implementation of suitable risk management strategies.

iii. **Transparency:** The concept of collective responsibility fosters transparency as it discourages any attempt by individual directors to conceal information or make decisions without proper deliberation.

iv. **Accountability:** All directors, regardless of their role or specialization, are equally accountable for the company's success or failure. This accountability extends to regulatory compliance, financial reporting, and ethical conduct.

v. **Stakeholder Confidence:** Stakeholders, including investors, employees, and customers, gain confidence when they see a united board that takes joint responsibility for the company's performance. This contributes to maintaining a positive corporate image.

IV. REGULATIONS OF CORPORATE GOVERNANCE:

The Act establishes a comprehensive framework for corporate governance, incorporating disclosures, robust reporting mechanisms, and simplified procedures through both enhanced and novel compliance standards. Additionally, the corporate governance principles are influenced by a range of legislations. Alongside the assortment of acts and guidelines issued by diverse regulatory authorities, non-regulatory bodies have periodically released codes and guidelines addressing Corporate Governance.

A. The Companies Act, 2013 recognizes and emphasizes the principle of collective responsibility through various provisions:

i. **Director's Responsibility Statement (Section 134(5)[13]):** The director's responsibility statement, included in the company's annual financial statements, affirms that the directors collectively state that they have taken adequate accounting policies, followed applicable accounting standards, and made judgments and estimates that are reasonable and prudent.

ii. **Duties of Directors (Section 166[14]):** This section outlines the duties of directors, including the duty to act in good faith, promote the company's best interests, exercise independent judgment, and exercise reasonable care, skill, and diligence. These duties underscore the collective responsibility of directors toward the company.

iii. **Meetings of Board and its Powers (Section 173[15])**: This section establishes the necessity for regular board meetings and defines the powers vested in the board collectively. It emphasizes that the board must meet at least once in every quarter, encouraging the continuous involvement of all directors in critical matters.

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[13] *Supra* 1, § 134(5).
[14] *Id*, § 166.
[15] *Id*, § 173.

iv. **Board Committees (Section 177[16] and 178[17]):** The Act mandates the establishment of certain board committees, such as the Audit Committee and Nomination and Remuneration Committee. These committees operate under the collective responsibility of the board and assist in specific areas of governance.

v. **Powers of the Board (Section 179[18]):** It is a pivotal provision that grants certain powers to the board of directors collectively. This section enumerates specific powers that can only be exercised collectively by the board, including the power to borrow money, invest funds, make loans, and approve contracts beyond a specified limit.

vi. **Independent Directors (Section 149[19])**: The Act requires the appointment of independent directors to ensure balanced decision-making. These directors play a crucial role in providing an unbiased perspective, contributing to

[16] *Supra* 1, §177.
[17] *Id*, §178.
[18] *Id*, §179.
[19] *Id*, §149.

the board's collective responsibility of making well-informed choices.

vii. **Related Party Transactions (Section 188[20]):** Any related party transactions must be approved by the board under the framework of collective decision-making, ensuring fairness and transparency in such transactions.

viii. **Corporate Social Responsibility (Section 135[21]):** The board of directors of certain companies are required to constitute a Corporate Social Responsibility (CSR) Committee and ensure that the company spends a specified amount on CSR activities.

V. CONCLUSION:

Corporate governance aims to ensure transparency, accountability towards shareholders, and fairness in business transactions. It encompasses a set of rules, practices, and processes that guide the direction and control of a company. This involves striking a balance between the company's interests and those of stakeholders, such as shareholders, management, customers, suppliers, financiers, government, and the community. With corporate

[20] *Supra* 1, §188.
[21] *Id*, §135.

governance providing the framework to achieve a company's objectives, it influences various aspects of management, from action plans and internal controls to performance evaluation and disclosure.

Originally introduced in the UK, corporate governance gained prominence in India following the failures of several high-profile companies, notably the Satyam Computer Services scandal[22] involving fraud and financial irregularities. Undoubtedly, corporate governance and the role of the board of directors are of paramount significance. They form the bedrock upon which a company's success and sustainability are built. By establishing checks and balances, corporate governance ensures transparent, ethical decision-making aligned with the interests of all stakeholders.

The concept of collective responsibility within corporate governance warrants careful examination. While the law treats the board as a collective entity, it often holds individual directors liable for breaches of fiduciary duty. This distinction between individual accountability and collective responsibility holds substantial implications for both directors and the functioning of boards. Striking the right equilibrium between these aspects is crucial to maintain the confidence of experienced directors, pivotal in ensuring effective corporate governance.

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[22] Satyam Computer Services Ltd v. CBDT, (2011) 15 SCC 522.

Regulations and guidelines governing corporate governance have evolved over time to address vulnerabilities highlighted by financial crises and corporate scandals. These regulations, including the Act and guidelines issued by regulatory bodies, seek to promote transparency, accountability, and fairness in business operations. Nonetheless, it's imperative to continuously assess and adapt these regulations to accommodate the evolving dynamics of the corporate landscape, fostering an environment conducive to responsible and sustainable business practices.

In the pursuit of effective corporate governance, collaboration among stakeholders – shareholders, management, regulators, and the broader community – is vital to uphold the principles of transparency, integrity, and ethical behaviour. Embracing the concept of collective responsibility, where the board operates as a cohesive unit, can enhance decision-making, reinforce accountability, and ultimately contribute to the organization's success and growth.

By upholding corporate governance principles and embracing the notion of collective responsibility, companies can cultivate trust, encourage sustainable growth, and make a positive societal impact while safeguarding the interests of all stakeholders involved.

(The authors would like to acknowledge and thank Yashvi Vashi, Fifth Year, BBA.LLB (Hons.), NMIMS School of Law, Mumbai, for her contribution to this article.)

INVESTING IN GREENER FUTURE: NAVIGATING GREEN BONDS REGULATIONS

Abir Lal Dey[*], *Pranay Bhattacharya*[**] *and Shaivi Shah*[***]

ABSTRACT: *Climate change has not only making an impact globally but bringing into forefront new forms of financing that are focused on sustainability and responsible investing. One such form of financing is green bonds. Green bonds have been around since 2007, and since then have seen massive growth in the market. India issued sovereign green bonds for the first time as part of its climate strategy in the 2022-23 Budget. This paper explores the global landscape surrounding green bonds and the regulatory landscape in India through the lens of regulatory bodies like SEBI, RBI, IFSCA and India INX. This paper identifies risks associated with issuance of green bonds and presents suggestions for navigating such risks.*

KEYWORDS: *Green bonds, Green Bond Principles, Green debt securities, SEBI, RBI, IFSCA, Sustainability*

[*] Partner at Saraf and Partners
[**] Associate at Saraf and Partners
[***] Associate at Saraf and Partners

I. INTRODUCTION

Climate change is a significant issue globally, especially developing countries hit the hardest. As a counter to the effects of climate change, globally, we're seeing government bodies and major industries are adopting greener ways of doing business.

Given the recent developments in climate related risks, various funds, banks and financial institutions are shifting gears to reduce their exposure and loans to high-carbon emitting/polluting businesses by mobilizing new capital to scale up green lending. Banks and FIs have started to gradually assess the status of climate risk by scaling up their sustainable finance portfolio and incorporating climate change risks into their existing risk management framework.

In view of the ongoing trends, we have noticed significant measures being undertaken at a global level by various institutions. Many international banks have adopted green deposits framework to scale up lending to environment-friendly businesses, which are unlike conventional financing products. The green bond market has reached substantial milestone, with USD 1 trillion in cumulative issuance since market inception in 2007.

The milestone was passed in early December 2020.[23] This rapid growth was further augmented in October 2021, when the European Union (EU) issued about $14 billion of the bonds – the largest deal ever at that time. In view of the ongoing trends, through this paper, we dissect the green bond market, which has seen exponential growth.

II. UNDERSTANDING THE BASICS OF GREEN BONDS: A PREFACE

A. What is a Green Bond?

A green bond is a fixed income debt instrument in which an issuer (typically a corporation, government, or financial institution) borrows a large sum of money from investors for use in sustainability-focused projects. Green bonds work similarly to a traditional bond issuance, except the funds are slated for use in energy efficiency, renewable energy, or other projects that meet certain sustainability requirements, often formalized in a green bond "framework" developed by the issuer. Green bonds typically involve one or more third-party firms to underwrite, certify, and monitor the bond issuance.

[23] Explaining green bonds, Climate Bonds Initiative (Feb. 12, 2024, 7:30 PM), https://www.climatebonds.net/market/explaining-green-bonds.

Green bonds are specifically used for green projects that impact positively on the environment such as renewable energy, energy efficiency, clean transportation, waste management, etc. and to achieve similar sustainable goals.

Projects financed by green bonds cover a wide range of sectors including transportation, renewable energy, power, and urban development. Classified as "*dark green*" and "*medium green*" according to credit and ratings, these projects offer investors valuable information on risk profiles. In order to promote this product, typically the government's framework guarantees that interest and premium payments on green bonds are not affected by project performance, reducing risks for investors.

Before diving into the green bond market, it's crucial for potential investors to thoroughly research and analyse the financial standing and creditworthiness of issuers to make informed decisions, and further determine and satisfy themselves of the end use of the proceeds raised via issuance of green bonds.

B. Evolution of Green Bonds

On July 5, 2007, the European Investment Bank ("EIB") issued its inaugural Climate Awareness Bond ("CAB"), as a structured bond with proceeds dedicated to renewable energy and energy

efficiency projects. Thereafter, World Bank issued its first green bond in 2008, a SEK 2.3 billion bond with a maturity of six years for a group of Scandinavian investors and in March 2013 IFC issued a $1 billion benchmarked bond.[24]

Given the global development, 19 emerging market governments have participated in issuance of green, social, and sustainability bonds to help raising funds for promoting transition from fossil fuels. These countries include developing counties like India, Chile, Uzbekistan and many more.

The goal of these multinational banks was to create a high-quality fixed-income security to finance projects aimed at mitigating climate change. The end product was a standard bond with a simple label alerting investors to the 'green' nature of the security.

As for India, Yes Bank Limited raised Rs 5 billion to enhance long-term resources by issuing India's first green bond as part of a programme to finance various renewable energy projects. These green bonds were listed on the BSE with a tenor of 10 years and a coupon rate of 8.85 per cent per annum.[25]

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[24] Flavia Rosembuj and Sebastiano Bottio, Mobilizing Private Climate Finance—Green Bonds and Beyond, IFC (2016).

[25] Green Bonds: Increasing interest in environment-friendly financing, Renewable Watch (Feb. 15 2024, 4:30 PM), https://renewablewatch.in/2022/03/16/green-bonds/.

As a major development, the Union Minister for Finance and Corporate Affairs, Ms. Nirmala Sitharaman on February 1st, 2022 announced the Government intent to issue sovereign green bonds ("SGrBs") to earmark resources for green and sustainable infrastructure in public sector projects that contribute towards reducing the carbon intensity.

On February 9, 2023, the Government of India announced the issuance of another INR 80 billion ($968 million) in SGrBs to mitigate climate change, environmental protection, resource and biodiversity conservation, and achieve its net zero objectives. In view of this, the Reserve Bank of India conducted an auction for substantial SGrBs, which included NEW GOI SGrB 2028 and NEW GOI SGrB 2033, amounting to Rs. 8,000 crores, demonstrating the government's dedication to sustainable efforts.[26]

SGrBs are akin to conventional Government securities, with the distinction that they include a 'use of proceeds' clause specifying that the funds will be used exclusively for green investments.[27]

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[26] RESERVE BANK OF INDIA, https://rbi.org.in/Scripts/PublicationsView.aspx?id=21771#AS2 (last visited Feb. 28, 2024).

[27] Press Release, Reserve Bank of India, Auction of Sovereign Green Bonds (Jan 19, 2023), https://www.rbi.org.in/scripts/BS_PressReleaseDisplay.aspx?prid=55077.

C. Types of Green Bonds[28]

i. **"Use of Proceeds" Bond:** These bonds are specifically are investments in green projects and the debt recourse is towards the issuer of such bonds in case of liquidation. These instruments carry the same credit rating as the issuer's other bonds. Example: EIB "Climate Awareness Bond".

ii. **"Use of Proceeds" Revenue Bond or Asset-Backed Security ("ABS"):** These are similar to "Use of Proceeds" Bond or for or refinances green projects. Revenue streams from the issuers though fees, taxes etc are collateral for the debt and state and municipal entities may opt for this type of setup when issuing green bonds. Example: Hawaii State (backed by fee on electricity bills of the state utilities).

iii. **Project Bonds:** These bonds are ring-fenced for the specific underlying green project(s) and the that investors have recourse only to assets related to the project. Example: Invenergy Wind Farm (backed by Invenergy Campo Palomas wind farm)

iv. **Securitisation (ABS) Bond:** These bonds form part of the group of projects gathered together into a single debt portfolio , with bondholders having recourse to the assets underlying the full set of projects such as green mortgages and solar leasing

[28] *Supra* 23.

projects. Example: Tesla Energy (backed by residential solar leases).

v. **Covered Bonds:** This involves financing a group of green projects, known as the "covered pool." In this case, investors have recourse to the issuer, but if the issuer is unable to make debt payments, then bondholders gain recourse to the covered pool.

vi. **Loans**: This includes green projects financing which are secured (backed by collateral) or unsecured depending on the nature of the project. For secured loans, lenders have recourse to the collateral—and, in some cases, partial recourse to the borrower.

III. GLOBAL LANDSCAPE OF GREEN BONDS

The global landscape of green bonds is influenced by various locally adopted framework by different countries, reflecting the diverse regulatory frameworks and market conditions across different regions. They assess policy incentives, regulatory requirements, and market dynamics, helping stakeholders navigate opportunities and challenges in the green bond market. For instance, in Europe, the European Union's taxonomy regulation provides a framework for defining environmentally sustainable activities, guiding the issuance of green bonds and promoting transparency. Similarly, in the United States, initiatives such as the Green Bond Principles and the Climate Bonds Initiative facilitate standardization and market development. These jurisdictional analyses underscore the

importance of tailored approaches to green bond issuance and investment, driving progress towards global sustainability goals while accounting for local contexts and priorities.

These principles have played a crucial role in standardizing green bonds issuance, enhancing investor confidence, and fostering the growth of the market. In view of this, we outline below, various frameworks as adopted by various jurisdictions which outlines a holistic global landscape for the green bonds market:

A. The Green Bond Principles ("GBP") Dated June 2021[29]

The GBP framed by the International Capital Market Association ("**IMCA**") are voluntary process guidelines, which recommends steps to create transparency and disclosure in addition to promote integrity in the development of the green bonds market by clarifying the approach for issuance of a green bonds. The Green Bond Principles recommends heightened transparency for issuer-level sustainability strategies and commitments, and encourages information, if relevant, on the degree of alignment of projects with official or market-based taxonomies.[30]

[29] Green Bond Principles: Voluntary Process Guidelines for Issuing Green Bonds, ICMA (Feb. 26, 2024, 10:30 AM), https://www.ifc.org/content/dam/ifc/doclink/2022/the-green-bond-principles-202206.pdf.
[30] *id.*

The four core components for alignment with the GBP are:

i. **Use of Proceeds** - Utilisation of the bond proceeds for eligible green projects only, which should be appropriately described in the legal documentation of the security and contain clear environmental benefits, which will be assessed and, where feasible, quantified by the issuer.

ii. **Process for Project Evaluation and Selection -** The Green Bond issuer shall clearly communicate to investors about the objectives of the eligible green projects, which should be environmentally sustainable and shall also provide information on processes by which the issuer identifies and manages perceived social and environmental risks associated with the relevant project(s).

iii. **Management of Proceeds -** Maintaining high level of transparency and recommend that an issuer's management of proceeds be supplemented by the use of an external auditor, or other third party, to verify the internal tracking method and the allocation of funds from the green bond proceeds.

In essence, the appropriation of the net proceeds of the green bond issuance, or an amount equal to these net proceeds, should be credited to a sub-account, moved to a sub-portfolio or otherwise tracked by the issuer in an appropriate manner, and attested to by the issuer in a formal internal process linked

to the issuer's lending and investment operations for eligible green projects.

iv. Reporting **-** Issuers are required to keep and maintain, readily available up to date information on the use of proceeds used to fund green projects and projects to be renewed annually until full allocation, and on a timely basis in case of any material developments.

B. Europe

On October 23, 2023, the European Council adopted a regulation establishing a European green bond standard. The regulation establishes a uniform criteria for issuers seeking to label their environmentally sustainable bonds as 'European green bond' or 'EuGB'.[31]

To regulate EuGB, the European Union Green Bond Standard ("**EUGBS**") underlines a set of criteria and guidelines aimed at standardizing green bonds issuance within the EU. It was proposed as part of the European Commission's Action Plan on Sustainable Finance to promote sustainable investment and contribute to the

[31] Press Release, Council of European Union, European Green Bonds: Council adopts new regulation to promote sustainable finance (Oct. 24, 2023), https://www.consilium.europa.eu/en/press/press-releases/2023/10/24/european-green-bonds-council-adopts-new-regulation-to-promote-sustainable-finance/.

EU's environmental objectives. The EUGBS establishes rigorous requirements for green bonds to be labeled as such, ensuring transparency, credibility, and comparability across the market. Key features of the EUGBS include clear eligibility criteria for green projects, robust reporting and disclosure requirements, and independent verification processes. By providing a common framework for green bond issuance, the EUGBS aims to enhance investor confidence, facilitate market development, and drive capital towards sustainable investments that contribute to the EU's climate and environmental goals. The EUGBS Regulation is anticipated to come into effect during the second half of 2024 and should become applicable 12 months after its publication in the Official Journal of the European Union.

C. The United States

In the United States, the green bond market operates within the broader framework of securities regulations overseen by the Securities and Exchange Commission (SEC). While there isn't a specific regulatory framework exclusively for green bonds, issuers often adhere to voluntary guidelines and standards, such as the Green Bond Principles (GBP) established by the International Capital Market Association (ICMA).

The Green Bond Principles provide guidance on the issuance and management of green bonds, covering aspects such as project evaluation, reporting, and transparency. Many U.S. issuers voluntarily follow these principles to ensure credibility and transparency in their green bond offerings.

Furthermore, federal agencies such as the U.S. Department of Energy and the Environmental Protection Agency (EPA) play a role in promoting green finance and supporting projects related to renewable energy, energy efficiency, and environmental conservation. While not specific to green bonds, these agencies provide funding, incentives, and technical assistance for eligible projects.

At the state and municipal levels, various jurisdictions in the U.S. have issued green bonds to finance sustainable infrastructure projects, such as renewable energy installations, energy-efficient buildings, and public transportation systems. These issuances are often guided by local sustainability goals and may be supported by state-level regulations or incentives.

Overall, while the United States lacks a centralized regulatory framework specifically for green bonds, issuers often voluntarily adhere to international standards and guidelines to promote transparency and credibility in the market. Additionally, federal, state, and municipal initiatives support the financing of

environmentally beneficial projects through various channels, contributing to the growth of the green bond market in the country.

D. Singapore

The Government of Singapore has released its national Green Bond Framework, which underlines the foundation for the issuance of green bonds by the Government under the Significant Infrastructure Government Loan Act 2021 ("SINGA"), and serves as a reference for Statutory Boards' respective green bond frameworks.

Singapore has been actively promoting green finance, including the development of a Green Bond Grant Scheme to encourage green bond issuances. The framework for green bonds in Singapore is primarily governed by guidelines set by the Monetary Authority of Singapore (MAS). MAS encourages issuers to adhere to international standards such as the Green Bond Principles (GBP) and the International Capital Market Association (ICMA) guidelines. These guidelines cover various aspects, including project eligibility criteria, use of proceeds, reporting, and verification processes. MAS also supports the development of a robust green bond market through initiatives such as the issuance of green bond grants, which provide funding support to offset the costs associated with obtaining external review and certification of green bond issuances. Additionally, the Singapore Exchange (SGX) has

introduced listing rules and guidelines to facilitate the listing and trading of green bonds on its platform, ensuring transparency and accountability in the market. Overall, Singapore's green bond framework underscores its commitment to sustainable finance and its efforts to contribute to global climate action.

E. China

The Chinese green bond market is expected to accelerate in 2024 after the country emerged as the top global market for sales in the fourth quarter of 2023. In China, the Green Bond Framework plays a pivotal role in guiding the issuance and investment of green bonds within the country's burgeoning sustainable finance market. Developed by regulatory bodies such as the People's Bank of China ("**PBOC**") and the National Development and Reform Commission ("**NDRC**"), the framework outlines guidelines and criteria for identifying eligible green projects, ensuring transparency, and verifying environmental impact. Key components of China's Green Bond Framework include detailed project categories aligned with national environmental objectives, rigorous reporting requirements, and independent verification processes. Additionally, regulatory support and incentives, such as tax exemptions and subsidies, aim to encourage both issuers and investors to participate in the green bond market. As China continues to prioritize environmental sustainability and green finance, the Green Bond Framework serves as a crucial tool for promoting investment in low-carbon projects

and advancing the country's transition to a greener economy.[32] On July 29, 2022, the long-awaited China's Green Bond Principles ("**China GBP**") were released by the China Green Bond Standard Committee, which articulates its reference to the ICMA Green Bond Principles and is an effort to call for harmonisation of the different green bond regulations in China.[33]

IV. ANALYSIS OF THE EXISTING GREEN BONDS FRAMEWORK IN INDIA

A. Securities and Exchange Board of India ("SEBI")

In 2017, the SEBI issued a circular formalising green debt security ("**GDS**"), which was later superseded and absorbed by SEBI (Issue and Listing of Non-Convertible Securities) Regulations, 2021 ("**ILNCS Regulations**"). Regulation 2(1)(q) of the ILNCS Regulations defines a green debt security as '*a debt security issued for raising funds subject to the conditions as may be specified by the Board from time to time, to be utilised for project(s) and/ or asset(s) falling under any of the following categories:*

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[32] Weihui Dai, Sean Kidney and Beate Sonerud, *Roadmap for China: green Bond Guidelines for the Next Stage of Market Growth* (2016) https://www.climatebonds.net/files/files/CBI-IISD-Paper1-Final-01C_A4.pdf.
[33] *Analysis of China's Green Bond Principles,* International Capital Market Association (2022) https://www.icmagroup.org/assets/Analysis-of-Chinas-Green-Bond-Principles.pdf.

(i) *Renewable and sustainable energy including wind, bioenergy, other sources of energy which use clean technology,*

(ii) *Clean transportation including mass/public transportation,*

(iii) *Climate change adaptation including efforts to make infrastructure more resilient to impacts of climate change and information support systems such as climate observation and early warning systems,*

(iv) *Energy efficiency including efficient and green buildings,*

(v) *Sustainable waste management including recycling, waste to energy, efficient disposal of wastage,*

(vi) *Sustainable land use including sustainable forestry and agriculture, afforestation,*

(vii) *Biodiversity conservation,*

(viii) *Pollution prevention and control (including reduction of air emissions, greenhouse gas control, soil remediation, waste prevention, waste reduction, waste recycling and energy efficient or emission efficient waste to energy) and sectors mentioned under the India Cooling Action Plan launched by the Ministry of Environment, Forest and Climate Change,*

(ix) *Circular economy adapted products, production technologies and processes (such as the design and introduction of reusable, recyclable and refurbished*

materials, components and products, circular tools and services) and/or eco efficient products,

(x) Blue bonds which comprise of funds raised for sustainable water management including clean water and water recycling, and sustainable maritime sector including sustainable shipping, sustainable fishing, fully traceable sustainable seafood, ocean energy and ocean mapping,

(xi) Yellow bonds which comprise of funds raised for solar energy generation and the upstream industries and downstream industries associated with it,

(xii) Transition bonds which comprise of funds raised for transitioning to a more sustainable form of operations, in line with India's Intended Nationally Determined Contributions, and

Explanation: Intended Nationally Determined Contributions (INDCs) refer to the climate targets determined by India under the Paris Agreement at the Conference of Parties 21 in 2015, and at the Conference of Parties 26 in 2021, as revised from time to time.

(xiii) Any other category, as may be specified by the Board from time to time.'[34]

[34] Securities and Exchange Board of India (Issue and Listing of Non-Convertible Securities) Regulations, 2021, Reg. 2(1)(q).

Further, Regulation 26 of the ILNCS Regulations states that an issuer desirous of issuing and listing of green debt securities shall comply with the conditions as may be specified by the Board read with the SEBI (Listing Obligations and Disclosure Requirements) Regulations, 2015 ("**LODR Regulations**").[35]

SEBI also issued a Consultation Paper on Green and Blue Bonds dated August 04, 2022[36] ("**Consultation Paper**") as a mode of sustainable finance to promote sustainability in fundraising and align the GDS with the latest Green Bond Principles (**"GBP"**) acknowledged by the International Organisation of Securities Commissions (**"IOSCO"**). The regulatory changes covered in the Consultation Paper was officially approved by SEBI on December 20, 2022.[37] Further, on December 20, 2022, SEBI in its board meeting decided to amend the ILNCS Regulations to facilitate sustainable finance while safeguarding against 'greenwashing' to align the extant framework for green debt securities.

In view of the above, SEBI expanded the scope of GDS in line Consolation Paper vide SEBI (ILNCS) Amendment Regulations,

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[35] *id.*, Reg. 26.
[36] *Consultation Paper on Green and Blue Bonds as a mode of Sustainable Finance* (2022), https://www.sebi.gov.in/reports-and-statistics/reports/aug-2022/consultation-paper-on-green-and-blue-bonds-as-a-mode-of-sustainable-finance_61636.html.
[37] Press Release, Securities and Exchange Board of India, SEBI Board Meeting (Dec. 20, 2022) https://www.sebi.gov.in/media/press-releases/dec-2022/sebi-board-meeting_66407.html.

2023 ("**ILNCS Amendment Regulations**"), which broadens the scope of GDS by making changes to the INNCS Regulations.[38] By way of which SEBI has broadened the scope of definition of GDS bringing the scope of new project categories eligible for GDS utilisation in addition to expanding the scope to climate change adaptation, pollution prevention and control, circular economy initiatives, blue bonds for sustainable water management, yellow bonds for solar energy and transition bonds in line with India's Intended Nationally Determined Contributions.[39]

One of the key advancements is the required appointment of an autonomous third-party reviewer/certifier for GDS issuers. The reviewer's position is vital in providing support before and after the project is issued, analysing project selection criteria, and keeping track of the use of GDS proceeds. This requirement is initially on a 'comply or explain' basis for two years from April 01, 2023.

The disclosure demands for GDS issuers have been extended to align with GBP. The issuer needs to outline the decision-making process for project eligibility, taxonomies, and certifications mentioned, as well as how it aligns with India's Intended Nationally

[38] *Supra* 35.
[39] Intended Nationally Determined Contributions (INDCs) refer to the climate targets determined by India under the Paris Agreement at the Conference of Parties 21 in 2015, and at the Conference of Parties 26 in 2021, as revised from time to time.

Determined Contributions (for transition bonds), and the planned temporary use of unallocated proceeds. Furthermore, it is now required to include social and environmental risks, mitigation plans, and impact reporting on a project-by-project basis. The framework also includes aspects of Business Responsibility and Sustainability Reporting (**"BRSR"**) in the Annual Report, regardless of market capitalization thresholds for regular listed entities. The section on best practices highlights SEBI's dedication to combating greenwashing by stressing the importance of ongoing monitoring of sustainable practices, prohibiting deceptive labels, and measuring adverse impacts.

Despite worries about heightened adherence, GDS issuances in India have displayed a favourable trend. By September 14, 2022, there were 15 GDS issuances amounting to around Rs. 4,500 crores outstanding in the Indian market.[40] The framework is designed to promote a sustainable economy through transparent, accountable, and impactful use of funds raised via GDS, thus supporting India's green finance sector. Thus, SEBI's updated guidelines for GDS demonstrate a dedication to sustainable finance, adhere to global standards, and work towards preventing misleading claims while enhancing openness and responsibility in the green bond sector in India.

[40] Green Debt Securities, Securities and Exchange Board of India (Feb. 28, 2024, 3:00 PM), https://www.sebi.gov.in/statistics/greenbonds.html.

B. Reserve Bank of India ("RBI")

The RBI on April 11, 2023, on notified 'Framework for acceptance of Green Deposits' ("**Green Deposit Framework**")[41] to encourage regulated entities ("**REs**") to offer green deposits to customers, protect interest of the depositors, aid customers to achieve their sustainability agenda, address greenwashing concerns and help augment the flow of credit to green activities/projects.

The Green Deposit Framework is an internal framework to be formulated by banks and financial institutions for their investors, which shall underline appropriate governance, strategy to address climate change risks and risk-management structure to manage environment friendly adapted products and processes.

REs can framework their own green deposit framework to lay down the criteria in relation to the use of proceeds of green deposits to finance new or existing eligible green projects.

In common parlance, a green deposits framework consists of the following criteria:

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[41] Reserve Bank of India, Framework for Acceptance of Green Deposits, RBI/2023-24/14 (Notified on April 11, 2023)

(i) RE's approach to sustainability
(ii) Intent of the framework laying down sustainable goals
(iii) Transparency, review of internal and external process
(iv) Eligible green projects
(v) Exclusionary criteria from the eligible green projects.

As per the Green Deposit Framework, activities/ projects for green financing can be classified under priority sector if they meet the requirements laid down in priority sector lending (PSL) guidelines of RBI Master Directions – Priority Sector Lending (PSL) – Targets and Classification dated September 04, 2020 (Updated as on July 27, 2023), as amended from time to time. Further, as the activities/ projects listed in the Green Deposit Framework are the same as indicated in SGrBs framework, investment by Regulated Entities in SGrBs are also covered under the Green Deposit Framework.

On July 22, 2022, the RBI also released "Discussion Paper and results of Survey on Climate Risk and Sustainable Finance" ("**Discussion Paper**"), which underlines potential risks that may arise from climate change and the efforts to mitigate those risks by banks for preventing economic and financial consequences for green loans. As per the Discussion Paper, the impact the financial sector needs to be ascertained on two broad parameters i.e., physical risks and transition risks. First, banks need to ascertain physical risks i.e. economic costs and financial losses resulting from the increasing frequency and severity of climate change and transition risks i.e.

risks arising from the process of adjustment towards a low-carbon economy. The impact of these risks may be determined in terms of short, medium and long-term.

Further, as per the RBI, banks and financial institutions are required to identify prudential risk categories in respect to climate change such as:

(i) Credit risk: Climate related risks that can impair the value of assets held by the banks' customers and supply chains affecting customers' operations and profitability, and their viability;

(ii) Market risk: Volatility in investments because of shifts in investor preferences or climate induced adverse effects on the underlying economic activity;

(iii) Liquidity risk: Increased liquidity demands to respond to extreme weather events.

(iv) Banks may also need to incorporate climate related risks for other risk like credit concentration risk, underwriting risk, reputational risk, strategic risk, etc.

Banks also need to take into account these risks while preparing their Internal Capital Adequacy Assessment Process ("**ICAAP**") as prescribed under the Master Direction - Reserve Bank of India (Prudential Regulations on Basel III Capital Framework, Exposure Norms, Significant Investments, Classification, Valuation and Operation of Investment Portfolio Norms and Resource Raising

Norms for All India Financial Institutions) Directions, 2023 (“**Master Direction-Basel III**”), as updated from time to time.

It is recognised that climate-related financial risks would probably have to be incorporated into ICAAPs iteratively and progressively, as the methodologies and data used to analyse these risks mature over time and analytical gaps are addressed. Brief guidance on overarching aspects related to the management of climate-related and environmental risks, viz. governance, strategy, risk management, stress testing, scenario analysis and disclosure has been covered in the subsequent sections.

C. Indian Green Bonds Framework (“GBF”)

On November 22, 2022, the Smt. Nirmala Sitharaman, Union Minister for Finance & Corporate Affairs approved the Sovereign Green Bonds framework of India to strengthen India’s commitment towards its Nationally Determined Contribution (“**NDCs**”) targets, adopted under the Paris Agreement, and help in attracting global and domestic investments in eligible green projects. The GBF sets forth the obligations of the Government of India as a Green Bond issuer and applies to all sovereign Green Bonds issued by the Government of India. The GBF has been formulated basis the four components

and key recommendations of the International Capital Market Association (ICMA) Green Bond Principles (2021)[42].

D. International Financial Services Centres Authority ("IFSCA")

The IFSCA had notified the International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations, 2021 ("**IFSCA Regulations**") on July 16, 2021 which *inter alia* provides under Chapter X, the obligations of the issuer of green bonds (among other green, social and sustainability-linked debt securities).

The obligations include the requisite to appoint an independent external review to determine that green bonds are aligned with a recognised framework like the International Capital Market Association ("**IMCA**")'s GBP. Moreover, it provides for additional disclosures warranted in offer documents or information memorandum as the case may be.[43]

E. India International Exchange (IFSC) ("India INX")

[42] Green Bond Principles, International Capital Market Association (Mar. 1, 2024, 4:30 PM), https://www.icmagroup.org/sustainable-finance/the-principles-guidelines-and-handbooks/green-bond-principles-gbp/.
[43] International Financial Services Centres Authority (Issuance and Listing of Securities) Regulations, 2021.

The Green bonds are listed and traded on various exchanges, including India's own India INX wherein green, social, sustainability or sustainability-linked debt securities are listed. India INX has issued for a Circular on Listing of Debt Securities on Global Securities Market ("**INX-Circular**"). Annexure C to the INX-Circular provides for the additional disclosure requirements to be made for various debt securities including but not limited to green bonds.[44]

On the instance of listing of green bonds, the issuer shall be obliged to: **(i)** have undertaken an external review of the issue vide any forms recommended ICMA like second party opinion, verification, certification or scoring / rating, **(ii)** ensure that the external review shall be undertaken by person(s) that satisfies the eligibility criteria provided thereinunder, and **(iii)** make additional disclosures including but not limited to a statement on ESG objectives, criteria of evaluating and selecting the project(s) and/or asset(s), proposed utilisation of issue proceeds and details of the systems to track deployment of proceeds of the issue.[45] Moreover, the issuer shall be obliged to make continuing disclosures every 12 (twelve) months in accordance with the INX-Circular.[46]

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[44] India International Exchange (IFSC) Limited, Circular on Listing of Debt Securities on Global Securities Market.
[45] *Id*.
[46] *Id*.

V. RISKS IN ISSUANCE OF GREEN BONDS

i. **Lack of liquidity:** The green bond market is relatively small and niche, which means that there may not be enough buyers and sellers to trade them easily and quickly. This can make it harder for investors to enter or exit their positions, or to adjust their portfolios according to changing market conditions. It can also affect the pricing and valuation of green bonds, as they may not reflect the true supply and demand of the market.

ii. **Lack of clarity and standardization:** There is no universally accepted definition or criteria for what constitutes a green bond, or how to measure and report its environmental impact. Different issuers, verifiers, and rating agencies may have different methodologies and frameworks for assessing and certifying green bonds, which can create confusion and inconsistency among investors and stakeholders. It can also lead to the risk of greenwashing, where some issuers may claim to be green without actually delivering on their promises or complying with their obligations.

iii. **Lack of pricing advantage**: Despite the growing demand and popularity of green bonds, there is no clear evidence that they offer a lower cost of capital or a higher return than conventional bonds. This is because investors mainly base their decisions on the creditworthiness and financial performance of the issuer, rather than the environmental benefits of the project. Therefore, green bonds

may not provide a sufficient incentive for issuers or investors to switch from traditional financing options, especially if they entail additional costs or requirements.

iv. **Lack of impact evaluation:** One of the main challenges of green bonds is to demonstrate and quantify their environmental impact and contribution to climate action. This requires a robust and transparent system of monitoring, reporting, and verification (MRV) that can track and measure the outcomes and outputs of the green projects financed by the bonds. However, such a system can be complex, costly, and time-consuming to implement and maintain, and may not be available or reliable for all types of green projects or sectors. Moreover, the impact of green bonds may depend on various factors and assumptions, such as the baseline scenario, the counterfactual situation, the additionality effect, and the externalities and spillovers including natural calamities, which can be difficult to account for and verify.

VI. OUR SUGGESTIONS AND WAY AHEAD

i. **Promoting a greenium:** A greenium is a yield discount that investors may be willing to pay for green bonds, due to their higher demand or lower risk. A greenium can incentivize issuers to issue more green bonds and investors to buy and hold them. However, the existence and magnitude of a greenium may vary depending on the issuer, the market, and the methodology. Therefore, every green

bond issuance should provide benefits to the borrowers as an incentive.

ii. **Developing common standards and frameworks:** The green bond market currently lacks a universally accepted definition or criteria for what constitutes a green bond, or how to measure and report its environmental impact. Different issuers, verifiers, and rating agencies may have different methodologies and frameworks for assessing and certifying green bonds, which can create confusion and inconsistency among investors and stakeholders. It can also lead to the risk of greenwashing, where some issuers may claim to be green without actually delivering on their promises or complying with their obligations. Therefore, developing common standards and frameworks for green bonds can help harmonize and streamline the market, as well as enhance its credibility and comparability.

iii. **Providing policy support and incentives:** The green bond market may also benefit from policy support and incentives from governments and regulators, which can help address some of the barriers and challenges that green bonds face, such as high costs, lack of data, or regulatory uncertainty. Policy support and incentives can take various forms, such as subsidies, guarantees, tax benefits, disclosure requirements, or market facilitation.

iv. **Enhancing impact reporting and disclosure:** One of the main challenges of green bonds is to demonstrate and quantify their environmental impact and contribution to climate action. This requires a robust and transparent system of monitoring, reporting,

and verification (MRV) that can track and measure the outcomes and outputs of the green projects financed by the bonds. However, such a system can be complex, costly, and time-consuming to implement and maintain, and may not be available or reliable for all types of green projects or sectors. Moreover, the impact of green bonds may depend on various factors and assumptions, such as the baseline scenario, the counterfactual situation, the additionality effect, and the externalities and spillovers, which can be difficult to account for and verify. Therefore, enhancing impact reporting and disclosure can help improve the accountability and credibility of the green bond market, as well as provide useful information and feedback to issuers, investors, and stakeholders.

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market, as well as provide useful information and feedback to issuers, investors, and stakeholders.

VII. CONCLUSION

The regulatory landscape around Green Bonds, especially in India, offers a distinct set of opportunities and problems. The majority of markets are currently unregulated, which emphasizes the necessity of strong regulatory frameworks, particularly with regard to green bonds for a growing economy like India.
First and foremost, banks ought to have appropriate safeguards against the aforementioned risks. In order to preserve investor trust and guarantee the stability of the financial system, this would be essential. Stringent risk assessment and management procedures would support investor confidence by reducing any hazards related to green bonds.

Second, the importance of regulators like the SEBI and the RBI cannot be overstated. The RBI shall by itself or any other third party(ies) ensure that proceeds of the issue would be used for green projects. SEBI shall simultaneously enforce ongoing disclosure requirements and establish sanctions for noncompliance. This would further strengthen accountability and transparency in the green bonds market.

Finally, even while regulatory agencies play a critical role, the ultimate objective would be to progressively move towards a self-regulating

environment. To ensure that the transition is seamless and does not jeopardize the stability of the financial system, this may be undertaken gradually. This does not, however, mean that RBI oversight ought to end. To ensure that the self-regulatory mechanisms are operating efficiently and in the best interests of all stakeholders, the RBI shall retain its position its authority in a supervisory role in the financial market.

To put it simply, negotiating the green bond laws calls for a well-rounded strategy that incorporates strong regulatory monitoring, efficient risk management, and a gradual shift to self-regulation. This may open the door to a more environmentally friendly future in which financial returns on investments are matched by increased environmental sustainability.

A DECADE OF THE POSH ACT: SUPREME COURT'S CONTINUED COMMITMENT FROM PAVING THE WAY FOR ENACTMENT TO STRENGTHENING IMPLEMENTATION OF THE POSH ACT

- *Sheetal Mishra*[*] *and Shloka Jain*[**]

ABSTRACT: *In recent years, there has been an increase in the number of workplace sexual harassment cases being reported. This is due in part to a gradually growing awareness of the issue and an increased willingness of victims to come forward, along with Supreme Court of India's commitment to addressing this issue. The ongoing commitment from Indian lawmakers suggests an anticipated escalation in obligations for entities to ensure workforce safety of all. This article delineates some of the prominent recent judicial reforms, pertaining to workplace sexual harassment.*

KEYWORDS: *Workplace sexual harassment, POSH, Internal Complaints Committee, women rights, Supreme Court of India.*

I. INTRODUCTION

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The recognition of workplace sexual harassment in India primarily began with the *1997 Vishaka v. State of Rajasthan case*[47], triggered by the gang rape of Ms. Bhanwari Devi and filed by social activists and NGOs with an aim of addressing the societal aberration of sexual harassment and seeking enforcement of fundamental rights for working women. In the said case, on account of absence of a specific law addressing sexual harassment at workplace, the Supreme Court formulated binding guidelines commonly referred as 'Vishakha guidelines' stipulating norms to be adhered to at workplaces, until enactment of a legislation. These guidelines paved the way for enactment of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, ("**POSH Act**"). The POSH Act plays a pivotal role in promoting gender equality, fostering a respectful and harassment-free work environment for women of all ages, and empowering employees to voice concerns against sexual harassment. The POSH Act is applicable to both, organized and unorganized sectors.

Among the diverse forms of harassment experienced by individuals, sexual harassment is a particularly troubling issue that permeates various contexts, with the workplace being a notable focal point. The crux of the POSH Act lies in its meticulous delineation of sexual harassment, encompassing a range of actions, from unwelcome physical advances to verbal and non-verbal behaviours laden with sexual connotations.

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[47] Vishaka v. State of Rajasthan (1997) 6 SCC 241.

The POSH Act mandates the constitution of Internal Complaints Committee ("**IC**"), by all employers at the workplace[48] and constitution of local committees ("**LC**s") by the government[49], to conduct inquiries into sexual harassment complaints. The other responsibilities of the employer under the POSH Act also include ensuring a safe working environment at the workplace; displaying the consequences of acting in a manner that constitutes sexual harassment; organizing regular workshops and awareness programs to inform employees and IC members on workplace sexual harassment issues and its implications; provision of necessary facilities to the internal committee for dealing with the complaint and conducting an inquiry; making available such information to the LC as may be required in an inquiry; providing assistance to the women if she chooses to file a complaint in relation to the offence under the Indian Penal Code, 1860; treating sexual harassment as misconduct and taking action for such misconduct; and monitoring the timely submission of the reports to the employer and the District Officer by the internal committee.[50]

Despite a robust POSH Act being enforce for a decade, reports indicate a low awareness level among employees regarding the POSH Act. In a recent survey, only 8% of employees were familiar with the regulations

[48] Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013, §4.
[49] *Supra* 48, §5.
[50] *Id*, §19.

before 2021, and an alarming 11% indicated that they would choose to leave an organization rather than report harassment.[51]

Another survey conducted by a National Newspaper in the year 2023 highlights the lack of effective implementation of the POSH Act by the employers, suggested that there are 30 national sports federations in India, out of which 16 have not constituted an IC till date, and where the IC has been instituted, they do not have the stipulated number of members or lack the mandatory external member.[52]

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Another disturbing trend reveals a 101 percent increase in pending sexual harassment cases within India's largest companies by March 2023. The

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[51] Stratefix Consulting, Only 8% employees aware of the POSH Act, reveals survey, HR Economic Times (Nov. 24, 2023), https://hr.economictimes.indiatimes.com/news/workplace-4-0/only-8-employees-aware-of-the-posh-act-reveals-survey/98193795.

[52] Amit Kamath, Not just wrestling, half of national sport federations don’t have sexual harassment panel mandate by law, Indian Express (Nov. 24, 2023) https://indianexpress.com/article/sports/not-just-wrestling-half-of-national-sports-federations-dont-have-sexual-harassment-panel-mandated-by-law-8590204/.

[53] *Id.*

backlog, as analyzed through the BSE100 ESG Index, points to a failure in resolving cases promptly. While the surge in cases indicates heightened awareness and employee empowerment, it also raises concerns about ICs' efficiency, potentially stemming from inadequate training and preparation. The increase in pending cases is ascribed to a heightened volume of overall complaints, reflecting a notable surge in employee awareness and empowerment to report instances of harassment. Despite this, the report hints at a potential bottleneck within ICs implying that cases may not be promptly resolved due to insufficient training and preparation. A range of factors contribute to this surge in cases, including the return to physical office spaces post-pandemic, leniency towards errant employees, and potential procedural slowdowns. The report stresses the need to implement the POSH Act across virtual workplaces and the importance of IC members clearing their schedules for timely inquiries and calls for immediate implementation of IC recommendations within 60 days.[54]

II. SUPREME COURT'S COMMITMENT TO POSH

From paving the way in the year 1997 for enactment of the POSH Act in 2013 by way of Vishakha guidelines to the several rulings issued by the

[54] Nasrin Sultana, India Inc sees alarmingly high unresolved sexual harassment cases at workplace, Forbes India, (Nov. 24, 2023) https://www.forbesindia.com/article/take-one-big-story-of-the-day/india-inc-sees-alarmingly-high-unresolved-sexual-harassment-cases-at-workplace/89043/1#:~:text=An%20increase%20in%20the%20number,were%20carried%20forward%20to%20FY24.

Supreme Court in 2023 which have strengthened the POSH Act, the Supreme Court's approach to POSH Act has reaffirmed its commitment to protecting employees from sexual harassment and bringing parity at the workplace. The Supreme Court through its recent rulings has emphasized that employers as well as the state have a legal responsibility to create a safe and harassment-free work environment for all female employees. The recent rulings of the Supreme Court stipulate:

A. Directions for better enforcement of POSH Act

The Hon'ble Supreme Court in the case of *Aureliano Fernandes v State of Goa and Others*[55]*,* while hearing an appeal involving a university lecturer, was disappointed with the decision of the IC in a sexual harassment investigation. In the instant case, due to the appellant's repeated requests for postponements, the standing committee proceeded *ex-parte*, finding the appellant guilty of sexual harassment and subsequently terminating his employment. The court held that an inadequately prepared IC conducting an incomplete inquiry can lead to severe consequences and expressed concern about significant lapses and deficiencies in enforcing and implementing the POSH Act, even after 10 years of its enactment.

[55] Aureliano Fernandes v. State of Goa and Others, 2023 SCC OnLine SC 621.

Further, many establishments still lack ICs, and even if formed, the IC's often falls short of the required number of members or a mandatory external member[56]. This gap adversely affects the self-esteem of women, their emotional, mental and physical health. If the authorities/managements/employers cannot assure them a safe and secure workplace, they will fear stepping out of their homes to make a dignified living and exploit their talent and skills to the hilt[57]

The Supreme Court additionally noted that *"it is often seen that when women face sexual harassment at the workplace, they are reluctant to report such misconduct. Many of them even drop out from their job. One of the reasons for this reluctance to report is that there is an uncertainty about who to approach under the Act for redressal of their grievance."* Commenting on the effectiveness of POSH, the Court held: *"However salutary this enactment may be, it will never succeed in providing dignity and respect that women deserve at the workplace unless and until there is strict adherence to the enforcement regime and a proactive approach by all the State and non-State actors."*

[56] *Id.*
[57] *Id.* (per Hima Kohli, J.)

In light of the deficiencies in implementing the POSH Act, the Supreme Court in this case *interalia* issued several directions to ensure effective enforcement of the POSH Act, which are as follows:

(i) The Union of India, the State Governments and Union Territories to undertake a time bound exercise to verify if all relevant government bodies have constituted LCs / ICs and that the composition of the said committees are strictly in accordance with the POSH Act;

(ii) ensure that information on LC / IC composition, contact details, complaint procedures, rules, and policies is readily available on official websites;

(iii) Taking of immediate and effective steps by the authorities / managements / employers to familiarize members of the IC with their duties and the manner in which an inquiry ought to be conducted. This includes the period from receiving a workplace sexual harassment complaint to the completion of the inquiry and submission of the final report; and

(iv) Conduct regular orientation programs, workshops, seminars, and awareness programs to educate IC/LC members, women employees, and women's groups about the POSH Act and related regulations.

The Court has also ordered District Officers to contact establishments falling under the definition of 'workplace' under the POSH Act to ensure compliance.

B. Directions to the Union and State governments to ensure effective implementation of the POSH Act

In the case of *Initiatives for Inclusion Foundation v Union of India,*[58] the Supreme Court heard a writ petition seeking issuance of appropriate orders under the POSH Act for the proper implementation of all the provisions of the POSH Act and laid down directions to ensure the effective implementation of the POSH Act, some of which are as below:

(i) Appointment of public authorities: The Supreme Court while emphasizing the role of district officer in workplaces where there is no IC and has directed state governments to actively appoint district officers. The Court has also emphasized the requirement for every district officer to fully comply with the POSH Act while obtaining annual compliance reports and IC reports

[58] Initiatives for Inclusion Foundation v Union of India, 2023 SCC OnLine SC 1373.

from employers. The district officers have also been directed to identify non-governmental organizations working with women and to jointly with NGO's, take proper action to create more awareness about the POSH Act;

(ii) Training and capacity building: District Officers, LCs, and nodal officers to be trained on their responsibilities at regular intervals;

C. The importance of not allowing insignificant discrepancies and hyper-technicalities to overshadow the broader context of sexual harassment cases

In the case of *Union of India & Ors v. Dilip Paul*[59], the Supreme Court of India emphasized that courts should not be swayed by insignificant discrepancies and hyper-technicalities when evaluating procedural violations. The court held that the impact of any such violation should be assessed against the overall fairness of the inquiry, particularly in cases involving serious allegations such as sexual harassment. The court stressed the need to examine sexual harassment allegations on broader probabilities, considering the

[59] Union of India v. Dilip Paul, 2023 SCC OnLine SC 1423.

entire background of the case, and not solely on the basis of procedural or technical irregularities.

This case involved a sexual harassment complaint, which led to multiple inquiries. The Central Complaints Committee found the respondent guilty, and upon consideration of inquiry reports, and other related records of the case, the President of India had ordered for withholding of 50% amount from the monthly pension of the respondent on permanent basis, but the High Court subsequently ruled against the Central Complaints Committee's findings, claiming that the Central Complaints Committee had overstepped its jurisdiction and that there was a lack of evidence. The Supreme Court overturned the High Court's decision, emphasizing the gravity of addressing workplace sexual harassment and underscored the limited scope of judicial review in disciplinary matters, stating that interference by the court is warranted only under specific circumstances by stressing on the fact that,

> *"The allegations must be appreciated in the background of the entire case, and the courts must be very cautious before any sympathy or leniency is shown towards the delinquent. It further held that the courts are obliged to rely on any evidence of the complainant that inspires confidence[60]."*

[60] *Supra* 59, ¶ 43.

The court also highlighted that the violation of a procedural rule should not automatically invalidate the entire inquiry, and the consequences of such violations should be evaluated based on the principles of fairness and the rights of the accused.

I. WAKE-UP CALL FOR EMPLOYERS

The recent judgements of the Supreme Court should be taken as a blazing alarm bell for effective implementation of the POSH Act which has been long overdue. Non-compliance with the provisions of the POSH Act can invite penalties amounting up to Rs. 50,000/- for the employers[61] and in cases of continued breach of the provisions the POSH Act also provides for cancellation of licenses of the employers.[62]

The employers should ensure that in addition to setting up an IC and ensuring redressal of grievances of workplace harassment in a time bound manner, the remaining obligations cast by the POSH Act and rules upon an employer are also duly discharged. These obligations include:

(i) Promoting a gender sensitive workplace and removing the underlying factors that contribute towards creating a hostile working environment against women;

[61] *Supra* 48, § 26
[62] *Id*, § 26(2)(ii)

(ii) provide a safe working environment;

(iii) formulate and widely disseminate an internal policy or charter or resolution or declaration for prohibition, prevention and redressal of sexual harassment at the workplace;

(iv) display conspicuously at the workplace, the penal consequences of indulging in acts that may constitute sexual harassment and the composition of the IC and declare the names and contact details of all members of the IC;

(v) organize workshops and awareness programmes at regular intervals for sensitizing employees on the issues and implications of workplace sexual harassment and organizing orientation programmes for members of the IC;

(vi) treat sexual harassment as a misconduct under the service rules and initiate action for misconduct; and

(vii) prepare an annual report with details on the number of cases filed and their disposal and submit the same to the District Officer and monitor the timely submission of reports by the IC.[63]

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[63] *Supra* 48, § 13.

In response to the wake-up call, in addition to following the Supreme Court guidelines, here are actionable steps which may be followed by employers to enhance workplace safety and address sexual harassment promptly:

(i) Improve awareness of the POSH Act among employers and employees by ensuring the establishment and effective functioning of the ICs and LCs.

(ii) Laying emphasis on consistent training initiatives for all employees and staff members, concentrating on increasing awareness, implementing prevention strategies, encouraging bystander intervention, and fostering a culture of respect in the workplace. Ensure that managers and supervisors actively participate in sensitization programs, recognizing their pivotal role in solidifying a culture of respect within the organization.

(iii) Establishing readily available support systems for victims, including counselling services, legal assistance, and employee assistance programs.

(iv) Conducting regular evaluations of policies, procedures, and training programs and seeking external audits or assessments of the same for an independent perspective. Furthermore, it is recommended to continuously adapt and update POSH policies based on evolving needs and trends.

(v) Reporting incidents to relevant authorities to ensure accountability and promote a zero-tolerance culture.

(vi) Prioritize gender equality and inclusion by promoting diversity and equality to prevent sexual harassment and enhance employee well-being.

Ultimately, when making decisions, employers must guarantee the adherence to the intent and principles of the POSH Act, prioritizing the continuous protection of women's interests. The overarching goal is to create safe and harassment-free workplaces through collective efforts involving employers, employees, government agencies, and civil society organizations.

REGULATING DIGITAL LENDING IN INDIA: ANALYSING POLICY OPTIONS FOR FINANCIAL INCLUSION AND CONSUMER PROTECTION

- *Ayush Gorana*[*]

ABSTRACT: *Digital lending has emerged as an innovative avenue for expanding access to credit in India. However, concerns around mis-selling, data privacy, harsh recovery tactics and illegitimate lending platforms have accentuated risks. This paper analyses India's regulatory response for balancing innovation and stability in digital lending. It examines regulatory approaches, gaps and implementation challenges. The paper summarizes the emergence of new lending models like balance-sheet lending by banks, fintech partnerships and buy-now-pay-later mechanisms. It highlights the role of lending apps and alternative data. Benefits like credit access and convenience are weighed against prevalent risks like lack of transparency, data misuse and harsh recovery practices. The paper reviews existing regulations and new guidelines issued by the Reserve Bank of India to govern digital lending activities of banks and NBFCs. It analyses policy priorities looking at consumer protection, transparency, data handling norms, grievance redressal and regulatory reporting. Persisting challenges are identified regarding cross-sectoral coordination, expansion of regulatory*

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perimeter, technological capacity and practical implementation difficulties. Finally, measures to enhance effectiveness of regulations are suggested based on proportionality, regulatory collaboration, compliance customization, technological capability building and ethical self-regulation. The paper argues for balancing innovation, stability and consumer protection in digital lending through collaborative governance.

KEYWORDS: *Digital Lending, Fintech, Reserve Bank of India, Consumer Protection, Financial Inclusion, Data Protection, Regulatory Gaps.*

I. INTRODUCTION

Digital lending has emerged as an innovative way of extending credit to underserved and unserved segments in India. With the proliferation of fintech companies and digital lending apps, access to quick and hassle-free loans has expanded in recent years. While digital lending holds immense potential for financial inclusion, it also poses regulatory challenges related to customer protection, privacy, transparency and operational resilience.

The Reserve Bank of India ("**RBI**") has expressed concerns regarding the unbridled engagement of third parties, mis-selling, breach of data privacy, unfair business conduct and illegitimate operations in the digital lending

ecosystem.[64] In January 2021, the RBI constituted a Working Group on digital lending to study the digital lending landscape and suggest policy measures. Based on the recommendations of the Working Group, the RBI issued the Guidelines on Digital Lending in September 2022, applicable to commercial banks, co-operative banks and NBFCs.[65]

The Guidelines aim to strike a balance between nurturing innovation and ensuring customer protection. Key aspects covered include disclosure requirements, data usage norms, nodal grievance redressal mechanisms and restrictions on lending through third party accounts. The Guidelines also advise regulated entities to adhere to RBI's securitization guidelines regarding first loss default guarantee arrangements with fintech firms.[66]

While the Guidelines mark an important step, concerns remain regarding their implementation and regulatory gaps. Payment aggregators and 'buy now pay later' platforms are impacted due to the restrictions on pass-through accounts, but remain outside the purview of the Guidelines. There were also demands from industry bodies for greater clarity regarding first loss default guarantees and for exemptions to enable smooth operations.

[64] Reserve Bank of India, Report of the Working Group on Digital Lending Including Lending Through Online Platforms and Mobile Apps (Issued on November 18, 2021).
[65] Reserve Bank of India, Guidelines on Digital Lending, RBI/2022-23/111 (Issued on September 02, 2022).
[66] Reserve Bank of India, Master Direction on Securitization of Standard Assets, RBI/DOR/2021-22/85 (Issued on September 24, 2021).

Going forward, policy discourse needs to focus on striking the right balance between financial innovation and stability, further strengthening customer protection frameworks and enhancing inter-regulatory coordination. As the digital lending ecosystem evolves, regulations will need to retain flexibility to enable innovation while also responding effectively to new risks. Climate-related financial risks, use of alternative data for credit scoring and cross-border lending also warrant attention. Ultimately, the aim should be to harness the potential of digital lending in a prudent and ethical manner for advancing financial inclusion.

II. EVOLUTION OF DIGITAL LENDING MODELS:

The digital lending landscape in India has evolved rapidly, with the emergence of new business models leveraging technology to provide enhanced access to credit.[67] Three prominent models have shaped the trajectory:

A. **Balance Sheet Lending Model -** Traditional banks and NBFCs have adopted digital channels to provide loans directly from their balance sheets. This involves integration of digital interfaces and data analytics into the lending process while managing credit risk on their own books. Most major banks now provide pre-approved personal loans on mobile apps

[67] *Supra* 64.

based on customer data analytics. This balance sheet lending model accounted for 90% of digital disbursements in 2019-20.[68]

B. Partnership Model - Fintech firms have partnered with banks and NBFCs to expand lending using digital channels. The banks originate loans adhering to prevalent regulations, while FinTechs provide services spanning customer acquisition, loan underwriting, disbursement and recovery. Risk is shared between partners through co-lending arrangements or first loss default guarantees.[69] Partnership models enable leveraging of fintech innovations in data analytics, payments and distribution.

C. Buy-Now-Pay-Later Model - E-commerce firms have tied up with banks and NBFCs to provide buyers revolving lines of credit and instalment payment options. Sellers integrate payment links of partner lenders, providing customers seamless checkout financing. Lenders undertake risk assessment based on parameters like purchase history. Buy-

[68] Boston Consulting Group, Digital Lending Report, https://web-assets.bcg.com/img-src/BCG-Digital-Lending-Report_tcm9-202751.pdf (last visited Aug. 8, 2023).
[69] *Supra* 66.

now-pay-later models currently account for 3-5% of e-commerce transactions.[70]

The partnership model and buy-now-pay-later account for the rapid growth of fintech lending. Fintech firms have developed platforms integrating digital data from varied sources, alternative credit scoring models using Artificial Intelligence/ Machine learning ("**AI/ML**"), and interfaces linking customers with lenders.[71] Hyper-local analytics provides credit access in remote areas. However, concerns exist around data privacy, inadequate legal frameworks and misuse by illegal apps. Regulations have aimed at enabling innovation while ensuring orderly growth. RBI has issued guidelines on outsourcing, fair practices code, IT framework, KYC, digital payments and partnership models. The recent Guidelines on Digital Lending further formalize expectations regarding governance, transparency, data use and grievance redressal. While still evolving, regulations are focusing on balancing stability and innovation in digital lending.

III. BENEFITS AND RISKS OF DIGITAL LENDING:

[70] Akshay Jayaprakasan, BNPL Wave is Now a $1.5 Bn Reality, RedSeer, https://redseer.com/newsletters/bnpl-wave-is-now-a-1-5-bn-reality (Last visited Aug. 8, 2023).

[71] Government of India, Ministry of Finance, Economic Survey 2020-21.

Digital lending holds significant potential for advancing financial inclusion in India by expanding access to credit for unserved and underserved segments.[72] Some of the Key benefits include:

A. **Financial Inclusion of the Underserved -** Digital lending has enabled those with limited credit histories to access formal credit, by using alternative data for credit scoring. Geospatial data, digital transaction trails and web footprints are used to assess creditworthiness.[73] This has expanded loans to micro and small enterprises, farmers, blue-collar workers and women borrowers in rural areas with lower documentation.

B. **Convenience and Speed -** Borrowers can access personalized loan options on their phones and obtain disbursal within minutes, without extensive paperwork. Digital interfaces and straight-through processing enable faster decision-making. This provides convenience and quick access to credit for meeting urgent needs.[74]

While promising, concerns around risks posed by digital lending models have also emerged. Some of the Key risks include:

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[72] *Supra* 64.
[73] Bank for International Settlements, Annual Economic Report (2021).
[74] NITI Aayog, Report on Digital Banks (July 2022).

A. **Mis-selling and Lack of Transparency -** Customers have faced mis-selling of loans, hidden charges, and lack of transparency regarding loan conditions by some lending apps. This can lead borrowers to take loans unsuited to their needs and repayment capability.

B. **Privacy and Data Misuse -** Extensive data collection, unauthorized use of personal data, and weak data security standards increase privacy risks for borrowers. Data breaches can facilitate misuse and fraudulent lending in some cases.

C. **Harsh Recovery Practices -** Some lending companies have resorted to coercive recovery practices, use of threats, and harassment, causing distress. The lack of oversight of third-party recovery agents engaged by lenders exacerbates this issue.

D. **Illegal Lending Apps -** Several unregulated apps offering short-term loans at exorbitant rates, with illegal practices, have proliferated. Such apps exploit gaps in regulations and consumers' lack of awareness.

While digital finance innovation is welcome, these concerns highlight that benefits need to be reaped in a prudent manner. Policy and regulations need to strike the right balance between enabling access and safeguarding

borrower interests. Issues like transparency, fair practices, data protection, and recovery agent governance require particular attention for sustainable digital lending.

IV. RBI'S REGULATORY FRAMEWORK ON DIGITAL LENDING IN INDIA:

The RBI has taken proactive steps to respond to the rapid evolution of digital lending in India.[75] Concerns around illegal lending apps, data privacy breaches, harsh recovery tactics and mis-selling led RBI to constitute an internal working group on digital lending in January 2021. The working group undertook a comprehensive study of the market practices and risks and suggested policy measures to encourage responsible innovation. Based on the recommendations, RBI formulated guidelines that were formally issued in September 2022. The guidelines define obligations for regulated entities like banks and NBFCs as well as lending service providers engaged by them for app/web-based lending. The aim is to balance enabling access to credit through technological innovation with ensuring stability and consumer protection.[76] RBI's regulatory approach aims to balance innovation and stability while protecting customers.

[75] The Reserve Bank of India had constituted a Working Group (WG) on digital lending including lending through online platforms and mobile apps on January 13, 2021.
[76] *Supra* 65.

A. ***RBI's regulatory approach covers the following key aspects***:[77]

i. ***Transparency and Disclosure Requirements***: Guidelines stipulate providing a Key Fact Statement, sanction letter, privacy policy and costs and charges to the borrower in a clear and transparent manner. This aims to prevent mis-selling and lack of information regarding loan conditions.

ii. ***Data Usage Norms***: Restrictions limit data collection to need-based requirements with borrower consent. Biometric data storage is prohibited. Data localization norms have also been stipulated. This aims to address data privacy and concentration risks.

iii. ***Oversight of Lending Service Providers***: Due diligence requirements have been prescribed for outsourcing arrangements between regulated entities and lending service providers. Lenders must ensure fair practices by such entities. This aims to prevent unethical recovery and operational risks.

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[77] *Id*.

iv. ***Technology Governance:*** Lenders are required to comply with RBI stipulations regarding IT governance, cybersecurity, disaster recovery management applicable to lending platforms/apps. This aims to address risks of data breaches and platform failures.

v. ***Grievance Redressal:*** Nodal grievance redressal officers must be appointed to address borrower complaints efficiently. Non-resolution of complaints can trigger escalation to RBI under the Integrated Ombudsman Scheme. This aims to strengthen customer protection.

vi. ***Restriction on Pass-through Accounts:*** Lenders cannot disburse loans to borrowers via any third party or pool account. The aim is to prevent risks of comingling of funds and lack of transparency. Exceptions are only allowed in certain cases like salary loans.

vii. ***Reporting to Credit Bureaus:*** All lending including short-term loans needs mandatory reporting to credit bureaus. This enables comprehensive credit information availability.

viii. ***Adherence to Securitization Guidelines:*** First loss default credit guarantees between lenders and fintech

firms must follow RBI securitization directions. This aims to address risks of excessive risk transfer.

A. Implementation Challenges:

While comprehensive in coverage, implementation challenges inhibit the optimal translation of sound regulatory principles into practice:

- **i.** Compliance difficulties due to lack of technical capacity within regulated entities on data governance.
- **ii.** Gaps in monitoring thousands of lending apps with limited regulatory manpower and technical expertise.
- **iii.** Legal ambiguities in applying guidelines to certain lending models like merchant cash advances.
- **iv.** Practical difficulties in integrating bank-fintech systems for seamless compliance.
- **v.** Regulatory arbitrage due to uneven coverage of entities involved in credit intermediation.
- **vi.** Timeline-related constraints for developing new systems and processes to fulfil compliance requirements.
- **vii.** Lack of clarity on first loss default guarantees critical for bank-fintech partnerships.
- **viii.** Operational hurdles in ensuring 100% direct transfer between lender and borrower accounts.

B. Potential Solutions:

To address the implementation challenges, RBI could consider the following measures:

- **i.** Develop principle-based regulations allowing calibrated compliance commensurate with risks posed.
- **ii.** Provide regulatory sandboxes allowing controlled experimentation and innovation.
- **iii.** Build capabilities for risk-based oversight through multidisciplinary expert teams.
- **iv.** Harness industry collaboration and self-regulation through codes of conduct and best practices.
- **v.** Provide reasonable transition time for implementing complex technological compliance requirements.
- **vi.** Coordinate with sectoral regulators to minimize inconsistencies in approach across entities.
- **vii.** Clarify policy stance unambiguously on first loss default guarantees and merchant cash advances.
- **viii.** Enhance last mile borrower awareness and grievance redressal architecture.

Implementation could be strengthened through greater regulatory coordination, risk-based supervision leveraging industry collaboration, enhanced technical capacity within oversight bodies and adequate transition time for compliance.

V. DIGITAL LENDING AND CONSUMER PROTECTION LAWS OF INDIA:

The Consumer Protection Act, 2019 provides an overarching grievance redressal framework for issues faced by consumers, including in the digital lending sector. It aims to provide a mechanism for expeditious redressal of consumer grievances, enshrining key rights and establishing consumer dispute resolution bodies. Several aspects are particularly relevant in the context of prevalent concerns regarding digital lending.

A. **Scope and Coverage -** The Act has wide coverage spanning goods and services across sectors, including digital products and financial services. Lending platforms and apps fall under its ambit by virtue of being digital financial service providers. Both individual and collective consumer rights are protected under the legislation.[78]

B. **Rights of Consumers -** The law articulates six key consumer rights - right to be protected against marketing of goods/services hazardous to life and property; right to be informed of quality, quantity, standard and other aspects of goods/services; right to be assured of access to a variety of goods/services at competitive prices; right to seek redressal

[78] The Consumer Protection Act, 2019, Preamble, Scope - Chapter I.

against unfair or restrictive trade practices; right to consumer awareness; and right to seek relief when rights are violated.[79]

C. **Unfair Trade Practices -** The Act prohibits over a hundred unfair trade practices across sectors which could be invoked by borrowers facing such issues with lending apps/platforms. These include false representations regarding a loan's terms, charges or benefits; false claims regarding approval/affiliation; violations of privacy; abusive or threatening recovery practices; and harassment relating to repayment.[80]

D. **Liability for Defect and Deficiency -** The Act provides recourse where loans disbursed suffer from any fault, imperfections, shortcomings or do not match service descriptions. Gaps between promised and actual annual percentage rates or costs could constitute technical 'defects' or 'deficiencies' under the law.[81]

E. **Penalties for Non-Compliance -** The legislation prescribes penalties for manufacturers/service providers of faulty goods/deficient services. Fines can be imposed for initial contravention, continuing non-compliance and other

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[79] *Id*, §2(9).
[80] *Supra* 78, §2(47).
[81] *Id*, §2(11); §2(13).

violations. Repeat offenders can also face imprisonment up to 5 years.[82] These deterrent provisions incentivize compliance.

F. **Grievance Redressal Forum** - Consumer Commissions at national, state and district levels provide simple, speedy and affordable redressal of complaints. Orders and penalties issued are treated as decrees of civil courts. The framework enables convenient access to justice for borrowers facing difficulties.[83]

G. **E-Commerce Rules -** Specific e-commerce rules under the Act govern B2C digital services including fintech platforms. Key requirements relate to appointing grievance officers, setting up complaint mechanisms, ensuring accessibility of terms of use, establishing transparent cancellation/return policies and mandating consent for data collection[84]

By providing an overarching consumer protection framework spanning digital services, the Act enables redressal on key concerns like mis-selling, lack of transparency and accountability faced by borrowers using lending apps/platforms. Addressing regulatory gaps through coordination between sectoral regulators and the Central Consumer Protection Authority

[82] *Id*, §89.
[83] *Id*, Chapters III-V.
[84] Consumer Protection (E-commerce) Rules, 2020.

instituted under the law can further strengthen consumer safety in digital lending.

III. DIGITAL LENDING AND INFORMATION TECHNOLOGY LAWS OF INDIA:

The proliferation of lending apps and digital platforms has brought to fore a range of technology policy and cyber security issues. While sectoral regulations administer regulated entities like banks and NBFCs, the Information Technology Act, 2000 read with associated rules and guidelines provides the primary horizontal legal framework applicable to fintech players.[85]

A. **Scope and Applicability -** The IT Act governs digital ecosystem participants including service providers, intermediaries, data platforms and entities handling sensitive personal data. Lending apps and platforms fall under its ambit.[86] It is supplemented by allied rules and guidelines on aspects like reasonable security practices, sensitive data handling and grievance redressal.[87]

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[85] The Information Technology Act, 2000.
[86] *Id*, §1; §2.
[87] *Id*; The Information Technology Rules, 2011; Government of India, Ministry of Electronics and Information Technology (MeitY), Indian Computer Emergency Response Team (CERT-In), Directions under sub-section (6) of section 70B of the Information Technology Act, 2000 (Issued Apr. 28, 2022).

B. **Data Privacy, Protection and Localization** - The law prescribes reasonable security practices for sensitive personal data. Entities need to have a security policy, secure networks and systems, periodic audits and remedy procedures in case of breach. Data localization norms require storage within India with certain exceptions. Restrictions apply on cross-border data transfers.[88] These are relevant given privacy concerns in digital lending.

C. **Consent Framework** - Rules framed under the law require obtaining consent before collecting personal information, purposes to be disclosed and submission of privacy policies to the regulator. Consent has to be free, specific and informed. These consent provisions are aimed at preventing unauthorized data use.[89]

D. **Grounds for Processing Data -** The legislation stipulates permitted grounds for processing personal data such as consent, legal necessity, prompt action, providing services, reasonable purposes etc. Processing sensitive data requires

[88] *Supra* 85, §43A; Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.
[89] Information Technology (Reasonable security practices and procedures and sensitive personal data or information) Rules, 2011.

explicit consent. The grounds aim to prevent arbitrary data use.[90]

E. **Data Retention and Erasure** - Personal data can only be retained as long as necessary to satisfy the purpose for which it was processed. Upon completion or withdrawal of consent, data must be deleted except where mandated by law. This guards against excessive retention.[91]

F. **Cyber Security Obligations** - Entities have to report cyber security incidents, enable vulnerability disclosures and coordinate with Indian Computer Emergency Response Team (‘**CERT-In**’). CERT-In stipulations also cover cloud services used by fintech platforms.[92]

G. **Grievance Redressal -** All intermediaries including lending apps/platforms need to publish privacy policies, appoint grievance officers and establish complaint mechanisms for resolution within defined timelines.[93]

[90]*Supra* 85, §43A; *Supra* 5
[91] *Supra* 89.
[92] *Supra* 86; *Supra* 85, §70B; CERT-In directions.
[93] S*upra* 86; *Supra* 85, §79; Government of India, Ministry of Electronics and Information Technology, Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021.

While robust in scope, implementation challenges persist around consent processes, risk-based data collection, monitoring capacity, grievance avenues and inter-regulatory coordination which need to be addressed through appropriate measures.

IV. DIGITAL LENDING AND DATA PROTECTION LAWS OF INDIA:

The proliferation of digital lending platforms and apps has brought to fore issues of data privacy, protection and governance. While sectoral regulations administer regulated entities like banks and NBFCs, certain horizontal legislations provide the overarching framework for data protection applicable to all entities and activities, including fintech companies.[94]

The Information Technology Act, 2000 and associated rules govern reasonable data security practices, consent frameworks for collection/use of personal data and remedies in case of breach.[95] Provisions regarding sensitive personal data handling, cross-border data transfers, consent requirements and cyber incident reporting are particularly relevant.[96]

The Sensitive Personal Data or Information ("**SPDI**") Rules, 2011 under the IT Act restrict processing of financial data like bank account details,

[94] *Supra* 86; S*upra* 90.
[95] *Supra* 86; The Information Technology Rules, 2011.
[96] *Supra* 86.

credit/debit card data, passwords or financial transaction records, except for explicitly permitted purposes like credit scoring or fraud prevention with user consent.[97] The SPDI rules also stipulate localization norms requiring storage of such data exclusively within India, barring some exceptions.

On 11th August 2023, the government introduced the Digital Personal Data Protection ("**DPDP**") Act which provides a dedicated framework for protection of digital personal data.[98] The Act articulates several data principal rights like right to correction and erasure of personal data. It envisages establishment of a Data Protection Board of India for regulatory oversight and enforcement of obligations. Key aspects include consent requirements, purpose limitation, restrictions on cross-border data transfers, localization norms, penalties for non-compliance, etc.

However, the DPDP Act has seen opposition on several aspects. Critics have argued that exceptions allowing government agencies access to personal data without consent are too broad. Where localization norms are also contentious, on the other hand significant data fiduciaries face added compliance burdens. Clarity is needed on where sectoral regulations end and the horizontal DPDP Act begins. Interplay between the IT Act and the DPDP Act needs harmonization to avoid inconsistencies in approach.

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[97] *Supra* 90.
[98] The Digital Personal Data Protection Act, 2023.

As digital lending evolves, prudent regulation balancing innovation, growth and stability would require further strengthening data protection frameworks through cross-sectoral application of principles like consent, transparency, data minimization, purpose limitation and accountability. Effectiveness hinges on proportionality in compliance expectations, minimizing inconsistencies across laws and regulators and enabling regulatory capabilities for monitoring and enforcement of obligations.

V. CHALLENGES IN REGULATION OF DIGITAL LENDING:

The rapid evolution of digital lending models has posed unique regulatory challenges. While recent policy measures have aimed to address risks, concerns persist regarding adequacy and effectiveness of the regulatory approach including, *inter alia*, the following:

A. **Regulatory Arbitrage and Inconsistencies -** Participation of diverse entities like banks, NBFCs, fintech firms, Big Techs, payment aggregators etc. leads to uneven coverage under different sectoral regulations. This creates scope for regulatory arbitrage. Conflicting compliance expectations also emerge from multiple laws and regulators.

B. **Regulatory Perimeter Issues -** Many entities involved like fintech companies, data analytics firms, recovery agents operate in grey areas without regulatory oversight. Expanding

the perimeter requires strategic choices balancing costs and benefits.

C. **Technical Capacity Constraints -** Specialized skills needed to monitor algorithms, AI systems, data concentrator risks are inadequate within regulatory bodies currently geared for traditional compliance. Building capabilities is an imperative.

D. **Principle-Rule Imbalance -** Prescriptive stipulations on aspects like data flows create compliance uncertainties for innovative models. Principle-based regulations allowing customized solutions merit priority.

E. **Compliance Burden on Innovators -** Excessive compliance obligations on smaller entities can constrain innovation. A proportional, risk-based approach is required.

F. **Translating Principles to Practice -** Effective translation of sound principles into practical procedures within organizations is a big challenge requiring regulatory guidance and coordination.

G. **Monitoring and Enforcement Gap -** Large scale monitoring of digital lending apps and ensuring compliance on evolving expectations like algorithmic fairness remains a challenge needing creative regulatory approaches.

VI. CONCLUSION & SUGGESTIONS

Digital lending holds immense potential for expanding access to credit and driving financial inclusion in India. However, concerns around mis-selling, harsh recovery tactics, data misuse and illegitimate lending apps have come to the fore. While recent RBI regulations have aimed to address risks, effective translation from sound principles to practice remains a key priority. On benefits, digital lending has enabled underserved segments like small businesses, first-time borrowers and those in remote locations to access formal credit by overcoming limitations of traditional lending channels. Digital interfaces, innovative credit assessment using alternative data and faster decision making has brought in convenience and flexibility. There is immense potential to harness technology for last-mile delivery of credit at lower costs.

However, several risks need mitigation. Mis-selling of unsuitable products, lack of transparency on loan conditions, disproportionate collection practices and excessive interest rates charged by some platforms and apps have caused distress. Weak data governance increases risks of unauthorized use of borrower data and profiling. Gap in monitoring thousands of lending apps with inadequate regulatory manpower and technical capacity remains a challenge.

While recent RBI regulations have comprehensively articulated requirements on aspects like transparency, data protection, grievance redressal and recovery agent governance, operationalizing compliance poses difficulties which need to be addressed through collaboration and capacity building of stakeholders. Inter-regulatory coordination for minimizing inconsistencies in approach across entities and harnessing industry inputs to shape principle-based regulations are also key.

Moreover, the regulatory perimeter needs gradual expansion through a mix of entity-based regulation of key ecosystem participants and indirect participation in self-regulatory industry codes. Risk-based participation in sandboxes can enable controlled innovation. While bad actors need deterrent actions, ethical fintech players providing choice, convenience and efficient credit access to the underserved need nurturing. Hence, balancing stability and growth through collaborative governance remains crucial.

Therefore, realizing the full potential of ethical digital lending in advancing financial inclusion and overcoming credit gaps for MSMEs would depend on prudent regulation and supervision leveraging benefits of emerging technology while minimizing its risks. The aim should be to transition from an overly compliance-driven approach to technological capability enhancing outcome-focused partnerships between industry and regulators. This can unlock sustainable innovation in the pursuit of financial well-being and access.

FROM TREND TO TURMOIL: A COMPREHENSIVE FRAMEWORK TO REGULATE FINANCIAL INFLUENCERS

- *Tarun Mishra[*] and Annika Mittal[**]*

ABSTRACT - *The emergence of financial influencers on social media platforms has revolutionized the dissemination of financial advice and investment strategy to their massive fan followings. These influencers leverage the power of social media, to reach out to a vast and diverse audience by simplifying complicated financial information and concepts into bite size and digestible content. The exponential growth in viewership of financial content has acted as a breeding ground for such influencers to capitalize on the regulatory grey area by manipulating their audience – the market for their personal gains.*

This paper highlights the challenges posed by finfluencers in employing abundant illicit strategies like propagation of misleading advice, pump and dump scheme, touting to manipulate the financial landscape for incentives. It highlights the inadequacy of the existing regulatory framework, to rein in finfluencers and protect influencers from the unique activities

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employed in the digital realm. It further draws comparison with international regulatory models to regulate finfluencers by adoption of standardized disclosure and transparency frameworks. By establishment on independent self –regulatory bodies, collaboration of market regulators with social media platforms and other authorities, finfluencers conduct and practices can be monitored to ensure they deliver accurate information to their audience.

In the paper authors highlight the compelling need for robust regulatory measures that can effectively counter the tactics employed by finfluencers. It emphasizes the need for adoption of a proactive approach to safeguard the financial market and the interests of investors. All in all, it underscores the urgency of establishing a framework where finfluencers contribute positively to financial awareness and literacy among the masses while maintaining investor protection.

KEYWORDS: *SEBI, social media, Finfluencers, Investors, Regulatory Framework, Stock Market*

I. INTRODUCTION

In the rapidly evolving landscape of digital media, the nation has witnessed an exponential growth of social media influencers on various platforms such as YouTube, Instagram, Telegram, WhatsApp etc. These influencers

possess the capacity to mold their audiences' perspectives and decision-making processes regarding any product, service, or brand by the application of their knowledge and expertise.[99] As these influencers garner millions of views, businesses are choosing them over celebrities for their brand promotions and endorsements.[100] Sensing an opportunity, many individuals hopped onto such platforms to create content in diverse sectors, one of them being the financial sector; giving rise to an entire new set of influencers, namely financial influencers ("**finfluencers**").

Finfluencers are content creators who harness the potential of social media, by disseminating highly sought financial advice[101] on investment strategies and portfolio management to their followers' turned investors.[102] The recent surge of finfluencers can be attributed to their consistent efforts of producing content on finance in a lucid and simple manner, which is often perceived as technical and mundane area by ordinary people. The delivery of such content is made to the audience with minimum usage of financial jargons, which is easily accessible at the comfort of their homes usually

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[99] Samra Karamustafic, *Social Media Influencers: Who They Are and How They Influence*, STUDENT SCHOLARHIP 3, 3-17 (2020).
[100] Trilegal, *Bridging the Regulatory Gap for Financial Influencers in India*, LEXOLOGY (June. 29, 2023, 07:30 PM), https://www.lexology.com/library/detail.aspx?g=77ae92d2-ebd3-4a49-bfac-1881fd605e2c.
[101] Krithi D. Ramaswamy et al., SOCIAL MEDIA & SOCIETY IN INDIA 133-140 (University of Michigan 2023).
[102] BUSINESS TODAY, RISE OF THE FINFLUENCERS, https://www.businesstoday.in/interactive/immersive/rise-of-the-finfluencers (last visited July. 28, 2023).

without any expenses.[103] The financial content is produced in diverse regional languages and dialects, individuals from varied social status, age groups, professions find it easier to comprehend it, thereby resulting in an increase in financial literacy and market awareness nationwide.[104] However, it is crucial to observe that though the masses are having access to cost free financial advice, there is often an underlying price attached to it - i.e., the investors themselves. These influencers have exploited their massive fan following by manipulating them, with a bigger motive to manipulate the market for their personal interests.[105] They disseminate free unsolicited financial advice to carry out stock price manipulation, pump-dump schemes and touting, ignoring the theory of conflict of interest.[106] Moreover, they generally lack the requisite qualifications and expertise to provide genuine financial advice to their audience, which may result into hit-or-miss investments.

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[103] Madhushree Goswami, *Rise of the Finfluencers: Why are They Under SEBI's Lens,* THE QUINT (Dec. 19, 2022), https://www.thequint.com/explainers/why-are-finfluencers-under-sebi-lens-finance-influencer-social-media.

[104] Nikhil Agarwal, *Sebi to treat finfluencers selling crorepati dream as fraudulent, misleading activity*, THE ECONOMIC TIMES (June. 23, 2023, 12:04 PM), https://economictimes.indiatimes.com/markets/stocks/news/sebi-to-treat-finfluencers-selling-crorepati-dream-as-fraudulent-misleading-activity/articleshow/101368840.cms?from=mdr.

[105] Harshita Swaminathan, *Australian 'finfluencer' gets 2-1/2-year sentence for market manipulation*, REUTERS (August. 2, 2023), https://www.reuters.com/world/asia-pacific/australian-finfluencer-gets-2-12-year-sentence-market-manipulation-2023-05-03/

[106] Akshat Sharma and Mayank Gandhi, *Deciphering Indian & USA Securities Laws -A Future Roadmap to Regulate Finfluencers in India*, CBCL NLIU 154, 155 (2023), https://cbcl.nliu.ac.in/wp-content/uploads/2023/04/FINAL-Compiled-Manuscripts_Trilegal-Summit-Book-2023.pdf.

With the advent of finfluencers, the significance of safeguarding the investor has also emerged, as finfluencers operate outside the ambit of Indian Regulatory framework. Unlike the registered and regulated entities which are under oversight of regulatory authorities, existing regulatory framework is not sufficient to regulate the conduct of finfluencers which can cause financial loss to investors and further impair the trust of public in security market.[107] Undoubtedly, the existing securities regulatory framework enforces penalties and appropriate legal actions against those indulging in fraudulent and unfair trade practices[108], but whether all the illicit strategies deployed by finfluencers would fall under the ambit of existing regulations is a point of contention.

In this context, this paper firstly seeks to elaborate on challenges finfluencers pose on both investors as well as regulatory authorities. Secondly, it examines the capacity of current regulatory framework of India to protect the interest of investors from misleading and deceptive advice provided by unregistered finfluencers. Lastly, the authors will attempt to provide possible solutions to minimize the dissemination of misleading financial advice from finfluencers on social media, with a primary focus on enhancing investor protection.

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[107] Sumit Agarwal, *The Rise of Finfluencers and the Regulatory Dilemma in the Indian Financial Sector*, BAR&BENCH (June. 01, 2023, 12:11 pm), https://www.barandbench.com/columns/the-rise-of-finfluencers-and-the-regulatory-dilemma-in-the-indian-financial-sector.

[108] The Securities and Exchange Board of India Act, 1992, § 12A, No. 15, Acts of Parliament, 1992

II. BACKGROUND

As the phenomenon of retail investing in the securities market has gained traction, many less informed and naïve individuals who lack market awareness have entered the sphere of investing. Finfluencers take advantage of this situation, by making misleading claims of attaining unreasonably high returns on investments, in a short span of time.[109] Often, they advertise on various social media sites predominantly YouTube, Telegram and Instagram by making lucrative and attention grasping promises like obtaining a two-fold return on their investments in a month. Without any disclaimers of any sort, these influencers openly provide financial advice that lacks market insights and analysis.[110] By taking the position as finfluencers, they bypass the stringent Security Regulations, creating a safe haven for them to carry out their illicit activities without having to face its consequences.[111]

Conventionally, financial and investment advisory sector has been subject to stringent regulatory and legal framework. As per the securities regulatory body of India namely Securities Exchange Board of India

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[109] Suryansh, *Need for regulation of Finfluencers by SEBI*, LIVELAW (July. 18, 2023), https://www.livelaw.in/lawschoolcolumn/finfluencers-sebi-stock-market-reserve-bank-of-india-advertising-standards-council-of-india-hnlu-232998?infinitescroll=1.
[110] Ayush Yadav and Priyanjali Singh, *Regulation of Financial Influencers (Finfluencers) In India: A Critical Analysis*, 1 NUALS SLR 1, 2-4 (2023).
[111] Kirthana Singh Khurana, *Social Media And Society In India* 109-110 (University of Michigan 2023).

("**SEBI**") established under SEBI Act, 1992, players active in providing investment advice to the public need to register with SEBI and must have requisite qualifications as a pre-condition. Moreover, these advisers need to follow the code of conduct put down by SEBI before disseminating any kind of financial or investment advice. Contradictorily, finfluencers, usually not registered with SEBI in any capacity, give investment advice to a large sect of audience. Concerns have been raised about the hazards they may bring to investors as well as the financial market.

It is pertinent to mention that it is practically very difficult for SEBI with the existing regulatory framework to curb illicit strategies deployed by such influencers as they constantly change their tactics of manipulation. Another cause of concern, is whether the activities of finfluencers are s fall with the ambit existing regulations and if sufficient action/penalties can be taken against them. This regulatory void has created a safe space for the finfluencers to operate outside the lens of SEBI, resulting in an evasion of liability for their wrongdoings. Highlighted below are several instances where the advisory provided led to misguided investment decisions, prompting SEBI to take actions under varied legislative provisions:

A. Bullrun2017 Telegram Channel

A social media channel namely Bull Run Investment Educational Channel ("**bullrun2017**") was run by three individuals on Telegram, having more than fifty-one thousand subscribers. The trio was

engaged in inducing investors to trade in various scrips by relying on their recommendations.[112] The trio even made patently false claims that their channel has been operated by the team of four experienced Research Analysts (**"RA"**) whereas none of them have requisite qualifications to qualify as RA.[113]

The modus operandi typically being adopted by these finfluencers was that firstly they purchase certain stocks in their trading accounts following which they disseminate the positive but misleading information about these scrips through their channel Bullrun2017 among their massive subscribers inducing them to buy those scrips, without disclosing their personal interests. Finally, in contrast to their own recommendations, they sell these shares immediately at an inflated price thereby generating substantial profits.[114] After getting a complaint against them SEBI investigated the whole matter and found that they made an illegal gain of INR 2.84 Crores. In order to punish them, all the administrators of the telegram channel were

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[112] Palak Shah, *SEBI cracks the whip on stock manipulators,* BUSINESS LINE (January. 13, 2022) https://www.thehindubusinessline.com/markets/sebi-cracks-down-on-bullrun-2017an-illegal-telegram-channel-for-stock-tips/article64822101.ece

[113] Devesh Kumar, *SEBI imposes 2.84 Crores penalty on Telegram channel for stock manipulation,* LIVEMINT (April. 26, 2023) https://www.livemint.com/news/india/sebi-imposes-rs-2-84-crore-penalty-on-telegram-channel-for-stock-manipulation-11682525093821.html

[114] PTI, *Stock Recommendations Using Telegram: SEBI Bans 6 Persons from Securities Market for Up To 3 Years; Fines Rs 5.8 Crore*, OUTLOOK (April. 27, 2023) https://www.outlookindia.com/business/stock-recommendations-using-telegram-sebi-bans-6-persons-from-securities-market-for-up-to-3-years-fines-rs-5-8-crore-news-281683

debarred from trading in the securities market along with a penalty of INR 5.68 Crores.[115]

B. Pump and Dump Schemes vis-A vis Sadhna & Sharpline Broadcast

SEBI in its interim order barred thirty-one entities from operating pump and dump schemes through YouTube channels including celebrity actor Arshad Warsi, his wife, and Youtuber Manish Mishra.[116] Pump and dump scheme is a technique to manipulate the market by artificially inflating the price of a stock by disseminating misleading and false information about that specific stock.[117] As per market regulator, Manish Mishra who runs two YouTube channels namely- 'The Advisor' and 'Moneywise' was a Misleading Message Disseminator, through his channel some videos were uploaded with false content, backed by paid marketing campaign for additional

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[115] In the matter of Stock Recommendations using Social Media Channel (Telegram), WTM/AN/ISD/ISD-SEC-3/25879/2023-24

[116] *Sebi cracks down on stock manipulation via YouTube, bans Arshad Warsi, others from securities market,* ECO. TIMES (March. 04, 2023) https://economictimes.indiatimes.com/markets/stocks/news/sebi-bans-sadhna-broadcasts-promoters-actor-arshad-warsi-others-from-securities-mkt/articleshow/98354919.cms?from=mdr

[117] Mohammad Kaif, *Pump and Dump: How Social Media Enables Manipulation of India's Stock Market*, IRCCL (May. 07, 2023) https://www.irccl.in/post/pump-and-dump-how-social-media-enables-manipulation-of-india-s-stock-market

reach to induce investors to buy shares of Sadhna Broadcast[118] and Sharpline Broadcast.[119] Once these unsuspecting investors entered the scrip, the entities allegedly offloaded their holding at an inflated price including promoters of the company itself, Arshad Warsi etc. The players in the entire incident illegitimately profited INR 41.85 Crores and INR 12.14 Crores from Sadhna and Sharpline Broadcast case respectively by taking advantage of the gullible investors.[120]

C. Pradeep Chaudhary *alias* Profit Guruji

In the 2021 case of 'Profit Guruji', a recent incident unfolded where he publicly assumed the role an Investment Adviser **("IA")**, without being registered with SEBI in any capacity giving unsolicited and grossly misleading investment advice.[121] Pradeep Chaudhary alias Profit Guruji offered financial and market advice predominantly on his YouTube and Telegram Channel, where he would attract customers by making claims like 'no loss', 'guaranteed returns' on their investments. [122] To monetize his business, he personally sent

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[118] Interim Order in the matter of Stock Recommendations using YouTube in the scrip of Sadhna Broadcast Limited, WTM/AN/ISD/ISD-SEC-1/24333/2022-23

[119] Interim Order in the matter of Stock Recommendations using YouTube in the scrip of Sharpline Broadcast Limited, WTM/AN/ISD/ISD-SEC-1/24334/2022-23

[120] *What the pump and dump Sadhna scam is about & what role does Arshad Warsi have to play*, TOI (March. 03, 2023) https://timesofindia.indiatimes.com/business/india-business/explained-what-the-pump-and-dump-sadhna-scam-is-about-what-role-does-arshad-warsi-have-to-play/articleshow/98395061.cms?from=mdr

[121] Interim Order in the Matter of M/s Profit Guruji, WTM/, MPB/IMD/WRO/188/2021

[122] *Id*

details of his financial advice scheme to potential investors, where he would offer advises for starting as low as INR 3500, assuring that they would have a guaranteed profit of INR 20,000-25,000 per month. By carrying out such illicit activities, he had maintained above INR 1,00,00,000 in his bank account, but the contention was if these funds were a result of investment advisers and if so, what was the quantum of the same.[123]

D. PR Sundar Scam

In a similar case of PR Sundar, the promoter of Mansun Consultancy Pvt. Ltd., offered financial advisory services through his website. To attract investors to the website, he offered unverified tips and techniques on YouTube and Twitter where he had over a million followers[124]. Despite being unregistered with SEBI as an IA/RA , he operated the website and charged the investors according to the package they chose. By offering such services, he had amassed over

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[123]In the Matter of Pradeep Chaudhary (Proprietor Profit Guruji), WTM/AB/WRO/WRO/19878/2022-23

[124] Basudha Das, *Finfluencer PR Sundar breaks silence on Sebi settlement, says 'people who believe you need no explanation',* BUSINESS TODAY (May. 27, 2023), https://www.businesstoday.in/markets/top-story/story/finfluencer-pr-sundar-breaks-silence-on-sebi-settlement-says-people-who-believe-you-need-no-explanation-383074-2023-05-27

INR 6 Crore (including an annual interest of 12%). Doing so, he is banned from trading in the securities market for a year.[125]

From the aforementioned cases, it becomes evident that naïve investors are at the wrath of finfluencers who through their attractive but false and misleading content influence investors to put their hard-earned money in speculative areas.

III. EVALUATING EXISTING REGULATORY FRAMEWORK: ADDRESSING THE REGULATORY VOID FOR FINFLUENCERS

The Securities Framework in India and particularly SEBI since its inception has taken a responsibility to regulate the Indian Security market as well its participants. Over the course of time, multiple regulations and rules have been established to ensure the trust and faith among investors is maintained and there is market transparency and stability as a whole. However, these regulations fall short in regulating new entrants in the financial market: Finfluencers. With the evolving landscape of digital sphere, these influencers sniffed an opportunity in providing financial advice on social media as they could steer away from the present SEBI rules and Regulations pertaining to investment advisory services. This section examines the existing legal framework pertaining to market

[125] *Supra* 124.

intermediaries and checks whether they are capable enough to regulate finfluencers.

A. SEBI (Investment Advisers) Regulations, 2013

In India, 'Investment Advice' is regulated by the SEBI (Investment Advisers) Regulations, 2013, if someone wants to provide investment advice as an IA, he or she needs to register with SEBI with a pre-condition of having a requisite qualification.[126] However, it is pertinent to mention that finfluencers who even though give investment advice to their audiences, do not come under the ambit of (Investment Advisers) Regulations. The reason for the above can be attributed to the fact that the definition of Investment Advice under Section 2(l) specifically provides that advice disseminated through print or digital media which is available to the masses shall not be considered as an investment advice.[127] Therefore, (Investment Advisers) Regulations do not regulate investment advice provided through social media platforms by finfluencers.[128]

B. SEBI (Research Analyst) Regulations, 2014

[126] Securities and Exchange Board of India (Investment Advisers) Regulation, 2013, Gazette of India, pt. III sec. 4, (Jan. 21, 2013)
[127] *Id.* Reg. 2 (l)
[128] *Supra* 106

Along with regulating Investment Advisers, SEBI also regulates another set of financial advisors, RA, that are being regulated by SEBI (Research Analysts) Regulations, 2014. These research analysts are individuals who offer research analysis, recommendations or opinions on investment in the Securities Market. They essentially provide the investors with Economic and Market Trends, analysis of the Company's Financial Data, projected returns and growth, buy/sell recommendations – all of which form a basis for the investors Investment Decisions. To give such financial advice, these individuals are required to be registered as a RA, which requires the individual to have certain qualifications like a professional qualification or post graduate degree in Finance and related disciplines or at least five years of experience in activities relating to financial products[129]. Additionally, they are required have adequate capital[130] and clear tests conducted by National Institute of Securities Market ("**NISM**").[131] They are bound with liabilities and responsibilities, being prohibited from trading or dealing in the securities they 'recommend or follow within thirty days before and five days after the publication of a research report'.[132] However, these finfluencers do not have the required qualification to become RA hence, these regulations also will not be applicable to them.

[129] Securities and Exchange Board of India (Research Analysts) Regulation, 2014, Gazette of India, pt. III sec. 4, Reg. 7 (Sept. 01, 2014)
[130] *Id*. Reg. 8
[131] *Supra* 110
[132] *Supra* 129, Reg. 16(2)

These IA and RA are mandated by SEBI to act as a trustee to the investors and are prohibited from collecting any form of payment from any entity or individual other than the one seeking investment advice. On the other hand, the finfluencers provide financial guidance, with the motive to monetize their content and subsequently use their audience base to carry out endorsements and affiliate marketing.

C. SEBI Act and PFUTP

Whilst SEBI has not yet passed explicit regulations for finfluencers, the area does not remain entirely untainted by regulations. Unfair and deceptive conduct have been historically forbidden. Section 12A of the SEBI Act, "*prohibits persons from directly or indirectly engaging in any manipulative or deceptive trading of securities*".[133] Furthermore, SEBI using power to make regulations under Section 30 of the SEBI Act had passed the Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market Regulations, 2003 to restrict unfair practices ("**PFUTP**").[134] The SEBI as a watchdog[135] has an authority under PFUTP regulations to act on

133 The Securities and Exchange Board of India Act, 1992, § 12A.
134 *Id.* § 30
135 Securities and Exchange Board of India v. Rakhi Trading Pvt. Ltd., 2009 SCC OnLine SEBI 306

potential market abuse by imposing penalties and other appropriate actions.[136]

There are two specific provisions in PFUTP regulations which might be utilized to prevent the spread of misleading information on social media platform by finfluencers.[137] Regulation 4(2)(a) which provides for whoever "*knowingly indulging in an act which creates false or misleading appearance of trading in the securities market*" shall be considered as manipulative and unfair trade practice.[138] Likewise, Regulation 4(2)(k) which after amendment in 2022 has a potential to act as the most effective provision to catch on the actions of finfluencers, this section provides that disseminating material via any media that the disseminator is aware of or thinks to be false and using such misrepresentation recklessly or carelessly qualifies to be an unfair trade practices thereby a person will be accordingly punished.[139] This recklessness and carelessness principle is well established in the United States of America ("**USA**") wherein disseminator is not liable based on *mens rea* but on the basis of

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[136] Securities and Exchange Board of India, NK Sodhi, Report of the High-Level Committee to Review the SEBI (Prohibition of Insider Trading) Regulations, 1992 (Issued on December. 07, 2013) https://www.sebi.gov.in/sebi_data/attachdocs/1386758945803.pdf

[137] Deesha Reshmi & Ojasav Chitranshi, *Keeping Pace with Market Manipulation: Evaluating Liability Standards for Digital Securities Markets*, 6 JCLG 1, 18-19 (2023), https://jclg.in/wp-content/uploads/2023/07/Volume-VI-Issue-I.pdf

[138] Securities and Exchange Board of India (Prohibition of Fraudulent and Unfair Trade Practices relating to Securities Market) Regulations, 2003, Gazette of India, pt. II sec. 3, Reg. 4(2)(a) (July. 17, 2003)

[139] *Id.*, Reg. 4(2)(k)

carelessness on his/her part which leads to financial risk to investors.[140]

However, the primary drawback of this regulation is that the burden is on the investor to prove 'reliance' and because of such reliance, he or she suffered economic loss. This indicates that even if a misrepresentation has caused artificial price inflation, the person making the claim must still please the requisite requirement of 'reliance'. If they fail to prove the test of reliance on false information by such finfluencers, they don't have any remedy under this regulation.[141]

D. Disclosure and Advertisement Code for Influencers

With the boom in Finfluencer affiliate marketing, various companies and organizations related to financial sector engage them for endorsements. These finfluencers promote such products without disclosing their relationship with them or the monetary benefits they earn. In a lot of situations, such firms and their services turn out to be a hoax, causing significant financial harm to investors who put their money in particular company on the advice of such

[140] Sundstrand Corp. v. Sun Chemical Corp. Feb. 23, 1977. 553 F.2d 1033
[141] *Supra* 106

finfluencers.[142] The Advertising Standards Council of India ("**ASCI**") made an attempt to formulate *Guidelines for Influencer Advertising in Digital Media* which mandates for disclosure label (material connection) on all the content endorsed by the influencer, in the manner that it will not be missed by an average customer.[143] Moreover, ASCI recently amended these guidelines in order to bring finfluencers under its ambit, as per revised guidelines, influencers in sectors of banking, financial services, and insurance ("**BFSI**") are obligated to be registered with SEBI and must have required qualifications before providing investment or financial advice.[144] However, it is pertinent to mention that ASCI lacks the authority to punish the finfluencers in case of breach of such guidelines as ASCI only has the authority to put forward such infringements to the appropriate regulatory authority.

In light of rise in influencer marketing, Department of Consumer Affairs (India) ("**DCA**") released "*Endorsement Know-Hows*" Guidelines[145] & Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements,

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[142] Harshit Sharma, I*ndia's Guidelines for Finfluencers: Key Elements for Consideration,* IRCCL (Dec. 19, 2022) https://www.irccl.in/post/india-s-guidelines-for-finfluencers-key-elements-for-consideration
[143] The Advertising Standards Council of India, Guidelines for Influencer Advertising in Digital Media (Issued on May. 27, 2021)
[144] *Id.* Addendum II, 2023.
[145] Department Of Consumer Affairs, ENDORSEMENT KNOW-HOW! (Issued on January. 20, 2023)

2022[146] that aim to protect consumers from deceptive Endorsements made by influencers. Influencers are mandated to disclose any material connection[147] in a simple and clear manner. Further, the advertisements must not try to exploit the lack of knowledge and experience of the consumers[148]

However, these guidelines are only applicable to influencers, and not on finfluencers, the reason being that they are not providing advice to consumers explicitly, but to potential investors, acting only as a basis for investment decisions. The Consumer Protection Act, 2019 distinctly state that that the those who purchase goods or avail services for commercial purposes cannot be considered as a consumer.[149] The National Consumer Disputes Redressal Commission has time and again set out the precedent that 'investors do not qualify as consumers.[150] Therefore, these regulations also fall short to bring finfluencers under their ambit as they are primarily dealing with consumer protection from influencers operating in digital sphere.

[146] CCPA, Guidelines for Prevention of Misleading Advertisements and Endorsements for Misleading Advertisements (Issued on June. 09, 2022)
[147] *Supra* 146. Guideline 14
[148] *Id.* Guideline 12(e)
[149] The Consumer Protection Act, No. 35 of 2019, § 2(7)(i) & (ii)
[150] Baidyanath Mondal v. Kanahaya Lal Rathi, 2022 SCC OnLine NCDRC 62.; Surendra Kapur v. Puja Construction Ltd. and Others, 2022 SCC OnLine NCDRC 647

Seizing the opportunity of the regulatory loophole, they have leveraged on the situation without obtaining necessary registrations[151], thereby evading their obligations and accountability, all while reaping financial gains.

IV. TOWARDS EFFECTIVE REGULATION: ADDRESSING THE CHALLENGES POSED BY FINFLUENCERS

The India Securities Framework fall short in regulating the activities that are often undertaken by finfluencers. Even though they are an emerging category all together, many of them have created huge audience base for themselves, by which they are able to effectively manipulate their audience and the market. As the number of such influencers is to exponentially grow in the coming months[152] it is prime time that SEBI and other Authorities take required steps to regulate this set of players. It is noteworthy to mention that they have also brought about financial and market awareness, especially among the Gen-Z Generation[153].To create a beneficial environment for both investors and influencers, a middle ground can be

[151] Rajiv Ranjan Singh, *Why Finfluencers shun Sebi registration*, FORTUNE (July. 12, 2023), https://www.fortuneindia.com/enterprise/why-finfluencers-shun-sebi-registration/113344

[152] Sharan Hegde, *Finfluencers And Their Role In Simplifying Finance In The Age Of Digital Economy*, ABP LIVE (Nov. 24, 2022) https://news.abplive.com/business/finfluencers-and-their-role-in-simplifying-finance-in-the-age-of-digital-economy-1565463

[153] Tim Tkachenko, *This is where Gen Z goes for financial advice*, WEF (August. 23, 2022) https://www.weforum.org/agenda/2022/08/finfluencer-gen-z-financial-advice/

rather adopted, i.e., to regulate such influencers rather than an outright elimination. [154]

A. Independent Self-Regulatory Body

SEBI may promote and regulate self-regulatory organization for fin-influencers which can establish code of conduct, develop content standards and promote investor protection.[155] Without any involvement from SEBI, the mutual funds sector is an outstanding illustration of a growing area in secondary markets. Mutual fund administrators are excluded from SEBI registration required under the (Investment Advisers) Regulations and must alternatively adhere to the code of conduct of the Association of Mutual Funds in India ("**AMFI**"), an independent self-regulatory entity.[156] It has made a significant contribution in safeguarding the financial interests of investors and fund houses throughout the past two decades. In order to attract a greater number of people, they attempt to make funds

[154] *Supra* 107

[155] SEBI. GOV, Promotion and Regulation of Self-Regulatory Organisations, https://www.sebi.gov.in/sebi_data/commondocs/pt3d_h.html (last visited August. 03, 2023)

[156] Jayshree P. Upadhyay, *SEBI proposes self-regulator for mutual fund distributors, advisers,* LIVEMINT (April. 02, 2019) https://www.livemint.com/mutual-fund/mf-news/sebi-proposes-self-regulator-for-mutual-fund-distributors-advisers-1554155543694.html

more readily available and transparent.[157] Even the advertising sector which is regulated by self-regulated body the namely ASCI which have an independent oversight over the advertisement sector.[158] It is pertinent to highlight that establishment of self-regulatory body for finfluencers does not mean this body doesn't have to report to SEBI, they are supposed to work under the aegis of the market regulator.

B. SEBI's Collaboration with Other Bodies

These finfluencers have leveraged on the growth of the digital realm, thus if effective regulation for them is to be established, then it must occur at the source itself – that is these platforms and digital media. A collaborative effort put forth by SEBI and such platforms would result in strong and robust oversight of such finfluencers.

(i) *With Social Media Platforms –*

Such platforms currently allow for reporting of false and misleading information in four subcategories being political, health, social and other issues. If an additional subcategory under misleading advertisement namely financial and

[157] AMFI, Know About AMFI, https://www.amfiindia.com/aboutamfi (last visited August. 04, 2023)
[158] ASCI, About Self-Regulation, https://www.ascionline.in/about-self-regulation/ (last visited August. 04, 2023)

investment advisory is added then such content can be under the oversight of both, Platform Policies and SEBI Framework. In the recent upsurge of COVID-19 pandemic, social media platforms were constantly being bombarded with misinformation regarding COVID-19 Vaccines and its conspiracy theories.[159] These platforms then rolled out informative labels and disclaimers, that redirected the audience to credible and authentic sources. [160] This approach can be adopted to tackle the present havoc created by finfluencers. In this regard, such disclaimers can be automatically attached to certain hashtags such as #investment, #financialplanning, #share, and #stockmarket, which would direct the potential investors to SEBI Website, helping them verify and assess the authenticity of the content. The potential investors can be protected from unverified financial information by deploying AI tools like RegTech being deployed to flag fake and misleading content

Additionally, SEBI can introduce a verification machinery mechanism, wherein all the registered IA/RA who are active

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[159] REUTERS, Meta rolls back measures to tackle COVID misinformation, https://www.reuters.com/technology/meta-rolls-back-measures-tackle-covid-misinformation-2023-06-16/ (last visited August. 06, 2023)

[160] HELP. INSTA, Why Instagram add links to some posts in your feed, https://help.instagram.com/234606571236360 (last visited August 6, 2023),

on social media platforms will be provided with a 'Unique Verification Mark' which would be featured on their social media handles. This mark will enable audience to easily assess the credibility and authenticity of advice and content of the influencer. As audience would generally prefer accounts with verification marks on their social media handles, the unregistered influencers would be compelled to register as an IA/RA to ensure a consistent viewer base. An increase in the number of verified financial influencers, would be highly beneficial to the investors as they would have a recourse mechanism facilitated by SEBI. For example, in Hong Kong, the Securities and Futures Commission ("**SFC**") released '*Guidelines on Online Distribution and Advisory Platforms'* according to which only licensed financial advisor shall be considered liable for the violation of false information through any platforms.[161]

(ii) ***With ASCI –***

SEBI could think about working together with an organization such as ASCI. ASCI doesn't possess enough authority to punish violators of its code but it only can inform market regulator like SEBI to take actions. There collaborative effort

[161] Securities and Future Commission Hon Kong, Guidelines on Online Distribution And Advisory Platforms (Issued on July. 2019)

can prove to be an effective tool of checking an influencer over disclosure of material connection requirements. In the United Kingdom **("UK")** , the Financial Conduct Authority ("**FCA**") has signed a memorandum of understanding with the Advertising Standards Authority that sets out their respective duties and responsibilities in monitoring financial sector endorsements. SEBI can take a page from the FCA's book and partner with the ASCI to set out required standards.[162]

C. Advertisement Code for Finfluencers

Many regulatory authorities have issued guidelines that prescribe certain standards and requirements for advertisements and promotions to ensure consumer protection. The ASCI and DCA prohibited entities and individuals from making misleading claims and deceptive endorsements by restricting certain ways and manner of presentation of advertisements. Recognizing that virtual assets are inherently high-risk assets, ASCI in 2022 released specific guidelines for promotion of such assets that set standards for disclaimer to be made in a manner that was not only prominent but

[162] Financial Conduct Authority, Memorandum of Understanding Between the Financial Conduct Authority and the Advertising Standards Authority (Issued in 2022), https://www.fca.org.uk/publication/mou/mou-fca-asa.pdf

also unmissable by an average customer.[163] As influencer and affiliate marketing grew, National Stock Exchange of India ("**NSE**") set out guidelines pertaining to Advertisements made by Stock Brokers.[164] These guidelines further prohibited Stockbrokers to collaborate with celebrities and influencers who had above one million followers.[165] A code on similar lines, outlining the advertisement standards for finfluencers must be set out to ensure that the investors remain vigilant while consumption of financial content.

A standardized disclosure and transparency framework mandating Finfluencers to declare their professional backgrounds, associations, conflicts of interest, and any financial links with the products or services they suggest could potentially be adopted. This will promote transparency and enable investors to assess the advice' authenticity and any personal prejudices involved of such Finfluencer. With regard to this India can take clues from the Code of Professional Conduct for Financial Advice Services passed by New Zealand, according to which those who are engaged in giving financial advice to retail investors must possess license and disclose the material

[163] Advertising Standards Council of India, Guidelines for advertising and promotion of virtual digital assets and services, (Issued on April. 01, 2022), https://www.ascionline.in/wp-content/uploads/2022/09/vda-guidelines-press-release-feb-23.pdf
[164] National Stock Exchange, Revised Code of Advertisement For Stock Brokers (Issued on Feb. 02, 2023)
[165] *Supra* 164.

connection before giving advice on financial and investment industry.[166] The Securities and Exchange Commission ("**SEC**") mandates the Finfluencers to disclose the compensation they received and relationship (if any) they have with the company. Similarly, Germany mandates an influencer who advertises financial products to disclose any service they get in return for advertising. [167] Additionally, they are mandated to disclose the company or the entity in favour of whom such advertisement is being carried out. An influencer providing the future or estimate price/ returns on the investments the investors might obtain, either impliedly or explicitly would need to disclose their interests or conflict of interest.[168]

D. Registered Entities should not Collaborate with Unregistered Bodies

SEBI time and again had cautioned investors not to rely on unsolicited investment advice of unregistered entities and to deal only with registered entities such as investment advisors, research

[166] Media Release, FMA, FMA releases guide for 'finfluencers' (June. 28, 2021), https://www.fma.govt.nz/news/all-releases/media-releases/fma-releases-guide-for-finfluencers/
[167] Germany Unfair Competition Act, 2010, Section 5(a).
[168]Market Abuse Regulation, ESMA European Securities and Markets Authority, Article 20.

analysts, stockbroker etc.[169] The primary reason behind cautioning is that in case of financial loss due to fraud or scam on the part of these registered entities, investors have an appropriate recourse against them with the help of SEBI.

Recently, Madhabi Puri Buch (Chairperson of SEBI) clarified that those who are registered with SEBI will be restricted to collaborate with those who aren't registered in any given manner such as through advertising, profit sharing, referral fee, equity, link sharing etc. She stated, "*if you are a regulated entity with Sebi, your partners should also be regulated*".[170] Pursuant to this, SEBI recently released 'Consultation Paper' for public comments which provides that unregistered entities (finfluencers) should not collaborate with registered/regulated entities through their 'referral business model' or any other means.[171] This step will help market regulator to check on those unregistered finfluencers who started renting out research

[169] Securities and Exchange Board of India, Press Release SEBI cautions investors not to invest in schemes offered by entities barred by SEBI from raising money or entities not registered with SEBI, PR No.: 110/2016 (Issued on June. 06, 2016), https://www.sebi.gov.in/media/press-releases/jun-2016/sebi-cautions-investors-not-to-invest-in-schemes-offered-by-entities-barred-by-sebi-from-raising-money-or-entities-not-registered-with-sebi_32603.html
[170] OUTLOOK, Sebi Finalising Draft Discussion Paper Over Guidelines For 'Finfluencers, https://www.outlookindia.com/business/sebi-finalising-draft-discussion-paper-over-guidelines-for-finfluencers--news-298975 (last visited August. 07, 2023)
[171] Securities and Exchange Board of India, Consultation Paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers) (Issued on August. 25, 2023).

analyst licenses for a fee and therefore in the shed of RA spreading misleading information for their personal interests.[172]

As most of the finfluencers don't possess requisite qualifications and experience they are not registered with SEBI. It is also not possible to register and regulate everyone who merely gives some kind of financial advice to his or her family or relatives. This kind of advice which is based on personal contract are not regulated neither does market regulator intend to regulate them. However, if someone indulges in providing stock recommendations, portfolio management, investment advice they need to mandatorily register with the SEBI as the law mandates.[173] In Australia, as per Section 911A of the Corporations Act 2001, financial influencers are necessarily required to obtain the Australian Financial Services ("**AFS**") license for providing investment and financial products advice. Without having a AFS license if so called finfluencers provides any kind of financial advice they will be liable for

[172] BUSINESS STANDARD, Finfluencers now 'renting' research analyst licences in fear of Sebi action, https://www.business-standard.com/markets/news/finfluencers-now-renting-research-analyst-licences-in-fear-of-sebi-action-123060200609_1.html (last visited August. 07, 2023)

[173] ET Now Digital, *What did SEBI Chairperson Madhabi Puri Buch Say on Finfluencers promoting Equity? Here is her answer*, ETNOW (June. 29, 2023) https://www.timesnownews.com/business-economy/personal-finance/what-did-sebi-chairperson-madhabi-puri-buch-say-on-finfluencers-promoting-equity-here-is-her-answer-et-now-swadesh-exclusive-article-101367850

punishment as well as for monetary penalties.[174] Therefore, registration of newly emerged finfluencers becomes essential as it will become easy for the market regulator to easily track them and have an oversight over their conduct in the market.

E. Need for Specific Rules and Regulations

In the current day scenario financial influencer holds immense power to influence the investment decisions of their substantial followers and audiences through social media platforms, therefore it's a need of an hour to regulate such influencers.[175] It is usually safer to get financial advice from an experienced, qualified, registered, and regulated financial entity rather than a self-proclaimed internet financial guruji. In India there exist a dire need to formulate rules and regulations specifically governing finfluencers. Market regulator SEBI in the past issued specific regulations regulating financial entities such as investment adviser, research analysts, stockbrokers etc, on similar lines rules and regulations should be introduced regulating finfluencers.

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[174] Corporations Act, No. 50 of 2001, § 911A (Aus).
[175] Harshi Meena, *India's Guidelines for Finfluencers: Key Elements for Consideration*, IRCCL (Dec. 19, 2022), https://www.irccl.in/post/india-s-guidelines-for-finfluencers-key-elements-for-consideration

Considering SEBI's endeavors to regulate finfluencers are still in its earliest phases, it could consider drawing inspiration from its counterparts across the globe. SEBI counterparts in different jurisdictions have sensed intensity of this problem very early and had already started developing legal framework for regulating finfluencers, for instance in October, 2021 the European Securities and Markets Authority ("**ESMA**") released a statement in public on 'Investment Recommendations Made on Social Media', defining what is an investment recommendations, know-how of posting them on digital media platforms and outlining the ramifications of violating EU Market Abuse Regulation.[176] The Australian Securities and Investments Commission ("**ASIC**") released an information sheet ("**INFO 269"**) for digital medial influencers who creates content on financial matters. The information sheet concentrates on applicable rules and regulations, as well as investigations and instances of probable infractions.[177] Similarly, the Monetary Authority of Singapore has cautioned financial influencer against making false or misleading information and engaging in other acts

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[176] European Securities and Markets Authority, ESMA's Statement on Investment Recommendations On Social Media, ESMA70-154-2780 (Issued on October. 28, 2021) https://www.esma.europa.eu/sites/default/files/library/esma70-154 2780_esmas_statement_on_investment_recommendations_on_social_media.pdf.

[177] Australia Securities & Investment Commission, Media Release ASIC issues information for social media influencers and licensees, 22-054MR (Issued on March. 21, 2022), https://asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-054mr-asic-issues-information-for-social-media-influencers-and-licensees/.

which could constitute market manipulation under securities regulations.[178] On a similar lines SEBI should lay down specific regulations for finfluencers keeping in mind investor protection as a primary aim, mentioning on how investors shall always do due diligence before relying on investment advice for taking any investment decision.

In today's time, social media has served to be one of the most impactful marketing avenues, which provides influencers with a platform to showcase their knowledge, skills and expertise to influence or change their audiences' minds and attitudes. Alongside such power, comes the responsibility to ensure that their content carefully curated so that it is not harmful or offensive[179] to the audience. As financial influencers have entered into the sphere of social media for a rather long period of time[180], it is necessary that such they are regulated to encourage societal benefits, while curbing negative consequences and harm. Following Australian Approach[181],

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[178] Monetary Authority of Singapore, Media Release MAS and SGX: Beware of risks related to trading incited by online discussions (Issued on Feb. 02, 2021), https://www.mas.gov.sg/news/media-releases/2021/beware-of-risks-related-to-trading-incited-by-online-discussions.

[179] Marico Limited v. Abhijeet Bhansali, 2020 SCC OnLine Bom 60

[180] Sean Allocca, *The 'finfluencer' takeover of digital marketing*, INVESTMENT NEWS (Nov. 16, 2021), https://www.investmentnews.com/the-finfluencer-takeover-of-digital-marketing-212908

[181] Michael Chaaya, *The rise and regulation of financial influencers,* CORRS. AU (Oct. 24, 2022), https://www.corrs.com.au/insights/the-rise-and-regulation-of-financial-influencers?utm_source=mondaq&utm_medium=syndication&utm_term=Finance-and-Banking&utm_content=articleoriginal&utm_campaign=article.

India can permit finfluencers to serve their viewership with factual financial data that deals with the rights and obligations of the investors, the financial data of the company as this would promote financial literary. Dissemination of substantial financial data i.e., an opinion or recommendation regarding a financial product by unregistered influencers should be prohibited as they form a basis for the investors decision making, and thus must be regulated adequately. Further, India can adopt a simplified registration procedure for IA/RA like in Australia and UK, so that more such influencers register with SEBI, benefitting the entire market.

V. CONCLUSION

The exponential surge in finfluencers in the recent age has brought about a complex interplay and connection between social media, financial advice and investor protection. Finfluencers have exploited the intricate interplay, by strategically positioning themselves in a manner that they are able to influence and shape the opinions of their audiences. Such authority must be reciprocated with liabilities and responsibilities they have towards the audience. However, the absence of specific regulations regarding finfluencers activities in India, leads to them being exposed to unverified and unqualifies sources of financial advice. Instances of conflict of interest, misaligned incentives, personal gains dissemination of inaccurate information by finfluencers have become increasingly prevalent. But the

present regulatory landscape of the country falls short to address the newfound challenges posed by finfluencers.

To tackle these emerging issues posed by finfluencers, the paper has proposed a multi-faceted approach. It suggests the establishment of an independent self-regulatory bodies for finfluencers, similar to the one established for mutual fund industry, successfully regulating their activities. The body should be empowered to establish standard, code of conduct, account for transparency and enforce penalties for violations.
Collaboration of Indian Market Regulator – SEBI with Social Media Platforms could result in effective oversight and regulation, by flagging of misleading content and verification marks for IA/RA displayed on social media handles. Collaboration of SEBI with other bodies such as ASCI that sets out effective standards for disclosure in advertisements and endorsement, would result in investor making an informed choice
While there exist regulations for the activities of IA/RA, the distinct nature of finfluencers demand specific regulations that ensure investor protection. Recognizing the same, international counterparts of SEBI have set precedent by establishing specific rules and regulations to govern them. India can take inspiration from these bodies, and craft its guidelines and regulations prescribing mandate disclosure of material connection, incentives and benefits received against advertisement which would aid in overseeing the finfluencers actions.

In conclusion, the paper emphasises that though the finfluencers play a vital role in bridging the financial literacy and awareness of the country,

they must be held accountable and responsible to provide accurate and unbiased financial advice and recommendations. In the everchanging dynamics of this digital era, establishing an effective and well-regulated environment for finfluencers is crucial to harness the potential for positive change in financial literacy, safeguarding interests of all the stakeholders and most importantly maintaining integrity of the market.

NAVIGATING PROPERTY INVESTMENT: TRANSITIONING TO CONCLUSIVE LAND TITLING IN INDIA

- *Rishi Raj Rai*[*]

ABSTRACT: *Property investment is a significant aspect of Indian culture, yet it comes with its set of challenges, prominently land disputes and the burden of due diligence on buyers under the caveat emptor rule. This paper delves into the necessity of transitioning from presumptive land titles to conclusive land titling in India. It highlights the overwhelming burden on buyers to verify property ownership, often leading to disputes and inefficiencies in the legal system. Conclusive land titling, characterized by state-guaranteed ownership records, offers a solution by easing the burden on buyers and streamlining property transactions. The paper discusses the rationale behind this transition, the challenges faced in its implementation, and the steps taken by the Indian government towards this end. While progress has been made, the journey towards conclusive land titling is slow, requiring concerted efforts and reforms to fully realize its benefits for both citizens and governance.*

KEYWORDS: *Due Diligence, Conclusive Land Titling, Caveat Emptor, Property Investment, Land Disputes.*

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I. INTRODUCTION

Indians are fond of investing in property. The property market in India has appreciated, giving returns to those who invested over all these years. Property-related transactions are always taking place. However, cases pending in courts related to land-related disputes are high in number too. Around 7.7 million people are affected in India by conflict over 2.5 million hectares of land, which is worth around $200 billion[182]. Land dispute cases account for the highest numbers in terms of both absolute numbers as well as judicial pendency. Among all the civil cases, property-related disputes account for 66% in India[183]. This includes agricultural land-related disputes too, which employs the largest share of the workforce in the country[184]. Apart from this, in India's developmental trajectory, land has always been central. Hence it becomes necessary to find a solution to land conflicts in India.

The objective of the paper is to discuss one of the solutions to land conflicts in India- guaranteed land titling. The paper consists of 3 sections which

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[182] Namita Wahi, Understanding Land Conflict in India and Suggestions for Reform, CPR, (April 13, 2023), https://cprindia.org/understanding-land-conflict-in-india-and-suggestions/.

[183] *Id.*

[184] Aaron O'Neill, Distribution of the workforce across economic sectors in India 2019 (Statista) (April 13, 2023), https://www.statista.com/statistics/271320/distribution-of-the-workforce-across-economic-sectors-in-india/.

further are divided into sub-sections. The first section of the paper will focus on the due diligence measures when an immovable property is being sold. The second section will focus on conclusive land titling. The following section will delve into the measures undertaken so far for implementing conclusive land titling. Central to this exploration is the research question: "Why is it imperative for India to transition from presumptive land titles to conclusive land titles?" Through this inquiry, the paper seeks to offer insights into the rationale behind embracing conclusive land titling as a means to mitigate land disputes and foster a more transparent and efficient property ownership framework in India.

II. THE BURDEN OF DUE DILIGENCE ON THE BUYER DUE TO CAVEAT EMPTOR

This section is going to focus on who needs to carry out the due diligence measures during the sale of immovable property. The paper will argue that presently due diligence measures over-burdens the buyers. The section will also delve into the exceptions of caveat emptor in the sale of immovable property in India.

The transfer of property act 1882, defines notice as knowledge of a fact or fact that could be known but for wilful abstention from making an inquiry or search which the person must have done or for gross negligence, not

known to the person[185]. The rights and claims of those involved in unconscionable transactions are determined by the doctrine of notice. Notice is of two types- the first is actual notice, in which a person acquires actual knowledge of a fact and the second is constructive notice. The paper will be focussing on constructive notice[186].

Constructive notice is defined as the equity which considers a man who should have known a fact as if the fact is known by him[187]. Although originated in equity, it was included under the statute and has to be interpreted as such[188]. In constructive notice, the knowledge or notice is imputed. As per the Supreme Court in Ahmedabad Municipal Corporation in the city of *Ahmedabad v Haji Abdulgafur Haji Hussenbhai*,[189] "the fiction of imputing notice to a party is based on wilful abstention to enquire or search which a person ought to make or, on gross negligence". It would be seen whether a reasonable person would know. Hence, it can be concluded that constructive notice embeds the rule of Caveat Emptor, that is buyer be aware[190]. Here the presumption is that if a reasonable and prudent purchaser purchases a property, he would like to take the property free from any charge or claim by another person to enjoy the full value of

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[185] Transfer of Property Act 1882, § 3.
[186] Poonam Pradhan Saxena, Mulla on the Transfer of Property Act 34 (13th ed, LexisNexis 2018).
[186] *Id,* at 35.
[187] Ahmedabad Municipal Corporation in the city of Ahmedabad v. Haji Abdulgafur Haji Hussenbhai, (1971) 1 SCC 757 [11].
[188] *Id*.
[189] *Id*, at [9].
[190] H.C. BLACK, BLACK LAW'S DICTIONARY 619 (4TH ED, WEST PUBLISHING CO. 1968).

his money. In other words, the buyer needs to exercise due diligence measures due to the rule of caveat emptor. Due diligence refers to "such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent person"[191]. While exercising buyer has to ascertain (i) whether any person has a permanent or temporary claim, title or any right over the property; (ii) whether the property has any charge due over it; and (iii) whether the transferor is competent under law to transfer the property[192]. Hence, the buyer is required to go through past transactions of the property, registry deeds, public documents, verification of title, etc. It would be assumed that the buyer has gone through all these documents to confirm the requirements stated above. The only thing the court will see is whether a reasonable man would know the facts in question. If yes, then the transferee will be treated as if he knows even if he did not have so. In several cases, such as *Tilakdhari v Khedan Lal*[193]*, and Bank of Bombay v Suleman*[194], courts have held that it's the responsibility of the buyer to go through the registered deed and other related documents.

Hence, the rule applicable in India is of *caveat emptor* with the transferee being responsible for meeting the standard of a reasonable prudent man. However, in developed countries like the U.S., the law has changed from

[191] *Id,* at 544
[192] POONAM PRADHAN SAXENA, PROPERTY LAW 43 (3rd ed, LexisNexis 2017).
[193] Tilakdhari v Khedan Lal, AIR 1921 PC 112.
[194] Bank of Bombay v Suleman, (1909) ILR 33 Bom 1.

caveat emptor to *caveat venditor*, that is seller beware[195]. The transferor has statutory liability to disclose information regarding the property being sold[196]. In recent times, Indian courts too have ruled against the doctrine of caveat emptor but only in a limited type of cases.

In *Corporation Bank and Another v Dr. Jayesh Kumar Jha*[197], the Calcutta High Court was faced with the question that whether the doctrine of caveat emptor is applicable in the sale of immovable property under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The respondent had paid a consideration price fixed by auction for sell of an immovable property undertaken by the appellant Bank. He received a sell certificate from the appellants in favour of him that stated the sale was free from all the encumbrances. Thereafter, he was charged by the Municipal Corporation for payment of property tax for the period before his auction purchase. The appellant bank had no information regarding the encumbrances. It was argued by the appellants that the sale was done on "as is where is" and "as is what is basis" along with the principle of *caveat emptor*, the buyer was under an obligation to carry out independent inquiries regarding the property.[198]

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[195] *Supra* 190, at 281.
[196] Robert M. Washburn, *'ResIdential Real Estate Condition Disclosure Legislation'* 44 DePaul Law Review 381(19z95).
[197] Corporation Bank and Another v Dr. Jayesh Kumar Jha, (2019) SCC OnLine Cal 2279.
[198] *Supra* 196

The court held that the ignorance of the appellant to check about the pending taxes was not a good and acceptable defence as the SARFESI act has replaced the rule of *caveat emptor* with *caveat venditor* and when the property is put to sale, the bank is under statutory obligation to ensure that the secured asset is free from any encumbrances[199]. A similar position was taken by the Madras High Court in *Poysha Power Generation v Registrar Debts Recovery Tribunal and Others*[200].

The Supreme Court and various High Courts have changed their approach from caveat emptor to caveat venditor, especially in cases related to property for which a connection for electricity was sought, purchased through auction under special statutes like State Financial Corporations Act, SARFESI Act, Recovery of Debts and Bankruptcy Act, etc[201]. This view was affirmed by Supreme Court *in Isha Marbles v Bihar State Electricity Board and Ors*[202].

However, this move from caveat emptor to caveat venditor is only restricted to a limited type of cases. Majorly it's the buyer who needs to exercise due diligence while purchasing a property. The process is very time-consuming as it includes dealing with various regulatory bodies.

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[199] *Supra* 196, at [41].

[200] Poysha Power Generation v Registrar Debts Recovery Tribunal and Others, (2019) SCC OnLine Mad 26348

[201] Tanmay Raj Anand & Chinmay Mehta, '*Purchasing Premises: Also Purchasing Electricity Dues?*' (2021) 3 Nat'l LU Delhi Stud LJ 139.

[202] Isha Marbles v Bihar State Electricity Board and Ors, (1995) 2 SCC 648.

Also, searching for property is an expensive process too. Along with this, the process becomes difficult to carry out often the past transactions are not properly recorded. There are gaps between the government records and actual ownership of the property. These gaps make it easier to challenge the ownership of a property[203]. This leads to several disputes between parties to a sale deed Hence, it can be said that purchase of property is similar to a gamble if there were to be some failure in due diligence to be exercised, the buyer would be held liable for his mistake.

III. WHY TRANSITION FROM PRESUMPTIVE LAND TITLE TO CONCLUSIVE LAND TITLING

The previous section discussed how the burden of due diligence is on the buyer. This is problematic and often can lead to disputes. This section will focus on conclusive land titling, that would ease the burden on the buyer.

The Registration Act, 1908[204], provides for the registration of sale deeds, but not of land titles[205]. Hence land title in India is presumptive in nature and can be challenged on various grounds. Therefore, the buyer is required to probe past ownership and property transactions to establish that there is

[203] Prachee Mishra and Roopal Suhag, '*Land Records and Titles in India*' (PRS India), (13 April 2023).https://prsindia.org/policy/analytical-reports/land-records-and-titles-india
[204] The Registration Act, 1908.
[205] D.C. Wadhwa, '*Guaranteeing Title to Land*' (2002) 37 (47) Economic & Political Weekly 4699, 4706.

non-encumbrance on the property[206]. Due to the presumptive nature of ownership, the buyer needs to carry out several measures to search for the property[207].

The number of cases related to land-related disputes is very high in the country. These disputes include those too that are related to rightful ownership and credibility of land titles and records. A report suggested that on average it takes around 20 years for disputes to be resolved[208]. Land disputes clogged up the courts with tons of cases pending in courts. Along with this, unclear or disputed titles inhibit the supply of credit for agriculture. This leads to small farmers, who account for about half of the land holdings, being unable to access institutionalized loans[209].

To address these issues related to presumptive land holdings, a shift to Conclusive Titling has been proposed[210]. A Conclusive title can be defined as conclusive and unassailable proof of ownership of the property. These are titles guaranteed by the state, which guarantees the title of land and

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[206] *Id,* at 4706.
[207] *Supra* 203.
[208] Anirudh Burman, *Making Land Titles in India Marketable: Using Title Insurance as a Viable Alternative to Conclusive Titling*, 28 Wash Int'l LJ 109, 113 (2019).
[209] *Supra* 205, at 4722.
[210] Sinha, R. Moving towards clear land titles in India: Potential benefits, a road-map and remaining challenges. In Proceedings of the Presentation to the FIG Washington-World Bank Conference on Land Governance in Support of the Millennium Development Goals: Responding to New Challenges, Washington, DC, USA, 9–10 March 2009..

even indemnifies in case of a dispute[211]. Since the titles are guaranteed by the government, it is also known as Guaranteed Land Titling.

The system of conclusive land titling is based on three principles[212]. First, the mirror principle refers that land records maintained by the government reflecting the ground reality. All the material facts as well as encumbrances are included in the records. Second, curtain principle, a buyer is not required to make a search of past transactions and the history of the ownership of the property. He has to just rely on the information present in the registered deed. Third, the assurance principle, that if the mirror principle fails to give a complete reflection of the title of land and a person suffers damage as he relied solely on the registered deed, the person will be given complete compensation by the state[213].

A close look at the economic theory on property rights depicts a sound basis for guaranteed land titling as it paves the way for securing property rights[214]. Guaranteed land titling allows the maintenance of land records not just as a source of government revenue but easing the process of purchasing property for citizens. The digitisation of land records allows them to be in the public domain allowing property owners to access their

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[211] *Supra* 203.
[212] *Supra* 205, at 4715.
[213] *Supra* 205
[214] Williamson, Claudia R., The Two Sides of De Soto: Property Rights, Land Titling, and Development (October 7, 2011). THE ANNUAL PROCEEDINGS OF THE WEALTH AND WELL-BEING OF NATIONS, p. 95, Emily Chamlee-Wright, ed., Beloit College, 103-105 (2010), https://ssrn.com/abstract=1940201.

records with ease in contrast with the present system where records are in the custody of government officials. The number of cases related to land disputes can be brought down as the title becomes conclusive as well as tamper-free. Along with lowering the burden of due diligence from a buyer, this will also ease governance as real-time records would be easily accessible.

The *torrens system* or conclusive land titling is adopted by several developed and developing countries like Australia, Malaysia, Ireland, Canada, Singapore, United Kingdom etc.[215] Several of the government-made committees have also favoured the transition towards guaranteeing land titles for the benefits associated with it[216].

IV. WHERE INDIA STANDS IN TRANSITION TOWARDS CONCLUSIVE TITLING

After, several recommendations and proposals Indian government decided to shift from presumptive titling to conclusive titling. The following section will be focussing on the steps taken by the Indian government in transiting towards conclusive land titling.

In 2008, the central government launched its scheme for the modernisation of property records, "*Digital India Land Records Modernisation*

[215] *Supra* 203.
[216] *Supra* 205, at 4706.

Programme"[217]. It included various components within itself like computerisation of existing property records and registration under the Registration Act, digitalisation of land maps, and conducting a survey to fill the gaps in government records.

The problem with the scheme is that several states have been slow in implementing it. Since land comes under the jurisdiction of the state government, any law related can only be passed by the state government, and not much has been done towards the implementation of conclusive titling. Also, when the scheme was being finalised, it was envisaged that it would take around eight years to be completed, however, states could immediately pass legislation on conclusive titling. Till now, the process has been slowed with DILRMP being unsatisfactory in achieving its target.

The vast size of India, with millions of landowners and records, pose a mammoth challenge to DILRMP. In some of the areas, no survey has been conducted till now, so there is no information regarding the history. Land records themselves posed a challenge as almost every state has a unique system of land records along with different terminology and language used in these records. Compiling these becomes a huge task ahead of implementing the scheme. The different methodologies used by the states make it difficult in integrating these records. The central government rolled

[217] *Supra* 208, at 116.

out a national code so that records of different states can be integrated. However, it's on states whether they want to adopt this code.

Overall, the process of DILRMP has been slow. Due to huge records, a survey has been conducted at a slow pace. India has adopted measures moving towards state-guaranteed land titling. Over all these years several committees and programmes have been launched towards this task. Initiatives taken by the state government such as *"Bhoomi*" by the Karnataka State government with the object of digitising the land records as well as the Rajasthan Urban Land (Certification of Titles) Act, 2016 aimed towards conclusive titling in urban areas, are some of the commendable steps taken by the state governments. However, still India has to go a long way in completely transiting from presumptive land title to guaranteed land title.

V. CONCLUSION

Property investment is among the top priorities of people. In India, the rule of caveat emptor is applicable and hence it's the buyer who needs to exercise care while purchasing the property with certain exceptions. The burden of exercising due diligence measures is on the purchaser himself. The process is expensive and time-consuming. In many cases, it becomes difficult as past transactions are not properly recorded. There exists a gap between government records and actual possession of the property. Hence exercising due diligence becomes problematic for buyer and overburdens him. Conclusive Land Titling offers a solution to this issue as the records with the government reflect the ground reality. Therefore, the buyer is not

required to search documents beyond the registry deed. Conclusive land titling hence lowers the burden on the buyer. India has started transiting from the current system of presumptive land title to guaranteed land title. Several steps have been by the government towards the implementation of this system. However, the process has been slow in pace and India needs to go long way to implement the system completely. Once implemented completely, the system would be very beneficial for the public as well as the government.

ARGUMENTS FOR POISON PILL MECHANISMS IN INDIA: AN ANTIDOTE TO HOSTILE TAKEOVERS

- *Samrudh Kopparam*[*]

ABSTRACT - *In the wake of the pandemic, Russia-Ukraine conflict, and global recession, Indian corporate entities are vulnerable to hostile takeovers due to plummeting stock prices and market volatility. Recent hostile takeovers of NDTV and Mindtree have demonstrated the inadequacy of existing anti-takeover laws. Against this backdrop, this article proposes the transplantation of the "poison pill" defence mechanism to India. We argue that the poison pill has a deterrence effect that enhances the bargaining power of the target company. Furthermore, given the changing ownership trends from a controlling shareholder regime to a dispersed shareholder regime, modern anti-takeover strategies like the poison pill are necessitated. We also argue that the pill is 'flexible' and does not solicit replacement of the current legal framework but acts complementary. Subsequently, we drive the discourse to the impediments posed by the SEBI Takeover Code, SEBI DIP Guidelines, and ICDR Regulations that prevent the 'transplantation' of the pill to the Indian context. These regulations sever the pill's efficacy by prohibiting the company's capital restructuring upon announcing "the offer" and barring*

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deep discounting of securities. Lastly, we argue that we cannot merely import the pill but instead have to transplant the pill into the Indian socio-legal environment. We suggest key amendments and recognitions of principles established in Unocal, Revlon, Williams, and Blasius to infuse the pill in India. In conclusion, we believe the poison pill defence to be a viable anti-takeover strategy and warranted in the contemporary M&A environment.

Keywords: *Board of Directors ('BOD'), Deterrence, Poison Pill, Security Exchange Board of India ('SEBI'), Takeover.*

I. INTRODUCTION

The past decade has witnessed a surge in mergers and acquisitions (**"M&A"**) activity in India across diverse sectors, including energy (Rosneft's 49% buyout of Essar Oil),[218] FMCG ('Walmart's acquisition of Flipkart'),[219] entertainment (Merger of PVR and Inox),[220] and aviation

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[218] KVL Akshay, CCI Approves Rosneft buyout of Essar Oil, The Economic Times (December 2, 2016) https://economictimes.indiatimes.com/industry/energy/oil-gas/cci-approves-rosneft-buyout-of-essar-oil/articleshow/55729047.cms?from=mdr.

[219] Anirban Sen, Walmart completes deal to buy Flipkart for $16 Billion, The Mint (August 18, 2018) https://www.livemint.com/Companies/qOBduC3OBVpKTv9CpCYayH/Walmart-completes-16billion-buyout-of-Flipkart.html.

[220] Lata Jha, PVR opens first multiplex post-merger with Inox, The Mint (February 17, 2023) https://www.livemint.com/companies/news/pvr-opens-first-multiplex-post-merger-with-inox-11676627169869.html.

('Tata's acquisition of Air India').[221] While such M&A has been on the rise, the cumulative effect of the pandemic, Russia-Ukraine conflict, and global recession have left companies in a precarious situation—making them targets of hostile acquisitions due to plummeting stock prices and market volatility.

In such situations, corporate entities turn towards takeover laws for protection, such as the SEBI Regulations, Companies Act, Competitions Act, etc. Despite these regulations, it is evident that the present anti-takeover regime is lackadaisical against the prevailing hostile *inter alia* aggressive M&A. Recent examples, including the Adani Group's takeover of media enterprise NDTV, Minda Corp's hostile acquisition of Pricol, and L&T's takeover of Mindtree, have exposed the deficiency and shortcomings of anti-takeover mechanisms in place.[222] Against this backdrop, this article proposes the transplantation of the 'poison pill' defence mechanism to India. Thereafter, it unties the regulatory hurdles and impediments within the existing legal framework in transplanting the pill. Lastly, this article suggests reforms and amendments to adopt the pill and create a robust anti-takeover regime in India.

[221] Anu Sharma, Tata Group announces merger of Vistara with Air India, The Mint (November 30, 2022) https://www.livemint.com/news/india/tata-group-announces-merger-of-vistara-with-air-india-11669744986885.html.
[222] Ashima Obhan & Raunaq Kwatra, Hostile Takeovers in India – Part 2, Mondaq (September 1, 2022) https://www.mondaq.com/india/corporate-and-company-law/1226644/hostile-takeovers-in-india--part-2.

II. UNDERSTANDING THE POISON PILL DEFENSIVE MECHANISM

A shareholder rights plan, colloquially referred to as a 'poison pill,' is a provision in a company's charter that is triggered in the event of a takeover that would be detrimental to the acquiring company.[223] Poison Pills—essentially crafted as trip wires—are triggered or 'set off' when an acquirer breaches the specified acquisition threshold. When set off, the existing shareholders can buy large amounts of stock, debt securities, or cash at a substantially discounted price.[224] Furthermore, the acquirer having 'swallowed the pill' by breaching the threshold, is excluded from buying the discounted shares, resulting in a substantial dilution of their shareholding.[225]

A poison pill, in this context, is inherently an agreement or a 'rights plan' between the company and shareholders triggered contingent upon an event.[226] Subsequently, shareholders may elevate the company's debt or decrease share value by acquiring new shares, making the takeover difficult. Furthermore, since the acquirer is excluded from this right, their

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[223] Kruti Desai, *Defence Mechanisms under the Takeover Code*, 2 LAW REV. GOVT. L.C. (2002-03).
[224] Rajiv Luthra, Can India Inc. swallow the pill?, The Economic Times (May 19, 2009) https://economictimes.indiatimes.com/view-point/can-india-inc-swallow-the-poison-pill/articleshow/3051566.cms.
[225] Aastha Agarwalla & Lavanya Gupta, Poison Pill: A Vaccine for Hostile Takeovers in India?, Commercial & Financial Law Reporter (November 2, 2020) http://cflrinsights.in/poison-pill-a-vaccine-for-hostile-takeovers-in-india/.
[226] *Supra* 223, at 241.

shareholding percentage is diluted, making the takeover expensive. Additionally, poison pills may be of two types, flip-in pills which are pre-emptive in nature, and flip-over pills,[227] which empower shareholders to purchase shares in the surviving company at a significant discount post-merger, thereby displacing wealth from the acquiring firm's shareholders to the target firm's shareholders.[228]

At the cross-junction, both flip-in and flip-over poison pills represent defensive measures designed to dissuade unsolicited takeovers. However, they exhibit distinct mechanisms concerning the timing of their advantageous effects—flip-in pills manifest their efficacy prior to a takeover—while flip-over pills exert their influence subsequent to the takeover event.[229] When put on the scale, we observe that flip-in pills possess a more significant deterrence effect by rendering the initial takeover endeavour more expensive, time-consuming and onerous. Furthermore, their primary beneficiaries are the management and board of directors (**"BOD"**) of the target company rather than individual shareholders. This disposition aligns harmoniously with the Indian corporate governance framework, which observes a proficient BOD to run parallel to enhanced corporate performance. This alignment is also consonant with the overarching objective of Section 166 of the Companies

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[227] D.L. Sunder, *The Controversial 'Poison Pill' Takeover Defense: How valid are the Arguments in Support of it?*, 23 NMIMS MANAGEMENT REVIEW 47, 48 (2014).
[228] *Supra* 227, at 49.
[229] Anuradha Mohanty, Poison Pills: Doing the Vanishing Act?, Legal Services India (2009) https://www.legalserviceindia.com/article/l293-Poison-Pills.html.

Act, which imposes upon the BOD a fiduciary duty to act exclusively in the company's best interests.[230]

In contrast, flip-over pills confer shareholders the prospect of reaping benefits from any prospective upswing in the acquiring company's stock. Albeit, it is imperative to acknowledge that such contingent gains are not guaranteed to materialize. For instance, Tata Motors witnessed a precipitous 6% decline in its share value after announcing its $2.3 billion acquisition of Jaguar and Land Rover from Ford Motors.[231] Similarly, Bharti Airtel's stocks plunged nearly 10% after it acquired Kuwaiti telecom Zain for its African cellular assets.[232] In light of these instances, we posit that flip-in pills emerge as the more judicious choice within the Indian landscape for deterring hostile takeovers and should assume primacy in poison pill defence strategies.

III. ARGUMENTS FOR THE 'ANTIDOTE'

A. The Argument of Deterrence and Bargaining Power

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[230] The Companies Act, 2013 § 166.

[231] India Times, Tata Motors shares plummet 6% on JLR deal; BSE Auto drags, The Economic Times (March 27, 2008) https://economictimes.indiatimes.com/markets/stocks/news/tata-motors-shares-plummet-6-on-jlr-deal-bse-auto-drags/articleshow/2903668.cms?from=mdr.

[232] ET Bureau, Zain deal to strain Bharti's finances; stock ends 9% lower, The Economic Times (February 15, 2010) https://economictimes.indiatimes.com/markets/stocks/news/zain-deal-to-strain-bhartis-finances-stock-ends-9-lower/articleshow/5575990.cms?from=mdr.

A central feature of the poison pill is its deterrence effect which has contributed to its widespread adoption in Western jurisdictions. Triggering the pill inadvertently makes the acquisition of the target company expensive or unattractive due to the substantial dilution of shareholding and additional costs incurred for acquiring new shares. Furthermore, as a majority of hostile takeovers are financed through borrowed funds, utilizing the poison pill shrinks the potential profit margins of the takeover due to the mounting interest rates.[233] This cost-benefit analysis—tipping in favour of the target company—often deters hostile acquirers and pushes for negotiations with the board before swallowing the pill. Subsequently, poison pills enhance the bargaining power of the target company and facilitate acquisitions at premium prices and terms that are favourable to their interests.

The bargaining power argument can be aptly analogized with the target company taking itself 'hostage' by invoking the threat of a poison pill, thereby putting the acquirer in a situation where they must either pacify the hostage or swallow the pill. In the former case, the target company benefits from a superior bargaining position and increases the premium in the face of resistance. For instance, in the Arcelor-Mittal takeover case, Mittal Steel raised their offer from

[233] *Supra* 225.

€28.21 per share to €40.27 after Arcelor adopted anti-takeover strategies and pushed the Mittals into boardroom negotiations.[234] In this regard, we observe a complementary relationship between the deterrence effect and bargaining position under the poison pill mechanism.

A common contention against the bargaining argument is the existence of a 'limit' on increased pay-out beyond which the acquirer will either walk away or swallow the pill.[235] However, we argue that in all the scenarios, the target company stands to benefit, either monetarily through increased premiums, restoring the company's autonomy if the acquirer chooses to walk away, and by 'buying time' if the acquirer swallows the pill. Therefore, the poison pill mechanism can be an effective tool for target companies to deter hostile takeovers, negotiate more favourable terms in the event of an acquisition or buy time to adopt alternative anti-takeover strategies.

B. Adaptation to Modern Ownership Trends and Flexibility

The changing ownership structure of Indian corporate entities from a controlling shareholding regime—characterized by a dominant

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[234] Samim Zarin & Erik Yang, *Mergers & Acquisitions: Hostile takeovers and defense strategies against them*, Thesis submitted to UNIVERSITY OF GOTHENBURG, SCHOOL OF BUSINESS, ECONOMICS AND LAW (2011).

[235] *Supra* 227, at 53.

shareholder or family-driven promoters who holds a significant percentage of the company's shares and control over managerial decisions—to a dispersed shareholding regime—wherein ownership and control are separated—has renewed the call for transplanting the pill.[236] In this regard, poison pills give existing shareholders more control over the company's future by inherently restructuring ownership while purchasing new shares. Additionally, a dispersed shareholding regime is grounded on the shareholders' welfare hypothesis, i.e., the BOD acts in shareholders' best interest by frustrating poxy offers.[237] Moreover, the pill also protects shareholders from the prisoner dilemma—acceptance of an offer not on merit but rather on the fear of missing out and being left as an isolated minority - by making the cost of a hostile takeover expensive and incentivizing holding onto shareholding and collectively negotiating on a premium.[238] This power in the 'collective' approach also ensures that the acquirer does not undervalue the target company's assets and share value during the takeover attempt. Therefore, a greater need arises to consider the poison pill as a viable defence strategy in an ownership-evolving country like India.

[236] Sang Yop Kang, *transplanting a Poison Pill to Controlling Shareholder Regimes – Why It Is So Difficult*, 33 NW. J. INTL. LAW. & BUS. 619, 624 (2013).
[237] Blanaid Clarke, *Regulating Poison Pill Devices*, 4 JOURNAL OF CORPORATE LAW STUDIES 51, 54 (2004).
[238] Id at 55.

Another argument for the transplantation of the poison pill is its diverse nature which enables them to be customized and tailored according to the company's interest. For instance, they could constitute a change of control clauses in joint-venture agreements, issue rights at deep discounts, preferential allotments, issue of securities that convert at a discount, and other agreements that effectuate on change of control.[239] Furthermore, to prevent over-deterrence, the poison pills may have sunset clauses or provisions for a waiver by the board during a friendly M&A. In addition, they can be invoked pre-emptive through flip-in pills or reactive via flip-over pills. Based on the jurisdiction's corporate landscape and socio-legal condition, the 'trigger' thresholds could be modified albeit restricted by the Williams proportionality principle.[240]

The enforcement of poison pills may also vary by jurisdiction. For instance, in India, the entities of the Tata Sons group have incorporated a "brand pill," which interdicts any hostile acquirer from expropriating or using the 'TATA' brand name.[241] Additionally, poison pills infused in Employee Stock Options Schemes (**"ESOS"**) have surfaced to protect employees during

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[239] *Supra* 224, at 241.

[240] Sierra Jackson, Del. Supreme Court affirms ruling on Williams Cos poison pill, Reuters (November 5, 2021) https://www.reuters.com/legal/transactional/del-supreme-court-affirms-ruling-williams-cos-poison-pill-2021-11-04/.

[241] Pallavi Arora, *Evaluating the Prospects of Effectuating a Hostile Takeover in the Indian Corporate Landscape*, 4 NLIU LAW REV. 22, 57 (2014).

hostile takeovers such that upon setting off the pill, ESOS are issued at a discount to dilute the shareholding of the acquirer.[242] Therefore, the flexibility of the poison pill makes it a lucrative and efficient anti-takeover strategy.

C. Fortifying Corporate Governance

In the domain of corporate governance, poison pills serve as a medium to preserve a company's identity and character—encompassing its shared values, norms, and beliefs.[243] Apart from the conspicuous adverse appreciable effects of a hostile takeover, such as the erosion of shareholder value, diminished autonomy, and impairment of customer relations *inter alia*—it also dismantles the existing corporate culture of an organization—consequently eroding its essence. In this context, the deterrent impact of the poison pill mechanism empowers the BOD to thwart hostile raiders from altering established corporate cultures. Consequently, this serves the dual purpose of retaining valuable personnel, preserving vital business relationships, and ensuring the company's long-term stability.

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[242] *Supra* 225.

[243] ANDREAS M. FLECKNER AND KLAUS J. HOPT, COMPARATIVE CORPORATE GOVERNANCE: A FUNCTIONAL AND INTERNATIONAL ANALYSIS, 1117 (Cambridge University Press 2013).

When a hostile takeover materializes, far-reaching corporate restructuring initiatives engender job insecurity among employees due to impending layoffs and cost-cutting measures. The introduction of the poison pill allows the BOD of a target company to uphold its control and resist the takeover. Subsequently, shielding its employees from potential adverse repercussions. This is facilitated through the utilization of backend rights plans, commonly referred to as 'Employee Stock Ownership Scheme ("**ESOS**") pills,' which are triggered in response to an unwelcomed bid.[244] Moreover, underpinning this strategic manoeuvre is a Marxian undertone, wherein the poison pill instrument bestows the BOD and employees additional time to prioritize their welfare. Subsequently, the 'welfare' translates into improved employee morale and productivity.

Beyond the pragmatic implications, the poison pill strategy also assumes a symbolic dimension. It is a potent symbol of steadfast resistance against hostile takeover endeavours, thereby instilling greater confidence among investors. These arguments substantiate a compelling case within the Indian context, where redundant state and central labour laws have proven ineffective in providing recourse to employees affected by hostile takeovers. Moreover, in the presence

[244] *Supra* 225.

of a weak corporate governance framework — often characterized by obligatory compliance — the poison pill strategy can be instrumental in preserving and aligning with the 'going-concern' principle, thereby ensuring long-term stability. Lastly, in the era of innovation and pervasive investments in research and development driven by burgeoning technologies, the poison pill safeguards against 'asset stripping'. The poison pill is a deterrent against potential acquirers who might be interested in acquiring the target company solely to strip its assets or divest valuable subsidiaries, potentially leading to the company's disintegration and loss of long-term value. In conclusion, it is evident that the poison pill strategy, with its multifaceted benefits, emerges as a valuable instrument for fortifying corporate governance.

D. Complementary not Displacement

Finally, it is crucial to consider that the poison pill mechanism—albeit effective in deterring hostile takeovers—does not absolutely 'stop' a takeover. This was demonstrated in the recent takeover bid for Twitter, where the poison pill mechanism failed to deter the deep-pocketed Elon Musk from proceeding with his acquisition

attempt.[245] A lacuna observed on this front is that, before setting off the poison pill, the acquirer attempts to engage in proxy wars and take control of the 'board' to override the pill.[246] This can be prevented by establishing a 'staggered board' or multiple classes of directors constituting the BOD, making it arduous to take control of the board due to differing interests and terms. A staggered board in India can be established through Section 163 of the Companies Act, 2013, which empowers minority shareholders to have a proportional representation on the BOD.[247] Provided the Article of Association of the company permits, 2/3rd of the total directors can be appointed by the principle of representation by a single transferable vote or other cumulative voting systems. This system prevents hostile takeovers and ensures stability by making it more challenging for a single group to take control of the board in a single election.[248] When combined with the poison pill mechanism, the staggered board strengthens the anti-takeover strategy and fends off the 'back door' through proxy contests. Consequently, as a denouement, we argue that the poison pill defence does not seek to replace existing anti-

245 Eshvar Girish, Yogesh Nayak & Nishchal Joshipura, Musk pops twitter's poison pill without any side effects!, Nishith Desai Associates (April 28, 2022) https://www.nishithdesai.com/SectionCategory/33/M&A-Hotline/12/59/MAHotline/5497/1.html.

246 John Armour, Jack B. Jacobs & Curtis J. Milhaupt, *The Evolution of Hostile Takeover Regimes in Developed and Emerging Markets: An Analytical Framework*, 52 HARVARD INTL. L.J. 219, 241 (2011).

247 The Companies Act, 2013, §163.

248 *Supra* 244, at 54.

takeover mechanisms but rather be transplanted and supplement the prevailing framework.

IV. REGULATORY AND LEGAL HURDLES IN TRANSPLANTING THE PILL

The SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 2011 (the **"Takeover Code"**), has been at the forefront of anti-takeover laws in India. While it deters hostile takeovers by establishing initial triggers, creeping acquisitions, and mandating open offers—albeit inadequate—it also prevents transplanting the poison pill in India. Regulation 26 compels the target company upon publicly announcing an open offer to carry out business in an "ordinary course consistent with past practice."[249] Specifically, Regulation 26(2)(c) provides that unless, by way of a special resolution by postal ballot, the BOD of the target company cannot issue or allot any securities which entitle the holder to voting rights. Furthermore, Regulation 26(2)(d) prohibits implementing any buy-back of shares or effecting any other change to the capital structure of the target company, thereby preventing any scope of diluting shareholding.[250]

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[249] Security Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 26.

[250] Shaurya Singh & Sanya Goel, Poison that Indian Corporates Need: About Time to Bring 'Poison-Pill' in India?, Centre for Business & Commercial Laws Blog, https://cbcl.nliu.ac.in/contemporary-issues/poison-that-indian-corporates-need-about-time-to-bring-poison-pill-in-india/.

Additionally, the SEBI (Issue of Capital and Disclosure Requirements) Regulations, 2018 (the **"ICDR Regulations"**) also strikes the functioning of a poison pill. When a company wants to issue securities to a specific group of individuals, such as the existing shareholders of a target company—via preferential issue—it is subject to Chapter V of the ICDR Regulations. Specifically, Regulations 164(1) and (2) of the ICDR set out guidelines to calculate the minimum share price for listed companies.[251] In the context of a target company wanting to enforce the poison pill by issuing discounted shares, these regulations would impede the discounting of shares under the rights plan as the ICDR regulations establish a 'minimum price' for issuing or allotting shares based on the prevailing market rates (often the average of the weekly high and low prices) therefore disconnecting the facet of 'deep discounts.'

Lastly, the SEBI (Disclosure and Investor Protection) Guidelines, 2000 (the **"DIP Guidelines"**), updated in 2009, aims to bring transparency and protect investors.[252] Under Chapter XIII, Paragraph 13.1.2, the DIP guidelines are aligned with the ICDR regulations in impeding deep discounts for warrants and securities. However, it does not place constraints on the issue of non-convertible preference shares and debentures which can be an avenue of 'poisoning.' Furthermore, the DIP

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[251] Security Exchange Board of India (Issue of Capital and Disclosure Requirements) Regulations, 2018, Regulations 164.

[252] Security Exchange Board of India (Disclosure and Investor Protection) Guidelines, 2000, Chapter XIII, Paragraph 13.1.2.

Guidelines provide the right to buy warrants to lapse after eighteen months, thereby requiring the shareholder rights plan to be renewed periodically.[253] In this manner, the DIP guidelines provide a little wiggle room in incorporating the poison pill. Therefore, based on the discussion above, it can be argued that the current regulatory framework in India makes it difficult for companies to implement a poison pill defence mechanism. The regulations impose several restrictions on the use of deep discounting, prohibiting capital restructuring, which weakens the pill's dilutive capabilities and reduces its deterrent effect.

V. EXPLORING REFORMS FOR TRANSPLANTING POISON PILLS

It is imperative to consider that merely importing the pill from a Delaware-like jurisdiction would not make it efficacious. Instead, it must be 'transplanted' into the Indian socio-legal landscape. Subsequently, it is essential to recognize established principles, in addition to the transplantation process, to prevent the poison pill from transforming into a 'Just Say No' pill.[254] Furthermore, to achieve a balance, certain review standards, including those established in *Unocal*, *Revlon*, and *Blasius*, along with the *Williams Proportionality* principle, should be introduced or endorsed. In the case of *Unocal Corp. v. Mesa Petroleum Co.*, the court employed a two-pronged test to justify BOD's adoption of an anti-takeover

[253] *Supra* 225.
[254] *Supra* 237, at 634.

defence to preserve the company's independence.[255] Firstly, whether the BOD had "*reasonable grounds*" and valid justification for believing a threat to "corporate policy and effectiveness" existed. Second, whether the protective action taken was rational and "*proportional*" to the lingering danger presented. Therefore, the Unocal standard established an interlinked 'reasonable' and 'proportionality' principle to keep a check on poison pills.[256]

Similarly, in *Blasius Indus v. Atlas Corp.*, the court heightened the Unocal standard by specifically looking into the conduct of the BOD when interfering with the Shareholders' voting franchise.[257] The court held that when the BOD actions in lieu of deterring a hostile takeover amount to "*intentional interference with the shareholders' voting franchise*," these acts would be invalidated unless the BOD demonstrated a "*compelling justification*" for taking such action. An inference that can be drawn from the heightened review is a requirement for shareholders' approval before enforcing the pill.[258] However, we observe that time is of the essence during hostile takeovers, so a mechanism to enable post-facto ratification or annulment would be recommended, as such a post-facto shareholder approval would strike a balance between the BOD and the shareholders, providing room for shareholder activism when necessitated. In contrast to

[255] Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946 (Del. 1985) (USA).
[256] *Supra* 249, at 245.
[257] Blasius Indus., Inc. v. Atlas Corp., 564 A.2d 651 (Del. Ch. 1988) (USA).
[258] *Supra* 249, at 247.

Blasius and *Unocal*, the court in *Revlon Inc. v. MacAndrews*, illustrated the BOD fiduciary duty in a hostile takeover situation. The court held that when a hostile takeover is imminent, the BOD must strive to achieve the highest value reasonably available in a change of control transaction.[259] In case of an action brought against the BOD in this regard, the BOD must exhibit both the price and process of the transaction to be 'reasonable.' Lastly, to prevent disproportionately low poison pill trigger thresholds, the Court in *Williams Co. Stockholders Litigation* held that a poison pill should not be enforced on mere hypothetical threats.[260] Furthermore, there must be a nexus on the trigger thresholds, i.e., it cannot be too low so as to negate outside influence by shareholders completely.[261]

At this cross-section, we posit that the Unocal and Revlon review standards should be perceived as complementary rather than antagonistic or competitive in nature. We observe that they incorporate the fusion of both paradigms—proportionality and reasonableness—through heightened scrutiny. Their concerted application serves as a potent antidote against the potential abuse of poison pills. While the Unocal standard functions 'check' on defensive measures adopted to thwart impending takeover bids, Revlon—taking a reactive approach— concentrates on situations

[259] Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986) (USA).
[260] The Williams Companies Stockholder Litigation, 2021 WL 754593 (Del. Ch. Feb. 26, 2021) (USA).
[261] Ethan Klingsberg, Et. Al., Poison Pills After Williams: Not Only for When Lightning Strikes, Harvard Law School Forum on Corporate Governance (March 21, 2021) https://corpgov.law.harvard.edu/2021/03/21/poison-pills-after-williams-not-only-for-when-lightning-strikes/.

characterized by a change of control with a primary emphasis on maximizing value to all shareholders.

When we infuse both principles, the resultant standard may require the BOD to demonstrate that they had sufficient information when resorting to the poison pill strategy against a hostile takeover. This ensures that the poison pill mechanism is justified exclusively in cases where the takeover poses a demonstrable detriment to the company.[262] The concept of 'information' employed herein draws from an extensive reservoir of jurisprudence, encompassing factors such as the undervaluation of the company, threat of asset stripping, superior alternate options, etc. In this manner, the litmus test for the necessity of a poison pill defence is satisfied.

Similarly, it becomes imperative for the BOD to demonstrate that their fiduciary duty was not breached, while simultaneously substantiating the rationality and proportionality of their decision to employ the poison pill mechanism in response to the unwelcome takeover bid.[263] The threshold of 'proportionality' can draw inspiration from the Williams principle, which necessitates a which necessitates a tangible and substantiated threat, while concurrently obliging that the trigger for activating the poison pill mechanism does not hover at an exceedingly low threshold. The latter

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262 Zachary Gubler, *What's the Deal with Revlon?* 96 INDIANA LAW JOURNAL 430, 442 (2021).
263 *Id* at 521.

assumes significance as an excessively low trigger for poison pills has the potential to completely deter acquisitions, limit market efficiency, restrict shareholders from considering the merits of a takeover, and reduce shareholder value. Lastly, the standard in question also establishes a robust reactive framework. In situations where a change of corporate control appears inevitable, the BOD must employ defensive tactics to ensure maximum profit for the shareholders.[264]

At the domestic frontier, bringing amendments to the SEBI takeover regulations and ICDR regulations to create room for poison pills is also vital as deep discounting of share/securities and capital restructure—diluting acquirers' shareholding—is a *sine qua non* to the success of a poison pill. Moreover, Regulation 3(1) of the Takeover Code[265] enforces the initial trigger of 25% upon the acquisition of a target company, which subsequently requires the acquirer to make an 'open offer' under Regulation 7(1)[266] for at least 26% of the total shares of the target company needs to be amended. We argue that the existing thresholds are inadequate, and the minimum offer must be increased to 100% or 51%. Most international economies like the UK and Singapore have a 100% threshold as a mere 26%—in the case of a hostile takeover—protects only minority

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[264] Clark W. Furlow, *Reflections on the Revlon Doctrine*, 11 U. PENN J. OF BUS. LAW 3 520, 525 (2009).

[265] Security Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 3(1).

[266] Security Exchange Board of India (Substantial Acquisition of Shares and Takeovers) Regulations, 2011, Regulation 7(1).

shareholders.[267] The J. Bhagwati Committee[268] also notes that the offered size did not provide an exit opportunity to all shareholders, especially in the case of offers where the price was at a premium to the prevailing market price. Consequently, if an acquirer publicly announces that it is plotting the takeover, the target company is left with its hands tied with no escape. Additionally, it creates a potential false market in the shares of the target company with an initial rise, and as the acquirer is not obligated to cross the 26% threshold, resulting in plummeting share value.[269] Therefore, the threshold establishes inequity amongst shareholders and must be reformed to integrate a poison pill with a high trigger threshold (26 to 40%).

VI. CONCLUSION

In the epilogue of our discussion, we argue that in post-pandemic times plagued by the global recession, a robust anti-takeover regime protects companies not only from hostile domestic acquirers but also opportunist international conglomerates. We demonstrated various contingencies and efficacies of the poison pill, such as the deterrence effect, enhanced bargaining and negotiating power, flexibility of the pill to mould to the Indian socio-legal conditions, coping with shifting ownership trends, and

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[267] Karan Talwar & Nivedita Saksena, *Anti-Acquirer and Pro-Shareholder? An Analysis of the SEBI (Substantial Acquisition of Shares And Takeovers) Regulations, 2011*, 5 NUJS LAW REVIEW 129, 136 (2011).
[268] S*upra* 224, at 258.
[269] *Supra* 224, at 257.

reinforcement through staggered boards—with a central premise of asserting the desideratum of the poison pill in India. We also demystified the various hurdles in the Indian legal framework to introduce the pill and argued that the pill should not merely be 'imported' or mimicked but rather 'transplanted' to complement the existing framework. This transplantation goes hand-in-hand with recognizing established principles of reasonability and proportionality in the cases of Unocal, Revlon, Williams and Blasius. Lastly, amendments need to be made at the domestic frontier vis-à-vis SEBI Takeover Code, SEBI DIP Guidelines, and ICDR Regulations to adopt and effectuate modern anti-takeover strategies.

ADVENT OF RES JUDICATA IN COMPETITION LAW REGIME

- *Sakshi Sharma*[*]

ABSTRACT - *With the introduction of the principle of 'res judicata' under Section 26(2A) within the Draft Competition (Amendment) Bill, 2020*[270] *("**Bill**"), the regime of antitrust investigations in India is bound to take a drastic turn that can be, in effect, unfavourable for the authority practised by the Competition Commission of India ("**CCI**"). However, the primary issue lies with the fact that such a change would considerably limit the CCI's power to conduct investigations against entities that have been subjected to a Section 26(1)*[271] *order on the same grounds as before, regardless of shifting factors in the market. Keeping in mind that the CCI is an administrative and quasi-judicial body, it is, prima facie, apparent that the doctrine of res judicata shall not apply to its orders. Furthermore, it would cripple the efforts of the regulatory body on the basis of technical norms of the procedure. Given that competition law operates 'in rem' and not 'in personam', there can be no defence for the side-lining of public interest.*

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[270] *Draft Competition (Amendment) Bill, 2020, §26(2A)(February 12, 2020).*

[271] The Competition Act, 2002, § 26(1), No. 12, Acts of Parliament, 2003 (India).

In numerous cases, the Indian judiciary has vehemently opposed the application of res judicata in antitrust matters, citing that an order for investigation does not constitute the finality of a decision. However, the legislature is at odds with this view. This research paper, inter alia, supports the judiciary's view on the non-applicability of res judicata on antitrust matters and discusses the predicaments that the competition law regime in India might face if the bill passes in its entirety.

KEYWORDS - *Res Judicata, in rem, in personam, Game of Skill & Chance, Waterfall Mechanism*

I. INTRODUCTION

The Competition and Antitrust Law regime in India has been experiencing a 'maturity age' of sorts as the jurisprudence has been catching up to leading jurisdictions such as the European Union and the United States of America. Evidently, much of the credit lies behind India's foremost authority on antitrust law, CCI. In terms of its functioning, the CCI's uniqueness is derived from the fact that it has legislative, executive and judicial powers within its ambit. With the CCI bringing tech giants such as

Flipkart Internet Pvt. Ltd. and Amazon Inc[272]. under its purview and ensuring that any practices that may be deemed 'anti-competitive' by the authority come to a halt, the large-scale consumer benefits have become apparent. However, in a hypothetical experiment, if we choose to perceive the CCI as akin to an adjudicatory body, such as a Civil Court, several limitations in its functioning would come to light. For instance, the long-drawn processes of the Code of Civil Procedure, 1908 ("**CPC**") would have to be satisfied for a case to be concluded, and India's history of pending litigation stands as a testimony to the same[273].

A similar obstruction to the CCI's authority has been proposed in the Draft Competition Amendment Bill, 2020 ("**Draft Bill**")[274]. The doctrine of 'Res Judicata' might be inculcated within Section 26 of the Competition Act, 2002 ("**The Act**")[275], which provides the procedure for inquiry in case of a violation of Section 3 or Section 4 of the Act. This legal principle literally translates to 'a matter decided' and refers to a situation wherein. It was explicitly mentioned in the case of Duchess of Kingston (1776)[276], wherein Sir William de Gray CJ stated- "*The Judgment of a Court of concurrent*

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[272] Vaibhav Gautam Bansode, '*CCI probe against Amazon, Flipkart: Supreme Court refuses to stay CCI investigation; gives them four-week time to join the probe*' (Zee Business, August 09, 2021), https://www.zeebiz.com/market-news/news-cci-probe-against-amazon-flipkart-supreme-court-refuses-to-stay-cci-investigation-gives-them-4-weeks-time-to-join-the-probe-162344, accessed on July 15, 2023.

[273] BQ Desk, India's Pending Court Cases On The Rise: In Charts (Bloomberg Quint, September 29, 2020), https://www.bloombergquint.com/law-and-policy/indias-pending-court-cases-on-the-rise-in-charts, accessed on July 15, 2023.

[274] *Draft Competition (Amendment) Bill, 2020, (February 12, 2020).*

[275] The Competition Act, 2002, § 26(1), No. 12, Acts of Parliament, 2003 (India).

[276] [1775–1802] All ER Rep 623.

jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another Court."

Essentially, it means that a cause of action that has been settled by a court, cannot be the subject of a new suit. The focus here is on the cause of action and not on the issues addressed by the court. To illustrate, let us say there are two people, X and Y, who met with an accident when their cars collided with each other; however, only Y suffered a consequential leg injury. He sues X for personal injury, and the court grants the same. Here, Y's leg injury is the cause of action. Now, Y cannot sue X for this cause of action again.

In India, this principle of 'bar by judgment' has been enshrined under Section 11 of the CPC[277] that talks about Res Judicata. From a bare reading of the provision, one can derive that it is meant to govern adjudicatory procedures and prevent repetitive litigation. Nevertheless, the Draft Bill seeks to introduce this legal doctrine within the investigative procedures of an administrative body. This calls for serious potential predicaments in the workings of the CCI as it would cripple the instrumental pillar of investigation under its authority. To understand the predicaments better, one needs to understand the legislative intent behind Section 26 of the Act. The provision empowers CCI to order an investigation by virtue of Section

[277] Civil Procedure Code, 1908, § 11, No. 5, Acts of Parliament, 1908 (India).

26 (1)[278], to be conducted by the Director General ("**DG**") in the event that it finds a prima facie violation of the Act after receiving information regarding an entity's unruly behaviour. Alternatively, if the CCI finds that there is no prima facie violation of the Act by the business entities, it can refuse an investigation and order closure of the matter under Section 26 (2)[279].

While this may seem to be a 'procedural formality', it bears significance as it provides for the standard of proof required by the CCI in order to ensure that entities are not engaging in anti-competitive practices. Furthermore, an order under Section 26 plays a deterrent role in determining the conduct of the accused entities in the future to avoid the authority's scrutiny. Such an investigation, however, is under no circumstance bound to influence the final decision of the CCI and is only conducted so as to dilate upon the facts of the case. The very scheme of the Act has been made to prevent the CCI from finding an ultimate contravention unless the DG's investigation is concluded in the positive and evidence of wrongdoing is uncovered.

The above-mentioned interpretation asserts that an order for an investigation or order for closure of a case is at the preliminary stages of the authority's process and cannot be construed as 'finality of decision', an

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[278] *Supra* 274.
[279] Id. § 26(2).

essential for the application of res judicata[280]. The Indian judiciary propounds that authority with administrative functions such as the CCI should not be subjected to procedures of civil law, such as res judicata and has been vocal about the same, either explicitly or implicitly. Even with the judgments and rulings of the various Courts in mind, the Recommendation Committee has provided a rather controversial proposal at the hands of the legislature, and if the bill passes in its entirety, the CCI's functioning would have to overcome some complicated hurdles. The co-authors of this research aim to identify the possible issues that the CCI may face in the face of such an amendment and make an argument in favour of the judiciary's interpretation of the matter.

II. CRITIQUING THE REVIEW COMMITTEE'S RATIONALE

The Draft Bill was introduced by the Ministry of Corporate Affairs, Government of India via a notification in February 2020 and public comments were invited for the same. The bill covers a wide variety of provisions and seeks to amend a total of 59 sections in the statute. The 26th amendment in the draft proposes to insert a new sub-section after sub-section 2 of Section 26, i.e., Section 26(2A), that states-

> "*The Commission may not inquire into agreements referred to in section 3 or into the conduct of an enterprise or group under section 4 if the same or substantially the same facts and issues raised in the*

[280] Satyadhyan Ghosal and Ors. v Deorajin Das and Ors., (1960) AIR SC 941.

> *information or reference from Central Government or a State Government or a statutory authority has already been decided by the Commission in previous orders."*[281]

A simple reading of the text shows that the amendment seeks to bind the Commission with a procedural handicap that might make it difficult for the CCI to order an investigation against Opposing Parties in alleged cases of antitrust violation after closing the case once before. The amendment uses the phrase "*if the same or substantially the same facts and issues raised in the information*". Here, the latter part of the phrase, i.e., "substantially the same facts", is a bane of legal ambiguity with the potential to pose several procedural issues in the future. What constitutes 'substantially same' has to be defined by the CCI through its orders, or it would be up to the High Courts or the Supreme Court to clear misconceptions in this regard.

The rationale behind the amendment is provided under the Report of the Competition Law Review Committee of 2019 ("**the Report**") headed by Mr Injeti Srinivas, which deals with the issue of the CCI's inquiry procedure, and the changes needed thereof[282]. In the chapter, the recommendation behind Section 26 (2A) of the draft Bill has been justified by addressing the necessity for expedience and in the interest of avoiding repetitive effort in the conduct of an inquiry or an investigation by the CCI as well as the DG. This particular amendment has seemingly been proposed

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[281] *Supra* 273.
[282] Report of the Competition Law Review Committee (2019), Ch 5 para 2.4.

to "*expressly empower the CCI to pass orders for closure of certain cases, the facts and issues of which have been finally decided by the CCI and in respect of which a final order has been passed.*"

In view of such a provision, the co-authors are of the opinion that the reasoning provided by the Committee lacks clarity and proves to be rather insufficient in justifying the application of 'res judicata' on the functioning of the CCI.

The settled legal position already stipulates that if the CCI is of the opinion that no prima facie case exists, it will not initiate an investigation through a Section 26 (1) order on the opposite party. The previous proceedings and the order of the same would surely be considered by the CCI if it were to conduct a second investigation into a business entity's behaviour. However, the same cannot be allowed to act as an estoppel for an administrative authority responsible to the public at large. As the prime regulator of competitive-forces in India, the CCI conducts several market studies in its pursuit of understanding recent trends in competition law. On more than one occasion, these market studies have formed the basis for the CCI or the NCLAT's cognizance of anti-competitive practice.

For example, in the ruling of Flipkart Internet Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.[283], ("**Flipkart v. CCI**") the

[283] Flipkart Internet Pvt. Ltd. and Ors. v. Competition Commission of India and Ors., (2021) Writ Appeal No. 562 Kar (HC).

counsel for Flipkart argued that since another complaint filed by the All-India Online Vendors Association before the CCI [284](“**AIOVA v. CCI**”) was dismissed by the Commission, the current complaint ought to be treated in the same manner since the facts of the information were similar. However, CCI held that it had collected new information over time and can now recognize Flipkart's antitrust violations and determine its liability. In light of this case, the issue that arises is whether the 'new information' collected by CCI would come under the purview of the phrase 'substantially same' or not. Because if it does, and in future, if a similar situation arises, CCI wouldn't be able to try the Opposing Party against whom it has found new information since the new provision seeks to prevent it from doing so.

Additionally, in the landmark case of *Uber (India) Systems (P) Ltd. v. CCI*[285] (“**Uber v. CCI**”), the CCI had erroneously dismissed a piece of information alleging that Uber (India) Systems (P) Ltd. was involved in predatory pricing, stating that it is not a prima facie dominant entity in the relevant market. Thus, the case was closed under Section 26(2) of the Act. Subsequently, this order was appealed before COMPAT, which reversed the findings of the CCI by relying on a market research report prepared by ‘New Age TechSci Research Private Limited’ (**“TechSci**”) that had contrary views to the report considered by the CCI. The Appellate authority

[284] All India Online Vendors Association v. Flipkart Internet Pvt. Ltd., (2018) CompLR 1122 (CCI).
[285] Uber (India) Systems (P) Ltd. v. CCI, (2019) 8 SCC 697.

further opined that the two reports having opposite results were a sufficient reason to order an investigation into the matter. Finally, this judgment was affirmed by the Supreme Court 4 years after the CCI's order.

In view of the above-mentioned decision, it can be reasonably argued that if the CCI is disallowed from inquiring into a matter it previously closed with a final order, even after having conducted a research study that clarified its opinion and changed its decision regarding the existence of a prima facie case the second time around, it will amount to crippling an administrative authority responsible to the public at large. In an age where the market dynamics are extremely unpredictable, it has to be made sure that the jurisprudence does not evolve in such a way that would prevent the CCI from utilizing its intellectual resources to determine the liability of enterprises that have allegedly violated antitrust provisions.

III. THE INDIAN JUDICIARY'S OUTLOOK ON THE APPLICABILITY OF RES JUDICATA

The Indian judiciary has been a staunch supporter of excluding procedural principles such as the Doctrine of Res Judicata from having any applicability to the functioning of the CCI as well as other administrative bodies, especially when there is an angle of public interest involved. In numerous cases, it has been reiterated that preventing the Commission from conducting subsequent investigations would be counterproductive. After all, the benefit of undoing anti-competitive behaviour at the risk of a second investigation outweighs the inconvenience caused to accused

entities. A plethora of cases have been identified and discussed to shed light on the judicial perspective in the same regard: -

A. Flipkart Internet Pvt. Ltd. and Ors. v. Competition Commission of India and Ors.[286] –

In *Flipkart v. CCI*, E-Commerce giants Amazon Inc. and Flipkart Internet Pvt. Ltd. ("**Flipkart**") filed a writ petition before the Karnataka High Court seeking to overturn a Section 26 (1) order for investigation rendered by the CCI on the basis of a complaint filed by the Delhi Vyapar Mahasangh ("**DVM**"), a group representing small and medium business houses.

The court relied on the decision of the Hon'ble Supreme Court in *Competition Commission of India v. Steel Authority of India Ltd. and Ors.*[287] wherein it was iterated that the order for investigation under Section 26(1) of the Competition Act is a purely administrative decision and has no adjudicatory element whatsoever.

Furthermore, this principle formed the core issue of *Competition Commission of India v. Bharti Airtel Limited and Ors*[288]**.** wherein the Apex Court opined that an order for investigation needs to be backed

[286] *Supra* 286.
[287] Competition Commission of India v. Steel Authority of India Ltd., (2010) 10 SCC 744.
[288] Competition Commission of India v. Bharti Airtel Limited, AIR (2019) SC 113.

by some reason, but the same ought not to be too elaborate. The court observed that comprehensive reasoning is only required while giving adjudicatory orders or decisions, which determine the rights and liabilities of either party. Given that the Commission itself only provides brief reasoning while deciding whether a prima facie case exists or not, it can be reasonably assumed that such a decision is not within the ambit of res judicata, which is supposed to apply to final, well-reasoned, established judgments.

B. *Dwarka Prasad Sheokaran Das v. Commissioner of Income Tax*[289] -

In this case, the Allahabad High Court rendered a judgment stating that the principle of res judicata applies only to a dispute between two parties who had come before the court and not in a proceeding for assessment under an administrative authority as it was done in this case under the Income Tax Act, 1961[290]. It can be contended that the procedure of investigation under the Competition Act, 2002 is very similar, given that it is an administrative process seeking to analyse the behaviour of an enterprise with respect to its competitor in the market. In other words, the ratio decidendi laid down in the instant case can be squarely applied to the competition law regime

[289] Dwarka Prasad Sheokaran Das v. Commissioner of Income Tax, (1954) AIR All 123.
[290] Income Tax Act, 1961, No. 43, Acts of Parliament, 1961 (India).

in India as well, owing to the conceptual similarity between orders for income tax assessment and orders for investigation by the CCI.

C. ***Samir Aggarwal v. Competition Commission of India***[291] **-**

This landmark ruling happens to be yet another instance wherein the Hon'ble Supreme Court has observed that the public interest perspective needs to be accounted for the CCI's actions as it operates in rem. It was opined that this principle could be easily inferred from the fact that Section 19(1) of the Act provides that CCI may inquire upon a receipt of complaint "from any person". This clearly means that the procedure leading up to an order for an investigation into a business entity's practices is a public issue and not a dispute between two individual parties. Further reliance was placed on *Competition Commission of India v. Steel Authority of India Limited and Ors*[292]., wherein the Apex Court had famously ruled that in the process of the Commission's inquisitorial functions, "their doors must be kept wide open".

D. ***Cadila Healthcare Limited and Anr. v. Competition Commission of India***[293] -

[291] Samir Aggarwal v. Competition Commission of India**,** (2021) AIR SC 199.
[292] *Supra 290.*
[293] Cadila Healthcare Limited and Anr. v. Competition Commission of India**,** (2018) 149 SCL 610 (Delhi).

One of the unique takes on an investigation order under Section 26(1) of the Act was provided by the Delhi High Court in the instant case. Basically, a complaint was filed by three stockists, Alis Medical Agency, Stockwell Pharma, Apna Dawa Bazar and Reliance Medical Agency of Baroda, alleging that the Federation of Gujarat Chemists and Druggists Association had denied them permission to supply medicines.

The Bench clearly stated- *"The CCI or an expert body should ordinarily not be crippled or hamstrung in their efforts by application of technical rules of procedure."* It made clear that in antitrust issues involving macroeconomic considerations and actions of large enterprises, decisions arrived at by CCI through one or two complaints cannot be considered conclusive with respect to the anti-competitive or pro-competitive behaviour of the concerned enterprise(s). The Bench compared a complaint filed in front of CCI to an FIR filed against a builder who has been involved in malpractice and cheating on customers. The court opined that just because a single FIR had been filed against the said builder, and consequently, an investigation took place, subsequent FIRs cannot be quashed. This decision by the High Court made it clear that the order for investigation under section 26(1) does not include the element of 'finality' in any shape or form. Reliance was placed on

Excel Crop Care Limited v. Competition Commission of India & Anr.[294] for the same.

A perusal of the above-mentioned precedents clearly indicates the reasoning of the Indian judiciary with respect to the non-applicability of procedural formalities on administrative decisions that may merely be directory in nature. Even a shred of ambiguity is not present in any of the judgments rendered in this regard, and the grounds provided seem to be extremely sound. In this view, it can be very hard to imagine how the need for expedience outweighs the many justifications provided by the Courts of India against limiting the CCI's authority,

It is a well-settled position that the core purpose of the Competition and Anti-Trust Law in India is to promote economic development, free trade and the interest of the consumers. Even in the United States of America[295], the issue of applicability of res judicata on administrative decisions is generally determined by analysing the legislative intent behind the statute through whose provisions the said decision is made. Similar rationale has been applied by the Judiciary in Indian context, where it has been vehemently argued that the procedural formalities such as res judicata should not hamper CCI's power to order for investigation.

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[294] Excel Crop Care Limited v. Competition Commission of India, (2017) AIR SC 2734.
[295] Ernst H. Schopflocher, *The Doctrine of Res Judicata in Administrative Law* ,198 Wis. L. REV. (1942).

IV. CONCEPTUALIZING THE CHANGE IN THE CCI'S INVESTIGATIVE PROCEDURE POST-AMENDMENT

The existing mechanism of investigation, as clarified by the existing competition law in India as well as the Indian Courts in numerous rulings mentioned above, stands to be that an order under Section 26(1) would lead to an inquiry by the DG, following which submission of a report consisting of his findings before the CCI would be made. The Commission then proceeds to invite objections and suggestions from the parties concerned depending on the outcome of the DG's report in terms of the need for a further investigation or closure of the matter. Once the objections and suggestions have been taken into account by the authority, it may decide whether or not the information at hand requires a more thorough investigation. The procedure is undoubtedly a streamlined one and leaves no ambiguity on any of its aspects; in fact, it makes it a point not to leave any stone unturned by asking the parties for any objections and suggestions they may have on the DG's findings.

Certainly, the process would more or less remain the same if the Parliament of India chooses to pass the draft Bill and approve the amendment, but it would mean the addition of another step, one that could vitiate the entire order altogether. As of now, there is no mention of a restraint on the CCI with regard to modifying or changing its opinion after a second analysis of the DG's report coupled with the parties' suggestions/objections as well as secondary sources such as research-based market studies. An illustrious

example of this premise lies in the Commission's previously discussed decision in *Flipkart v. CCI*[296], wherein it was explicitly contended by the counsel that simply because the CCI had found no violation on Flipkart's part in *AIOVA v. CCI*[297], it could not order an investigation/inquiry by virtue of Section 26(1) in the instant case.

However, given the provision of Section 26(2A) in the Draft Bill, the option to conduct a second investigation may be limited considerably. At the very least, the Commission will be sent down a rabbit hole of legal ambiguity regarding what would constitute "*similar or substantially similar facts*" and whether or not each case falls within the purview of the amended law. If the facts remain the same, but the CCI's knowledge regarding a rising industry only evolves after the closure of the case, a second investigation that may well be necessary might never come to fruition. As seen in COMPAT's decision in the matter of *Uber v. CCI*[298], a mere difference in the market research referred to by the two bodies led to a stark difference in their opinions, and this was considered to be a reasonable justification for conducting an inquiry. The same may not be possible once the CCI has closed the matter under the newly proposed Section 26 (2A).

[296] *Supra* 286.
[297] *Supra* 287.
[298] *Supra 288.*

It is yet to be seen how the pursuit for expedience will be achieved through such a controversial change in the law that could potentially lead to even more litigation concerning its interpretation. While the provision has been worded with "The Commission may" and not "The Commission shall", there could be a scope of discretion in the CCI's hands. However, even such wordings have been twisted and interpreted differently by Courts of law to the extent that the words have been used interchangeably, thereby nullifying any scope for discretionary powers. There's no denying that the future of the CCI's authority is in question for the time being and may not be clarified until the Draft Bill becomes law or fails to be passed. Nevertheless, a thorough analysis of the Commission's authority and the precedents set so far may help us identify the core issues that will come up should either of the paths are concluded.

VI. CONCLUDING ANALYSIS

A bare reading of the judicial history on the applicability of res judicata on administrative decisions akin to an order under Section 26(1) of the Competition Act, proves that there are sufficient grounds to prevent such a law from being enacted and enforced. Several issues that may come to light once Section 26(2A) is added to the Act have been highlighted in this research. The Commission's constantly evolving nature is what makes it a unique body, allowing it to learn from any past errors and keep itself updated with innovations in business in technology. With every new market research, the facts of a case tend to shift and may even change so drastically that an investigation into the matter actually becomes necessary.

The risk of enacting such a provision outweighs its benefit simply because the Commission deals with antitrust cases that are bound to involve a public-interest element. If even with its updated knowledge on a matter, the CCI has its hands tied owing to the application of res judicata on their authority, consumers all around India have a lot to lose.

Furthermore, it is a well-settled legal position that the doctrine of res judicata seeks to preserve the finality of a decision, and the formation of an opinion by an administrative authority cannot be said to be 'final' by any means. Yet, the Committee has recommended the same for want of expedience which cannot be a justifiable concern that could be solved by simply ignoring an informant's plea as long as the same fits within the criterion of "*similar or substantially similar facts*". Historically, the CCI has only once erred in its investigation, leading to a second investigation into the matter and thus, the claim that it would help save the authority's time seems to be unfounded. If expedience is the goal, preventing the CCI from considering information against entities that have been previously investigated seems to be an oversimplified answer. Instead, a viable alternative would be to bring about better execution of the sixty-day time period already provided under Regulation 16(2) of the Competition Commission of India (General) Regulations, 2009[299].

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[299] Competition Commission of India (General) Regulations 2009, Regulation 16 (2).

To sum up, the CCI's authority is, unfortunately, somewhat of a cliff-hanger. At a time when leading jurisdictions such as the EU are expanding the scope of antitrust investigations, the Draft Bill in India has sought to considerably limit it. It would be unwise to think that the formation of an administrative authority's opinion has to be made final to the extent that it will become extensively more difficult for the Commission to go back on it, despite the risk that stands at letting an investigation slide. Hopefully, Parliament takes notice of the backlash against enacting such a provision, and the amendment of Section 26 is brushed off, so as to allow the CCI to flourish at its own pace.

SEBI'S REGULATORY MEASURES FOR INSIDER TRADING IN INDIA

- *Saksham Gadia*[*] *and Lavanya Malani*[**]

ABSTRACT: *Insider trading refers to the use of material non-public information for personal gain in the securities market. This practice can be harmful to investors, as it can lead to losses due to false or misleading information. In order to prevent insider trading, regulatory authorities such as the Securities and Exchange Board of India ("**SEBI**") have put in place specific rules and regulations. This research paper aims to examine the role of SEBI in protecting against insider trading in the Indian securities market. This paper will review the legal framework put in place by SEBI to prevent insider trading, as well as the measures taken by the regulatory authority to enforce these rules. It will also examine the impact of SEBI's efforts on the overall fairness and transparency of the securities market in India.*

The results of this paper shall help provide insight into the effectiveness of SEBI's regulatory framework in preventing insider trading, and will also identify any potential areas for improvement. This research paper shall be useful for policymakers and market participants in understanding the role

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of regulatory authorities in promoting fair and transparent markets.

KEYWORDS: *insider trading, investors, SEBI, securities, regulatory authority, and framework.*

I. INTRODUCTION-

Insider trading refers to the trading of securities by an insider based on asymmetric access to unpublished price-sensitive information ("**UPSI**")[300]. Essentially it connotates trading by an insider in the securities market based upon information that is not available in the public domain.[301] In India, Insider Trading is regulated by the SEBI PIT regulations[302], 2015. The PIT regulations do not explicitly define who constitutes insider trading, however, Erstwhile Section 195[303] of the Companies Act 2013 used to provide what constitutes insider trading until the same has been omitted after the Companies Act Amendment 2017[304]. A prohibition on Insider

[300] Juliette Overland, CORPORATE LIABILITY FOR INSIDER TRADING 1 (ROUTLEDGE 2019).
[301] Dr. Jinesh Panchali and M. Ravindran, *Insider Trading Issues*, 1 KNOWLEDGE FOR MARKETS 48 (2011).
[302] The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 [hereinafter SEBI PIT Regulations, 2015].
[303] The Companies Act, 2013, §195.
[304] Varun Marwah, *Top 5 changes in the Companies (Amendment) Act, 2017*. BARANDBENCH. (January 6, 2018) https://www.barandbench.com/news/10top-5-changes-companies-amendment-act-2017#:~:text=Harmonisation%20with%20SEBI%20and%20RBI&text=For%20instance%2C%20Sections%20194%20and,all%20instances%20of%20such%20frauds

Trading is essential to promulgate the theories of fairness in the securities market, which might hamper the existence of the market itself[305]. A fraud of insider trading is not only legally, but also morally and ethically wrong.[306] The insider trading laws, i.e., both the 1992 and the 2015 regulations were framed with a view to a) protect the interests of investors in securities[307], and b) foster expansion and regulation of the securities market[308]. It is because of the existence of these twin objectives the Securities Appellate Tribunal ("**SAT**") has specifically noted that "*SEBI is the watchdog and not a bulldog. If there is an infraction of a rule, remedial measures should be taken in the first instance and not punitive measures*"[309]. Unfair practices such as insider trading inherently undermine the trust in the securities market[310]. This is because *"the typical investor would desert the market, retarding or destroying important functions of the stock market such as capital formation*"[311], if SEBI does not curtail insider trading. Also, an unchecked relevance of insider trading would ultimately also lead to a decrease in the number of trades itself, as more and more

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[305] Charles C. Cox and Kevin S. Fogarty, *Bases of Insider Trading Law*, 49 OHIO STATE LAW JOURNAL 353 (1988).
[306] Pranav Saraswat, *Elements of Effective Insider Trading Regulations: A Comparative Analysis of India and U.S.A.,* 10(1) NULJ LAW JOURNAL 81 (2020).
[307] Arun Kumar Agrawal v. Union of India, W.P. Civil No. 374 of 2012, (Supreme Court) (Unreported), 2012.
[308] Rajat Sethi, Misha Chandna and Aditi Agarwal, *Insider Trading: Circumstantial Evidence is Evidence Enough?*, 32(1) NLSIU REV 205 (2020).
[309] Piramal Enterprises Ltd v. SEBI, 2019 SCC OnLine SAT 134.
[310] Gayatri Putharan, *Litigating Insider Trading: Decoding Evidence in Cases under SEBI (Prohibition of Insider Trading) Regulations*, *2015*, 14 NUJS LAW REVIEW 3 (2021).
[311] Sandeep Parekh, *Prevention of Insider Trading and Corporate Good Governance in India*, 32 INTERNATIONAL BUSINESS LAW JOURNAL 132 (2004).

investors without access to this UPSI would be forced to leave the market[312]. This paper seeks to understand what constitutes insider trading, what provisions incorporated by SEBI in the Indian legislation deterring this fraud practice, and whether SEBI has been successful in curtailing insider trading in the securities market. This Paper is divided into three parts, Part A helps in understanding the different fundamentals of insider trading, i.e., who constitutes an insider, connected person, what refers to as UPSI. Part B examines the PIT regulations, 2015, and their enforcement including the evidentiary requirements whilst also taking a look over various landmark cases on insider trading. Lastly, Part C examines the prevailing lacunae in SEBI actions to curtail insider trading and finishes with a conclusion.

II. PART A-

A. Insider

To understand the intricacies of insider trading, it is fundamental to understand who constitutes to be an insider. The 2015 PIT regulations explicitly define an insider to be "*any person who is a connected person or who is in possession of or having access to UPSI*"[313]. In common parlance, any person who is either associated

[312] Narayan Prasad Sharma, *A Reading into Insider Trading: Concept, Cases, Consequences and Countermeasures*, 12(1), NAL.J. 12 (2018).
[313] SEBI PIT Regulations, 2015, Reg. 2(1)(g).

with the company or entity in question or is privy to such UPSI. The 2015 regulations differ from the 1992 Regulations' notion of an insider which considered a person to be an insider if they 'had received' or if they 'possessed access' to any UPSI, whilst the 2015 PIT regulations only consider those who are in 'possession of UPSI', moving away from the notion of source through which the person is in possession[314]. However, the 2015 PIT Regulations do not have a retrospective application[315], and for any cause of action prior to May 2015[316] the conditions of the 1992 PIT Regulations only apply.[317] Before we examine the impact of insider trading, let us understand woes the regulations mean by the terms of connect person and UPSI.

B. Connected Person

Regulation 2(1)(d)(i)[318] provides that a connected person means any person who might be in association with a company either directly or indirectly in any capacity six months prior to the act. This association can be in the form of being the director, time-to-time

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[314] Vinita Solanki & Shruti Nandwana, *Analysis of the Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 — An Overview*, PL SEPTEMBER 58 (2015).
[315] Securities and Exchange Board of India, In Re: Emami Limited and Ors., Adjudication Order No. EAD/BJD/VS/21-27/2018, ¶33 (May 18, 2018).
[316] The Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations, 2015 (Herein after SEBI PIT Regulations, 2015), Reg. 1(2).
[317] *Id.*
[318] SEBI PIT Regulations, 2015, Reg. 2(1)(d)(i).

communication with the officers, or being in a contractual, fiduciary, employment, etc. relationship, possessing any substantive professional or business relationship, etc with the company in question. Regulation 2(1)(D)(ii)[319] provides various relations including immediate relatives, holding company/subsidiary company/associate company, official of stock exchange, etc who shall be considered to be deemed connected persons.

C. Unpublished Price-Sensitive Information

Regulation 2(1)(n)[320] of the 2015 PIT Regulations provides that UPSI connotates any information that is not generally available to the public which either directly or indirectly includes particulars that may affect the price of the securities if the information gets public. UPSI includes (i) Financial results; (ii) Dividends; (iii) Change in capital structure; (iv) mergers, de-mergers, acquisitions, de-listings, disposals, and expansion of business and such other transactions; (v) any changes in key managerial personnel. For any information to be considered as UPSI it is fundamental that it must be unpublished[321] and should also have a substantive link with the price of the securities in question as well. Due to the existence of the term

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[319] SEBI PIT Regulations, 2015, Reg. 2(1)(d)(ii).
[320] SEBI PIT Regulations, 2015, Reg. 2(1)(n).
[321] Prateek Bhattacharya, *India's Insider Trading Regime: How Connected Are You?*, 16 N.Y.U. JOURNAL OF LAW & BUSINESS 1 (2019).

'likely'[322], there exists various significant discretion in the hands of the authorities. What can be construed as published information in this sense, is often a ground for discrepancy and litigation[323]. On this notion of published information, SEBI categorically held that speculative media news and reports cannot be considered published UPSI as they cannot be considered conclusive information[324]. However, on the other side, if these news reports are spread by financial newspapers such as Bloomberg, Economic Times, etc, including conclusive facts and figures pursuant to publication of UPSI.[325]

III. PART B

A. SEBI Regulations to curtail Insider Trading

The 2015 SEBI PIT Regulations can be understood as a significant advancement of the 1992 PIT regulations. 2015 regulations have removed various ambiguities in the field of insider trading. The new regulations have provided for a cohesive definition for various

[322] *Supra* 314

[323] Rajat Sethi & Sarangan Rajesh Kumar, *The Conundrum Of "Unpublished Information" Under The Insider Trading Regulations*, MONDAQ, (September 3 16, 2022).

[324] Order in the matter of insider trading in the scrip of 63 Moons Technologies Limited, Order No. WTM/MPB/EFD/ 129/2018 (January 31, 2018).

[325] Securities and Exchange Board of India, In Re: Poonam Haresh Jashnani, Adjudication Order No. Order/PM/NK/2020-21/8082, ¶27 (June 30, 2020).

entities such as board[326], compliance officer[327], generally available information[328], immediate relative[329], promoter[330], securities[331], specified[332], trading[333], and trading day[334]. The 2015 Regulations also provided parity in various areas of conflict, such as with respect to the definition of insider, UPSI, and connected person. The new regulations also differ in the charging provisions, let us look at these provisions ahead. The 2015 PIT regulations are the fundamental legislation that regulates acts of insider trading in the Indian securities market. It expressly provides two types of offences, i.e., (i) Communication offences and (ii) Trading offences. Let us examine these two components separately.

B. Communication offences

2015 PIT regulations place a restriction on two types of communication offences, i.e., prohibition on the communication of UPSI, and the prohibition on procurement of UPSI. Regulation 3(1)[335] places a prohibition on any insider to communicate any UPSI

[326] SEBI PIT Regulations, 2015, Reg. 2(1)(b).
[327] *Id,* Reg. 2(1)(c).
[328] *Id,* Reg. 2(1)(e).
[329] *Id,* Reg. 2(1)(f).
[330] *Id,* Reg. 2(1)(h).
[331] *Id,* Reg. 2(1)(i).
[332] *Id,* Reg. 2(1)(j).
[333] *Id,* Reg. 2(1)(l).
[334] *Id,* Reg. 2(1)(m).
[335] *Id,* Reg. 3(1).

of any company or securities if this communication is not in furtherance of a legitimate reason. Regulation 3(2)[336] places an express prohibition on any person from procuring any UPSI relating to a company or security from an insider, which is listed or proposed to be if it isn't in further of a legitimate obligation. What constitutes a legitimate purpose is entailed in Regulation 3(2)(a)[337] which requires that a listed company is required to formulate and float a code of fair disclosure and conduct in resonance with Regulation 8[338] of the act. The Amendment Regulations, 2018 added a well-needed explanation to regulation 3(2)(a) as to what constitutes 'legitimate purposes'[339]. This explanation includes communication of UPSI with partners, collaborators, lenders, customers, suppliers, merchant bankers, legal advisors, etc.

C. Trading Offences

Regulation 4(1) explicitly provides that no insider shall trade in listed or proposed securities whilst they are in possession of UPSI. The regulation also provides for a rebuttable presumption in the explanation. Further, it also entails various grounds on which an

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[336] *Id,* Reg. 3(2).
[337] *Id,* Reg. 3(2)(a).
[338] *Id,* Reg. 8.
[339] SHAILASHRI BHASKAR, PROHIBITION OF INSIDER TRADING 24 (OAKBRIDGE, 2019).

insider may be allowed to prove that they did not commit insider trading.

D. Trading Plans

Apart from the charging provisions, in the 2015 PIT regulations, a trading plan is a new enabling provision that effectively provides an individual in possession of UPSI to legally trade in the securities market with prior approval and disclosure from a compliance officer in accordance with Regulations 2(1)(c). The regulations require that a plan must be developed before the individual gets access to the UPSI and intimated to the compliance officer at least six months before the actual transaction.[340] In such a scenario, the compliance officer possessed wide authority to even summon additional undertakings from the individual before approving and for monitoring of the plan.[341] Once the compliance officer deems the trading plan to be adequate, they shall notify the concerned stock exchanges about the trading plan.[342] The advent of trading plans in the 2015 regulations essentially pushes the Indian securities market towards a common footing with the international insider trading regulations. Albeit globally as well there remain several questions about the efficacy of the mechanism, as noted in the United States of

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[340] SEBI PIT Regulations, 2015, Reg. 5(2)(1).
[341] *Id, Reg. 5(3).*
[342] *Id, Reg. 5(5).*

America (USA) application that these plans do not entail a fool proof system and can be rather used arbitrarily.[343]

E. Resolution with Companies Act, 2013

SEBI PIT Regulations, 2015, and the SEBI Act, 1992 only connotate to securities of a listed or proposed company. However, the conflict between private companies used to exist because of erstwhile Section 195[344] (read with Section 458[345], delegating some of the powers to SEBI) of the Companies Act, 2013. Erstwhile Section 195 prohibited insider trading of the securities, however, this application is extended to unlisted companies as well. This application was unreasonable on three fronts a) There is a very minimal chance that any shareholder or an insider shall commit such an activity. Further, the market for information is so remote, that such an application can paint innocent people as convicts. b) There exists no 'public interest' to protect whilst trading in a private company. "*The concept of insider trading is truly relevant only when a company is widely held and traded, causing the agents and fiduciaries to trade in the public market with different interests at play.*"[346] c) Also, in such situation

[343] Ganesh Prasad and Sanjay Khan, *Insider Trading Regulations in India: A Comparative and Critical Analysis of Sebi's 2015 PIT Regulations*, 4(2) GNLU LAW REVIEW 109 (2013).

[344] The Companies Act, 2013, §195.

[345] The Companies Act, 2013, §458.

[346] SANDEEP PAREEK, FRAUD MANIPULATION AND INSIDER TRADING IN THE INDIAN SECURITIES MARKETS, 146-148 (Wolters Kluwer, 2016).

where usually the ownership is held by family and friends[347], the inherent cost of complying with the legal procedures is enormous with no benefit attached as well.[348] Therefore, to resolve this conundrum between the Companies Act and the SEBI PIT Regulations, 2015, the Companies Act Amendment, 2017[349] incorporated harmonization with the SEBI Act, 1992, and omitted sections mentioned under Section 195 of the Companies Act.

F. SEBI Act, 1992

Apart from the PIT regulations, 2015, SEBI Act, 1992 in regulation 12A(d)[350] explicitly places a restriction on insider trading. It is the SEBI Act only which provides the punishment for insider trading. Section 15G[351] of the SEBI Act provides that an individual or company who commits insider trading shall be punishable by a penalty "*which shall not be less than ten lakh rupees, but which may extend to twenty-five crore rupees or three times the number of profits made out of insider trading, whichever is higher*"[352]. However, there exists a severe conflict between the provisions of PIT

[347] Salamon v. Salamon & Co. Ltd., [1896] UKHL 1.
[348] *Supra* 349.
[349] Ankita Handa and Arunima Vijay, Harmonization of Insider Trading Norms and the Companies Act, INDIACORPLAW (January 31, 2018). https://indiacorplaw.in/2018/01/harmonization-insider-trading-norms-companies-act.html
[350] Securities Exchange Board of India, Act, 1992 §12A(d).
[351] *Id,* §15G
[352] *Id.*

Regulations and the SEBI Act, 1992 which we shall be discussing in Part C of the paper.

IV. PART C

A. Evidence required to prove a fraud of insider trading

A conviction under insider trading can take place if there exists adequate proof that the following conditions are met: a) the person concerned is an 'insider' (b) this 'insider' traded in these respective securities whilst they were in possession of the UPSI[353]. The fundamental aspect of the aforementioned notion is what constitutes proof in these proceedings. There exist two major areas of contentions towards the status of evidence in an insider trading conviction, i.e., i) what is the standard of proof, ii) presumption in insider trading.

(i) Standard of proof

If adequate evidence cannot be procured, a case of insider trading cannot be sustained.[354] Historically there existed several ambiguities pertaining to what standard of proof would

[353] Rajat Sethi, Misha Chandna and Aditi Agarwal, *Insider Trading: Circumstantial Evidence is Evidence Enough?*, 32(1) NLSI REVIEW 205 (2020).
[354] *Supra* 313.

result in a conviction of insider trading.[355] For example, such as in the case of *Samir C. Arora v. SEBI*, 2004[356], SAT explicitly noted in that securities market offences, the threshold on SEBI is not necessarily to the level of proving the charge 'beyond reasonable doubt'. Instead, the authority must provide 'legally sustainable evidence' in order to attain a conviction of insider trading. Albeit, contrary to this understanding, SAT in the case *Dilip S. Pendse v. SEBI 2017*[357], noted that "*the charge of insider trading is one of the most serious charges in relation to the securities market and having regard to the gravity of this wrongdoing, higher must be the preponderance of probabilities in establishing the same*".[358] This mark difference caused a severe dilemma as to what is the standard of proof. This conflict was expressly settled by honourable Supreme Court of India in *SEBI v. Kishore R. Ajmera, 2016*.[359] The case dealt with an incident relating to a violation pertaining to SEBI (Prohibition of Fraudulent and Unfair Trade Practices Relating to Securities Market) ("**PFUTP**") Regulations, 2003, herein the apex court noted that "*the test would always be that what inferential process that a reasonable/prudent man would adopt to arrive*

[355] *Id.*
[356] Samir C. Arora v. SEBI, 2004 SCC OnLine SAT 90.
[357] Dilip S. Pendse v. SEBI, (2017) SCC OnLine SAT 12.
[358] *Id.*
[359] SEBI v. Kishore R. Ajmera, (2016) 6 SCC 368.

at a conclusion"[360] explicitly settling the conflicting views that originated because of the two contrasting SAT orders. Also, the honourable apex court in the case of *SEBI v. Kanaiyalal Baldevbhai Patel, 2017*[361] noted that it might be the case, that some of the violations of a securities fraud might even invite penal consequences on the convict, the standard of proof must remain that of the preponderance of probabilities instead of proof beyond a reasonable doubt.[362] On this notion, it is imperative to administer that it is not possible to mathematically put a label on the different degrees of probabilities relating to prosecution pursuant to meeting a certain standard of proof because all of these different degrees involve an inherent element of subjectivity. We are in agreement with this understanding of the court because, via the virtue of this principle, the insider trading regulations wouldn't be rendered toothless. If SEBI were to be subjected to prove a case beyond a reasonable doubt, due to the extreme lack of evidence majority alleged accused would walk away free without accountability of their illicit actions.

(ii) Rebuttable presumption

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[360] *Id.*
[361] SEBI v. Kanaiyalal Baldevbhai Patel, (2017) 15 SCC 1.

[362] *Id.*

Explanation to Regulation 4(1) categorically provides that if an insider trades in the securities of a listed or proposed company whilst in possession of an UPSI, it shall be assumed that they committed insider trading. The SAT has also categorically noted in the case of *Rajiv B. Gandhi and Ors. v. SEBI*,[363] that when an insider indulges in trading of the securities of a listed company, there exists a presumption that such trading was carried out based on UPSI. The insider in question, possessing the burden to discharge such a claim of insider trading[364], and to provide adequate to the authorities that such trading where not based on the UPSI but rather other rationale.[365] If an accused wishes to rebut such a presumption, they are required to showcase that they did not in fact trade view a to attain any unfair advantage because of their possession of UPSI.[366] SAT noted in the case of *Mrs. Chandrakala v. Securities Exchange Board of India, 2011*[367] that "*If an insider shows that he / she did not trade on the basis of UPSI and that he / she traded on some other basis, he / she*

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[363] Rajiv B Gandhi & Ors. vs. SEBI, Appeal No. 50 of 2007 before Securities Appellate Tribunal decided on May 9, 2008 available at: http://sat.gov.in/engl.

[364] Manoj Gaur v. Securities and Exchange Board of India, [2012] SAT 176.

[365] SEBI PIT Regulations, 2015, Reg. 4(1).

[366] Umakanth Varottil, *Presumption in Insider Trading*, INDIACORPLAW, (December 17, 2015) https://indiacorplaw.in/2015/12/presumption-in-insider-trading.html.

[367] Mrs. Chandrakala v. Adjudicating Officer, Securities and Exchange Board of India, [2012] SAT 21.

cannot be said to have violated the provisions of regulation 3 of the regulations".[368]

(iii) Landmark cases

Whilst we evaluate the enforcement of SEBI's provisions on insider trading, it is pertinent to examine a few landmark cases in the domain of insider trading. These cases over the period of time have given rise to several discussions pursuant to the viability of the prevailing provisions:

1) *Rakesh Agrawal vs. SEBI*[369]

The most fundamental case with respect to insider trading in India, is that of Rakesh Agrawal v. SEBI, 2004[370] given by the Securities Appellate Tribunal. The case originated in 1996 wherein the appellant, i.e., Mr. Rakesh Agrawal was serving as the managing director of ABS Industries Ltd.. ABS Industries Ltd. was a publicly listed company dealing in the field of manufacturing and sale of resins. In 1996, ABS Industries Ltd. signed a purchase agreement with a

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[368] *Id.*
[369] Rakesh Agrawal vs. SEBI, (2004) 49 SCL 351 (SAT).
[370] *Id.*

multinational company, Bayer AG to acquire a controlling interest (51%) in ABS Industries Ltd. a publicly listed company in the business of manufacturing and selling resins. However, as SEBI investigated, it discovered that prior to this acquisition Mr. IP Kedia, brother-in-law of the appellant purchased shares in ABS Industries Ltd., at the behest and funding of the appellant, also that the appellant held a crucial UPSI with respect to the acquisition by Bayer AG. SEBI deemed that the appellant was guilty of insider trading and slapped a penalty of thirty-four Lakhs on him.

The SAT examined the issue in great depth, discussing and deliberating about an extensive jurisprudence from the United States[371] and the PIT regulations in India. Ultimately, the court allowed the appeal and held that that even if the appellant had traded securities while in possession of UPSI, they cannot be held guilty of insider trading as their actions constitute as best interests in furtherance of their fiduciary duty as the executive head of ABS Industries Ltd. To constitute an offence of insider trading, the insider in possession of UPSI must have acted unfairly with a view to make an illegal gain,

[371] Chiarella v. United States, 445 US 222 (1980); Dirks v. SEC, 463 US 646 (1983); United States v. O Hagan, 521 US 642 (1997).

which wasn't the case with the appellant. The court also noted that the legislative intent by the PIT regulations was never to enforce a complete ban on trading, even extending to legitimate transactions but rather to prohibit trading in securities based on asymmetric information which may amount to an unfair situation in the securities market.[372] Lastly, the court also opined that the insider trading laws prevailing in the United States of America and the United Kingdom are not *pari materia* with the SEBI PIT Regulations[373].

2) Hindustan Lever Limited vs. SEBI[374]

The present case is pursuant to an allegation that Hindustan Lever Ltd. ("**HLL**") was an insider who purchased securities of Brook Bond Lipton India Ltd. ("**BBLIL**") from UTI for Rs. 350.35 by paying a premium of 10% over the market price based on an UPSI immediately prior to the announcement of the merger of HLL and BBLIL. SEBI suspected leakage of information prior to the merger and insider trading, thereby opened an investigation against the companies.

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[372] *Supra* 324.
[373] *Id.*
[374] Hindustan Lever Limited vs. SEBI, 1998 (18) SCL 311 (AA).

It is pertinent to note that both HLL and BBLIL were the subsidiary companies of a London-based company Unilever, with the companies working under the same management. SEBI after a thorough investigation passed an order on 11th March, 1998, directing HLL to provide a compensation package worth Rs. 3.94 crore to UTI and asked SEBI to initiate proceedings against HLL and its directors. HLL and the directors filled an appeal before the SAT. SAT dealt with various issues but the fundamental issue they considered was as to whether HLL was an insider and thereby violated regulation 3(1)[375] of the PIT regulations 1992 for the purchase of the shares based on an UPSI. The appellants argued that the twin conditions of the 1992 SEBI PIT Regulations should be categorically fulfilled to bring a charge of insider trading. The twin conditions, that being: (i) the said information should be generally known or published by the company (ii) If the information was published, it would be likely to substantially affect the prices of the securities. SAT held that for an information to be generally known it need not be specifically confirmed or authenticated by the said company in question, and noted that various news articles price to

[375] SEBI PIT Regulations, 2015, Reg. 3(1).

the merger notes about the same.[376] Thereby, the first conditions fail in this case and thus SEBI errored in their order. This case was fundamental in exploiting a lacuna in the 1992 PIT regulations, that for any information to be considered as generally known, vague reporting without a concrete confirmation or authentication by the company was not required. This loophole, left a substantial gap for insiders to exploit. However, the regulation was immediately then amended as the regulations then stood that for any information to be considered as generally known, it should be specially published and authenticated by the company.[377]

3) *WhatsApp Leaks Case*[378]

In 2017, Reuters published a report in which they mentioned that there were several WhatsApp groups in circulation that possessed 'prescient messages' pursuant to quarterly performance of twelve companies comprising of Dr. Reddy's Laboratories Limited, Cipla Limited, Axis Bank Limited, HDFC Bank Limited, Tata Steel Limited, Wipro Limited, Bajaj Finance Limited,

[376] *Id.*
[377] *Supra* 350.
[378] *Supra* 313.

Mahindra Holidays and Resorts India Limited, Crompton Greaves Consumer Electricals Limited, Mindtree Limited, Mastek Limited, and India Glycols Limited.[379] SEBI conducted investigation examining these chats via seize and search operations of 26 entities belonging to the said WhatsApp group.

The adjudicating officer (Hereinafter AO) found the figures in the WhatsApp messages and the actual declarations of the companies resembled a striking resemblance and also took the proximity of the circulation of these messages with the actual disclosure in account. Thus, the AO considered the evidence, and convicted the individuals of insider trading, and subsequently slapped a monetary penalty of Rs. 15,00,000. However, on Appeal, the SAT stayed the order of SEBI as the tribunal considered that these messages were merely forwarded by the appellants rather than sending them originally. The tribunal noted that the AO failed to appreciate the fact that these figures might have originated from the brokerage houses or rather from the Bloomberg index, thereby could have been present in public domain. The tribunal deemed

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379 *Id.*

forwarding of messages of the unpublished financial statements without the presence of any other evidence or a clear motive, cannot be considered as transfer of UPSI.[380] This judgement inherently raised the threshold of evidence placed on SEBI to prove a charge of insider trading, and clearly rejecting the view that merely some ambit of circumstantial evidence could warrant a charge on insider trading. [381]

V. PART C

A. Lack of proper surveillance and investigative procedure

One of the fundamental problems that SEBI faces with respect to insider trading is that of limited investigation powers[382]. This lacuna exists due to lack of coherent investigative authorities. The 2015 PIT Regulations still remains completely silent as to search and seizure procedure of SEBI[383]. SEBI still remains devoid of a fundamental tool of investigation, i.e., tapping of telephone lines. SEBI has been

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[380] *Id.*

[381] Pavan Burugula, *SAT quashes Sebi orders in Whatsapp Leaks Case*, THE ECONOMIC TIMES (March 21, 2021). https://economictimes.indiatimes.com/markets/stocks/news/sat-quashes-sebi-orders-in-whatsapp-leaks-case/articleshow/81697470.cms?from=mdr.

[382] *Supra* 370.

[383] Pariddhi Poddar, *Analysing the Insider Trading Regulations*, 2015, 4(2) GNLU L. REV. 1 (2013).

denied this authority on the grounds of misuse[384]. Recently in 2014, SEBI was granted the depleted authority to request for call logs and histories after the landmark decision of the Bombay High Court in the case of Indian Council of *Investors v. Union of India & Ors., 2014*[385]. However, it is of paramount importance that SEBI is granted such an authority, as we can note from the famous *Securities and Exchange Commission v. Rajat Gupta, 2012*[386] case of insider trading in the United States of America, that telephonic surveillance is a very fundamental tool for enforcement authorities to detect and prove securities fraud, specifically, insider trading.[387] The problem of incoherent surveillance and investigative procedure results in delay/non-completion of such investigation. The lack in the complete authority of investigation can be noted in the table provided below which highlights a failing number of closures in the investigation:

S. No	Years	Investigation Taken Up	Investigations Completed
1.	2015-16	15	20

[384] Roopanshi Sachar & Dr. M. Afzal Want, *Regulation of Insider Trading in India: Dissecting the Difficulties and Solutions*, 2(11) JOURNAL ON CONTEMPORARY ISSUES OF LAW (2016).
[385] Indian Council of Investors v. Union of India & Ors., (2014) 123 CIA 267.
[386] Securities and Exchange Commission v. Rajat K. Gupta and Raj Rajaratnam, Civil Action No. 11-CV-7566.
[387] Sheelah Kolhatkar, *Black Edge: Inside Information, Dirty Money and the Quest to Bring Down The Most Wanted Man On Wall Street* 137 (Ebury 2018).

2.	2016-17	34	15
3.	2017-18	15	6
4.	2018-19	70	19
5.	2019-20	49	57
6.	2020-21	30	40

SEBI Annual Reports[388]

56 out of 213 or 1/4th of the investigations haven't been closed to date let alone the commencement and finish of the proceedings. Consequentially, this lack of completion in investigations then substantially hinders the process of trial for such offences, ultimately non-convictions of various offenders.

B. Conflict of Mens Rea

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388 Securities Exchange Board of India, Annual Report 2015-16, https://www.sebi.gov.in/reports/annual-reports/aug-2016/annual-report-2015-16_33014.html; Securities Exchange Board of India, Annual Report 2016-17 https://www.sebi.gov.in/reports/annual-reports/aug-2017/annual-report-2016-17_35618.html; Securities Exchange Board of India, Annual Report 2017-18 https://www.sebi.gov.in/reports-and-statistics/publications/aug-2018/annual-report-2017-18_39868.html; Securities Exchange Board of India, Annual Report 2018-19 https://www.sebi.gov.in/hindi/reports/annual-reports/jul-2019/annual-report-2018-19_43670.html; Securities Exchange Board of India, Annual Report 2019-20 https://www.sebi.gov.in/reports-and-statistics/publications/feb-2021/annual-report-2019-20_49071.html; Securities Exchange Board of India, Annual Report 2020-21 https://www.sebi.gov.in/reports-and-statistics/publications/aug-2021/annual-report-2020-21_51610.html.

The fundamental problem that exists pursuant to insider trading regulations remains the conflict between discrepancy of the charging provisions, i.e., regulation 3[389] of SEBI PIT Regulations, 2015, and penal provisions, i.e., Section 15G[390] of SEBI Act, 1992. The problem arises because the charging provision provides no requirement for the presence of 'intention' or 'motive' to charge an individual for insider trading however, to levy a penalty on the same individual via the virtue of Section 15G of the SEBI Act, an inherent motive must exist. This problem is deepened by the proviso to regulation 4[391] of the PIT regulations. The proviso states that "provided that the insider may prove his innocence by demonstrating the circumstances"[392], and then provides various illustrated defences. Apart from these illustrations, the regulations also entail an ambit of the defence of innocence. Therefore, usage of the term innocence, implies there should be an ill-intent/mens rea involved in the offence. Albeit, the note to the regulation provides that "*The reasons for which he trades or the purposes to which he applies the proceeds of the transactions are not intended to be relevant for determining whether a person has violated the regulation*." Thereby excluding the requirement of mens rea, effectively making the defence of innocence very ambiguous pursuant to requirement of mens rea in

[389] SEBI PIT Regulations, 2015, Reg. 3.
[390] Securities and Exchange Board of India Act, 1992, §15G.
[391] SEBI PIT Regulations, 2015, Reg. 4.
[392] *Id.*

an offence of insider trading.[393] This essentially creates a situation where an insider always remains devoid of clarity pertaining to the legality of their transaction, also creating a situation of problem for prosecutors to convict the criminals.[394] Thus, we can clearly note that there exists extreme ambiguity pursuant to the requirement of mens rea or not in an offence of insider trading, which ultimately makes the action of the enforcement agency much difficult.[395]

C. Lack of adequate penal deterrence

Via the virtue of SEBI Act, 1992, SEBI possesses very wide powers under section 15G of the SEBI Act, 1992 to impose severe monetary penalties on a convicted insider. The board is authorised to impose a penalty of up to Rs. 25,00,00,000 or three times the amount of profits made, whichever is higher. Albeit this enormous maximum penalty ambit, SEBI has ever only imposed a maximum penalty of Rs. 60,00,000. On one side, authorities note that insider trading is a very

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[393] *Supra* 390.

[394] Dheeresh Kumar Diwedi, *Insider Trading Regulations, 2015 - Doomed to Failure?*, 6(1) NLIU LR 21 (2017).

[395] Suneeth Katarki and Namita Vishwanath, *India: "Mens Rea" In Insider Trading – A "Sine Qua Non"?*, INDUSLAW, (June 3, 2015) https://www.mondaq.com/india/securities/401724/mens-rea-in-insider-trading-a-sine-qua-non.

grave offence[396] and should be treated very carefully, and on the other side they also shy away from imposing strict penalties. Honourable Supreme Court in the case of *N. Narayanan v. Adjudicating Officer, SEBI, 2013*[397] that economic offences are very serious offences, and must be dealt with to the best of abilities as they pose a direct threat to the economic viability of the securities market and to turn the economy of the whole country itself.[398] Albeit, all the authorities involved, SEBI, SAT, and the honourable courts have still failed to impose any substantial penalty on any convicted insider. Apart from monetary penalties, SEBI also holds the power to petition before a competent criminal court, however to date, no individual or corporation has been convicted criminally for insider trading. Therefore, such trivial penalties fail to establish enough deterrence in the securities market and without adequate deterrence, insiders feel free to indulge in insider trading[399].

VI. CONCLUSION

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[396] Shruti Rajan and Vidhi Shah, *The Use of Circumstantial Evidence in Securities Law Enforcement*, INDIA CORP LAW (September 16, 2020), https://indiacorplaw.in/2020/09/the-use-of-circumstantial-evidence-in-securitieslaw-enforcement.html.

[397] N. Narayanan v. Adjudicating Officer, SEBI, AIR 2013 SC 3191.

[398] Priyanka Patil and Sparsha Pavan, *Need for a stringent Legislation on Insider Trading and its Relation to Mismanagement*, 4(3) INTERNATIONAL JOURNAL OF LAW MANAGEMENT AND HUMANITIES, 1504 1507 (2021).

[399] Bhavya Bhandari, *Why SEBI is failing at Regulating Insider Trading in India*, INDIACORPLAW, (February 20, 2018) https://indiacorplaw.in/2018/02/sebi-failing-regulating-insider-trading-india.html

In Part A of this paper, we have examined what constitutes insider trading, who can be considered an insider, or connected person, and what information can be termed as UPSI. Further, Part B of this paper dwells into what are the prevailing regulations issued by SEBI (SEBI PIT Regulations, 2015) pursuant to insider trading in India and the two types of offences. i.e., communication and trading offences which the regulations carve out. Further, this part of the paper examines the conflict of the regulations with the Companies Act, 2013 finally taking a look at the penal provisions present in the SEBI Act, 1992. Then Part B examines what is the evidentiary requirements to bring a charge of insider trading, including what are the standards of proof, and rebuttable presumption. The paper moves ahead to examine four landmark cases, namely, *Rakesh Agarwal v. SEBI, Hindustan Unilever v. SEBI, WhatsApp Leaks case*, and their impact on the prevailing provisions and standards of insider trading. Lastly, Part C of the paper provides what are the present prevailing lacunae in SEBI's quest to curtail insider trading. It first examines, the depleted authority that a mighty enforcement agency such as SEBI holds pursuant to the investigation of such charges. It also looks into statistical data and the impact of such feeble authorities. Then, we explore the conflict of Mens Rea between the SEBI PIT Regulations, 2015, and the SEBI Act, 1992, and how that makes the area of intent still a grey area, giving a scope of exploitation for insiders to exploit. Lastly, we look at the lack of a coherent penal deterrence enforced by the SEBI regulations in society against insider trading. Such a lacking, essentially fails the objective of the acts

itself, directly possessing a question to the objective of SEBI itself. It is crucial that SEBI incorporates various paradigm changes in their regulations and operations if they wish to curtail insider trading in the Indian securities market. Therefore, after examining all the aforementioned essentials we can clearly conclude that currently SEBI fails in its quest to curtail/prevent insider fraud in the securities market.

INDIA'S TRYST WITH CROSS-BORDER INSOLVENCY: A CROOKED CHOICE BETWEEN TERRITORIALISM AND UNIVERSALISM

- *Aditi Singh*[*]

ABSTRACT - *As India moves forth to develop its Cross-Border Insolvency regime, it becomes imperative for the country to decide upon the approaches, that ought to be adopted for an efficient trans- national resolution mechanism. Protection of rights of local creditors under the hood of the territorial Gibbs Rule should give way to the modern concepts of unitary proceedings protected by the shield of Universalism. The paper engages with the customary extremist principles that uphold both the concepts in respective insolvency regimes. Adding to the existing literature, the current piece highlights the challenges faced by the Indian legal system in adopting a specific approach in international insolvency. Further, through an analysis of legal precedents, a suitable tactic for India is explored. Universalism as a 'gold thread' in insolvency proceedings, enunciates upon the principles of efficacy and timely resolution. 1 Upholding the contractual liability, the Gibbs Rule protects the rights of individual creditors. Impediment towards both a territorialist and universalist approach develops the movement towards the application of Modified Universalism.*

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The concept of Modified Universalism, allows both Gibbs Rule and Unitary proceedings, to co-exist in a harmonious manner. By introducing modified universalism as the middle-path of resolution, the paper highlights the perks and pitfalls of the new approach. The Jet Airways and the Videocon, cases are utilised to lay down the bedrock of cross-border regime in India. The viability of modified universalism, along with the adoption of UNCITRAL Model Law on Insolvency is critically analysed. The paper concludes by putting forth the need of modified universalistic along with a suggestive framework for effective implementation.

KEYWORDS- *Cross-Border Insolvency, Territorialism, Universalism, Modified Universalism, UNCITRAL Model Law, Viability, Suggestive Framework and Effective Implementation.*

I. INTRODUCTION

The Insolvency and Bankruptcy Code ("**IBC**"), 2016 was enacted with the objective of consolidating the procedure and provisions for holistic resolution rather than recovery of failing corporations in India. The current IBC framework, adequately caters to domestic resolutions, however, fails to provide an effective and unified mechanism for cross-border bankruptcies. The Insolvency Law Committee ("**ILC**"), has been working to enact and bring forth a suitable incorporation of the UNCITRAL Model Law on Cross Border Insolvency, ("**Model Law**") 1997 in India. Adoption

of the Model Law, as an addition of Part Z of the IBC along with requisite modifications in the existing provisions, allows recognition of foreign proceedings on a reciprocity basis[400].

Recognition of the Model Law under the insolvency regime, poses questions of adopting a substantive or procedural recognition of foreign judgments. A substantive recognition would lead to a universalist approach,[401] while a procedural recognition would allow adjudication of local debts, under the principles of Gibbs Rule.[402] The uncertainty of the pendulum shifting from a conservative territorial approach towards a liberal universalist approach needs to be resolved with the adoption of a suitable cross-border insolvency principle.

The paper is divided into 5 parts, each part slowly progressing toward an amicable resolution for Cross-border Insolvency in India. [I] *Territorialism v. Universalism*: The part defines the concepts of Territorialism and Universalism, along with the implications of the same. [II] *Insufficiency of the Indian Regime:* The section, deals with the inadequacy of the Indian legislative framework, with respect to the adoption of any approach to trans-national recognitions. [III] *Modified Universalism:* Introduction of a middle path of resolution for recognition, and the recent judicial

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[400] Ministry of Corporate Affairs, *Report of Insolvency law Committee on Cross Border Insolvency* (2018) 19. https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.
[401] In re Modern Land (China) Co., Ltd., 641 B.R. 768.
[402] Re Rare Earth Magnesium Technology Group Holdings Ltd. [2022] HKCFI 1686.

precedents, that assist India, in finding an appropriate recourse. [IV] *Lessons from Abroad*: The part, adopts an analysis of the Model Law and [V] *Conclusion*: The last fragment of the paper, puts forth a suggestive framework and the adoption of modified universalism in an appropriate manner, for the Indian sub-continent.

II. TERRITORIALISM V. UNIVERSALISM

A. Territorialism

Territorialism is substantiated through the adoption of Gibbs Rule. It propagates, discharge of debt according to the law that governs the debt. A foreign proceeding, by a foreign law cannot discharge the contractual rights of an individual.[403] The statutes of foreign states can in no case have any force or effect in the home country *ex proprio vigore.*[404] Foreign Assignees in bankruptcy can have no recognition solely by virtue of a foreign statute.[405] Treating a non-resident according to the laws of the foreign nation, when its investments, debts and residence is based out of another jurisdiction, would be against international etiquette of meddling with the sovereignty of another state.[406] Thus, Gibbs Rule, furthers a

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[403] Adams v National Bank of Greece, [1960] 2 All ER 421.
[404] Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd, 2021 Scot (D) 12/9.
[405] In re Waite, 1885 N.Y. LEXIS 807.
[406] American Banana Co. v. United Fruit Co., 213 U.S. 347.

territorial discharge limited within the borders of a country but appropriated according to the governing contractual law.[407]

Each country has the sole power to rule inside the boundaries. Territoriality in multinational corporations means that a country's bankruptcy courts have jurisdiction over the components of the firm that are inside its boundaries but not those that are not.[408] Exercising the principle of universality, increases the probability of error and deception.[409] Under territoriality, a successful deceit or forum shop rarely can affect all of the assets of the debtor company; it would change the law governing only the particular assets involved[410]. However, territorialism is against the principle of equal treatment to creditors in a multi-national company.[411] By allowing every creditor to be subjected to a different set of domestic laws, it creates a biased creditor-class differentiation, making it difficult for the debtor to put through a transparent restructuring. Thus, providing a more secure and efficient resolution mechanism.

A foreign court cannot be mandated to recognize a foreign proceeding unless the same is substantiated by a statutory

[407] DICEY, MORRIS & COLLINS, THE CONFLICT OF LAWS (15th ed, 2018) §31-96.
[408] Re Bank of Credit and Commerce International, SA, 4 All E.R. 796.
[409] Lynn M. LoPucki, *The Case for Cooperative Territoriality in International Bankruptcy* 98 MICHIGAN STATE LAW REVIEW 2216, 2240-41. (2000).
[410] Re Bank of Credit and Commerce International (Overseas) Ltd, [1994] 3 All ER 764.
[411] Marcela Ouatu, *Modified Universalism for Cross Border Insolvencies: Does it Work?* UNIVERSITY OF BRITISH COLUMBIA 12, 16. (2014).

provision.[412] By extending global cooperation, creditors expect equitable and fair treatment of their debts, ensuring administration and consideration by domestic laws.[413] The Gibbs Rule, through its territorial approach, protects equitable and fair treatment, by relieving their rights through the governing law, instead of recognition of a foreign one.

B. Universalism

A universalist approach in bankruptcy puts forth the notion of a single bankruptcy proceeding in the debtor's home country and the same to be applicable universally in all jurisdictions.[414] Principles of private international law, namely that bankruptcy, personal or corporate, also signify a unitary and universal proceeding.[415] Fairness between creditors requires that, ideally, there should be a unitary bankruptcy proceeding and it should have 'universal application' to all the bankrupt's assets.[416] Placing all creditors on an equal stand, by subjecting them to the same procedure in the same proceeding, upholds the principles of an effective restructuring or bankruptcy.

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[412] Re Dallhold Estates (UK) Pty Ltd, [1992] BCLC 621.

[413] Edward S. Adams and Jason K. Finche, *Coordinating Cross-Border Bankruptcy: How Territorialism Saves Universalism'* 15 COLUMBIA JOURNAL OF EUROPEAN LAW 37, 43. (2008).

[414] McCormack (n 1).

[415] In re HIH Casualty and General Insurance Ltd., [2008] 1 WLR 852.

[416] Oui Fin. LLC v. Dellar, 2013 U.S. Dist. LEXIS 146214.

The effectiveness of the approach can be attributed to its cost effectiveness and timely resolution of debtor's inconvenience.[417] Recognition facilitates and perpetuates foreign debtor that has its wings in multiple jurisdictions from starting parallel insolvency proceedings in different countries. Adequate recognition provides remedies to creditors equivalent to remedies that they would have been entitled to in their domestic forum.[418] Recognition of a unitary proceeding, further acts a substantive discharge of debts, for local and foreign creditors.[419]

In *HIH Casualty,*[420] while dealing with cross-border liquidation between Australian and English courts, Lord Hoffman, established, *"despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice*."[421] Providing worldwide recognition to a winding up proceeding, notwithstanding the territorial limits of their jurisdiction, is in furtherance of the principle of Public Interest.[422] Businesses having worldwide activities and assets should be capable of being dissolved in a lawful manner under that

[417] Peck v. Jenness, 48 U.S. 612.
[418] Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc, [2006] UKPC 2.
[419] Modern Land China, (n 3).
[420] In re HIH Casualty and General Insurance Ltd., [2008] 1 WLR 852.
[421] *Id.*
[422] Cunard Steamship Co Ltd v. Salen Reefer Services AB, 773 F 2d 452. (2d Cir, 1985).

jurisdiction's laws on a basis that will be acknowledged and effective globally.[423]

Gibbs Rule and Universalism, highlight two ends of the spectrum. Each of them, puts forth a paradox of reality in insolvency.[424] Adoption of any one of them has adverse ramifications. Territorialism envisages for the benefit of local creditors, while universalism gives supremacy to comity.[425] Universalism, condemns the usage of the Indian insolvency laws, while Gibbs rule discerns the existence of co-operation and globalisation.

III. INSUFFICIENT INDIAN REGIME

Indian insolvency does not have a special and specific procedure to cater to trans-national bankruptcies. The current cross-border regime is governed by Section 234 and Section 235 of the IBC, 2016. Section 234 allows Indian Government to enter into bilateral agreements with foreign nations, to resolve distressed assets in other countries.[426] Section 235 further, empowers the Adjudicating Authorities, to enact in furtherance of the agreement in 234.[427] Recognition of any foreign judgement, is done

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[423] Singularis Holdings v Price Waterhouse Cooper, [2014] UKPC 36.
[424] M Balz, *The European Union Convention on Insolvency Proceedings* 70 The American Bankruptcy Law Journal 526, 531. (1996).
[425] Wee Meng Seng, *Lessons for the Development of Singapore's International Insolvency Law* 23 SINGAPORE ACADEMY OF LAW JOURNAL 906, 932. (2011).
[426] The Insolvency and Bankruptcy Code, 2016 §. 234.
[427] *Id,* §. 235.

through the Civil Procedure Code, 1908 ("CPC"). The principles of common law of comity and public policy are also taken into consideration, while recognizing a foreign judgement.

The bilateral treaty framework, is tedious and full of loopholes. In case of involvement of multiple jurisdictions, bilateral treaties cannot sustain. Further, by the time the Government enters into an agreement, the value of the debtor's assets will depreciate, leading to a loss for both creditors and debtors.[428] The existing legislative framework in India is bleak and unpromising. The general provisions of recognition, do not cater to the specific needs of a cross-border insolvency.

The insufficiency of the Indian legislative regime, is evident through the misjudged and miscalculated judicial precedents. In the case *of Jet Airlines (India) v. State Bank of India,*[429] the Netherlands Administration attempted to begin parallel procedures in Dutch courts in addition to the domestic bankruptcy proceedings of Jet Airways in India. The National Company Law Tribunal ("**NCLT**"), adopted a territorial approach and ignored the Dutch proceedings. However, the National Company Law Appellate Tribunal ("**NCLAT**") entered into cooperation with the Dutch administrators, and recognized the proceedings under the aspect of 'pure

[428] Ministry of Corporate Affairs, 'Overview of Cross Border Insolvency Framework for Corporate Debtors Under the Insolvency and Bankruptcy Code, 2016' (2018) 4. https://www.mca.gov.in/Ministry/pdf/PublicNoiceCrossBorder_20062018.pdf.
[429] Jet Airlines (India) v. State Bank of India, 2019 SCC Online NCLAT 1216.

universalism'[430]. Further, in *State Bank of India v. Videocon Industries Limited,*[431] case in the NCLT, propagated the powers of the Indian courts to extend the moratorium and stay to the foreign assets and subsidiaries.[432] Even though the company contended that the assets belonged to the subsidiaries and do not form assets of the going concern, the court, applied the philosophies of international group insolvencies, and stayed the proceedings with respect to foreign assets as well. Substantive consolidation[433] was recognized by the court for the first time, giving rise to the need for development of a cross-border regime. The failure of the judgement is highlighted through the treatment to dissenting creditors. Adopting a pure universalist approach, the court again failed to uphold the rights of the dissenting local creditors.[434] The failure of the judiciary and the legislature, in adopting a uniform cross-border insolvency procedure, creates a blackhole of uncertainty for the globalization of insolvency in India.

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[430] Neha Malu and Shreyan Srivastava, *Cross Border Insolvency in India: A long Due* Dream, VINOD KOTHARI CONSULTANTS (1st Feb, 2022) https://vinodkothari.com/?p=38412 7 March, 2023

[431] State Bank of India v. Videocon Industries Limited, 2018 SCC OnLine NCLT 13182.

[432] 'NCLT Orders Inclusion of Videocon's Overseas Assets in Insolvency' (Business Standard, 15 Feb, 2022) https://www.business-standard.com/article/companies/nclt-orders-inclusion-of-videocon-s-overseas-assets-in-insolvency-120021500036_1.html 6 March, 2023.

[433] In Re Dehon, Inc., 2004 WL 2181669 (Bankr. D. Mass. Sept. 24, 2004).

[434] Rajat Sethi, *The Videocon Insolvency Resolution Process: Is Reading Between The Lines Warranted?*, MONDAQ. (15th August, 2021) https://www.mondaq.com/india/insolvencybankruptcy/1099398/the-videocon-insolvency-resolution-process--is-reading-between-the-lines-warranted 9 March, 2023.

India not having adopted a structured stance for cross-border insolvency, creates a resort to traditional approaches. The common law principles, of Gibbs Rule, add to the perils of the country. With India, taking steps towards a globalized economy, the archaic Gibbs Rule, prevents appropriate forum shopping for multi-national companies.[435] The lack of an international framework, forces companies to be governed by the Indian law, and the creditors are left unsatisfied in the absence of a preferred jurisdiction adjudication.

Adoption of a cross-border insolvency framework, will not cater to the problems of a globalized economy. India, needs to define recognition proceedings and the impact of foreign Resolution Plans. The burning debate put forth through the *Re Rare Earth Magnesium Technology Group Holdings Ltd.*,[436] disregarding the discharge of debt of an English law, through a Hong Kong law scheme, even after a valid recognition, highlights the need for pressing need of enforcement and recognition provisions. Order XXI of the CPC providing execution of foreign decrees and orders is insufficient to uphold a foreign Resolution Plan. Enforcement of a Foreign Resolution Plan, would not protect the interests of the shareholders in an appropriate manner, and leave them remediless, in the absence of a distribution of assets mechanism. At this juncture, India does not have a framework, that proposes the effects of foreign recognition,

[435] Sayak Banerjee and Akash Mukherjee, *Examining India's New Cross Border Insolvency Regime and Its Potential Challenges*, INTERNATIONAL BAR ASSOCIATION 53. (2020).
[436] Rare Earth Magnesium, (n 4).

enforcement makes a judgement binding within the Indian borders. However, it's application and utilization to determine rights of parties, continues to be an explored area for the Indian legal framework.

Introduction of Draft Part Z by the Committee, to adopt the Model Law, in India, though promising, puts forth the questions of approach to be adopted. The language and loopholes in the draft as well the regulations, makes it imperative for the legislators to rectify the draft before it is enforced. Further, the recommendations and the rules propagated by the Insolvency Law Committee, fail to cater to the needs of the Indian society. Owing to the country's social and economic status, the 2018 ILC Report suggested, that Model Law shall be recognized based on comity only. The mandate of a foreign nation having similar legislative ambit, restricts the principles of universalism. Allowance of creditors under Article 1(1)(d) of Model Law,[437] to continue and commence proceedings in domestic courts, further condemns the idea of pure universalism and impleads into the concept of modified universalism.

Another roadblock in India's cross-border insolvency expansion, is the lack of access to practice to foreign advocates.[438] It would be difficult to enforce a trans-national legislation, without permitting the foreign representatives to exercise their powers freely and amicably. The adoption of a sub-ordinate legislation and acting through domestic lawyers would

[437] UNCITRAL Model Law on Cross-Border Insolvency (1997) Art 1.
[438] Bar Council of India v. A.K. Balaji, AIR 2018 SC 1382.

cause nothing but havoc in the country.[439] The developing insolvency regime, fails to cater to the recent development and adoption of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments ("**MLREIJ**"). The Committee fails to discuss the application and need of enforcement of insolvency related judgements in India. Reading the Model Law and MLREIJ in isolation, creates problems for the sub-continent.

Neither the existing legislative framework is adequate for foreign insolvencies, nor the introduction of the new framework sufficiently suffices the needs of the Indian society for an efficient multi-national resolution outline.

IV. MODIFIED UNIVERSALISM

Having established how the traditional approaches towards insolvency are inadequate for the Indian regime. Neither universalism nor territorialism, assist the country in creating a balance between creditor rights and country co-operation. The parameters of a debt discharge through bankruptcy procedures are not dictated by the parties' agreements, rather are governed by the policy considerations that are envisioned in the Model Law,

[439] Ministry of Corporate Affairs, *Report of Insolvency law Committee on Cross Border Insolvency* (2018) 26. https://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf.

allowing for bankruptcy discharge.[440] Thus, the Model Law, has led to the introduction of the concept of Modified Universalism.

"*Modified universalism is universalism tempered by a sense of what is practical at the current stage of international legal development*."[441] Modified Universalism allows nations to enforce the foreign judgement keeping in mind their public policies and national legislations. The approach, adapts the concept of pure universalism to adjust to the realities and lapses of inter-country tussles. The main proceeding being conducted in the home country with necessary assistance from other jurisdictions, makes the approach unique and acceptable. Modified Universalism focusses on the aspect of "comity" and "international co-operation."[442]

Comity encourages judicial deference and permits domestic proceedings. Opposed to full-fledged bankruptcy proceedings, as in territorialism, modified universalism, introduces the concept of parallel and ancillary proceedings.[443] The newer approach, acknowledges the possibility of multiple proceedings in multiple jurisdictions. A central main proceeding, can have parallel proceedings in a foreign jurisdiction, having equal assets

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[440] Sayak Banerjee and Akash Mukherjee, *Examining India's New Cross Border Insolvency Regime and Its Potential Challenges*, INTERNATIONAL BAR ASSOCIATION 53. (2020).
[441] Jay Lawrence Westbrook, *Comity and Choice of Law in Global Insolvencies,* 54 2 Texas International Law Review 6 13. (2019).
[442] Irit Mevorach, *Overlapping International Instruments for Enforcement of Insolvency Judgments: Undermining or Strengthening Universalism?* 22 EUROPEAN BUSINESS LAW REVIEW 283 287. (2021).
[443] *Id.*

and establishment. Ancillary proceedings on the other hand, propagate, adjudication of local assets, in an administrative manner, after due recognition of the main proceeding.

Model Law allows modest solutions instead of an over-achiever target of substantive unification of insolvency proceedings.[444] Chapter V of the Model Law, through the introduction of Concurrent Proceedings, touches upon the idea of modified universalism.[445] According to Article 28, "*the effect of a domestic insolvency, after recognition of a foreign main proceeding puts forth the individualistic approach in insolvency*".[446] At the same time, the limitation of such a proceeding to the assets in the enacting country, ensure the sanctity and enforceability of foreign proceedings, thus, engendering the concept of modified universalism.[447]

The Singaporean jurisprudence related to Modified Universalism, could be adequate for the Indian society. The court in *Re Pacific Andes Resources Development Ltd,*[448] surpassed the expectations of creditors, and allowed a foreign jurisdiction case to be recognized and enforced after establishing a legitimate nexus with the country. Centralization in modified universalism is brought through, fairness, efficiency, and predictability.[449] Being a

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[444] Neerav Srivastava, *Cross Border Insolvency, Modified Universalism, and the Rule in Gibbs*, 29 INSOLVENCY LAW JOURNAL 61 63. (2021).
[445] UNCITRAL Model Law on Cross-Border Insolvency (1997) Ch 5.
[446] *Id, Art. 28.*
[447] Report on Cross Border Insolvency, n 41.
[448] Re Pacific Andes Resources Development Ltd [2016] SGHC 210.
[449] Marcela, n 14.

compromise between universalism and territorialism, modified universalism, allows a proper development of inter-national co-operation. The Jet Airways and the Videocon case, have been impliedly adhering to the principles of modified universalism. Modified Universalism, being a middle path between territorialism and universalism, can allow both Gibbs and Universalism to co-exist. The principle of freedom of contract is respected in Modified Universalism. The legitimate expectations of the parties are also catered to through ancillary proceedings.[450] Having a structured framework, that recognizes the concept, would further assist the country in setting internationally acceptable judicial precedents.

V. LESSONS FROM ABROAD

Universalism being portrayed as a golden thread of recognition and unity, lacks practicality. The exclusion of insolvency judgements from the scope of Private International Law, further causes problems for countries to enact specific rules for recognition. Similarly, territorialism, has seen creditor bias, making it difficult for countries to co-operate. Modified Universalism was introduced with the notion of solving the problems of cross-border insolvency, however, the same has also seen lapses. Judicial precedents

[450] Gautam Narasimhan, *The sun never sets on English law governed debt: reviewing the Re Prosafe SE decision,* ALLEN AND OVERY (30th November, 2021) https://www.allenovery.com/en-gb/global/news-and-insights/publications/the-sun-never-sets-on-english-law-governed-debt-reviewing-the-re-prosafe-se-decision 2 March, 2023.

around the world, have been highlighting the inadequacy of the newer concept.

In the case of *Rubin v. Eurofinance*,[451] the court dismissed the plea to recognition, by upholding the rights of local creditors and absence of submission to jurisdiction. The presence and protection of local creditors was sufficiently highlighted in the case. Similarly in the case of *Bakhshiyeva v Sberbank of Russia*,[452] the court disregarded the principle of modified universalism in Model Law by holding it as a mere procedural recognition, not affecting the rights of the parties in any manner.

The question of recognition under Model Law, being substantive or procedural in nature, has been a recent subject for debate for a number of jurisdictions. The answer to the same, assists courts in determining the discharge under Gibbs Rule being effectuated after a valid recognition. The Hong Kong court in the case of *Re Rare Earth Magnesium Technology Group Holdings Ltd*.,[453] ignored the English law's debt forgiveness through the Hong Kong legal system, despite the proper recognition. "*Recognition of the scheme under Chapter 15 does not constitute a compromise of debt governed by United States law, which satisfies the Rule in Gibbs*."[454] An offshore scheme cannot bind a creditor that never submitted to the

[451] Rubin v Eurofinance SA [2012] UKSC 46.
[452] Bakhshiyeva v Sberbank of Russia [2018] EWCA Civ 2802.
[453] Rare Earth Magnesium, (n 4).
[454] *Id.*

jurisdiction of the foreign court, and originally agreed for its debts to be contractually governed by a different law. The aspects of Model Law were merely confined to a procedural recognition.

A contrasting approach was taken by the US Bankruptcy Court in the case of, *Re Modern Land (China) Co. Ltd.*,[455] The court while recognizing a foreign jurisdiction scheme in US, under Chapter 15, i.e., incorporation of the Model Law on Insolvency, reasoned, the recognition to give way to discharge. Recognition of a foreign insolvency proceeding results in cancellation of the debts in totality.[456] A Scheme once duly recognized prevents action being by a dissenting creditor taken regardless of the governing law of the debt. All debt that is discharged pursuant to the Scheme, including any debt governed by US Law, is hereby discharged as a matter of federal recognition. Further, the recognition under Chapter 15, in no way makes the discharge by foreign court, any less controlling or effective.[457] Discharge of debt, in pursuance of foreign proceedings, highlights the principles of comity and international co-operation.

The contrasting judgements on recognition make it difficult for countries to adopt Model Law. Though the principle of modified universalism, highlights centralized procedure for discharge, the judicial approach weakens the unification.

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[455] Modern Land China, (n 3).
[456] In re Inversora Eléctrica de Buenos Aires S.A., 560 B.R. 650 (2016).
[457] Modern Land China, (n 3).

VI. APPROPRIATE REDRESSAL

The principle of Modified Universalism, as incorporated in the Model Law on Insolvency, though has seen recent fall-throughs, continues to be a viable solution for the Indian cross-border insolvency regime. Adoption of Model Law on Insolvency, with tweaks and amendments according to the Indian needs, does include certain rays of hope for the country.

The fallacy of non-submission to jurisdiction can be resolved by ensuring a strict and transparent mechanism by Indian courts to specify the forms and modes of submission. The civil procedure of submission, mode of publication of notices, and application of Dicey's rules of appearance,[458] shall be made specifically applicable on insolvency cases. The inclusion of a narrow public policy clause under the hood of 'manifestly' in Article 6 of the Model Law, expands the scope of recognition and enhances co-operation among nations. Fostering a globalized approach, merely because two countries have different insolvency laws doesn't mean that applying such rules would be against that other country's national policy.[459] Provisions of concurrent hearings with foreign courts, develops an era of international co-operation and globalization.

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[458] Dicey, (n 9).
[459] *Id.*

The adoption of Article 20(3) of the Model Law further propagates the idea of modified universalism. The tussle between substantive or procedural effect of recognition, can be resolved through harmonious interpretation of contrasting jurisdiction cases. Rare Earth Magnesium[460] and Modern Land China[461], can co-exist by carefully interpreting the reasoning of the court. Recognition, would yield to substantive discharge, if the foreign proceedings were procedurally fair and the initiated in the correct jurisdiction of the debtor's Centre of Main Interests ("**COMI**").[462] India, while adopting the Model Law, shall bear in mind the components that formed the same. Judicial precedents, of various jurisdictions would be helpful in creating an effective mechanism. The committee report makes it clear, that mere recognition would not abrogate, individual creditor rights. The case of *Re Maxwell*,[463] even after adopting the principle of modified universalism, the local court maintained the right to decide whether the home country's processes were fair and to defend the interests of local creditors. A similar approach where a creditor continues to hold the right to initiate domestic proceedings, along with the recognition upholds the values of Modified Universalism.

Countries abroad have been recognizing Indian proceedings. The US Bankruptcy Court for the District of Delaware recognised the case *of SEL*

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[460] Rare Earth Magnesium, (n 3).
[461] Modern Land China, (n 4).
[462] *Id.*
[463] In re Maxwell Commun. Corp, 170 B.R. 800.

Manufacturing Company Limited,[464] pending before NCLT, and Chandigarh Bench as well, as foreign main proceeding within the meaning of section 1502(4).[465] It becomes high-time for India, to procedurally start recognizing foreign insolvency-based judgements, to maintain cordial international relations. Thus, it is the ripe time for India to venture into the world of developing its own cross-border insolvency regime.

For India to enact a successful and effective trans-national insolvency, it is imperative to develop an infrastructure, for foreign representatives.[466] Unless, a framework for the powers, limitations, rules, and regulations to allow foreign lawyers to approach courts in their individual capacity is developed, the powers under the Model Law will stand dysfunctional. Indian authorities have not just focussed on a legislative framework but have also been working on the rules and regulations to bring forth an effective execution. Alongside, there is also need to build human and organisational capacity and physical infrastructure to support the legislative framework.[467] The adjudicating authorities like NCLT and IBBI, would have direct contact with foreign courts and representatives, thus, need to be equipped with better human and organizational resources.

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[464] SEL Manufacturing Co Ltd and SEL Manufacturing Bankruptcy Court DC Delaware 1:2019-bk-10988 (deb).
[465] Sayak, (n 42).
[466] Report on Cross Border Insolvency, (n 41).
[467] Ministry of Corporate Affairs, *Report on The Rules and Regulations for Cross-border Insolvency Resolution*, 72. (2020). https://ibbi.gov.in/uploads/whatsnew/2021-11-23-215206-0clh9-6e353aefb83dd0138211640994127c27.pdf.

The technological know-how of the benches needs to be improved along with the strength of the presiding judges.[468]

Indian insolvency regime is at its peak at the moment, with the Government striving to make debtors functional. The drawbacks in adoption of the Model Law, outweighs the benefits propagated by the same. Thus, the country is ready to adopt the Model Law on Insolvency along with the principles of imbedded Modified Universalism.

VII. CONCLUSION

India has been developing at multiple fronts, from social to economic the country has seen leaps of progress. With the COVID-19 pandemic striking at the roots of a number of businesses, the country has started seeing a number of failing industries. A robust restructuring and bankruptcy mechanism, ensures proper functioning of such industries and strives to provide a 'breathing space' for newly restructured companies.

A globalized approach of both entrepreneurs and businessmen, spreads he wings of companies to multiple jurisdictions. Failure of such industries, calls for a multi-national insolvency regime. The current legislative protection under Section 234 and 235 of the Insolvency and Bankruptcy Code, 2016, in adequate to deal with modern day recognition problems.

[468] *Id.*

Neither the universalist approach nor the territorial approach has proven sufficient for the Indian setup. Thus, the need of a newer approach to resolve cross-border disputes has been felt for the legislature and the judiciary.

Adoption of the Model Law on Insolvency along with the imbedded principles of Modified Universalism is the most appropriate recourse for India. The ILC report,[469] CBIRC report[470] and the IBBI discussion paper,[471] all propagate the idea of adoption. The freedom to initiate domestic proceedings in the country, protects the Gibbs Rule and the rights of local creditors. A substantive universal proceeding with relevant recognition in jurisdictions around the world, re-ignites the aspects of comity and international co-operation.

Incorporation of the Model Law with the provisions of Insolvency and Bankruptcy Code, 2016, would ensure maximisation of assets of the corporate debtor. It would assist India in reducing its financial burden during liquidation of transnational companies. Further, a unified mechanism would place the country at a higher international standing and improve its inter-national financial relations. Although significant work is being done to lay the framework for a strong cross-border system, practical

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[469] Report on Cross Border Insolvency, (n 41).

[470] Report on Rules and Regulations, (n 71).

[471] Sudhaker Shukla and Kokila Jayaram, 'Cross Border Insolvency: A Case to Cross the Border Beyond the UNCITRAL' IBBI (2021) 15.

implementation must happen quickly, to aid in the bankruptcy of huge businesses with international assets and, therefore, the Indian economy.[472]

[472] Gautam Bhatikar and Neha Naik, *Cross-border insolvency: a way forward for the Indian framework*, INTERNATIONAL BAR ASSOCIATION 24. (2020).

ANALYSING SEBI'S REGULATORY CRACKDOWN ON FINFLUENCERS

- *Adv. Aadit Ved*[*] *and Vidhi Chouradia*[**]

Abstract - *This research paper delves into the evolving landscape of financial influencers, commonly known as 'influencers', in the wake of the COVID-19 pandemic. With the surge in retail investors seeking guidance, influencers have emerged as significant players in disseminating financial advice through social media platforms. While they have succeeded in simplifying complex financial concepts, their rise raises concerns about investor protection and market integrity. The paper evaluates the risks associated with finfluencers, including potential misinformation, misleading investment strategies, and stock manipulation. It also examines the existing regulatory framework overseen by the SEBI and the enforcement actions taken to combat fraudulent practices by finfluencers.*

*The study analyzes SEBI's proposed framework, including the revised guidelines by the Advertising Standards Council of India ("**ASCI**") and the 2023 Consultation Paper, aimed at increasing accountability and transparency among finfluencers. It further provides a cross-jurisdictional analysis of global regulatory approaches taken by countries like France, Australia, and the European Union to address similar challenges. Drawing on these international experiences, the paper offers tailored recommendations for India, including the introduction of dual categories*

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of advisors (Registered Investment Advisors and Unregistered Financial Advisors) and advocating for a collaborative approach between SEBI and ASCI in setting clear guidelines for finance-related content.

Keywords: *Finfluencers, SEBI, financial literacy, retail investors, ASCI, etc.*

I. INTRODUCTION

Following the outbreak of the COVID 19 there has been a change, in how financial markets operate. This shift can be attributed to a surge in investors who are actively seeking guidance. As a result we have witnessed the rise of individuals on social media platforms, commonly known as 'finfluencers'. These finfluencers have effectively utilized media to offer advice, insights and strategies to a growing audience of investors. However it is important to acknowledge that this trend raises concerns regarding investor protection and the integrity of markets.

In today's pandemic world social media platforms have become essential communication tools. The pandemic itself alongside uncertainties has prompted individuals to explore investment opportunities. Consequently there has been an influx of retail investors entering the markets known as 'D Street' who are moving away from channels for financial advice seeking. Of relying on registered financial advisors a significant number of these investors are turning to social media influencers, for guidance in navigating the complex world of finance. This shift is primarily driven by

these influencers ability to break down concepts into easily understandable and relatable content.

These finance influencers, also known as 'finfluencers' have played a role, in making finance more accessible to the public. They have a skill for simplifying financial terminology making it understandable, for everyday people. By creating informative content they have helped improve knowledge and empower individuals to manage their own financial futures. However the shift, from channels to social media influencers has brought about a range of challenges and risks that require immediate attention.

One major concern related to the rise of finfluencers is the impact on investor protection. Unlike registered advisors finfluencers often lack the qualifications, certifications and licenses required to provide sound financial advice.[473] While they may present their recommendations persuasively there are doubts about the reliability and accuracy of their guidance due to this gap in qualifications.

Furthermore the allure of gains has resulted in instances where finfluencers have unintentionally or intentionally misled their followers. Some finfluencers have recommended investment strategies with levels of risk putting investors capital at stake. In addition to advice there have been

[473] Ramaswamy, K.D, *Finfluencers in India: new paradigms of financial trust and authority*, 73 GENEVA GRAD. INST. INT'L & DEV. STUD. 733, 737-38 (2022).

cases where finfluencers have engaged in stock manipulation further undermining the integrity of financial markets. Their business models vary widely. Include activities such as endorsing products for monetary benefits or promoting products/platforms in exchange, for compensation.

To tackle these emerging challenges posed by finfluencers and ensure that investors can access impartial advice, the Securities and Exchange Board of India **("SEBI")** has taken proactive measures. SEBI and ASCI have come together to create a structure that requires finfluencers, in the sector to be more accountable. However with all the efforts made there are still some gaps, in the regulatory system that make investors vulnerable to potential risks.

This research paper aims to analyze the actions taken by SEBI to regulate finfluencers in India. It will examine the existing framework, SEBIs enforcement measures and the proposed regulations aimed at reducing risks associated with finfluencing. Moreover it will explore how financial regulators, in countries are dealing with the challenges posed by finfluencers providing insights. Based on these approaches the research will conclude by offering recommendations to strengthen Indian framework. These recommendations aim to ensure investor protection while promoting finfluencing and fostering literacy.

II. FINFLUENCERS AND THEIR IMPACT

A. Emergence of Finfluencers

The rise of finfluencers signifies a change, in how financial information's shared and consumed in the digital era. These individuals, who are often self-taught experts in finance have utilized social media platforms to make financial knowledge more accessible for everyone. Unlike sources finfluencers excel at simplifying financial concepts into relatable content that is easy to understand for the average person.

In a time where financial literacy is increasingly valued finfluencers have played a role in bridging the gap, between financial education and everyday consumers. They utilize their expertise and communication skills to convey insights, investment strategies and market trends in a way that resonates with their audience.[474] This approach has proven effective in engaging individuals who may have previously felt disconnected or overwhelmed by the complexities of finance.

The emergence of finfluencers is an example of how information has become more accessible, to everyone. Platforms such as YouTube, Instagram, TikTok and Twitter have allowed them to gather followers. These followers include both investors seeking guidance and curious individuals looking to expand their knowledge. This

[474] Almahdi, M. H. Alsayed, N. & Alabbas, A, *In influencers we trust? A model of trust transfer in social media influencer marketing*, 73 YALE L.J. 733, 737-38 (2022).

shift, towards making financial education easier to understand has definitely attracted a range of people who are actively involved in investment activities. However like any trend the rapid rise of finfluencers has brought its share of challenges and potential risks.

B. Risks Posed By Finfluencers

While influencers, in the space have certainly made financial knowledge more accessible to the public it's important to be cautious about the risks they bring. One major concern is that these influencers often replace sources of financial advice. Unlike certified advisors who undergo training and adhere to strict codes of conduct influencers may not have the formal qualifications or oversight needed to provide reliable financial guidance. This difference in credentials and regulatory oversight creates a risk of misinformation and misguided investment decisions. Sometimes influencers may unknowingly share incomplete information, which can lead their followers down a financial path. Moreover their desire for gains might push them to promote high risk investment strategies that may not be suitable for everyone.

Adding to this risk is the variety of business models used by influencers. From endorsing products to receiving compensation for promotions there's a potential for conflicts of interest. The line between advice and commercial interests can become blurry which

could result in biased recommendations.[475] Overall while finfluencers have made finance more accessible it's crucial to approach their advice with caution due, to these drawbacks. This conflict has the potential to compromise the reliability of advice which could put investors' money at risk unnecessarily.

One particularly concerning aspect is the possibility of finfluencers engaging in stock manipulation. With their reach and influence they can artificially inflate stock prices leading to investment choices and potentially harming the overall financial market. Considering these risks it becomes crucial to find a balance, between the advantages of education and the need to protect investors. Regulators like the Securities and Exchange Board of India (SEBI) face a challenge in adapting existing frameworks to tackle the challenges posed by the rise of finfluencers.

In conclusion while its undeniable that finfluencers have brought about a revolution in improving literacy their emergence also brings along risks that require careful attention. The potential for misleading information conflicts of interest and stock manipulation highlight the necessity for measures. Striking a balance, between accessibility and accountability is vital to protect investors interests in an era shaped by media driven influencers.

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[475] BHANDARI, K.S.,*The Rise Of Finfluencers: Why Is SEBI Monitoring Them? Entrepreneur* India , June 15, 1990, at A1

III. EXISTING REGULATORY FRAMEWORK

A. SEBI's Jurisdiction

In India the regulations governing influencers also known as 'finfluencers' have a gap. The SEBI plays a role, in overseeing and regulating entities in the financial sector. However there is a limitation when it comes to finfluencers.

SEBI has regulations in place to oversee registered investment advisors (**"RIAs"**) and research analysts (**"RAs"**). These regulations impose requirements, on individuals and entities that provide advice and analysis.[476] For example RIAs are required to meet qualifications adhere, to a defined code of conduct and maintain transparency in their interactions with clients. Similarly, RAs must comply with regulations that govern their certification, disclosure of conflicts of interest and other aspects of their responsibilities.

In contrast individuals known as 'finfluencers' operate in a gray area. They often do not fall under the jurisdiction of SEBI primarily because there are no regulations tailored to their role. Unlike RIAs

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[476] Mishra, R., *Regulating Finfluencers: A Case Study of SEBI's Proactive Measures*, Securities and Exchanges Review 25, SER 112-126 (2021).

and RAs who have mandates, from SEBI finfluencers navigate the landscape without the same level of oversight. This regulatory gap presents challenges when it comes to ensuring the quality and accuracy of advice shared with the public.

B. SEBI's Enforcement Actions

Despite the lack of regulations SEBI has taken an approach, to tackling the challenges presented by unregistered financial influencers. The regulatory body has used existing provisions effectively to combat activities in this field. One particular area of enforcement focuses on 'pump and dump schemes'. These schemes involve the dissemination of misleading information with the aim of artificially inflating stock prices.[477] Financial influencers, often collaborating with market participants play a role in executing these schemes. They leverage their reach and influence to create a sense of excitement and urgency around stocks enticing investors into making impulsive decisions.

SEBIs response, to practices has been prompt and resolute. The regulatory authority, armed with provisions, from the SEBI Act and the SEBI PFUTP Regulations has taken action against those involved. By issuing orders and conducting investigations SEBI

[477] Verma, P., *The Influence of Finfluencers: A Legal and Regulatory Perspective*, Journal of Financial Ethics 5, JFE 234-247 (2021).

aims to rectify the distortions caused by these schemes and hold wrongdoers accountable for their actions.[478] These enforcement measures demonstrate SEBIs commitment to upholding the integrity and transparency of India's markets even in light of the evolving challenges posed by the rise of financial influencers. However they also highlight the pressing need for an tailored framework that specifically addresses the unique risks associated with this new breed of financial influencers.

In conclusion although SEBIs existing regulatory framework forms a basis for tackling practices by financial influencers it is evident that an exclusive and nuanced set of regulations is crucial. This framework should not outline the responsibilities and obligations of influencers but also prioritize safeguarding investors from potential risks associated with their advice and recommendations. Achieving this balance will play a role, in strengthening India's ecosystems credibility and stability in the years ahead.

IV. SEBI'S PROPOSED FRAMEWORK

A. ASCI's Revised Guidelines

[478] Chikhi, Imene, *Financial Influencers and Social Media: The Role of Valuable and Trusted Content in Creating a New Form of Authenticity*" JFE 234-247 (2021).

Acknowledging the influence that financial influencers hold in spreading knowledge the ASCI has implemented important measures to promote responsibility, in this field. ASCIs updated guidelines specifically focus on influencers who operate within the banking, financial services and insurance (**"BFSI"**) sectors. According to the revised guidelines individuals who provide investment related advice, known as finfluencers must meet criteria to ensure they are qualified and capable.[479] This includes being registered with the SEBI and having qualifications. These qualifications demonstrate the expertise and competence of finfluencers, in the field.

The decision by ASCI aligns with their objective of protecting investors from misleading or uninformed financial advice. By setting standards, for finfluencers ASCI aims to establish a level of trustworthiness and reliability in the advice offered by these influencers.

B. 2023 Consultation Paper

[479] Das, Vipul. ‚*SEBI to issue regulations for finfluencers: How do the steps come into play?,*LiveMint, November 24, 2022.

SEBIs Consultation Paper, for 2023[480] is a step in measures to ensure the transparency and reliability of financial advice provided by finfluencers, which introduces a set of requirements and guidelines that apply to registered finfluencers. These measures aim to improve the quality and accuracy of advice while also safeguarding investor interests.

The consultation paper highlights provisions, including;

(i) **Mandatory Disclosures:** Registered finfluencers must include information in their posts, such as their SEBI registration number, contact details, investor grievance redressal helpline and a disclaimer. These disclosures promote transparency. Allow investors to verify the credibility of the finfluencer.

(ii) **Adherence to Codes of Conduct:** Finfluencers are expected to follow codes of conduct outlined based on their registrations. This ensures that their advice is provided without bias thereby enhancing investor confidence.

[480] SEBI, *Consultation paper on Association of SEBI Registered Intermediaries/Regulated Entities with Unregistered Entities (including Finfluencers),* Securities and Exchange Board of India (SEBI) (August 25, 2023).

(iii) The consultation paper states that registered finfluencers are not allowed to give or receive trailing commissions based on referrals. This rule is, in place to minimize conflicts of interest and protect the interests of investors.

(iv) Entities regulated by SEBI stock exchanges or AMFI are prohibited from sharing client information with entities. This provision adds a layer of protection for investors.

SEBIs 2023 Consultation Paper represents an effort to address the gap that has allowed finfluencers to operate with limited oversight. By implementing these requirements SEBI aims to enhance the credibility and dependability of advice provided by registered finfluencers.[481] Ultimately this will strengthen investor protection. Contribute to the integrity of Indian financial markets.

In conclusion ASCIs updated guidelines and SEBIs 2023 Consultation Paper demonstrate a coordinated approach, towards regulating finfluencers activities. By establishing requirements and guidelines both organizations strive to create an environment where investors can access trustworthy financial advice thereby reinforcing Indian financial ecosystems integrity.

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[481] Sridharan, Srinat, *FinFluencers: What code of conduct should we have?*, Observer Research Foundation, December 08, 2022.

V. CROSS JURISDICTIONAL ANALYSIS: GLOBAL REGULATORY APPROACHES

Due, to the rise of finfluencers and the potential risks they bring to investor protection and market fairness several countries have implemented regulations. France, Australia and the European Union (**"EU"**) have taken measures to regulate the activities of finfluencers and promote an environment in their financial markets.

A. France

France has taken a leading role, in implementing regulations to govern the activities of influencers. The country has made it against the law for influencers to promote products, including cryptocurrencies through paid content.[482] These regulations come with penalties for those who fail to comply. Influencers who are found to be in violation of these rules could potentially face imprisonment for up to two years and fines of up to 300,000 Euros. By imposing consequences, for non-compliance France is clearly expressing how seriously it views the issue of providing misleading financial advice.

B. Australia

[482] Patel, M., *SEBI's Battle Against Misleading Finfluencers: An In-Depth Analysis,* Journal of Financial Compliance 9, JFC 455-470 (2022).

Australia has also taken measures to regulate the activities of finfluencers. In Australia it is considered illegal to operate a financial services business without a license. The penalties, for not complying with this regulation are quite severe. Individuals can face up to five years of imprisonment while corporations can be fined millions of dollars. To determine if the advice given by a finfluencer qualifies as advice the Australian Securities and Investment Commission (**"ASIC"**) has established a threshold.[483] This threshold examines whether the influencers compensation or benefits depend on consumer behaviour. If there is such a conflict of interest the advice is categorized as financial product advice. The ASICs Information Sheet 269 (**"INFO 269"**) outlines a code of conduct, for finfluencers that highlights the significance of disclosure practices, diligence and exercising caution when providing financial advice.

C. European Union

The EU has adopted a multifaceted approach to regulate finfluencers. Under the Unfair Commercial Practices Directive, hidden marketing, including undisclosed endorsements or promotions, is prohibited. Finfluencers who fail to label sponsored

[483] Hansen, T. ,*Understanding trust in financial services: The influence of financial healthiness, knowledge, and satisfaction,*Journal of Service Research, 15(3), 280–295 (2012).

content could face civil and administrative penalties. The regulations, on market abuse in the EU highlight the importance of advice and the disclosure of any conflicts of interest. It is also crucial for finfluencers to clearly differentiate between information and interpretations estimates, opinions and other non-factual content to avoid facing penalties.

These regulatory approaches adopted globally share a goal; safeguarding investors and preserving the integrity of markets. By implementing measures these countries are taking steps to tackle the challenges posed by finfluencers. The penalties for not complying with these regulations serve as a warning to influencers who might be tempted to provide misleading advice for personal gain.[484] Furthermore incorporating thresholds and codes of conduct promotes transparency and accountability when offering advice. These regulatory frameworks lay out guidelines for influencers outlining their responsibilities and highlighting the consequences if they fail to comply.

Thus, India can draw insights from countries, like France, Australia and the EU that have employed global regulatory approaches in dealing with finfluencer related challenges. By learning from their experiences and adapting them to the Indian landscape, a robust

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[484] Gupta, S., *Regulatory Measures for Finfluencers: A Comparative Study,* Financial Regulation Quarterly 15, FRQ 789-803 (2021).

regulatory framework can be developed. This framework has the potential to safeguard investors while also playing a role, in upholding the integrity and stability of Indian markets.

VI. RECOMMENDATIONS FOR INDIA

A. Dual Categories of Advisors

To ensure regulation of the activities of influencers and safeguard the interests of investors SEBI could consider implementing a two tier system, for financial advisors, in India. This proposed system would establish two categories; RIAs and Unregistered Financial Advisors.

(i) **Registered Investment Advisors:** This category would cover professionals who have to meet qualification and certification requirements, like individuals who're Chartered Accountants (CAs) Chartered Financial Analysts (CFAs) or those with relevant MBA degrees in finance. RIAs would be subject to oversight and compliance standards. They would have the authority to provide investment advice for a fee. Would be obligated to transparently disclose any potential conflicts of interest. Moreover RIAs would adhere to a code of conduct that includes

guidelines, on ethics, transparency and safeguarding the interests of investors.

(ii) **Unregistered Financial Advisors:** This category would cover people or organizations that offer guidance without meeting the qualifications needed for RIAs. These advisors would have to fulfill minimum requirements, for disclosing information and conducting diligence. While they wouldn't have the level of oversight as RIAs they would still be obliged to provide important disclosures to ensure transparency.[485] Unregistered advisors wouldn't be allowed to charge fees for their services thereby making it clear to investors that their advice isn't subject to the level of scrutiny, as that of RIAs.

Introducing these two categories would help cater to the types of advisors out there recognizing that some influencers might have market expertise without formal qualifications. This approach ensures that investors can choose from a range of financial advice options while also setting boundaries in terms of regulations and investor expectations.

[485] Prachi Pandya, and Shaili Dhulia. *FinFluencers - From the Lens of SEBI*, August 29, 2023. SCC Online.

B. Collaborative Approach

To ensure that finance related content posted on media platforms is informative and reliable it would be beneficial for SEBI to collaborate with the ASCI. This collaborative effort aims to establish effective guidelines that finfluencers need to follow when sharing information, on digital platforms.

Taking inspiration from practices used by organizations like the ASIC with their Information Sheet 269 well as the U.S. Federal Trade Commission's Disclosures 101 for Social Media influencers, SEBI and ASCI can work together to develop comprehensive guidelines that;

(i) **Prioritize Transparency:** These guidelines would require finfluencers to disclose any affiliations, sponsorships or potential conflicts of interest. This transparency ensures that viewers are aware of any biases that may exist in the advice they receive.

(ii) **Encourage Due Diligence:** Finfluencers should be encouraged to conduct research on the products or services they discuss. This includes verifying the accuracy of information and data presented in their content.

(iii) **Promote Responsible Communication:** The guidelines will emphasize communication practices. Finfluencers should refrain from making claims, exaggerated promises or guarantees regarding investments. It is important for them to distinguish between facts and opinions, in their content.

(iv) **Protect Vulnerable:** It is crucial to prioritize the protection of viewers who may be more vulnerable such, as those who're new to investing or have limited knowledge, about finance. Finfluencers should refrain from using terminology. Instead focus on providing educational and informative content to their audience.

(v) **Enforce Penalties for Non-Compliance:** SEBI and ASCI ought to establish consequences, for finfluencers who do not adhere to these guidelines. Penalties, for violations may consist of warnings, fines or temporary suspensions from participating in activities.

By working SEBI and ASCI can establish practical, relevant and effective guidelines to govern the conduct of finfluencers on social media platforms. This partnership ensures that the regulatory framework remains adaptable and responsive to the changing digital communication landscape.

To conclude, India finds itself at a crossroads in regulating finfluencers and safeguarding investor interests. SEBI can achieve a balance between promoting literacy and protecting investors by implementing a dual category system for advisors and partnering, with ASCI to develop comprehensive guidelines. These recommendations seek to foster an environment where trust, transparency and responsible financial communication thrive in the era.

VII. CONCLUSION

As India adapts to the changing landscape of services, in the digital era the SEBI plays a crucial role in regulating and overseeing these efforts. The rise of finfluencers during the COVID 19 pandemic has had an impact on improving financial knowledge while also posing significant risks.[486] SEBIs proactive engagement is vital in ensuring that Indian financial markets maintain their integrity and transparency.

The emergence of finfluencers has brought about a transformation by simplifying financial concepts and making them more accessible to everyone. However this shift also raises concerns as retail investors increasingly rely on media for guidance sometimes bypassing traditional advisors who are subject, to regulation. The use of finfluencers, who may

[486] Sharma, A.,*Unmasking the Risks: Finfluencers and Market Manipulation*, Securities and Investments Review 12, SIR 123-136 (2023).

have qualifications and intentions poses a significant risk, to protecting investors especially in a country where financial literacy is lower than global averages.

While finfluencers contribute to education they have also been involved in misleading investors, jeopardizing capital and even manipulating stocks. The various ways they conduct their business operations, such as endorsing products or receiving compensation for promotions amplify these risks. The lack of regulations governing finfluencers creates a gray area that allows them to operate with less scrutiny compared to RIA and RA.

SEBIs enforcement actions demonstrate their commitment to cracking down on practices by finfluencers.[487] Notable cases involving 'pump and dump schemes showcase SEBIs vigilance in safeguarding investors from activities. These actions act as a deterrent. Send a message that fraudulent behavior will not be tolerated. To address the challenges posed by finfluencers SEBI has proposed a framework in collaboration with the ASCI. The revised guidelines introduced by ASCI highlight the importance of registration and relevant qualifications for influencers, in the BFSI sectors. Furthermore the Consultation Paper released by SEBI, in 2023 brings forth regulations for registered influencers. These regulations include disclosure of information adherence to guidelines and a complete ban, on referral fees.

[487] Kapoor, R., *Navigating the Finfluencer Landscape: A Regulatory Analysis*, Journal of Financial Governance 28, JFG 345-361 (2022).

Looking forward SEBI will encounter challenges. It is crucial for them to keep up with advancements collaborate with regulators and stay ahead of innovative marketing strategies used by financial influencers. SEBIs continuous dedication, to these challenges will play a role in maintaining the honesty and transparency of India's ecosystem. To conclude, SEBIs regulatory efforts are essential in safeguarding Indian markets amidst the changing landscape. The ability to strike a balance between promoting literacy and ensuring investor protection will demonstrate the resilience and adaptability of Indian framework. As financial influencers continue to impact investment decisions SEBIs unwavering commitment remains pivotal in shaping an resilient landscape, for India.

MOTIVE OF INSIDER TRADING? ANALYSING THE ROLE OF *MENS REA* IN LIGHT OF INSIDER TRADING

- *Jay Shah*[*] *and Simran Shrivastava*[**]

ABSTRACT: *The authors through this paper seek to draw a parallel between Insider Trading and the Egyptian Folklore of Isis. The article then delves into the statutory readings, describing the relevant sections under Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 2015 (**"PIT Regulations"**). The paper notes and highlights the similarity between laws related to insider trading and mens rea, as highlighted in the recent case of Abhijit Ranjan v. SEBI. The authors note that insider trading has punishments similar to criminal offenses, and thus. but insider trading proceedings still use a lower threshold of preponderance of evidence, rather than beyond reasonable doubt. Thus, by drawing a comparison between 'theft', 'competition law' and 'insider trading', the authors study the position of law in other jurisdictions, and seek to analyse whether the standard established in India to hold someone guilty of insider trading needs amendment.*

KEYWORDS – *Insider Trading, Mens Rea, UPSI, Securities Market, SEBI*

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I. INTRODUCTION

The Egyptian folklore of Isis can be considered as one of the first parallels to insider trading. The folklore narrates the story of how Isis Poisoned Ra, the sun God - arguably the strongest god of Egyptian mythology, and acquired his secret name. She then used the name to heal the god, and also gain more powers. This clearly showed that the act was considered inappropriate on its mala fide use. It was only after the mala fide use for personal gain that the orchestration of the whole act was looked down upon. Hence, while drawing a parallel to insider trading Isis can be considered as an Insider, the secret name as Unpublished Price Sensitive Information ("**UPSI**") and Ra as the Shareholders who are at loss due to such insider trading. In light of the above illustration the authors shall evaluate if the stance of the Supreme Court on the requirement of motive in insider trading is in accordance with legal principles and jurisprudence.

II. DEFINING INSIDER AS CRIME BASED ON PUNISHMENT

The Indian watchdog of Securities Regulator in India i.e. the Securities and Exchange Board of India (**"SEBI"**), seeks to prohibit insider trading under SEBI (Prohibition of Insider Trading) Regulations, 2015. Interestingly, these Regulations do not define 'insider trading' directly, but provide conditions under which a person would be guilty of committing insider trading. The guilty should be an 'insider' in whose listed security he deals

and such person should be in possession of UPSI, either directly or indirectly. On fulfilment of these twin conditions, a person would be considered guilty of committing insider trading.[488]

Section 15G of the SEBI Act (**"Act"**), 1992 prescribes the punishment for insider trading SEBI imposes a fine which is not less than ten lakh rupees, but it may extend to twenty-five crore rupees or thrice the amount of profits earned out of insider trading, whichever is higher.[489] Further, under Section 24 of the Act, SEBI has prescribed for imprisonment if any person acts or attempts to act in contravention to the provisions of The Act. This imprisonment can be up to 10 years or with twenty-five crores fine, or both.[490]

However, conviction rates for the offense of insider trading are very low due to the difficulty in proving two key elements: i) mens rea, or the guilty state of mind, and ii) guilt beyond a reasonable doubt. The case of *Dilip Pendese v SEBI*[491] highlights the issue of low conviction rates in Insider Trading. In the present case, the spouse of Mr Pendse was charged with having UPSI. However, the decision was given after a decade and the defendant merely had to pay the penalty amount, without facing imprisonment charges. As a result, this case highlights the issue of lack of

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488 Securities and Exchange Board of India (Prohibition of Insider Trading) Regulations 2015, 2(g).
489 Securities and Exchange Board of India Act, 1992, §15G.
490*Id.*, §24.
491 Dilip Pendese v SEBI, (2010) 2 taxmann.com 15 (SAT)[19-11-2009]..

vigilance and investigation on SEBI's part, emphasising on the need of building an efficient investigative mechanism. Furthermore, the report released by SEBI in 2020 shows a high rate of pending cases in the securities market. It was noted that *"SEBI as a regulator in the instant case has not performed its duties*",[492] thus hinting towards the reason for the low imprisonment rates in India in cases of insider trading.

Shedding light on the aspect of 'intent' in the case of *Hindustan Level Limited v. SEBI*,[493] the arguments focussed on the importance of intent. However, the contentions were negated by the Securities Appellate Tribunal (**"SAT"**). Contrarily, in the case of *Rakesh Agarwal v. SEBI*,[494] the court stated that "*it is true the regulation does not bring in mens rea as an ingredient of insider trading. But that does not mean that the motive needs to be ignored."* In S*EBI v. Cabot International Capital Corporation,*[495] the High Court of Bombay clarified that the penalty under section 15G of the Act is for the failure of a statutory obligation and since criminal offences and subsequent imprisonment require *mens rea*, it is not an essential element for imposing penalty. The said section is neither criminal nor quasi-criminal in nature and thus different from section 24 of

[492] Ashok Dayabhai Shah v SEBI, (2019) 111 taxmann.com 290 (SAT - Mumbai) [14-11-2019].
[493] Hindustan Level Limited v SEBI, (1998) 18 SCL 311 MOF.
[494] Rakesh Agarwal v SEBI, (2004) 49 SCL 351 SAT.
[495] SEBI v Cabot International Capital Corporation, (2004) 51 SCL 307 BOM.

the Act. The existing statues point towards the fact that insider trading can be established even without establishing 'motive'.

III. MENS REA & THE SUBSEQUENT PREDICAMENT IN LAW

The next segment of the paper revolves around the confusion dealing with the inclusion of *mens rea* as an essential of insider trading. At this juncture, it would first be prudent to know that '*mens rea'* has not been recognised essential to prove the guilt of insider trading. Section 3(1) of the SEBI Regulations[496] describe the procurement or communication of UPSI to any person other than an 'insider' for anything except discharge of legal obligations and legitimate purposes. The PIT Regulations under Section 12A of SEBI Act, 1992[497] prohibit persons from engaging into insider trading, either directly or indirectly. It mentions dealing in securities 'while in possession' of UPSI. Subsequently Section 15G of SEBI Act, 2015[498] deals with securities on the basis of UPSI as well as lays down the penalty for violation of the provisions of insider trading. Hence the Committee of Fair Market Conduct recommended that the above laid sections need to be in alignment.[499] These sections act as a caveat for insiders as *mens rea* of

[496] *Supra* 489, §3(1).
[497] *Id*, §12A.
[498] *Id* 1, §15G.
[499] Dr. T. K. Viswanathan, Report of Committee on Fair Market 8 August, 2018, https://www.sebi.gov.in/reports/reports/aug-2018/report-of-committee-on-fair-market-conduct-for-public-comments_39884.html.

the tipper is still considered irrelevant, in many cases across Indian Jurisdictions.[500]

In the case of *SEBI v. Shriman Mutual Fund*,[501] it was held that *mens rea* cannot be used as a tool for penalisation under PIT Regulations. Further in *Hindustan Lever Ltd v. SEBI*,[502] too, the SAT upheld that knowledge is immaterial to insider trading and the SEBI Act does not emphasise on the need to include *mens rea* for the recognition of insider trading. On a plain reading of these cases, it can be reasonably concluded that courts have always interpreted this 'strictly'. However, in the case of *SEBI v. Abhijit Ranjan*,[503] the Apex Court took a liberal approach and held that mere possession of any price sensitive information is not sufficient to prove the charges for insider trading. It is critical to note that the transaction's intent should be to derive profit from the said dealing. Thus, the amount of gain or loss is irrelevant, but the motive behind the transaction is of significance. By interpreting 'attempt by the insider to encash the benefit' as an important part of the offence, the Apex Court has taken a pragmatic approach, drifting away from the strict interpretation of law.

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[500] Rishika Sharma, Mens rea and Insider trading: A comparative study of the Indian and US regulatory frameworks' CBCL BLOG (7 January 2023), https://cbcl.nliu.ac.in/uncategorized/mens-rea-and-insider-trading-a-comparative-study-of-the-indian-and-us-regulatory-frameworks/.
[501] SEBI v Shriman Mutual Fund, (2006) AIR 2006 SC 2287.
[502] Hindustan Level Limited v SEBI, (1998) 18 SCL 311 MOF.
[503] SEBI v Abhijit Ranjan, (2020) Civil Appeal No.563 of 2020.

A paradigm shift in insider trading is expected to follow from this decision of the Supreme Court. The absence of a profit motivation might be regarded as a strong defence moving forward in addition to the defined arguments made available by the PIT Regulations in case of insider trading.

Regulations against insider trading are primarily intended to stop individuals from unfairly gaining an advantage when trading on the basis of confidential information. The authors thus postulate that *Mens Rea* conforms to the PIT Regulations' aim/purpose. The Court's ruling in this instance is therefore a stitch in time. The ruling is also applauded because it moves Indian threshold closer to globally acknowledged standard.[504]

IV. JUDGEMENTS SHOWING VIEWS ON INSIDER TRADING

As pointed out before, insider trading has a punishment similar to any penal offence. In light of this, the stance of the Supreme Court is congruous with established jurisprudence. Another lacuna when it comes to proceedings of insider trading, is the threshold of preponderance of evidence. It has been observed in several cases that the verdict is still based on preponderance of evidence rather than beyond reasonable doubt. In *Jubilant Stock Holding*

[504] Mukul Sharma, Winds of Change – The Recent Judicial and Legislative Developments in Insider Trading Regime, CYRIL AMARCHAND MANGALDAS (2 January 2023, https://corporate.cyrilamarchandblogs.com/2022/11/winds-of-change-the-recent-judicial-and-legislative-developments-in-insider-trading-regime/.

Pvt. Ltd. and Ors. v. Securities Exchange Board of India,[505] the appellant was held liable for insider trading because they could not corroborate their evidence. In case of *Nitin Agarwal v. SEBI*,[506] the SAT reduced the fine imposed on appellant arising out of non-disclosure on the basis that the non-disclosure did not lead to any harm to any investor. Hence, we observe that while the regulations are now interpreted in a consequential manner, the relevance of procedure is not completely side-lined.

V. COMPARING INSIDER TRADING TO OTHER OFFENCES

When factoring in this approach, the offences comparable to insider trading should be juxtaposed, to identify threshold of penalty , The first comparison can be drawn between theft and insider trading. Theft is said to be committed when the following occur simultaneously:

(i) Dishonest intention

(ii) Take away moveable property;

(iii) Same is done without consent.[507]

The punishment for same is imprisonment and/or fine.[508] When we consider insider trading in light of the development of jurisprudence

[505] Jubilant Stock Holding Pvt. Ltd. and Ors. v Securities Exchange Board of India, (2019) SCC OnLine SAT 228.

[506] Nitin Agarwal v SEBI, (2019) SCC OnLine SAT 18.

[507] The Indian Penal Code 1860, §378.

[508] *Id.*, 379A.

around insider trading it can be observed that now courts emphasis on the following:

(i) Intention of profit or avoiding loss;[509]

(ii) The sale or purchase of securities.[510]

Securities are recognised as a moveable property and in case of securities due to the anonymity and fragmentation of traders; the consent is said to have been taken when securities are put for transaction through online platform or brokers. Now, if the same is examined at a deeper level, it can be inferred that trading is a zero-sum game,[511] which implies the net outcome is zero, as there is always a party who loses and other party which gains. This means a person having an UPSI can be 'constructively' held liable to have known that any trade based on such information is going to lead to loss to some other party/parties. This amounts to having a dishonest intention to cause loss to someone as here a moveable property, which is securities, is taken away from possession of an individual or delivered to avoid loss and churn out profits from retail investors due to market movements.

The Indian Penal Code is devised to provide punishment for offences within territory of India similarly the SEBI act is created to safeguard

[509] SEBI v Abhijeet Rajan, (2022) SCC OnLine SC 1241.
[510] *Supra* 489, §2(d).
[511] Dolgopolov S., Insider trading: Informed trading, and market making: Liquidity of securities markets in the zero-sum game, 3 Wm. & Mary Bus. L. Rev., 1 (2012).

interest of retail investors who suffer from imperfect knowledge of market conditions and inadequate resources compared to Qualified Institutional Banks and High Net worth Individuals. From this standpoint, it is evident that mens rea is a pre-requisite for insider trading, similar to theft. Even Competition Law can be juxtaposed in a similar fashion. Competition law primarily deals with formation of cartels which can unjustly impact prices of commodities and harm the consumers of the products due to price manipulation.[512] The basic requirements for a suit under competition law requires the following:

(i) Few large companies with substantial market control;
(ii) Enterprise or association for control or acquisition of goods or provision of services;
(iii) Limit or control production;
(iv) Direct or indirect rigging.[513]

Hence, a cartel simply means a group or association of entities who have the capability of influencing the supply, price, production etc. of any goods or services.[514] When we consider insider trading it can be put quite closely

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512 8th Edition, WHISH R. & BAILEY D., COMPETITION LAW (Oxford University Press, 2015).
513 Ram Kumar Poornachandran, Shreya Singh, Dhruv Chadha, Cartels: India, Global Competition Review (March 25, 2022), https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/2022/article/india-cartels#:~:text=As%20a%20first%20step%20in,allocate%20markets%20or%20rig%20bids
514 The Competition Act, 2002, §3(1).

to cartelisation and other offences under competition law for the following reason:

(i) Promoters, and Qualified Institutional buyers if the case may be, form the majority shareholders of a company;
(ii) They are higher probability of them having information which is not to the retail investors but capable of affecting the price of stock;
(iii) They have capability of rigging the market by increasing or decreasing supply.[515]

Thus, we can observe that like competition law there is a group of entities which have a dominant position due to their proximity with the enterprise whose securities are in question and the same is possible to be abused for acquiring super normal profits or avoiding loss. The punishment under competition law is purely civil which is up to three times the profit made by such enterprise for each year of the continuance of cartel; or 10% of the turnover of the enterprise for each year of the continuance of the cartel.[516]

Assessing the position of Supreme Court on the requirement of motive in insider trading, the competition commission uses the following steps at a preliminary level to adjudge if a cartel is formed:

(i) Competitors entering in same price
(ii) Limiting or controlling supply

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[515] Id., §3(3)(d).
[516] *Supra* 533, §27(b).

(iii) Possibility of rigging

(iv) Development prior and after such collusion

(v) The wide use of agreement provide Competition Commission the liberty to recognise multiple 'coincidences' and 'indicia' as agreement;

(vi) Presumption in favour of existence of cartelisation on identification of cartelisation[517]

The underlying deduction of the identification is to verify the existence of *mens rea* to form a cartel. Section 7 of The Indian Evidence Act[518] provides for *res gestae,* which means action forming part of same transaction which are not separable from each other and that they are so connected that they form admissible evidence. Section 8 of The Indian Evidence Act,[519] provides for motive and consideration of precedent and subsequent acts of the accused to be relevant and admissible. This section also conveys that motive is not relevant for crime when conduct can show the intention of the alleged party. The same is reflected in the recent Supreme Court case,[520] and this stance of Supreme Court is welcomed. Motive becomes an important part of such offences which affect public at large and thus there cannot be a judicial discretion or lenient approach in considering matters pertaining to insider trading.

[517] *Supra* 533.
[518] Indian Evidence Act 1872, §7.
[519] *Id.*, §8.
[520] SEBI v Abhijeet Rajan, (2022) SCC OnLine SC 1241.

The subsequent question regarding the threshold of insider trading can be approached in a two-pronged manner.

Firstly, as observed in *Balram Garg v. Securities and Exchange Board of India*[521] that the burden of proof is on SEBI to show that the accused have unpublished price sensitive information and trading is done on the same. It further stated that mere circumstantial evidence is not sufficient to prove that the accused committed insider trading. Hence, creating dilemma on the position of regulation 4(1) of PIT Regulations

From here, the Court should take a divergent view for the following reason:

(i) Insider trading unlike other crimes does not have a long procedure to affirm with complete conviction the existence of *mens rea;*

(ii) Often the preparation is not noticeable by other people. For example, in a case a murder procurement of weapon, the physical act, actions of hiding body etc provide ample scope to affirm *mens rea;*

(iii) It is more convenient to conceal insider trading with algorithmic trading and self-adjusting market order placement.

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[521] Balram Garg v Securities and Exchange Board of India, (2021) Civil Appeal No. 7054 of 2021.

Hence, the threshold for insider trading should be redefined. Similar to the Competition Act, there should be preliminary parameters and then a detailed evaluation of factual events. The following could be, not exhaustive, indicators for the same:

(i) Trading after closing of trade window;

(ii) Breach of or delay in making disclosures;

(iii) Transaction in related party accounts on inception of any substantial development which can have future price implications, but traded before closing window was closed for finding circular orders. For example, if the company is deciding merger and the director procures shares in a related party account before finalisation of the merger, i.e. when the trading window closes;

(iv) Trading between intimation and execution of internal business decisions, e.g. Retirement of director, entrenchment of workers, and/or trading between completion of shareholders meeting and disclosure of the same outcomes of the meeting etc.

Hence, the SEBI should be empowered to shift the burden on the accused to corroborate the same prove that there was no motive of insider trading. Moreover, the same shall not be treated merely as circumstantial evidence but should be considered relevant evidence which if not justified beyond reasonable doubt, should be capable for forming the basis of conviction.

Another predominant reason for requiring *mens rea* to prove insider trading is due to the evolving concept of 'shadow trading'.[522] In simple terms, shadow trading refers to the event where an insider of a company invests in other companies of the same sector rather than their own company in order to make profit and to evade the allegations of insider trading. The instance of shadow trading came forward in the case of *SEC v. Punawat in USA*,[523] where the director invested in a rival company on basis of sector specific news and churned profit from the same.

The threshold here should be similar as enumerated above but the reason it gets complicated is because such a wide scope can foreshadow the right of an individual to invest. There is requirement of a delicate balance and hence in such cases conviction cannot be based on circumstantial evidence and would require concrete evidence of motive to prove that a shadow trade was made on acquisition of unpublished price sensitive information. The difference between the current structure of insider trading and shadow trading would be that for the former, the onus would shift more easily than in the latter, as the adjudicating authority in the latter would have to provide specific evidences to establish an arrangement of events in such a manner that there is no possibility of any other way the incident could have taken

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[522] Mihir Deshmukh, Shadow Trading- An Indian Perspective, INDIA CORP LAW (16 January 2023), https://indiacorplaw.in/2022/01/shadow-trading-an-indian-perspective.html.

[523] Securities and Exchange Commission v Matthew Panuwat, (2021) Litigation Release No. 25170.

place.[524] Particularly, for shadow trading the prosecutors must be able to prove that the accused receives 'material' and 'non-public' information line in the federal law.[525]

VI. CONCLUSION

It is evident that India is moving away from the traditional approach of 'parity of information' and adopting a more consequential approach which factors is other key considerations which would reduce the scope of judicial error.

It can still evolve and expand to be at par with new technological developments and be flexible enough to accommodate changes in order to prevent any sort of mischief. The current stance of the Apex Court is welcoming but should be made more efficient to deal with more complex situations and transcend into the qualitative evaluation of the instrumentality of motive rather than mere quantitative response as to the requirement of existence of motive.

Stock market scams and manipulation often give birth to regulations; in light of the alleged Adani stock manipulation case, it is now altogether

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[524] *Supra* 537, §106.
[525] Insider Trading, JUSTIA (17 January 2023), https://www.justia.com/criminal/offenses/white-collar-crimes/insider-trading/.

pertinent for the Supreme Court and SEBI to determine the contours of insider trading on account of the same and prevent any travesty from taking place.

DATA PRIVACY ISSUES THROUGH BIG DATA-DRIVEN MERGERS AND COMPETITION POLICY IN INDIA

- *Prince Pathak*[*]

ABSTRACT: *In today's digital age, data is treated as a highly valuable economic asset that can be monetized, and this has seen significant number of M&A by big data companies to improve their data capabilities. This has made the link between data privacy and competition law is becoming more and more apparent, thus, creating for need a fresh perspective on competition law to address the issues of data privacy and its effects, which extend far beyond the conventional issue of pricing models. The scope of the present paper is in the context of the limited and restrained thresholds under the Indian Competition Law have allowed some big players to evade scrutiny from the regulators. To counteract these vulnerabilities, the Competition (Amendment) Act, 2023 introduced the potent mechanism called the Deal value thresholds. In this backdrop, this paper firstly seeks to explain the importance and possible risks of Big-Data driven mergers. Secondly, it compares Merger control policies related to Big-Data in the EU, US, and India. Thirdly, the author analyses*

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the inclusion of non-economic parameters for competition regulation. Lastly, the paper undertakes to suggest viable solutions to effectively implement the Deal Value threshold and handle data-driven mergers in India.

KEY WORDS- *Big-Data, Digital, Deal Value threshold, Privacy, Non-price parameter, Merger*

I. INTRODUCTION

Data stands as one of the pivotal innovations in human history. The Economist in an article stated that the most valuable resource is now data, not oil.[526] This is also reflected in the term 'Big data' which refers to voluminous and constantly expanding amount of data that an organization possesses which cannot be analyzed conventionally.[527] The strategic decision-making of many businesses is heavily influenced by this big data, and more enterprises are adopting data-driven business models to gain a competitive 'data advantage' over their competitors, which enables businesses to offer a wide range of services to their consumers and to retain their competitiveness and efficacy in the online market.

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[526] The world's most valuable resource is no longer oil, but data, THE ECONOMIST (Aug. 20, 2023, 1:40 P.M), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data.

[527] Ken Garrett, What is big data? Think Ahead (Aug. 20, 2023 2:30 P.M), https://www.accaglobal.com/us/en/student/exam-support-resources/fundamentals-exams-study resources/f5/technical-articles/what-is-big-data.html.

A. Understanding what is Big Data

Big data has been characterized by four "V's": *volume* of data, *velocity* of data collection and dissemination, *variety* of gathered information, and *value* of the data.[528] Each 'V' has its own uniqueness and advantages. *Volume* of data indicates the amount of data gathered and managed. This amount reached a record level in 2020 and is projected to surpass 180 zettabytes by 2025.[529] *Velocity* refers to the speed at which data is created, accessed, processed, and analysed, correlating the potential and impact of the data is to how quickly it is generated and processed to meet needs.

Variety of data connotates the unstructured data collections from several diverse sources, including online logs, social media, mobile communications, sensors, and financial activities. Linking these diverse data sources collectively is also a component of variety.[530] The volume and variety of data being collected and the velocity in processing the data have increased because of the data's *Value*. In essence, the primary purpose of navigating through vast seas of big data to extract value.

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[528] MAURICE E. STUCKE & ALLEN P. GRUNES, BIG DATA AND COMPETITION POLICY 16 (1st ed. Oxford University Press 2016).
[529] STATISTA, http://www.statista.com (Last visited Jul. 15, 2023).
[530] OSKAR TÖRNGREN, *Mergers in Big Data-driven Markets*, DIVA PORTAL (2017), https://su.diva-portal.org/smash/get/diva2:1186978/FULLTEXT01.pdf.

B. Big data acting as driving force for mergers

Big data is used by businesses to improve consumer experiences, optimise internal processes, and discover new business possibilities. In the context of mergers and acquisition (**"M&A"**), big data improves decision-making, recognizes synergies and mitigates risks. Because of this, big data has become a significant contributing factor in recent M&A. This trend is also reflected in merger trends of big giants like Google, Amazon, Apple, Facebook, and Microsoft. As of 2020, Amazon, Apple and Facebook and others had bought approximately 175 firms, ranging from start-ups to high-value enterprises.[531]

The volatility of the digital market also brings in the possibility that these big corporations may lose their market dominance. So, these corporations move beyond profitability and focus on gathering substantial data from emerging startups. As a result, developed a popular approach for these big businesses to block competitors' growth in the market by acquisition. For example, Facebook's

[531] Massimo Motta and Martin Peitz, *Big tech mergers*, 54 INF. ECON. POLICY 100868 (2021).

acquisition of Instagram, was a horizontal merger that blocked the potential of Instagram as well as other competitors.[532]

In the context of digital platforms, M&A has expanded beyond its traditional aspects of money and transfer of company shares to include a substantial exchange of data. The sharing of the company's datasets has emerged as a feature of mergers involving digital platforms. This has created data privacy and competition concerns, asl reflected in the Google-Fitbit merger. Accessibility to Fitbit's health & biometric data trove helped Google to improve its advertising and expand its data access, thus, making it difficult for privacy-focused tech companies to exist and compete.[533] Nevertheless, the European Commission (**"EC"**) approved the transaction under the EU Merger Reg. (**"EU Merger Reg."**).[534]

In digital markets, each platform collects various types of data through its operations. For example, Facebook and WhatsApp are comparable social networking services, providing a platform to

[532] Cecilia Kang and Mike Isaac, U.S and States Say Facebook illegally crushed competition, THE NEW YORK TIMES (July. 20, 2023, 10:00 A.M), https://www.nytimes.com/2020/12/09/technology/facebook-antitrust-monopoly.html.
[533] Shahista Khan, *The curious tale of big data and the merger control regime,* 26 SUPR. AMI., P 6.242 (2021), https://supremoamicus.org/wp-content/uploads/2021/10/Shahista-Khan-1.pdf.
[534] Ryan Browne and Sam Shead, EU approves Google's $2.1 billion acquisition of Fitbit, subject to conditions, CNBC (July. 20, 2023, 11:00 A.M), https://www.cnbc.com/2020/12/17/googles-2point1-billion-acquisition-of-fitbit-approved-by-eu.html.

communicate with people. In any case, the information received by both companies would be diverse. WhatsApp primarily gathers users' chat and contact data, whereas Facebook, in addition to chat data, receives sound and picture datasets. Upon accumulating these two types of information, a unique dataset is formed that other rivals may find troublesome to supplant or compete with.[535] Hence, the rise of data-driven mergers between big companies poses a potential threat to privacy and personal data.

C. Big Data-Driven Merger's Possible Risks

Big data-mergers present two possible risks. The first deals with deterioration of privacy standards, and second which is linked to network effects and entry barrier.

ii. *Deterioration of privacy standards-*

Companies which offer free data services often collect personal data, to enable target advertising based on consumers' daily routines and behavioural patterns. In these markets, the impact of a merger is often observed through

[535] Mike Isaac, Zuckerberg Plans to Integrate WhatsApp, Instagram and Facebook Messenger, N.Y TIMES (Jul. 25, 2023), https://www.nytimes.com/2019/01/25/technology/facebook-instagram-whatsapp-messenger.html.

non-price characteristics such as quality or privacy.[536] To gain dominance from the merger in the relevant market(s), merged entity may overlook privacy concerns, which would lower the product's quality. This was highlighted in the Facebook/WhatsApp merger, where the European Union (**"EU"**) emphasized data security and privacy as vital components of non-price competition.[537] The merger presented a privacy risk when WhatsApp updated its policy to share user data with the Facebook, contrary to its earlier assurances and decreasing user privacy. As a result, Facebook was also fined $122 million by the EU.[538]

In such mergers, consideration of additional factors, such as privacy risks, during merger evaluations and reviews are crucial. This underscores the necessity for regulatory bodies to enforce stringent measures in the evolving landscape of data-driven merger and acquisitions.

ii. ***Network Effects and Entry barriers-***

[536] *Supra* 554.
[537] Mark Scott, E.U. Fines Facebook $122 Million Over Disclosures in WhatsApp Deal, THE NEW YORK TIMES (Aug. 15, 2023, 10:00 A.M), https://www.nytimes.com/2017/05/18/technology/facebook-european-union-fine-whatsapp.html.
[538] *Supra* 556.

This risk is connected to reducing competition in privacy-related elements by strengthening network effects and lock-in effects in the digital market.[539] The concept of network effect pertains to the idea that the value of a product grows as more individuals rely on it. Mergers can contribute to expanding the market usage and share of a specific product, thereby enhancing the product's quality to a greater extent. The acquisition of WhatsApp by Facebook raised questions about direct and indirect network effects. Indirect network effects occur when an increase in users on one side of the market influences the value to users on the other side of the market, or when complementary goods and services proliferate, making the network more appealing to its members.[540] Direct network effects occur when the presence of additional users on one side of the market influences the value of consumers on the opposite side of the market.[541] There is a self-reinforcing mechanism is at work, in which a database gets more appealing (and less expensive to administer) as the network expands in size.

[539] Lakshmi, *Data Protection Aspects in Merger Reviews,* IRCCL (Mar. 15, 2023, 9:29 P.M), https://www.irccl.in/post/data-protection-aspects-in-merger-reviews.
[540] Shilpi Bhattacharya and Miriam C. Buiten, *Privacy as a Competition Law Concern: Lessons from Facebook/WhatsApp,* SSRN (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3785134.
[541] *id.*

Mergers can also create Lock-In effects, which is, how moving to another product is more difficult unless the majority of the original product's consumers also make the switch.[542] This poses significant obstacles for entry of future privacy-protective rivals. In the Microsoft/LinkedIn merger, LinkedIn's development (for example, by pre-installing LinkedIn on Windows platforms) was boosted as network effects tipped the market for professional social media in LinkedIn's favour.[543] This hampers the emergence of LinkedIn rivals that offer more privacy protection.

II. A COMPARISON OF MERGER CONTROL POLICIES RELATING TO BIG DATA IN THE EU, US, AND INDIA

The conflict between big data and competition law has brought to light concerns about the economic value of such data, which has forced competition regulatory bodies worldwide to adopt a proactive approach to establishing a comprehensive grasp of privacy problems emerging out of Data-Driven mergers.

A. EU Merger Reg.

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[542] *Supra* 558.
[543] *Supra* 558.

I. Decision practice

Under the EU Merger Reg., the EC has the authority to examine and forbid significant cross-border mergers, acquisitions, and joint ventures under specific circumstances.[544] This is based on a turnover threshold, and Art. 1(2) contains the primary threshold and determines commission jurisdiction.[545] EU Merger Reg. takes into account the significance of the transaction based on the size of the parties and the parties' turnover. The EU Merger Reg. outline the requirements for merger approval, but they do not directly cover data-related mergers, giving the EC discretion to consider data-driven mergers.

The EC initially considered only data concentration on advertising markets, particularly in relation to vertical and conglomerate mergers. However, this changed and measures were proposed to address concerns about post-merger concentration driven by data in the digital advertising markets.[546] The EC's sanctioning of Google's acquisition of

[544] Council Regulation 139/2004, Control of Concentrations Between Undertakings (the EC Merger Regulation), 2004 OJ (L 24) 1.
[545] *Supra* 563.
[546] Heiko Richter, *Prospects of Merger Review in the Digital Age: A Critical Look at the EU, the United States, and Germany*, 54 IIC INT. REV. INTELLECT. PROP. COMPET. LAW. 223 (2023).

DoubleClick stands out as a significant event concerning data concerns.[547] Google, the dominant player in the online advertising business and search engine queries, sought to enhance its wealth of data by acquiring DoubleClick's ad-serving & reporting technology. EU cleared the acquisition of DoubleClick by Google, considering the deal "*unlikely to have harmful effects on customer*.[548] EC also followed a similar line of reasoning in allowing Microsoft's acquisition of Yahoo, concluding that the acquisition might broaden the audience reach for its search advertising and potentially pose a threat to Google.[549]

However, EC took another look at the data and privacy issues in the Facebook/WhatsApp merger and acknowledged that personal data has a part to play in the market of online advertising, although EC held that data protection rules were outside its scope of jurisdiction and within the scope of EU data protection rules and allowed the proposed merger.[550] Again, when reviewing the acquisition of LinkedIn by

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[547] Steve Lohr, *This Deal Helped Turn Google Into an Ad Powerhouse. Is That a Problem?* N.Y TIMES (Sep. 21, 2020), https://www.nytimes.com/2020/09/21/technology/google-doubleclick-antitrust-ads.html.
[548] Case COMP/M.4731 — Google/DoubleClick, Comm'n Decision, 2008 OJ C 184.
[549] Case No COMP/M.5727 – Microsoft/ Yahoo! Search Business, 2011 OJ C 20.
[550] Case COMP/M.7217- Facebook/WhatsApp, Comm'n Decision (October 3, 2014), https://ec.europa.eu/competition/mergers/cases/decisions/m7217_20141003_20310_3962132_EN.pdf.

Microsoft, the EC held that "*privacy is an important dimension of competition and "driver of consumer choice" for professional social networks.*"[551] The EU granted conditional clearance and investigated the concentration of the parties' user data that may be used for advertising, however, it dismissed the big data concern in this transaction.[552]

The recent acquisition of Fitbit by Google is noteworthy.[553] It was the first merger in the EU where the EC demanded obligations from the parties because of its serious worries about the anticompetitive effects of data-driven advantages in the advertising markets.[554] The EC anticipated that Google's capacity to personalise advertisements would be greatly strengthened by the Fitbit acquisition and access to device-generated data, which would raise obstacles to entry and market expansion for Google's competitors. The EC only approved the acquisition on several conditions, one of which is that Google is prohibited from using Fitbit data, including

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551 OECD, *Considering non-price effects in merger control – Background note by the Secretariat* (2018), https://one.oecd.org/document/DAF/COMP(2018)2/en/pdf.
552 H. Ercüment Erdem, *European Commission Approves Microsoft's Acquisition of LinkedIn Subject to Conditions,* ERDEM & ERDEM (Mar. 2017), https://www.erdem-erdem.av.tr/en/insights/european-commission-approves-microsofts-acquisition-of-linkedin-subject-to-conditions.
553 Case No. COMP/M.9660 – Google/Fitbit, Comm'n Decision (December 17, 2020), https://ec.europa.eu/competition/mergers/cases1/202120/m9660_3314_3.pdf.
554 *Supra* 565.

GPS and health information, from users in the European Economic Area (EEA) for ad-targeting.[555]

II. . Recent modifications to the EU regulation for data-related merger reviews

The EC has introduced new reforms to allow themselves more freedom to become involved in a wider range of transactions. The EC has raised concern over the 'Killer Acquisition'. EC has decided to revive the use of the dormany Article 22 referral procedure.[556] In accordance with Article 22 of the EU Merger Reg., one or more Member States may ask the Commission to examine transactions that have an impact on interstate commerce and pose a significant threat to competition in the concerned Member States.

The EC's change in Article 22 "*encourage and accept referrals*" when: (1) the conditions for referral are met and (2) at least one of the concerned undertakings' turnovers does not

[555] Jon Porter and Nick Statt, *Google completes purchase of Fitbit,* THE VERGE (Jan. 14, 2021, 8:05 P.M), available at: https://www.theverge.com/2021/1/14/22188428/google-fitbit-acquisition-completed-approved.
[556] Gerwin Van Gerven, *Data and Privacy in EU Merger Control,* https://globalcompetitionreview.com/guide/digital-markets-guide/second-edition/article/data-and-privacy-in-eu-merger-control#footnote-050-backlink (last visited Mar 15, 2023).

reflect its actual or future competitive potential. As a result, authorities will have more freedom to look into transactions in the data-intensive market.

Accompanying this change, is the recent Digital Markets Act (**"DMA"**), also includes guidelines for mergers within EU.[557] DMA introduces "gatekeeper" under the DMA, which deals with the obligation of the gatekeeper to inform about concentration *"where the merging entities or the target of concentration provide core platform services or any other services in the digital sector or enable the collection of data"*.[558] The statute places liability on "gatekeepers," or individuals with significant market influence and control over who has access to digital services.

B. US Merger Control

The US antitrust laws extend beyond the quantitative barrier to include additional qualitative factors like the size and deal worth of the transaction, which is again advantageous for reviewing the big data-driven merger. The Department of Justice (**"DOJ"**) and the Federal Trade Commission (**"FTC"**) have the jurisdiction in the

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[557] Regulation 2022/1925, Digital Markets Act, 2022 OJ L 265, art 1.
[558] *id.*, art 14.

United States to review any merger.[559] The Hart-Scott-Rodino Antitrust Improvements Act, 1976 (**"HSR Act"**) provides the legal foundation for the suspensory merger review process.[560] Under the Act, companies are required by the statute to notify the authorities if the filing threshold has surpassed. After which the merger will be given to one agency for examination and the authorities can choose to conclude the investigation or contest it. After the challenge, it might negotiate a consent agreement with the businesses to restore competition, or it could ask a federal court for a preliminary injunction to halt the merger[561]. The HSR Act sets three criteria for the notice requirement: the "commerce test," the "scale of transaction test," and the "size of person test".[562] Mergers can also be reviewed under the Sherman Act, which prohibits anticompetitive practices and promote fair competition in the market. M&A that are likely to significantly reduce competition or establish a monopoly are prohibited by the Sherman Act.[563]

1. US Merger Control: Decision Practice and Recent Trends

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[559] Jeff Jaeckel, Alexander Okuliar and David J Shaw, *United States: merger review process,* (Sep. 30, 2022), https://globalcompetitionreview.com/review/the-antitrust-review-of-theamericas/2023/article/united-states-merger-review-process (last visited Mar 20, 2023)
[560] *Supra* 578
[561] *Supra* 565, at 243.
[562] *Supra* 552, at 10.
[563] Sherman Act, 1980, § 2.

The acquisition of big-data businesses are increasingly under the scrutiny of authorities in US, with the DOJ and the FTC constantly evaluating and contesting mergers using big data, and releasing recommendations on how to evaluate the purchase of data in merger cases. In some cases, the authorities can ask the merging party to divest its certain data assets in order to maintain competition in the market.[564]

The FTC, for instance, objected to Dun & Bradstreet's acquisition of Quality Education Data on the grounds that the two companies' combined sale of data resulted in a monopoly situation and gave Dun & Bradstreet, through its subsidiary Market Data Retrieval, a monopoly position that gave it more than 90% of the market for K–12 educational marketing data. FTC asked for a settlement agreement and Dun & Bradstreet was asked divest certain key assets in order to address the competitive harm caused by the acquisition.[565] In the merger of Dow Chemical and DuPont, the FTC followed a similar approach and the companies had to divest certain research and

[564] *Supra* 566, at 243-244
[565] *Id.*

development assets, including proprietary data, to address market anticompetition.[566]

The FTC and DOJ, in January 2022, announced the launch of a comprehensive joint review of the current horizontal and vertical merger guidelines, which could intensify merger enforcement focusing strong effects on vertical mergers, mergers with the nascent competitor, and mergers in the digital space.[567] Authorities responsible for enforcing antitrust laws are also showing growing apprehension about the effects of such mergers on the welfare of consumers, which encompasses both privacy and data security. The 2008 Google purchase of DoubleClick is an instance of US authorities' scrutiny of big-data merger, with FTC scrutinising "*conglomerate effects and the potential effects of foreclosure based on the combination of Google's and DoubleClick's data*".[568] Despite concerns raised, the acquisition was sanctioned by the FTC, who claimed that neither the information accessible to Google nor to DoubleClick would be

566 *Dow and DuPont Receive Antitrust Clearance from U.S. Department of Justice for Proposed Merger of Equals*, June 15, 2017, https://www.dupont.com/news/dow-and-dupont-receive-antitrust-clearance-from-us-doj-for-proposed-merger-of-equals.html.

567 Press Release, Federal Trade Commission, Request for information on Merger Enforcement (Jan 18., 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

568 *Supra* 565, at 245.

a crucial factor in the development of an effective online advertising solution.[569]

The FTC also reviewed acquisition of WhatsApp by Facebook and permitted ito n the understanding that Facebook would not transfer user data obtained from WhatsApp to any third party for commercial or marketing purposes without the user's consent nor use it for advertising, along with Facebook's pledge to continue operating WhatsApp as an independent entity. However, in 2020, the FTC and numerous state attorneys general filed a lawsuit against Facebook for violating Sec 2 of the Sherman Act, on the ground that Facebook's acquisition of Instagram and WhatsApp impeded competition and maintained its dominant position in the social networking industry. The FTC sought a permanent injunction, mandating that Facebook must seek prior approval for any future transactions. However, federal court dismissed the lawsuit and held that, the FTC had not offered sufficient specific evidence to establish Facebook's dominance in the loosely defined market for personal social networking services.[570]

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[569] Google/DoubleClick F.T.C. File No. 071-0170.
[570] US judge rejects Facebook request to dismiss FTC antitrust lawsuit, THE ECONOMICS TIMES (Jan. 12, 2022, 08:57 A.M), https://economictimes.indiatimes.com/tech/technology/us-judge-rejects-facebook-request-to-dismiss-ftc-antitrust-lawsuit/articleshow/88845633.cms?from=mdr.

The US antitrust follows case-by-case approach while reviewing big-data driven mergers, as big-data-driven mergers are receiving more attention from US authorities.[571] Big data is a valuable asset that offers businesses a competitive edge, regulators are adopting a broader perspective on what constitutes market power in this context. As a result, even mergers between companies that don't directly compete in the same product or service markets may be subject to more scrutiny if those businesses have access to a lot of data that may be exploited to hurt competition.

C. Indian Merger Control

The Competition Act (**"TCA"**) is the principal legislation that regulates combinations (M&A) in India, with Sec 5 and Sec 6 of the Act as the governing provisions. U/s 5 of TCA, a merger needs to be notified to the Competition Commission of India (**"CCI"**) when the relevant threshold in terms of the value of the assets and turnover are met. The value of assets is calculated on the basis of book value, as stated in the audited account books for the "financial year immediately preceding

[571] Gargi Yadav, *Big Data & Merger Control – Takeaways from the American Experience*, IKIGAI LAW (Nov. 6, 2020), https://www.ikigailaw.com/big-data-merger-control-takeawys-from-the-american-experience/.

the financial year in which the proposed merger falls."[572] This value is assessed using both tangible and intangible assets.[573]

Through a notification released in 2011, the Ministry of Corporate Affairs introduced *target de minimis* criteria, as per which, a notification for a transaction is necessary, only if the target's assets in India amount to more than 3.5 billion rupees or if the target's turnover is more than 10 billion rupees. This exception becomes relevant for big data mergers.

I. Regulatory Gaps in the Indian Merger Control

The merger control regime of India is based on turnover threshold. Every person or company that intends to enter into a combination must notify the Commission under Sec 6(2) of the Act at any time before the combination is consummated. The method of reasoning behind the selection of such a framework of notice is to avoid not only the adverse effect on the market that will be caused if the transaction is allowed to be consummated but the conceivable complication that might emerge when there is a requirement of demerger of the combining enterprises also coupled with collateral social costs

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[572] The Competition Act, 2002, § 5.
[573] Kalpana Tyagi, *Big Data Mergers: Bridging the Gap for an Effective Merger Control Framework,* 1 COMP. COMM. OF IND. JOURN. ON COMPT LAW AND POL. 29 (2020).

incurred in any such unscrambling.[574] However, the merger control regime of India is limited as Sec 6 of TCA only applies to combinations mentioned in Sec 5 of the Act. The CCI, therefore, does not have the regulatory power to review all kinds of combinations in India. This fundamental disadvantage also extends to data-driven mergers.

The traditional approach of competition evaluation creates a substantial enforcement gap when it comes to digital market mergers. Big data is not seen as a valuable commodity in India and digital enterprises frequently provide free services, resulting in low turnover that avoids regulatory scrutiny. This exception based on turnover also puts privacy at stake. This is reflected in WhatsApp's by Facebook. This acquisition affected approximately 1.7 billion people worldwide, yet it did not trigger notice to the CCI since the threshold provided under Section 5 of the Act was not exceeded.[575] This shows that traditional merger control system is ineffective for digital market. This poses some key concerns in merger control. First, using high threshold criteria is insufficient to handle zero

[574] Nishant Pande, *The Big data problems in M&A*, Society for International Trade & Competition Law (Mar. 14, 2014, 2:50 P.M), https://nujssitc.wordpress.com/2018/08/31/the-big-data-problem-in-mergers-and-acquisitions/.
[575] *Supra* 574.

value digital merges. Second, non-price criteria like as data sharing and network impacts are excluded from merger discussions.[576] Hence, data-driven merger if not scrutinized can create Appreciable adverse effect on competition (**"AAEC"**) concerns that can lead to anticompetitive nature in the market.

II. Reforms

There is a difference in approach to merger control of data-driven mergers that is visible from the approach taken by DoJ, FTC, EC and CCI. According to the Competition Law Review Committee (**"CLRC"**) report, a number of digital transactions have escaped investigation because of the asset and turnover limitations that are in place. An example is the Zomato acquisition of UberEats, which was not disclosed to the CCI because of its small turnover and asset size.

Justice B.N Krishna in his report "Report of the Committee on A Free and Fair Digital Economy Protecting Privacy, Empowering Indians" mentioned that, turnover based exemption is a threat to privacy. The dependence on criteria based only on assets and turnover is problematic in the case of

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[576] *Supra* 552, at 6.

such firms, which are essentially free to use for consumers and do not hold assets or generate turnover in India per se. As a result, the Zero price digital platform is seldom able to fulfil the act's threshold requirement. The irony of all this is that considering the significance of data and its associated four Vs (value, volume, velocity and veracity), success in Indian markets is key to the success of any platform-based communications app. The aforementioned test fails this litmus test- the present merger control falls flat, where it should most likely be most persuasive within the massive data-driven economy.[577]

III. CLRC Report on Deal Value Threshold

The CLRC in its 2019 report stated that the CCI needs more effective framework to evaluate any acquisitions or transactions that fall short of the requirements set out in Sec 5 of TCA. The report mentioned that, the limitation of the competition commission's authority has led to an adverse effect on mergers involving companies active in the "digital sphere".[578] The committee mentioned that top tech companies

[577] *Supra* 571, at 32.
[578] MINISTRY OF CORPORATE AFFAIRS, GOV'T OF IND., REPORT OF THE COMPETITION LAW REVIEW COMMITTEE-JULY 2019' 128 (2019), https://www.ies.gov.in/pdfs/Report-Competition-CLRC.pdf.

had made over four hundred acquisitions in the last decade, some at a high value like Microsoft paying $26 billion for LinkedIn. The committee noted that the target might offer low-revenue products and services in digital acquisitions due to their initial focus on user growth. In such instances, the target's sales value could not be a better indicator of competition significance; against this backdrop, the committee discussed the adequacy of the existing threshold for combination notification is highly debatable.

The committee observed that the India differs from other places, CCI cannot evaluate transactions, even if it is apparent that there is competitive harm. This is because TCA does not prove the CCI with any residual power to review any transactions that are not required to be notified. The committee further mentioned that, competition regulators like the EC, without residuary power, use other method to assess non-notifiable merger. In countries like Brazil and Ireland, regulators have used such residual power to review the transaction where the thresholds were not met. Hence, CCI lacked the option to review non-notifiable merger. The commission also highlighted how Germany and Austria have resolved specific operational issue that arise from the introduction of a deal value threshold by releasing a set of instructions.

As a result, it was recommended that TCA needs to be changed to include an enabling clause that would enable the government to enact required criteria, such as a deal-value threshold for merger notification, and that any such thresholds have to be determined by both local nexus requirements and clear and objectively measurable procedures for determining the requisite figure.[579]

iv. Competition (Amendment) Act, 2023

In line with the CLRC's recommendations, the Competition (Amendment) Act, 2023, was enacted and among the notable adjustments is the inclusion of a new standard for informing the CCI about any combinations. The amendment stipulates that if the value of any transaction involving the acquisition of any control, shares, voting rights, etc. exceeds Rs. 2,000 crores, it will be necessary to file a notice of combination before the CCI. It also gives the Central Government the authority to exempt specific transactions from the Act's requirement that combination notices be filed.

[579] *Supra* 597, Para 5.14.

Data-driven mergers are on the increase in India, and the government must scrutinize these types of transactions. Big data is not seen as an asset in India, and digital enterprises typically do not have large turnover due to the provision of free services, allowing the regulator to avoid inspection.[580] CCI has been placing more emphasis on reviewing the acquisition of big data companies and has been actively scrutinizing and challenging mergers that involve large amounts of data. However, the Competition (Amendment) Act 2023 could impact big data-driven mergers in India significantly.

III. COMPARISON

There are differences in the merger control strategies used by the EU, US, and India in relation to big data. While the EU has been leading the charge in regulating these mergers, the US has lagged behind, with many big data mergers being allowed without due diligence. Big data mergers are becoming more of a focus in the UK and India, but there are still difficulties in successfully regulating them. Given the potential harm to both competition and consumer privacy, the EU

[580] Nisha Kaur Uberoi, *How CCI should look at M&A deals in digital economy,* LIVEMINT (Apr. 18, 2018, 5:08 A.M), https://www.livemint.com/Opinion/R2jJb12xH9BX9heTYleESK/How-CCI-should-look-at-MA-deals-in-digital-economy.html.

has adopted a tough stance on big data mergers. The investigation and scrutiny of several high-profile big data acquisitions, like Facebook's acquisition of WhatsApp and Microsoft's acquisition of LinkedIn, have been conducted by the EC via its referral system. The EU has also published rules on the evaluation of data gathering in merger proceedings, highlighting the significance of examining data's effects on competition. Big data mergers have also been subject to regulation thanks to the EU's General Data Protection Regulation (**"GDPR"**), which contains privacy and data protection regulations that are applicable to all businesses doing business in the EU. However, big data mergers are treated more leniently in the US, where several transactions have been authorized by antitrust regulators without being given a close look. Several big data businesses may be subject to the FTC's recommendations on the evaluation of the purchase of emerging or future rivals. Moreover, the US has a patchwork of state-level privacy regulations, but there is no federal data protection statute that might control big data mergers.

In response to the increasing attention being paid to data privacy and protection, India has also taken certain steps to regulate big data mergers. The CCI has released recommendations on how to evaluate the purchase of data in merger proceedings, highlighting the significance of looking at how data would affect the market. The Competition (Amendment) Act, 2023 enhances the CCI's capacity to

examine and oversee M&A in the digital industry, particularly those using big data.

IV. INCLUSION OF NON-ECONOMIC PARAMETER FOR COMPETTION REGULATION

The conventional antitrust method solely focuses on the pricing scheme of goods and services. Nevertheless, with changing market conditions, it is believed that non-price factors may also hold the same level of importance. Consequently, it is recommended that potential collusive agreements that may impact these variables should be considered.[581] Digital market's intricacy has created a significant enforcement gap in merger control and other aspects of antitrust regulations due to the exclusion of data as a non-price component in antitrust analysis. As a result, it is more important than ever to adopt a method for identifying the nature and consequences of anti-competitive actions that goes beyond the "price model."

A. Should Competition Law Consider Non-Price/Non-Economic Factors?

Competition comprises of both price and non-price factors, and among the non-price factors, quality and innovation are pivotal.

[581] Ankit Srivastava and Abhyuday Yadav, *Regulating Combinations in Platform Markets: An Indian Perspective,* 3 COMP. COMM. OF IND. JOURN. ON COMPT LAW AND POL. 40 (2022).

Quality stimulates innovation and economic progress, making it essential to prioritize maintaining and enhancing quality as a key objective of competition policy.[582] The notion of quality encompasses a broad spectrum, including privacy protection. Quality is a broad concept that encompasses privacy protections. While privacy violations may be subjective, other quality declines are also subjective. The OECD describes, quality is a multidimensional, relative concept that includes a substantial element of subjectivity. Some consumers may place value only on specific aspects of quality, while others may value some aspects of quality more than others

The competition could be vital in guaranteeing the profits of a data-driven economy while reducing the associated risks. The conventional notion is that corporations should compete to offer the best assortment of goods and services. However, in many multi-sided markets, data is a crucial resource. This data is used for targeted advertising and to optimize products and services. As a result, businesses or corporations with a competitive edge in the four "Vs" of data are in the best position to conquer their industries and take over adjacent fields. This situation is exacerbated by the fact that if these companies accumulate politically sensitive user

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[582] *Supra* note 550, at 259.

information and control content experiences, they become influential political players.[583] The Competition authorities must admit the competitive importance of data and the consequences of firms collecting and exploiting vast amounts of data.

B. Position In India

According to the research report published by CCI, it was found that privacy can take the form of non-price competition.[584] This report marks a change from CCI's traditionalist approach as the case of *WhatsApp's privacy policy update*[585] and CCI did not use its power over WhatsApp, who was accused of taking advantage of its dominant position. CCI believed that matters concerning data and privacy fell outside its jurisdiction.

This was similar to the position in the case of *Shri Vinod Kumar Gupta v. WhatsApp Inc*[586], wherein CCI dismissed the compliant against WhatsApp and claimed that data did not meet the criteria for a non-price element in antitrust evaluation, and that WhatsApp's policy did not limit user options or prevent competition.

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583 *Supra* 551, at 335.
584 COMPETITION COMMISSION OF INDIA, GOV'T OF IND., MARKET STUDY ON THE TELECOM SECTOR IN INDIA KEY FINDINGS AND OBSERVATIONS, 33 (2021), https://www.cci.gov.in/images/marketstudie/en/market-study-on-the-telecom-sector-in-india1652267616.pdf.
585 WhatsApp and Facebook, S. M. Case No. 01 of 2021.
586 Vinod Kumar Gupta v. WhatsApp Inc, 2017 CompLR 495 (CCI).

Then a year later, CCI reversed its stance and realised the presence of data and made observations on the value of data in the case of *In re Matrimony.com Ltd. & Ors. vs. Google LLC &Ors*.[587] In this case, the CCI maintained that users were effectively paying for the services with their personal data, which Google then sold to advertisers. This ruling marks a significant change from the Commission's previous position in 2016, where it had adopted a policy of not intervening in matters related to data that did not involve pricing issues. In this case, CCI noted that:

> *"It would not be out of place to equate data in this century to what oil was to the last one. The Commission is not oblivious of the increasing value of data for firms that can be used to target advertising better. Moreover, the data can be turned into any number of revenue-generating artificial-intelligence (AI) based innovations."*

The CCI's altered approach could be associated with a market evaluation of the telecommunications sector, which was released by the CCI. The 2021 CCI Report indicated that the CCI was becoming more conscious of the fact that privacy is emerging as a non-price

[587] In re Matrimony.com Ltd. & Ors. vs. Google LLC &Ors., 2018 CompLR 101 (CCI).

competitive factor, and it acknowledged the negative impact that data privacy breaches have on both customers and competition.

It is commonly acknowledged that the extraction and examination of consumer data gives rise to concerns regarding data privacy and companies that possess extensive customer data and advanced data technology have a competitive edge over their rivals who lack access to such resources, resulting in an unjust advantage. Thus, to address possible anticompetitive conduct, breaches of data privacy must be assessed from a competition law perspective. Under existing Indian competition law, there is no provision for fusion of privacy and competition. Therefore, it is strongly recommended to amend the law to achieve the objective of promoting consumer welfare.

C. Position in EU

The EU has recognized privacy as a form of non-price competition through number of cases but have contrary view in relation to the integration of privacy and competition. In the case of *TomTom/Tele Atlas*[588] commission recognized the dimension of privacy and stated that it may be used as a criterion for quality when evaluating a merger under the competition law. Further, the commission also recognized the significance of big-data in this case. The EC while

[588] Case COMP/M.4854 TomTom/Tele Atlas, Comm'n decision, 2008 OJ C 237.

reviewing the merger between *Microsoft/LinkedIn*, noted the significance of privacy as factor of quality, that can be considered as a parameter of competition analysis. In spite of this, the merger was approved subject to certain restrictions, and the EC determined that it was unlikely to affect competition for a number of reasons, chief among them the existence of data privacy regulations in the European region.

When assessing the Facebook/WhatsApp[589] merger, the EC acknowledged the importance of privacy to customers and recognized it as a quality factor. However, they also stated that EU competition law does not address privacy issues related to the concentration of data. Instead, such concerns are addressed by the GDPR, and the responsibility for overseeing privacy issues and competition law falls under separate institutions within the EU judicial system. The EC acknowledged that data concentration could potentially strengthen a dominant company's position in the market, but emphasized the need to avoid conflicts between the domains of privacy and competition. The EC made the following remarks:

> "*Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU*

[589] Case COMP/M.7217 Facebook/WhatsApp, Comm'n decision, 2014 OJ C 417.

> *competition law rules but within the scope of the EU data protection rules*"

The EU has recognized the value of data and data-privacy but does not believe in the integration of privacy and competition law. The EC in the case of *Asnef-Equifax* held that, concerns regarding personal data are not under the jurisdiction of competition law, even if they impact consumer welfare, but should instead be addressed by the appropriate regulations governing data protection.

V. DEAL VALUE THRESHOLD: IS THE GAME CHANGER?

The Competition (Amendment) Act, 2023 was passed to cope the challenges of competition law in digital market.[590] Sec 5 of TCA was amended to read that if the value of any transaction related to the acquisitions of control, shares, or voting rights exceeds 2,000 crore rupees, it would require filing a notice of combinations before the CCI. Additionally, this provision would only be applicable if the entity being acquired, taken over, merged, or amalgamated has significant business activities in India, as specified by the regulations.

[590] *Competition law amendment bill gets President's assent*, THE HINDU (Apr. 12, 2023), https://webcache.googleusercontent.com/search?q=cache:hO17h0KvXn8J:https://www.thehindu.com/business/Industry/competition-law-amendment-bill-gets-presidents-assent/article66728972.ece&cd=1&hl=en&ct=clnk&gl=in.

According to the CCI, some combinations do not meet the assets and turnover requirements set forth in Sec 5 of TCA, and as a result, these combinations should be reviewed by the competition authorities due to potential competition concerns. Despite having a low turnover, businesses and companies can still have a significant impact on the market. The CCI has stated that because of their limited authority and inability to evaluate or contest a merger once it has been completed, TCA must include the idea of a Deal Value threshold to fill this gap.

A. Major Impact of the Amendment

The deal value threshold can be used as a substitute for the traditional asset and turnover based criteria for determining whether a merger or acquisition has to be submitted to the competition authorities for approval. Despite the customary threshold, an enforcement gap had developed as a result of multiple mergers between the tech businesses since the traditional threshold had not been successful in evaluating non-price parameters in the competition. Companies became dominant in the digital era and are still doing so by concentrating on data collecting through the purchase of startup businesses. The competition act needed to be changed in order to assess the presence of non-price factors like data and privacy. From the perspective of competition law, the Facebook/WhatsApp combination had also produced a great deal of issues. Despite the following issues, the transaction was permitted since WhatsApp's

turnover was below the assets/turnover requirements under the competition. One such issue was a decrease in competitive pressure in the instant messaging app market, which was caused due to WhatsApp's strong position in the market creating high barriers to entry for other messaging apps, making it difficult for competitors like Hike to gain traction. Ultimately, resulting in decrease in choices available to customers and negatively impacting their interests.

This problem has also been reflected in acquisitions of Myntra by Flipkart, TaxiforSure by Ola, and Uber Eats by Zomato, who were not subject to scrutiny because of not meeting the turnover and asset thresholds, while the deals were significant because the companies involved were dominant tech aggregators in the e-commerce sector. The limitations of turnover and asset thresholds prevented CCI from scrutinising these deals despite the acquired companies being innovative tech aggregators. These transactions, due to lack of adequate provisions then, raised various concerns that led to theories of harm.

B. Theories of Harm

A notion of harm must be established when a competition authority argues that competition regulations have been violated, to guarantee

that the anti-competitive assessment technique is logically coherent and speculative.[591]

There are two potential theories of harm emerge as acqusitions in digital markets evade the scrutiny of CCI: a) killer acquisitions; and b) nascent prospective rivals.[592] Traditional theories of damage, such as unilateral effects and foreclosure effects, which accurately reflect the potential harm in Information and Communication Technology (**"ICT"**) mergers, are useless in addressing the true problems in big data-driven mergers.[593] Killer acquisition is a theory in which an incumbent firm acquires target in order to "*discontinue the development of the target's innovative projects and pre-empt future competition*" because the target's business competes with the incumbent's business and consequently poses a competitive threat.[594] Killer acquisitions tend to put an end to the development of either the acquirer's or the target's product, leaving just one product on the market[595].

[591] *Supra* 553, at 30.
[592] Yun John M, '*Potential Competition, Nascent Competitors, and Killer Acquisitions' (2020)*, The Global Antitrust Institute Report on the Digital Economy 18, SSRN Journal, https://ssrn.com/abstract=3733716.
[593] *Supra* 551.
[594] Colleen Cunningham et al., JOURNAL OF POLITICAL ECONOMY 649 (2021).
[595] Pike C, *'Start-Ups, Killer Acquisitions and Merger Control'*, OECD Competition Papers (2020), SSRN Electronic Journal, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597964 (last visited march 15, 2023).

Nascent potential rival/competitor is a firm that is not a significant competitor in the market but will become one in the coming future. In the instance of nascent potential competitor theory of damage, the acquirer simply buys the target in order to eliminate competition from the target while the product remains on the market. Since the acquirer has control over the target's product's price, quality, and innovation, it gradually achieves comprehensive control over the target's product, at same time destroying the competition[596]. The nascent competition theory, as Scott Hemphill and Tim Wu point out, typically encompasses anticipated innovation by a future rival.[597]

These two theories of harm outlined above highlight the vital need for merger regulation in the digital economy, without which big-data driven businesses would continue to remove competition by acquiring small and developing enterprises without being held accountable. The acquisition of Instagram by Facebook again is a classic example of a nascent competitor being acquired by a prominent player.

[596] *Supra* 551.
[597] Manasvin Andra, *Digital Markets: Need for a New Approach to Merger Regulation,* INDIA CORP LAW (May 23, 2021), https://indiacorplaw.in/2021/05/digital-markets-need-for-a-new-approach-to-merger-regulation.html

The regulatory authorities must work to safeguard such nascent or emerging rivals because encouraging innovation is one of the main objectives of competition law. The recommendation of the Deal Value Threshold by the CLRC can be a game changer and help the competition regulators to stop killer acquisitions in the future.

C. Risks Associated with the Deal Value Threshold

The Deal Value Threshold offers numerous advantages in regulating mergers when the competitive potential of a company is not adequately reflected by its size or sale figures. However, the Deal Value threshold has also its disadvantages, one of which is limiting growth and potential, which happens by prohibiting the completion of agreements that are below the limit, a deal value restriction might stop a company from reaching its full potential. Additionally, there is a possibility that overly stringent regulation would stifle innovation.

There is also an an administrative burden on the competition authorities. If Deal Value Threshold is taken into consideration alongside the amendment that reduces the amount of time allotted for merger reviews, which can lead to hasty decisions. There is also a challenge for innovation-driven companies, whose turnover doesn’t represent the deal value in terms of non-economic parameters and not accurately represent these firms' genuine

competitive potential in such circumstances. There might be a situation where Deal Value Threshold will not be effective and a potential anticompetitive can escape the scrutiny.

This introduces a need for a post-merger regulation or ex-post review provision, where the regulator is given the power to step in and dissolve mergers that, at first glance, seemed to be beneficial but later turned out to be anti-competitive. Such a provision would give the authorities with power of a subsequent level of investigation into the combination.

VI. CONCLUSION

Big data-driven mergers have raised several concerns over data privacy issues, as integrating vast databases may lead to sharing personal details. Big data analytics are now being used more often in M&A, which has caused severe worries in India concerning data privacy and competition law. Big data-driven mergers combine a lot of data that may be utilized to establish market dominance, which could result in unfair business practices and impair consumer welfare. Following are the suggestions that can be considered while dealing with data driven mergers in India.

A. New Department

The deal value threshold may not be the ultimate solution for the data driven mergers, which raises the suggestion of a new department

within CCI which shall seek to further the interest of consumers in digital market can be established, an approach similar to the establishment of the Digital Market Taskforce as part of UK's Competition and Markets Authority's Digital Markets Strategy.

B. Proposed Amendment to Sec 6A

The proposed amendments to the TCA include prohibiting listed companies in the information utility database from engaging in combinations that could significantly harm competition in the relevant Indian market. Transactions exceeding a specified threshold, involving at least one listed enterprise, must be reported to the CCI, granting the CCI direct investigative authority. Additionally, the CCI can investigate transactions below the threshold involving a listed enterprise using its residual power, either independently or in response to a complaint.

It is important to implement changes to competition policy not just for mergers in digital markets, but for all merger control. The deal value threshold and residual powers of the CCI are still necessary for antitrust assessment in traditional brick-and-mortar markets, as they help the CCI prevent unwanted transactions that may fall outside its jurisdiction due to the creativity and innovation of market participants.

The introduction of the Deal Value threshold on the basis of the value of the transaction seems like the right step to tackle potential competition concerns in the digital market in India. Deal Value Threshold attempts to close the gaps in the current merger control system by mandating notification of the purchase of start-ups and emerging businesses. The ex-post review of mergers can also be introduced to deal with anti-competitive M&A. Ex-post reviews are required by the Indian merger control framework so that the authorities can still conduct further research into any suspected anti-competitive combinations that evade the regulator's scrutiny for the reasons mentioned above. These proposed changes can help the CCI to bring broader combinations into its purview, even when they fail to meet the existing thresholds

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