

DETERMINING THE REASONABILITY OF CONDITIONS UNDER §3(5) OF THE COMPETITION ACT: ANALYSING THE INTELLECTUAL PROPERTY LAW EXEMPTION

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Reasonable conditions under §3(5) of the Competition Act, 2002, exempt a person with a valid, registered intellectual property right ('IPR') from the application of Indian competition law. They provide a limited exemption, allowing an IPR holder to take steps that are reasonable and necessary for the protection of one's rights. The position, though, on how the reasonability of such a condition is to be assessed, still remains unsettled. This leads to ambiguity for IPR holders involved in antitrust litigation. It also creates a direct conflict between the objectives of competition law and intellectual property. We highlight the need for determining the extent of reasonability, undertaking an analysis of the trend of interpretations in this regard. In contrast to some sections of opinion and cross-jurisdictional analysis, we propose a development-oriented approach to ensure pro-competitive usage of IPRs.

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I. INTRODUCTION

Competition law and intellectual property ('IP') law have been observed to be at friction at multiple instances.¹ The former is built on the premise of maximising public interest.² Competition law attempts to encourage the entry of firms into the market as this provides consumers with cost-effective products and greater choice.³ The latter rests on a model of exclusivity.⁴ IP law grants protection to one's intellectual labour and allows one to exercise control over the same by excluding others from using the resultant property and associated proprietary rights.⁵ In the past, exclusivity emanating from IP law has been equated with granting monopoly power to right holders while the promotion of access to the market by competition law has been seen as a direct attack on such monopoly power.⁶ Thus,

¹ Asia-Pacific Economic Cooperation (APEC), APEC Committee on Trade and Investment, *Study on Competition Laws for Developing Economies*, APEC#99-CT-01.1(December 1999).

² *Id.*

³ *Id.*

⁴ Organisation for Economic Co-operation and Development (OECD), Directorate For Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Policy Roundtables, Competition Policy and IP Rights*, DAFFE/CLP (98)18 (September 21, 1998).

⁵ *Id.*

⁶ A. Douglas Melamed & Nicolas Petit, *The Misguided Assault on the Consumer Welfare Standard in the Age of Platform Markets*, Vol. 54, REVIEW OF INDUSTRIAL ORGANIZATION (2019).

a conflict arises with respect to the exercise of intellectual property rights ('IPR') in a competitive market in this context.⁷

Although competition law and IP law are evidently seen to have in congruent modes of operation, it is essential to reconcile the conflict so as to maintain a balance in the market. Reconciliatory theories, as a central theme, require working along the lines of the objectives common to both competition law and IP law.⁸ This involves enhancing innovation, social welfare, and dynamic efficiencies of a market.⁹ A reconciliatory outlook to these legal domains suggests that an innovation-centric approach must be adopted so that both the regimes operate in tandem to bring the most cost-effective and efficient innovations to the market.¹⁰

Moreover, it is also important to note that regulatory attitudes towards the impact of competition law on IP agreements significantly affect the dissemination and creation of novel technology in the economy. Thus, a careful balance must be reached between the operation of competition law and IP law regimes. Arguably, one way to generate this balance is by exempting certain rights granted by IP statutes from the general application of competition law. A limited IP law exception to competition law in this regard can serve as a viable balancing mechanism between the two regimes while simultaneously fostering innovation. Such an exception could help regulate not only the exercise but also the ramifications of exploitation of the IPRs.¹¹ However, in order to be constructive and truly serve its purpose, the scope of such an exception must be well defined.

§3 of the Competition Act, 2002 ('Act') provides that all anti-competitive agreements, including horizontal and vertical agreements, would be void. Accordingly, it bars entities from entering into agreements that may have an appreciable adverse effect on competition ('AAEC') in India. §3(5) of the Act thus exempts agreements made by certain persons from falling within the purview of anti-competitive agreements, as under §3, if they contain *reasonable conditions*. It provides that

“3(5) Nothing contained in this sections shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under:

⁷ Consten & Grundig v. Commission 1966 CMLR 418 (European Court of Justice, European Union); RTE & ITP v. Commission, 19954 CMLR718, ¶49 (European Court of Justice, European Union).

⁸ Gitanjali Shankar & Nitika Gupta, *Intellectual Property and Competition Law: Divergence, Convergence, and Independence*, Vol.4(1), NUJS L. REV., 113 (2011).

⁹ *Id.*

¹⁰ *Id.*

¹¹ M. M. Sharma, *Economics of Exemptions from Competition Law*, Vol. 24(2), NATIONAL LAW SCHOOL OF INDIA REVIEW, 71 (2013).

- (a) the Copyright Act, 1957 (14 of 1957);
- (b) the Patents Act, 1970 (39 of 1970);
- (c) the Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);
- (d) the Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);
- (e) the Designs Act, 2000 (16 of 2000);
- (f) the Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);”

Thus, in order to be eligible under the provision, conditions in the agreement must be reasonable and necessary to protect the rights that find their basis in the IP law statutes specified in §3(5)(i) of the Act. The provision exempts IPR holders from the application of §3 only if the conditions contained in their agreements with third parties are reasonable and necessary to protect their rights.

Regrettably, the application of this provision is based in ambiguity. Neither does the statute define reasonable conditions nor does it specify the extent to which IPRs may be protected. Adjudication of reasonable conditions in the past has been limited to price-related abuses by IPR holders and has not contributed towards the development of detailed analyses which can serve as the basis on which reasonability of conditions can be conclusively determined.¹² Despite India’s growing contribution to technology markets, research and development (‘R&D’) and ventures to invite foreign investment, the administration of issues at the intersection of competition law and IP law remains obscure. Clarifying the scope of application of these laws is essential from the legal and economic perspectives. In light of the same, it has become imperative to analyse and demarcate the boundaries of application of the IP law exemption under §3(5) of the Act and determine the extent of protection offered by it in the context of competition law.

This paper is divided into nine parts. In Part II of the paper, we survey the problems which may arise from the lack of a definition of reasonable conditions under §3(5)(i) of the Act and establish why determining the meaning of the provision is essential. In doing so, we assess the position from two different perspectives — competition law and IP law, and accordingly highlight the need for the conciliation of the conflict. In Part III of the paper, we analyse the purpose of limitedly exempting IP law from competition law, trace the need for the exemption in India, and also delineate the legislative evolution of the exception. Next, we determine the scope of such an exemption in the Indian context and juxtapose the objectives of Indian competition law and policy with those of IP law and policy in order to delineate the circumstances in which the conflict between the two regimes

¹² See discussion *infra* Part VI on “Cases on Interpretation of Reasonable and Necessary Conditions”.

arises in Part IV. We also analyse the existing legal provision and seek to understand the purpose of incorporating such an exception in the Indian context. In Part V, we investigate the jurisdictional issues which arise in conflicts which lie at the cross roads of competition law and IP law. Following this, in Part VI, we examine cases under the Competition Act, 2002 with an aim to decipher the attitude of regulatory bodies towards such conflicts. Here in, we classify cases on the basis of approaches adopted in determining a condition as unreasonable. In Part VII of the paper, we undertake a comparative cross-jurisdictional analysis with countries around the world to understand how different approaches have been evolved to reconcile similar conflicts and present the nuances of the respective exceptions to competition law. In Part VIII of the paper, we propose recommendations based on which a §3(5)(i) analysis may be undertaken by regulatory authorities to determine the reasonability of conditions. Lastly, we offer our concluding remarks in Part IX of the paper.

II. THEORETICAL UNDERPINNINGS OF THE IP LAW EXEMPTION

To determine the extent of protection offered by §3(5) to right holders, it is important to review the conflict between IP law and competition law, and methods of reconciliation of the same. This has been done below by assessing the objectives of competition law, IP law, and reconciling them in a dynamic-efficiency based model.

A. COMPETITION LAW AND POLICY

To understand the roots of the current state of competition law, it is important to refer to the role of competition policy and its objectives in shaping the law as it exists today. Competition policy relates to the promotion of efficiency and maximisation of social welfare.¹³ One of the primary goals of competition policy is “protect and preserve competition as the most appropriate means of ensuring the efficient allocation of resources - and thus efficient market outcomes—in free market economies.”¹⁴ Thus, it seeks to promote creation of fertile environment for businesses, which may in turn improve static and dynamic efficiency by stimulating competition.¹⁵ It includes government measures which have an impact on the functioning of businesses and industries.¹⁶ Competition policy is structured on two frames; the positive element includes the promotion of competition in domestic

¹³ National Competition Policy, 2011.

¹⁴ Organisation for Economic Co-operation and Development (OECD), *Interim Report on Convergence of Competition Policies*, OCDE/GD (94)64 (June 1994).

¹⁵ Frédéric Jennyetal, *Competition Law, Intellectual Property Rights and Dynamic Analysis: Towards a New Institutional “Equilibrium?”*, No. 4, CONCURRENTS JOURNAL (2013).

¹⁶ The World Bank Group, R. Shyam Khemani & Mark Dutz, *Competition Law and Policy: Challenges in South Asia* (2007).

settings through national policy,¹⁷ whereas the negative element requires coming up with legislation, judicial decisions and regulations aimed at preventing anti-competitive conduct.¹⁸

Competition policy also requires governing the interaction between competition law and IP law. This is done in two ways – *first*, by regulating the abuse of the monopoly power acquired by right holders in lieu of receiving exclusionary rights for their IPRs and *second*, by regulating horizontal or vertical agreements between a right holder and a third party.¹⁹ In India, the misuse of market power by right holders is not exempted from the application of §4 on abuse of dominance as yet, however, certain agreements may be exempt from absolute competitive scrutiny under §3 of the Act. For example, even though including restrictions in licensing agreements is generally pro-competitive, it may be anti-competitive where restrictions are used to veil cartel activities and engage in restriction of competition between competing technologies.²⁰

B. IP LAW AND POLICY

IPRs and IP policy are designed so as to encourage innovation, and in turn improve consumer welfare, and economic advancement.²¹ This is based upon the exclusionary nature of IPRs which gives the right holder an exclusive legal right to the economic exploitation of the innovation for a period of time.²² The promotion of innovation by IP law through *iusexcluendi* or right to exclude others incentivises other key economic players to engage in R&D and innovation.²³ Right holders may also enter into agreements with third parties over licensing, assigning or using their IPRs to further their economic returns. The economic gains are received from the enjoyment of these exclusive rights which serve the dual purpose of rewarding the right holder for the innovation and encouraging others to come up with innovations.²⁴ If the aspect of exclusivity were to be detached from IPRs,

¹⁷ Includes Liberalised Trade Policy, Openness to Foreign Investments and Economic Deregulation; United Nations Conference on Trade and Development, UNCTAD Series on Issues in Competition Law and Policy : Papers Presented at the Pre-UNCTAD X Seminar, June 14-15, 1999, *The Role of Competition Policy for Development in Globalizing World Markets*, UNCTAD/ITCD/CLP/Misc.14 (1999).

¹⁸ Preventing anti-competitive business practices and unnecessary government interventions, avoiding concentration and abuse of market power and thus preserving the competitive structure of markets.

¹⁹ OECD, *supra* note 4.

²⁰ Gregory Day, *Competition and Piracy*, Vol. 32, BERKELEY TECHNOLOGY LAW JOURNAL, 775 (2017).

²¹ Christopher M. Kalanje, *The Role of Intellectual Property in Innovation and New Product Development*, IETT, June 11, 2017, available at <https://iettn.ieee-ies.org/role-intellectual-property-innovation-new-product-development/> (Last visited on March 8, 2021).

²² CUTS INTERNATIONAL, Alice Pham, *Competition Law and Intellectual Property Rights: Controlling Abuse or Abusing Control?* (2008) available at http://www.cuts-international.org/pdf/CompetitionLaw_IPR.pdf (Last visited on February 23, 2021).

²³ David Encaoua & Abraham Hollander, *Competition Policy and Innovation*, Vol. 18(1), OXFORD REVIEW OF ECONOMIC POLICY, 63 (2002).

²⁴ *Id.*

the aforementioned purposes would not be achieved; as the returns of an invention would diminish, the incentive to innovate would also reduce. Thus, exclusivity and innovation with respect to IPRs are inextricably linked.

This cycle promotes long run dynamic efficiency by improving the quality of goods and services in the market through the use of technology and increased productive efficiency.²⁵ Further, it also encourages investment, and produces more inputs for competition in the long run. In the absence of protection of IPRs, innovations could be rapidly reproduced at lower costs and without compensation to right holders.²⁶ This vitiates the role of R&D and investment in promoting innovation and thus reduces the incentive to innovate. A reduction in innovation can also be viewed as a reduction in consumer welfare as it may directly impact the quality of goods and services available in the market.²⁷

The extent of protection and rewards offered by IP law to these right holders has remained a point of contention in various jurisdictions. The returns to creators from enjoyment of their IPR should be sufficient to provide incentives for investment in R&D and innovation by third parties.²⁸ Thus, according protection to results of innovation and inventions of creators is a fundamental principle of IP. If the IPR is not protected and is subject to absolute application of competition law, then the invention can be reproduced with little cost, reducing the incentive to innovate. On the other hand, over protection of IPRs also does not help achieve the objectives of IP law.²⁹

Therefore, subjecting agreements between right holders and third parties to regulatory regimes, such as in relation to competition law, must be done in a justifiable and prudent manner so that the objectives of IP law are not defeated unjustifiably. If reducing the extent of protection available to right holders in agreements is deemed necessary, in such cases the underlying rationale and whether the stated policy objectives can be attained by other alternatives must be assessed as the protection of IPR in competitive markets is an essential aspect of the IPR itself.³⁰

²⁵ Dean Baker, Arjun Jayadev & Joseph Stiglitz, *Innovation, Intellectual Property, and Development: A Better Set of Approaches for the 21st Century*, ACCESS IBSA: INNOVATION & ACCESS TO MEDICINES IN INDIA, BRAZIL & SOUTH AFRICA (2017).

²⁶ Stephen Ezell & Nigel Cory, *The Way Forward for Intellectual Property Internationally*, April 25, 2019, available at <https://itif.org/publications/2019/04/25/way-forward-intellectual-property-internationally> (Last visited on January 16, 2019).

²⁷ Guillermo Marshalla & Álvaro Parra, *Innovation and Competition: The Role of the Product Market*, Vol. 65(C), INTERNATIONAL JOURNAL OF INDUSTRIAL ORGANIZATION, 221 (2019).

²⁸ *Id.*

²⁹ Martin Senftleben, *Overprotection and Protection Overlaps in Intellectual Property Law – The Need for Horizontal Fair Use Defences* in THE STRUCTURE OF INTELLECTUAL PROPERTY LAW: CAN ONE SIZE FIT ALL (2011).

³⁰ Ezell & Cory, *supra* note 26.

C. CONFLICT AND CONCILIATION

It is imperative to acknowledge that even though the objectives of competition policy and IP Policy may be aligned, the application of IP law may come in conflict with competition law in certain situations. Competition law regulators promote competition by aiming for the maximum number of competitors in a market.³¹ IP law seeks to protect rights of individual innovators by allowing the individual to exclude others from the use of the individual's protected property.³² Competition law attacks this exclusionary aspect of IPRs so as to maintain effective access to the market.³³

By defining the nature and scope of protection available to right holders, IP law allows right holders to further commercial gains through licensing without fear of copying. Agreements centered on the use of IPR increase the allocative efficiency of businesses.³⁴ However, the attitude of competition authorities regarding the scope of these licensing agreements and resultant rewards is currently unclear. Countries belonging to the OECD have previously stated that the licensing practices of right holders and firms in their jurisdictions have been regularly affected by competition policy of that country.³⁵ Factors such as price, quality, quantity, period of contract, exclusivity and tie-in provisions in licensing agreements are often subject to competition law scrutiny.³⁶ Thus, it is important to analyse the competition law related ramifications of licensing agreements in determining their reasonability.

While competition law and IP law are not divergent in all aspects, they come into conflict with respect to the question of establishing the extent of protection offered by IP law to an individual in a competitive market setting. In granting protection to innovation, IP law defines the scope of legal exclusivity available to the right holder. This is often considered as synonymous to the creation of market power which limits static competition in the interests of long term, dynamic competition.³⁷ Competition law, on the other hand, protects static competition by regulating misuse of dominance by monopolistic firms, market access and anti-competitive conduct of firms at a given point of time, so as to encourage dynamic competition in the long run.³⁸

³¹ Federal Trade Commission, Antitrust Guidelines for the Licensing of Intellectual Property, 1995(USA).

³² *Id.*

³³ RICHARD WHISH & DAVID BAILEY, COMPETITION LAW, 2 (9th ed., 2005).

³⁴ Ezell & Cory, *supra* note 26.

³⁵ OECD, *supra* note 4.

³⁶ CUTS INTERNATIONAL, *supra* note 22.

³⁷ *Id.*

³⁸ Static competition refers to the competition in the market at a given point of time, whereas dynamic competition refers to development of new products and technologies over time; see J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, Vol. 5(4), JOURNAL OF COMPETITION LAW & ECONOMICS, 581-631 (2009).

Both competition law and IP law have common objectives of furthering long run dynamic competition through innovation, and social welfare by promoting the construction of an efficient marketplace and pro-competitive conduct by firms.³⁹ Over time, the philosophy and purpose of IP law has transitioned from the reward theory, where individual innovators are rewarded with exclusionary rights for the protection of their property, to the incentive theory, a continuous process that incentivises further innovation in markets.⁴⁰ Although the reward theory may contradict the objectives of competition law by bestowing on individuals the rights to make their property available restrictively, the incentive theory is more reconciliatory in nature and allows for balancing of individual interests of right holders with competition by incentivising innovation and technological progress in the long run. Thus, it has been predicted that by acknowledging modern IP law as a form of competition policy, the two regimes may be harmonised.⁴¹ This can be addressed by a limited IP law exemption within competition law which may serve as a balancing mechanism for the two conflicting regimes.

Protection to IPR furthers innovation while higher number of market players gives consumers better quality of goods and services at lower prices. However, in certain situations, balancing these two *vis-à-vis* monopolistic profits and short-run static inefficiency helps achieve dynamic efficiency in the long run and kicks off a cycle of long term economic growth and development.⁴² While there are discrepancies in the modes of operation of these regimes and the short-term and long-term goals, the end objective of enhancing innovation and consumer welfare remains common to both.

There is a school of thought that when IP law functions as an institutional regulatory framework for agreements centered on the innovation in question, the same must be exempt from anti-competitive analysis. For example, the IP law exemption for competition law provided by §3 of Article 81 (previously Article 85) of the Treaty of Rome provides that innovations which contribute to economic growth, technological progress, and improve the production or distribution of goods or services must be included in block exemptions. Similarly, in the US, restrictions in licensing agreements are analysed under the rule of reason to assess their economic benefits, consumer welfare and technological contribution.⁴³

³⁹ *Id.*

⁴⁰ ILKKA RAHNASTO, *INTELLECTUAL PROPERTY RIGHTS: EXTERNAL EFFECTS AND ANTI-TRUST LAW*, 19 (2003).

⁴¹ Shubha Ghosh, *Competitive Baselines for Intellectual Property Systems* in *INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY* 793, 795-802 (2004).

⁴² For example, it has been argued that letting the price exceed the marginal cost through a succession of temporary monopolies such as those created by intellectual property can spur dynamic competition and in turn long term dynamic efficiency. This cycle kicks off rapid innovation, increased importance of declining average costs, followed by network externalities, all of which have created conditions ideal for dynamic competition for monopoly, in which temporary monopolies rise and fall in the rhythm of rapid entry and exit. See CUTS INTERNATIONAL, *supra* note 22.

⁴³ The Sherman Antitrust Act, 1890, §1 (USA).

It is believed that if the objectives of IP law and competition law are achieved through these limited gateways, then an exemption from the general application of competition law is appropriate. An exemption in this regard would ensure the complementary working of the two regimes.

Competition law upholds short run allocative efficiency, which implies driving the price of products towards its marginal costs in order to further the output of society's resources.⁴⁴ IP law on the other hand incentivises innovation by allowing right holders to exclude others or charge prices higher than the marginal cost of production.⁴⁵ The fixed costs associated with the an intellectual property are those involved in its production. Upon its creation, the marginal cost of use of IPR is nil. Because of its non-rivalrous nature, the IP can be used an infinite number of times without being consumed or exhausting itself . Thus, the exclusionary legal rights allow positive prices to be charged.⁴⁶ This gap between the objectives of the two regimes can be bridged by focusing on consumer welfare in the long run which ultimately depends on dynamic and allocative efficiency.⁴⁷ Thus, well-defined application of competition law and IP law are essential for efficient operation of markets and achieving economic growth.

III. BACKGROUND OF THE IP LAW EXEMPTION

§3(5)(i) of the Act governs the intersection of IP law and competition law. It allows right holders in competitive settings to prevent the infringement of their IPRs or impose reasonable conditions that are necessary for the protection of their IPRs. In doing so, it acts as a balancing mechanism and carves out the prospects where pro-competitive usage of IPRs may be made. However, the scope of this exemption is unclear, as is the extent of the protection it offers to the right holders. In this part, we aim to highlight the rationale behind such an exemption, keeping in mind the evident conflict between competition law and IP law. We then endeavour to trace the evolution of §3(5)(i) and reconstruct the provision based on its syntax.

A. THE NEED FOR AN EXEMPTION

It is imperative to acknowledge that the application of IP law may come in conflict with competition law. Then a ture of competition law suggests that it should have *general application* and shall apply similarly to all commercial

⁴⁴ Jenny, *supra* note 15.

⁴⁵ Richard A. Posner, *Intellectual Property: The Law and Economics Approach*, Vol. 19(2), JOURNAL OF ECONOMIC PERSPECTIVES, 57-67 (2005).

⁴⁶ John F. Duffy, *The Marginal Cost Controversy in Intellectual Property*, Vol. 37(71), THE UNIVERSITY OF CHICAGO LAW REVIEW, 40 (2004).

⁴⁷ Jenny, *supra* note 15.

industries and sectors alike.⁴⁸ This derives its basis from fundamental legal and economic reasons.

In order to further the goals of equality and fairness, entities in similar situations should be treated similarly before the law. This includes not only individuals but also commercial entities which should be subject to the uniform and non-discriminatory application of law.⁴⁹ Ensuring similar treatment of entities under competition law helps maintain consistency in the way that law is interpreted and implemented.⁵⁰ This adds transparency and accountability in the legal order and fosters due process under the law which is essential for building an environment conducive to economic growth and investment.⁵¹

The economic reasons for general application of competition law relate to the interconnected nature of commercial activities in different markets.⁵² This implies that a change in the regulation of one market would affect the prevailing conditions in other connected markets. Thus, if a market producing a particular good or service is exempted from the application of competition law, other markets, where that good or service is an input, substitute or complement to the primary good or service, would invariably suffer from positive or negative economic distortions. This can be attributed to the role of price and profit signals in redeployment of resources across different lines of economic activity.⁵³

In India, the purpose of competition law is broadly two fold: protection of consumer welfare and creation of a free and fair business environment for firms.⁵⁴ To achieve the latter objective, competition law seeks to prevent the creation of monopoly, restrictive trade and monopolistic practices which may affect the primary market for that good or service and also interfere with the allocation of resources in other connected markets.⁵⁵ If a particular firm or sector is exempt from the application of competition law, the firm's market power would potentially be strengthened and may be subsequently abused depending on the commercial viability of its ventures. However, this may result in adverse economic effects for its competitors, customers, end consumers, and other economic players while simultaneously reducing the incentive to innovate. Isolating any economic agency from

⁴⁸ United Nations Conference on Trade and Development, Trade and Development Board Trade and Development Commission Intergovernmental Group of Experts on Competition Law and Policy Sixteenth session, July 5-7, 2017, *Model Law on Competition*, TD/B/C.I/CLP/L.8(2017).

⁴⁹ United Nations Conference on Trade and Development (UNCTAD), Shyam Khemani, *Application of Competition Law: Exemptions and Exceptions*, *Application of Competition Law: Exemptions and Exceptions*, 5, UNCTAD/DITC/CLP/Misc.25(2002).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ The National Competition Policy, 2011.

⁵⁵ CUTS INTERNATIONAL, Dr. S. Chakravarthy, *Why India Adopted a new Competition Law* (2006) available at http://www.cuts-ccier.org/pdf/Why_India_Adopted_a_new_Competition_Law.pdf (Last visited on February 24, 2021).

the application of competition law would directly or indirectly impact the market negatively.⁵⁶ Nevertheless, while exemptions would negatively impact competition, at times they could also be indispensable so as to further other overriding objectives such as economic efficiency and consumer welfare.⁵⁷ For instance, in addition to the IPR exemption, the Act also protects rights of persons exporting goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or services, by barring them from application of §3.⁵⁸ Thus, the justifications and underlying rationale of such exemptions must be carefully understood for more equitable application of competition law.

Subjecting all entities to uniform application of competition law may not be beneficial in the long run. Many jurisdictions have recognised the role of limited exemptions in reconciling competition law conflicts with other areas in some manner.⁵⁹ The justifications for granting exemptions range from promotion and maintenance of competition and economic efficiency,⁶⁰ to increasing public interest,⁶¹ economic freedom,⁶² and consumer welfare.⁶³ For instance, Canada follows a cost-benefit method based analysis to assess whether certain exemptions to competition law should be granted. It requires ascertainment of whether a certain exemption may result in substantial lessening of competition but also have offsetting economic efficiencies that may benefit the economy as a whole. This has been used to exempt mergers and acquisitions ('M&A') regulation from competition law and has come to be known as the Total Welfare Approach.⁶⁴ This approach takes into consideration both the consumer surplus (welfare) and the producer surplus, and balances them against the negative effects (such as reduced output, higher prices and resulting deadweight loss) arising from the M&A transaction.⁶⁵ Japan, on the other hand, exempts natural monopolies and infrastructure industries such as railways, electricity, gas, etc, from the application of competition law. While the competition policy of Japan is silent on efficiency based exceptions to competition law, such arguments have previously been considered by competition authorities while determining lessening of competition by a particular industry or practice.⁶⁶ Competition authorities in EU member states such as Norway, Spain, and Italy, also entertain *time-bound* exemptions to competition law, if justified on pretexts

⁵⁶ R.G. Lipsey & K. Lancaster, *The General Theory of Second Best*, Vol. 24(1), REVIEW OF ECONOMIC STUDIES (1956-57).

⁵⁷ UNCTAD, *supra* note 49.

⁵⁸ The Competition Act, 2002, §3(5)(ii).

⁵⁹ See discussion *infra* Part VII on "Comparative Analysis".

⁶⁰ Canada, New Zealand, and Colombia.

⁶¹ UK, Venezuela, and Colombia.

⁶² EU.

⁶³ USA.

⁶⁴ UNCTAD, *supra* note 49.

⁶⁵ *Id.*

⁶⁶ See Organisation for Economic Co-operation and Development (OECD), *Policy Roundtables, Round Table No. 4, Efficiency Claims in Mergers and Other Horizontal Agreements*, OCDE/GD(96)65(1995).

of public interest, consumer welfare, technological progress, improved quality of products, as well as international competitiveness.⁶⁷

IP law exemptions from competition law fall in one such category of limited exemptions. Protecting IPRs in an economy incentivises innovation, early disclosure of inventions, and the diffusion of new ideas, products and production methods.⁶⁸ These incentives play a vital role in technological progress which results in a cycle of dynamic economic efficiencies.⁶⁹ However, owing to the exclusionary nature of IP law, a prudent balancing solution must be worked out between competition law and IP law.

Scholarship suggests that these exemptions should be as minimally restrictive of competition as possible.⁷⁰ It is important to balance unjustified monopolies but also protect right holders' investment. Thus, to create an incentive for innovation, and enhance the quality of products and services, it is crucial that competition law and IP law are balanced through limited exemptions. Since exemptions from competition law are exceptions to the rules of general application, the exemptions must be specific and well defined.

Thus, the exercise of granting exemptions to industries must be justified on legal and economic reasons while furthering due process and objectives of competition law and IP law. Assessing whether an exemption should apply to a specific industry or firm should include analysis, taking a cue from various established factors as followed in other jurisdictions, of the impact of exemptions on economic efficiency and consumer welfare, cost-benefit impact on the stakeholders, overriding benefits that serve the consumer, or any other broader economic interests as per the competition law structure in that country.

B. LEGISLATIVE EVOLUTION OF THE EXEMPTION

In India, §3(5)(i) of the Act provides a limited exemption from the application of §3 of the Act. The exemption is *limited* as it is qualified and does not shield the right holder from the general application of competition law completely. Rather, it only protects right holders from the application of §3 of the Act if certain conditions under §3(5) are satisfied. To fully understand the meaning of the exemption, it is imperative to outline its legislative background and determine the manner in which the rationale for such an exemption evolved. We do so by analysing the way in which IPRs were treated under the Monopolies and Restrictive Trade Practices Act, 1969 ('MRTP Act'). We also examine the perception of the intersection of the IP and competition regimes by the Raghavan Committee, which

⁶⁷ *Id.*

⁶⁸ UNCTAD, *supra* note 49.

⁶⁹ *Id.*

⁷⁰ *Id.*

was responsible for recommending the structure of competition law as it stands today.

1. Monopolies and Restrictive Trade Practices Act, 1969

Before the Competition Act, 2002 came into force, the MRTP Act governed all antitrust disputes in India. The objective of the MRTP Act was to control monopoly and curtail restrictive trade practices in the market. It assumed that the presence of IPR led to the creation of monopolies and since these monopolies were generated by the operation of law, IPRs were not to be subject to the application of competition law.⁷¹

Unlike the Competition Act, 2002, the MRTP Act did not make reference to a variety of IPR. Instead, it only made reference to patents in §15. The provision protected the right of persons with patents registered in India to prevent the infringement of their rights. Thus, even if the said prevention furthered monopolistic and restrictive behaviour, if it was made for the protection of a person's rights under the Patents Act, 1970 ('Patents Act') then no order could be made under the MRTP Act restricting the right holder from doing the same. Despite the explicit reference to patents, the Monopolies and Restrictive Trade Practices Commission ('MRTPC') was not faced with a situation where it would have been required to adjudicate upon the effect of monopolistic and restrictive behaviour *vis a vis* prevention of infringement of a patent registered in India. Abuse arising out of exercise of other IPRs was regulated by §36A of the MRTP Act.

In the case of *Vallal Perumanv. Godfrey Phillips*,⁷² the Monopolies and Restrictive Trade Practices Commission ('MRTP Commission') observed that as long as a person holds a valid IPR and the same is used in accordance with the terms and conditions with which it was granted, provisions of the MRTP Act could not be attracted.⁷³ However, if the right holder misuses one's rights through "manipulation, distortion, contrivances and embellishments, etc., so as to mislead or confuse the consumers, he (the right holder) would be exposing himself to an action under clause (7) of §36A of indulging in unfair trade practices." Thus, the MRTP Commission held that provisions of the MRTP Act would become applicable in situations where the exercise of IPRs as per the relevant IP Statute has resulted in an abuse. The nature and extent of abuse requiring intervention from the MRTP Commission was not opined upon.

Moreover, in the case of *Manju Bharadwaj v. Zee Telefilms Ltd.*,⁷⁴ it was held that the interaction of IPRs and anti-competitive practices would be limited to the misuse of IPRs resulting in monopolistic or unfair trade practices. The

⁷¹ CUTS INTERNATIONAL, *supra* note 55.

⁷² *Vallal Peruman v. Godfrey Phillips (India) Ltd.*, 1994 SCC OnLine MRTPC 24.

⁷³ *Id.*, 206.

⁷⁴ *Manju Bharadwaj v. Zee Telefilms Ltd.*, 1996 SCC OnLine MRTPC 12.

case clarified that the MRTP Commission would have jurisdiction over all disputes concerning abusive exercise of IPR resulting in unfair trade practices, other than patents, through §36A(1) of the MRP Act.⁷⁵

Thus, in determining anti-competitive behaviour solely from the purview of the abuse in exercise of rights under the relevant IP law statute, and creating different thresholds of abuse for IPRs, the MRTP Act did not adequately regulate upon the intersection of IP and competition law. Additionally, with India becoming a party to World Trade Organisation's General Agreement on Trade and Tariffs ('GATT') as well as Trade Related Aspects of Intellectual property Rights ('TRIPS'), an overhaul in competition as well as IP Law statutes was required to bring the regulation in consonance with international standards. Thus, it was observed that the MRTP Act did not adequately govern the intersection of IP and competition a win India.

2. Raghavan Committee Recommendations

With the liberalisation of the economy and the provisions of the MRTP Act becoming obsolete,⁷⁶ a High Level Committee on Competition Policy and Competition Law, chaired by Mr S.V.S. Raghavan, was set up in 1999 to determine the future course of application of competition law in India. Alongside its major recommendation in favour of repeal of the MRTP Act, the Raghavan Committee acknowledged the need for remodelling of competition law on the basis of principles recognised worldwide, taking into account nuanced aspects of competition law and economics.⁷⁷

The Raghavan Committee Report, 2000, observed that IPRs must not be completely exempt from the application of competition law as the operation of these rights has the potential to raise competition law and policy issues.⁷⁸ Even though IP law confers exclusive rights upon right holders, it does not allow them to exert restrictive or monopoly power.⁷⁹ The Report further provided that the exercise of IPRs must be distinguished from their existence.⁸⁰ If the former results in a deterioration of consumer or public interest, competition law must prevail over IPRs.⁸¹

⁷⁵ *Id.*, ¶13.

⁷⁶ After 1991, a variety of changes were introduced in policies relating to foreign investment, industrial licensing, technology imports, government monopolies, financial sector, etc. In light of the changes enacted throughout the 1990s, it was realised that the MRTP Act was not adequately suited to 'encourage' competition in the evolving markets.

⁷⁷ Raghavan Committee Report on Competition Law, ¶¶ 5.1.7-5.1.8.

⁷⁸ *Id.*, ¶ 5.1.7

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.*

In recognising such a distinction, the Report explicitly clarified that competition law intervention is warranted in cases where a particular exercise of IPR may put consumer or public interest at stake.⁸² It also recommended that Indian competition law be amended so as to accommodate such a conflict and bolster competition in general.⁸³ Thus, the Report took note of the interplay of IPR and competition law and formed the basis of enacting the IPR exemption in the upcoming competition legislation. While it recognised that the application of IP law may be limited by competition law on the grounds of public interest, such a distinction was not explicitly taken into account by the Competition Act, 2002 in the framing of §3(5).

IV. SCOPE OF §3(5) COMPETITION ACT, 2002

Acknowledging the growing tension between IPR regimes and competition law, the legislature sought to concretise the relationship between competition law and IP law through the Competition Act, 2002. §3(5)(i) of the Act was enacted accordingly as an attempt to guide the conditions under which IP law protection may be limited.⁸⁴

In this part, we explore the contours of the provision by understanding its scope as an exemption, the rights it protects and the extent of protection it offers. Further, we also explore some important cases for the limited purpose of understanding the interpretation of reasonable and necessary conditions under §3(5)(i) of the Act.

A. §3(5)(I): AN EXCEPTION?

In comparison to its predecessor, the 2002 Act recognises the additional objectives of not only controlling monopoly power but also promoting healthy competition amongst market players and preventing agreements which have adverse effects on the market.⁸⁵ Accordingly, such an exemption was enacted in light of certain IPRs assuming an anti-competitive character if left unregulated and thereby having adverse effects on the market. §3 of the Act regulates conditions in agreements relating to production, supply, distribution, storage, acquisition or control of goods or provision of services, which may result in AAEC. Thus,

⁸² The practice of granting protection to broad patents, results in greater rewards for the primary innovator but leads to inhibition of innovation and practical difficulties, such as increased costs and uncertainties, for the secondary innovators. This practice is notably common in biotechnology sector where broad patents over inventions in certain countries have generally diminished innovation and technological progress. See OECD, *supra* note 4.

⁸³ *Id.*

⁸⁴ Max Planck Institute for Intellectual Property and Competition Law, *Configuration of Intellectual Property and Competition Law*, available at <https://www.ip.mpg.de/en/research/intellectual-property-and-competition-law/field-of-research/ii-configuration-of-intellectual-property-and-competition-law.html> (Last visited on March 5, 2021).

⁸⁵ The Competition Act, 2002, Preamble.

any agreement that causes an AAEC would be void.⁸⁶ §3(5)(i) of the Act provides that a person may impose conditions which are reasonable and necessary to protect one's rights or prevent the infringement of the rights contained in the IP law statutes.

Some have asserted that §3(5) does not exempt right holders from the application of §3. Thus, if right holders indulge in practices listed under §3(3) and §3(4), then they would not be protected by §3(5).⁸⁷ However, it is argued this position is not legally sound. §3(5) is exempted from the application of other provisions of §3 as the contents of the two may clash in operation. If a condition is reasonable and necessary for the protection of certain IPR, then the remaining provisions of §3 will not apply even if the agreement amounts to a vertical or horizontal agreements as regulated by §3(3) and §3(4). The Competition (Amendment) Bill, 2012, introduced another sub-clause to §3(5) clarifying that §3 shall not restrict the matters regarding the protection of IPR as contained in any other law. However, the same is not reflected in the provision as it is today.

Agreements between entities are regulated when they lead to an AAEC. §3 applies when an agreement may be deemed anti-competitive, whereas §3(5), an exception to §3, applies when that particular agreement is either made to prevent the infringement of a person's rights or contains reasonable conditions for the protection of a person's IPR. Notably, even if the agreement satisfies the threshold of reasonability and necessity under §3(5), it must not result in the breach of §4 as the safe harbour for IPRs is not available for abuse of dominant position as per §4(2) of the Act. §4A of the Competition Amendment Bill, 2020, seeks to extend this safe harbour exemptions available to IPR to §4 as well. However, the same has not made its way into the Competition Act as of yet.

B. WHICH RIGHTS ARE PROTECTED?

The provision does not protect know-how or forms of IP law other than those listed therein.⁸⁸ Thus, if an agreement is centered on know-how or trade secrets, the same would be subject to the provisions of §3 and not be exempt from its application. The Competition (Amendment) Bill, 2020,⁸⁹ & 2012,⁹⁰ introduced in the Lok Sabha provided for widening the Scope of the forms of IP law that would be protected by this provision.⁹¹ However, these Bills have not materialize into law, and as of now, the provision only protects rights associated with IP in the nature of copyrights, patents, trademarks, geographical indicators ('GI'), industrial designs and layouts of integrated circuits.

⁸⁶ *Id.*, §3(2).

⁸⁷ ABIR ROY, *COMPETITION LAW IN INDIA* (2016).

⁸⁸ INTELLECTUAL PROPERTY, *COMPETITION LAW AND ECONOMICS IN ASIA*, 169 (Rian McEwin ed., 2011).

⁸⁹ The Competition (Amendment) Bill, 2020.

⁹⁰ The Competition (Amendment) Bill, 2012, 136 of 2012.

⁹¹ *Id.*, Cl. 3(B) provided for the insertion sub-clause (g) in § 3(5)-“(g) any other law for the time being inforce relating to the protection of other intellectual property rights;”.

Further, the provision also delineates that the rights that are to be protected or whose infringement is sought to be prevented, must either exist at the time of imposition of conditions or may be conferred upon a person in the future. However, the ambit of the protection of rights that may be conferred upon a person in the future under §3(5) remains unclear. It is uncertain if the provision protects those who have filed applications as per legal process and subsequently receive protection for their rights or if it refers to rights which are granted legal protection even if no formal application for protection has been filed.⁹²

In *Shamsher Katariav. Honda Siel Cars Ltd.*,⁹³ (‘Shamsher Kataria’) the Competition Commission of India (‘CCI/Commission’) held that in or derto avail of the protection under §3(5), it is necessary that either the right should already subsist or that the process for protection of rights under the relevant IPR statute must have already been initiated.⁹⁴ Arguably, this position is not affirmed by the provision which appears to merely seek to protect rights which may be conferred upon right holders in the future. In the same case, the Commission also clarified that the rights under the provision were territorial and would thus not be protected *vis-à-vis* technology transfer agreements (‘TTA’).⁹⁵ Therefore, §3(5) allows right holders or future right holders—in a limited sense—to impose conditions in agreements without being subject to competitive scrutiny under §3 of the Act if they are qualified by the exemption. However, it is unclear whether rights for which no registration or application process has been initiated, for instance copyright law which does not mandate registration to begin with, could also be protected by the provision in light of the position established by Shamsher Kataria.

C. PROTECTION OR ENJOYMENT?

On basic reconstruction of the exception, it is apparent that under §3(5) a person may exercise their IPRs in two ways – either one may restrain the infringement of one’s IPRs or one may impose conditions which are reasonable and necessary for the protection of one’s rights under relevant IP law statues.⁹⁶ As long as the conditions imposed are reasonable and necessary for the protection of one’s rights, the private rights of IPR holders are placed above the general market phenomenon of anti-competitive agreements under §3.⁹⁷ However, the right to impose conditions to protect one’s rights from infringement is safeguarded from any

⁹² Copyrights are protected even without formal process of registration.

⁹³ *Shamsher Kataria v. Honda Siel Cars India Ltd.*, 2014 SCC OnLine CCI 95.

⁹⁴ *Id.*, ¶20.6.17.

⁹⁵ *Id.*

⁹⁶ Illustration: In case of patents, the §48 of the Patents Act, 1970, provides for the rights of the patentee. This includes the exclusive right to prevent third parties, who do not have his consent, from the act of making, using, offering for sale, selling or importing for those purposes. Therefore, restraining the infringement of the patent rights under the Patents Act will include the negative right to disallow third parties from associating with the product that is the subject-matter of the patent.

⁹⁷ *Id.* The existence of IP rights restricts competitive market forces for a set period. See Australian Government, *IP Australia and the Future of Intellectual Property*, IP AUSTRALIA, July 2017,

further qualifications. Thus, a distinction is drawn between enjoyment or exploitation of IPRs and protection or prevention of infringement of IPRs contained in the relevant IP statutes; §3(5) only addresses the latter. The exemption provided by §3(5) is limited to circumstances where right holders may prevent infringement or protect their current or future IPRs through reasonable and necessary conditions. This cannot be categorised as a blanket exemption to IP law from competition law in general.

D. REASONABLE AND NECESSARY: DRAWING THE LINE

The CCI has provided an illustrative list of conditions which would be unreasonable under §3(5). These include patent pooling, tie-in arrangements, agreements for payment of royalty after expiration of the patent, restricting competition in R&D, disallowing licensee from challenging the validity of IPR, fixing the price at which the licensee can sell products, coercing the licensee to take more licenses than required, imposing quality control on the licensed patented product beyond those necessary, restricting licensee's right to sell the product to a specific group of people, restricting licensee's business, limiting the maximum amount of use the licensee may make of the patented invention and forcing licensee to employ staff as designated by the licensor.⁹⁸

The provision specifies that right holders may protect their rights as may be found in the relevant IP statutes listed there under. Thus, if the conditions in the agreement go beyond the scope of the rights conferred by the IP law statute, then the agreement would not be exempt from the application of §3. Accordingly, for the determination of what may be necessary for the protection of certain IPR, it is imperative to define the subject matter of the IPR and the ways in which it may be utilised. If a condition falls outside the ambit of the two, it is not necessary for the protection of the IPR.

In the case of *FICCI–Multiplex Assn. of India v. United Producers/Distributors Forum* ("FICCI Multiplex"),⁹⁹ the CCI clarified that the non-obstante clause in §3(5) of the Act is not absolute and that the purpose of the exemption is to safeguard the right holder from the rigours of competition law, only to protect their rights from infringement.¹⁰⁰ In allowing the exemption to apply only in cases of protection of rights, the threshold to avail the exemption was set exceedingly high. Here, CCI distinguished *protection* from *commercial exploitation*, and laid down that §3(5) would be applicable only in case of the former.¹⁰¹ Moreover, since

available at https://www.ipaustralia.gov.au/sites/default/files/ip_australia_and_the_future_of_intellectual_property.pdf (Last visited on March 9, 2021).

⁹⁸ COMPETITION COMMISSION OF INDIA, ADVOCACY BOOKLET ON INTELLECTUAL PROPERTY RIGHTS UNDER THE COMPETITION ACT, 2002 (2018).

⁹⁹ *FICCI–Multiplex Assn. of India v. United Producers/Distributors Forum*, 2011 SCC OnLine CCI 33.

¹⁰⁰ *Id.*, ¶23.30.

¹⁰¹ *Id.*, ¶23.27.

the specific agreements under review had made the subject matter opposed to consumer interest, the conditions were adjudged unreasonable as under §3(5) of the Act.¹⁰² The CCI did not explicitly enlist the parameters based on which it found the conditions in the agreement to be unreasonable.

In the *Shamsher Kataria* case,¹⁰³ it was held that to successfully avail of the exemption under §3(5), a restriction must pass a two pronged test—first, the right it protects should be a valid IPR under the relevant IP statutes, and second, the requirement of laws granting the IPR should have been satisfied.¹⁰⁴ CCI went on to add that the existence of an IPR does not entitle the right holder to avail the exemption; a condition should be both reasonable and necessary for the protection of certain IPR in question. Similar to the *FICCI Multiplex* case, the CCI interpreted *necessary* to mean indispensable for the protection of IPRs.¹⁰⁵

Apart from the lone factor of weighing consumer interest, it is unclear how conditions under a certain agreement would be classified as reasonable or necessary to protect IPRs. It is also uncertain whether prevention of infringement of rights in the context of this provision of the Act is the same threshold as infringement under the respective IP statutes. While courts have previously held that the determination of reasonability would be a case-to-case based analysis, there is no reference point of set parameters or prescriptions through which an assessment of the reasonability may be made by contesting parties. Usually, agreements related to IPRs are centered on licensing of the rights. However, the provision does not restrict the agreements under its ambit to licensing, but instead relates to the imposition of conditions in any horizontal or vertical agreement, the subject-matter of which is any right protected by the relevant IP statute. Thus, in this backdrop, it becomes necessary to revisit the conflict that arises between operation of competition law and IP law and explicate the contours post a detailed examination of competition law exemptions.

V. JURISDICTIONAL ISSUES UNDER §3(5)

The overlap between IP law and competition law is explicitly addressed by §3(5) of the Act. Yet, despite the overlap, it is unclear whether the jurisdiction for disputes concerning the exercise of IPR against the backdrop of competition law would rest with the CCI or an IP authority or both. This creates a situation of uncertainty for right holders and adverse parties alike as it is unclear which forum they should approach in case of a legal conflict. In the following parts, we aim to clarify the scope of this issue by providing an overview of the current position on jurisdictional issues arising out of the IP-competition law conflict. Thereafter we contrast two models adopted in cases of jurisdictional conflicts

¹⁰² *Id.*, ¶28.35.

¹⁰³ *Shamsher Kataria v. Honda Sael Cars India Ltd.*, 2014 SCC OnLine CCI 95.

¹⁰⁴ *Id.*, ¶20.6.16

¹⁰⁵ *Id.*

between sector regulators and competition agencies. We then test the suitability of these models to the current framework and provide our recommendations to resolve this IP– competition jurisdictional tussle.

A. CURRENT POSITION

Cases in the past have illustrated that the CCI is competent to adjudicate disputes at the intersection of IP law and competition law and that it would have the sole jurisdiction in §3(5) disputes. Nevertheless, the jurisdiction of the CCI has remained a point of contention in many disputes concerning IP law and competition law in India.

The case of *Aamir Khan Productions (P) Ltd. v. Union of India*¹⁰⁶ established the jurisdiction of the CCI in a dispute which concerned competition law and IP law. The facts of the case revolved around the exercise of IPR by a group of film production companies, which refused to release movies in multiplex cinemas as an exercise of their rights under the Copyright Act, 1957. Among the various contentions involved, the petitioner challenged the jurisdiction of the CCI to hear disputes relating to the exercise of their copyright as it was protected by §3(5) of the Act.

It was argued that the Copyright Act, 1957, ('Copyright Act') allowed the petitioner to impose restrictions relating to exclusivity, and thus, the restrictions imposed by them were legally sound.¹⁰⁷ However, the High Court of Bombay dismissed this claim, going on to hold that CCI itself may determine whether it has requisite jurisdiction in a particular case. No opinion was expressed on the merits of the case and in doing so, the court refrained from entering the contentious overlapping arena of IP law and competition law.¹⁰⁸ Instead it was simply clarified that the CCI is competent to adjudicate upon IPR disputes based on §3(5) of the Act.

This issue came up yet again in *HT Media Ltd. v. Super Cassettes Industries Ltd.* ('Super Cassettes Industries').¹⁰⁹ In this case, it was alleged that Super Cassettes abused its dominance in the market by charging excessive royalties from radio operators, imposing monthly commitment charges, and also making licensing agreements contingent upon acceptance of other conditions. The petitioners argued that such conditions were an abuse of the dominant position of the respondent parties and unreasonable, and hence violative of §3(5) of the Act. When CCI undertook an investigation on the conduct of Super Cassettes, the latter challenged its jurisdiction on the ground that only the Copyright Board under

¹⁰⁶ *Aamir Khan Production (P) Ltd. v. CCI*, 2010 SCC OnLine Bom 1226.

¹⁰⁷ Copyrights Act, 1957, §18 confers upon the owner of the copyright the right to assign to any person a copyright either wholly or partially. §30 recognizes the right of the owner of the copyright to grant any interest in the right by licence in writing.

¹⁰⁸ *Aamir Khan Productions (P) Ltd. v. Union of India*, 2010 SCC OnLine Bom 1226, ¶15.

¹⁰⁹ *HT Media Ltd. v. Super Cassettes Industries Ltd.*, 2014 SCC OnLine CCI 120.

the Copyright Act was competent to hear the dispute as the agreement was focused on the licensing conditions of their copyright. It was argued that since the subject matter concerned copyright, the reasonability and necessity of conditions surrounding licensing of the subject matter had to be determined by the Copyright Board itself.

Super Cassettes also argued that when the market for the copyrighted material is already regulated by the Copyright Board, the role of competition law diminishes and the jurisdiction of CCI is ousted. The CCI, however, found that since the Copyright Act does not contain equivalent provisions for §3 and §4 of the Competition Act, the Copyright Board could not be said to have absolute jurisdiction over the issue. It was stated that the *regulatory domain* of CCI differs from that of the Copyright Board as both the authorities govern different aspects of law.¹¹⁰ CCI also ruled that it is a market regulator and hence, may adjudicate upon all disputes which have anti-competitive effects on the market unlike the Copyright Board, which cannot be tasked with regulating anti-competitive conduct.

Yet again, in *Telefonaktiebolaget LM Ericsson v. Competition Commission of India*,¹¹¹ Intex and Micromax alleged that Ericsson was violating FRAND Terms and demanding discriminatory, unreasonable and unfair royalties for licensing its standard essential patent ('SEP'). The petitioners argued that CCI did not hold jurisdiction as the relevant IP law statute, in this case the Patents Act, 1970 ('Patents Act') was equipped with adequate mechanisms to deal with the abuse of rights through provisions such as compulsory licensing. Further, it was asserted that since a civil suit had already been registered and was pending in the Delhi High Court, CCI could not have taken up the matter for adjudication. Relying on §27 of the Competition Act and §84 of the Patents Act, the Delhi High Court held that CCI cannot be ousted of its jurisdiction due to the reason that the case falls within the domain of another authority.

While upholding the contention that certain provisions of the Patents Act provide remedies for abuse of other rights contained in the statute, the High Court also held that issues as to whether a condition imposed under the IP agreement is reasonable or not will be a matter which can only be decided by the CCI under the provisions of the Competition Act and no other authority. The Controller of Patents *cannot* exercise powers which have *not* been specified by the Patents Act. The Court held that the Patents Act was special law which would override provisions of competition law in cases of irreconcilable differences, however, there were no such irreconcilable differences between the two laws. Moreover, even civil courts are ousted of jurisdiction to entertain suits of proceedings which Competition law authorities, namely the CCI or National Company Law Appellate Tribunal ('NCLAT'), are to determine.¹¹² The Court held that the remedies under

¹¹⁰ *Id.*, ¶130.

¹¹¹ *Telefonaktiebolaget Lm Ericsson v. CCI*, 2016 SCC OnLine Del 1951.

¹¹² *Id.*, ¶172.

the two acts could not be said to overlap as provisions of the Patents Act, were limited when viewed in light of the Competition Act.¹¹³ Thus, the Court held that with respect to §3 of the Competition Act, there is no irreconcilable conflict as the Acts are consistent in operation. As per §62 of the Competition Act, provisions of the Competition Act should be interpreted “in addition to” and “not in derogation of” provision of the Patents Act.

From the established jurisprudence, it can be inferred that the current position of law is that only CCI can hear §3(5) disputes pertaining to the intersection of competition law and IP. CCI, being a market regulator, would have jurisdiction over all disputes relating to anti-competitive effects and abuse of dominance. Moreover, since respective IP law statutes do not contain equivalent provisions governing anti-competitive behaviour in the market, IP law agencies cannot be said to have jurisdiction over §3(5) disputes.

While we agree that CCI has the regulatory power to entertain disputes relating to anti-competitive effects of agreements and IP law authorities cannot be given sole jurisdiction of §3(5) disputes, we argue that the CCI is not the sole authority with which the entire jurisdiction for §3(5) disputes should rest. While the CCI is competent to hear the competition law aspect of disputes, IP law authorities may be better fit to analyse whether a particular restriction is necessary to protect certain IP rights or protects other rights reasonably. Such questions of law invariably involve analysis of individual situations where adjudicatory bodies have to examine if a particular usage is necessary to protect IPRs, which requires them to delve into questions involving determination regarding the extent of protection that should be available to right holders. Such a determination cannot be made by the CCI exclusively. In the case of *FTC v. Actavis*,¹¹⁴ it was held that courts must consider both antitrust policies and patent law to determine the scope of protection offered by a particular IPR. In other words, the scope of patent monopoly is defined by both patent law and antitrust law. Hence, adjudication of each such case must deal with both the laws and may not be determined by considering antitrust law in isolation. This lends credence to our position, that determining disputes situated at the interface of IP law and competition law must involve striking a balance between competition law and IP law. We further argue that the questions related to IP law and extent of protection afforded by certain IPR should not be determined by a competition regulator alone as they equally fall within the domain of respective IP law authorities as well.

B. WAY FOR WARD

For the limited purpose of understanding the jurisdictional aspect of conflicts, a parallel may be drawn with the inconsistencies arising out of jurisdictional conflicts between sector regulators and competition agencies. Duplicity

¹¹³ *Id.*, ¶169.

¹¹⁴ *FTC v. Actavis*, 133 S Ct 2223 (2013) (Supreme Court, United States of America).

of jurisdictions can broadly be dealt with by using three different models — exclusivity, concurrency, and cooperation.¹¹⁵ The exclusivity model suggests that only competition law authorities and agencies should regulate disputes concerning competition law.¹¹⁶ Indian jurisprudence on IP law exemptions for competition law falls under this category as courts have previously held that only the CCI can regulate IP-competition law and §3(5) disputes.¹¹⁷

The second model of concurrency of jurisdictions suggests that both agencies would be individually capable of adjudicating cases relating to the intersection of the two areas.¹¹⁸ Owing to the mixed nature of §3(5) disputes, this model cannot be adopted as neither of the authorities can be given full jurisdiction to settle §3(5) disputes. While it is true that agencies such as the Copyright Board or the Controller of Patents cannot be tasked with eliminating anti-competitive practices in the market, CCI alone cannot decide the extent of protection available to right holders. Reference must be made to both IP law and competition law authorities; either agency cannot alone determine both reasonability and necessity of a particular condition for the protection of other IPRs in a competition law backdrop.

The third model of cooperation requires two agencies with conflicting jurisdictions to cooperate and amicably resolve conflicts through consultations and reference to each other.¹¹⁹ It is argued that a model akin to the third model could ideally be adopted for §3(5) disputes. The jurisdictional conflict arising out of §3(5) cases may alternatively be addressed by either mandatory consultations or by following the approach adopted by the Indian Supreme Court in the case of *Competition Commission of India v. Bharti Airtel Limited* ('Airtel').¹²⁰ The validity of these approaches has been discussed below.

1. The Airtel Approach

In allowing domain experts to determine issues relating to the respective areas of the law, the Supreme Court drew from the third model of jurisdiction, which focuses on cooperation of the two regulators, and designed a new approach

¹¹⁵ United Nations Conference on Trade and Development (UNCTAD), Trade and Development Board, Commission on Investment, Technology and Related Financial Issues Intergovernmental Group of Expertson Competition Law and Policy, Seventh Session, October 31-November 2, 2006, *Best Practices for Defining Respective Competences and Settling of Cases, which Involve Joint Action by Competition Authorities and Regulatory Bodies*, TD/RBP/CONF.6/13/Rev.1TD/B/COM.2/CLP/44/Rev.2 (2006); Paridhi Poddar, *Sectoral Regulation, Competition Law, and Jurisdictional Overlaps: Tracing the Most Viable Solution in the Indian Context*, KLUWER COMPETITION LAW BLOG, May 24, 2018, available at <http://competitionlawblog.kluwercompetition-law.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/> (Last visited on December 22, 2019).

¹¹⁶ *Id.*

¹¹⁷ *Telefonaktiebolaget Lm Ericsson v. CCI*, 2016 SCC OnLine Del 1951.

¹¹⁸ UNCTAD, *supra* note 115; Poddar *supra* note 115.

¹¹⁹ *Id.*

¹²⁰ *CCI v. Bharti Airtel Ltd.*, (2019) 2 SCC 521.

in which jurisdictional conflicts may be perceived. In the Airtel case, the Supreme Court held that questions regarding interconnection agreements and clauses under the same, quality of services, obligations of the service providers are governed under the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act') and its derivative rules and regulations. The Court opined that if a particular question of law concerns two distinct and conflicting areas of law and two domain experts are competent to hear the dispute individually, facts relating to a particular question of law may be determined by the forum which is more *appropriate* and better suited to consider the specific issue. The suitability of a particular forum would be determined based on the thematic relevance of the subject-matter. Though the Competition Act may apply to the anti-competitive usage of the respective rights and determination of AAEC, it is not equipped to regulate issues which concern the exercise of rights that from within the provisions of the TRAI Act.

The Supreme Court specified that it would have been "unjust" if TRAI was denied evaluation of agreements arising under the Act as it was the "domain expert". The Supreme Court also held that CCI could intervene after the jurisdictional facts had been determined by TRAI. While TRAI was better positioned to regulate upon specific issues relating to violation of condition of licenses and regulations by the telecom companies, CCI was equipped to look into the anti-competitive practices of litigants. In ruling so, the Court clarified that there may exist disputes where two "special" laws might prevail in their relevant contexts and spheres of operation, however, the specialised regulator must act before the CCI.

In the case of the *Monsanto v. CCI*,¹²¹ the Delhi High Court was required to adjudge whether the unreasonable conditions under §3(5) are to be determined through Patents Act, 1970 or Competition Act, 2002, and whether the Competition Commission had adequate jurisdiction to adjudicate upon disputes concerning the exercise of rights under the Patents Act, in light of the Airtel decision. The petitioners distinguished their case from Ericsson, and placed reliance on the Airtel case to contend that CCI could only exercise its jurisdiction after determination of jurisdictional facts by the Controller of Patents. Further, a parallel was drawn between the roles of the Controller of Patents and the TRAI Regulator in their respective domains; since Patents Act defines and regulates the exercise of rights under the legislation, the Controller would be the initial authority to determine jurisdictional facts. It was also argued that §3(5)(i) consists of two mutually exclusive limbs; first, rights of persons to restrain in fringement of their right and reasonability of conditions to protect their rights. The determination of whether a condition is reasonable or not should be an exercise to be undertaken by relevant IP authorities such as the Controller, and not the CCI.

In dismissing the contention of the petitioners, the High Court of Delhi distinguished the roles of the Controller of Patents and TRAI on the basis of

¹²¹ *Monsanto Holdings (P) Ltd. v. CCI*, 2020 SCC OnLine Del 598.

“domain expertise” required under their respective enactments, to demonstrate the non-applicability of the Airtel judgement to the current facts. The Court held that the said judgement was “not an authority for the proposition that whenever there is a statutory regulator, the complaint must be first brought before the Regulator and examination of a complaint by the CCI is contingent on the findings of the Regulator”.¹²² The Court further held that the two limbs of §3(5) could not be divorced from each other, and could not be interpreted to allow the imposition of onerous conditions in licensing terms. Thus, the Court concluded that the jurisdiction in the current dispute rested solely with CCI.

In our opinion, the argument with respect to the pervasive role of TRAI as a regulator in the telecom sector whereas the lack of domain expertise on part of the Patent Controller is not sound. It is imperative to consider provisions relating to compulsory licensing, as found in Chapter XVI of the Patents Act, as well §140 to appreciate the scope of duties of the Controller. §84 of the Patents Act relates to conditions of granting compulsory licenses. While making such an assessment, the Controller is required to pay heed to principles codified in §83 of the Patents Act which relate to the objective of patent law in commercial settings, prevention of monopoly, obligation to not *unreasonably* restrain trade, and allow access to inventions at reasonable prices. A compulsory license may be granted if an invention fails to meet the “reasonable requirements of public”.¹²³ Further, §84 read with §90 of the Patents Act also require the Controller to make an assessment of anti-competitive conduct, prevailing market conditions, and public interest while granting compulsory licenses. §140 of the Patents Act also prohibits the insertion of certain restrictive conditions in licensing agreements of contracts concerning patented inventions. Further, in addition to granting protection and compulsory licensing, the Controller is also equipped to deal with their regulation, revocation, registration, and in turn, make an assessment of the liabilities and rights of the patent holder qua third parties. These factors demonstrate the *pervasive* role of the Patent Controller in a patent regime and also bring the Patent Controller to a position similar to one occupied by TRAI in the telecom sector.¹²⁴ It has been argued that the true test of whether the Patents Act accords the Controller status of a regulator is the scope of its functions and “whether the Controller can cover the grievances raised by the Informants before the Competition Commission.”¹²⁵

¹²² *Id.*, ¶56.

¹²³ The Patents Act, 1970, §84(7). Furthermore, §92 of the statute provides for special provision for compulsory licenses on notification by the Central Government, whereby the Controller is even empowered to bypass the procedure specified in §87. While §92 may be for the purposes of national emergencies and extreme emergencies, it also includes “a case for public non-commercial use”. If a need does arise where the requirement is essential, the Central Government is empowered by the Parliament to take the necessary steps under §92 to fulfill such a need. Such a provision highlights the inrem nature of grant of compulsory licenses.

¹²⁴ Ajay Sabharwal & Ashish Kumar, *Monsanto v. CCI – A Critique of Delhi High Court’s Judgment*, LIVE LAW, June 3, 2020, available at <https://www.livelaw.in/columns/monsanto-v-cci-a-critique-of-delhi-high-courts-judgment-157738> (Last visited on March 9, 2021).

¹²⁵ *Id.*

Viewing §3(5) disputes in light of the above reasoning, it is clear that even though CCI has jurisdiction over §3(5) disputes, it may not be the *only* forum where such disputes could be determined. We assert that it is also not the most appropriate forum to determine whether a particular condition or restriction in an agreement is *necessary* or *reasonable* for the protection of certain IPRs. The technicalities and context of particular IPRs must be taken into consideration when examining whether a particular condition is *necessary* to protect a right under a given IP law statute. This may be done by a civil court or dedicated IP law authority, but it is outside the ambit of powers of the CCI. This is because there is no specific requirement of IP law expertise in the selection procedure of the members of the Competition Commission.¹²⁶ On the other hand, IP law statutes delineate IP Authorities such as the Patents Office, Copyright Board, etc, as domain experts while simultaneously recognising the broad adjudicatory expertise of civil courts. Further, the Competition Act does not empower the CCI to adjudicate upon the limits and contours of IPRs under the specific IP law statutes.¹²⁷ It merely seeks to regulate any anti-competitive behaviour in the market. Specific IP law statutes, on the other hand, grant and regulate monopolistic behaviour of respective IPR holders.¹²⁸

2. Mandatory Consultations

Mandatory consultations traditionally take place in settings of jurisdictional conflicts between competition agencies and sector regulators, and require the latter to consult the former before adjudicating upon disputes at the intersection of the two.¹²⁹ Though the ultimate jurisdiction rests with the competition regulator, mandatory consultations on a common subject-matter help determine disputes through a more reasonable, balanced, and holistic approach.¹³⁰

Mandatory consultations were recommended by the Ministry of Corporate Affairs' High-powered Committee on National Competition Policy and Allied Matters in 2011 as a way to resolve conflicts arising out of overlapping

¹²⁶ The Competition Commission of India (Selection of Chairperson and other Members of the Commission) Rules, 2003, Rule 3.

¹²⁷ Yogesh Pai and Nitesh Daryanani, *Patents and Competition Law in India: CCI's Reductionist Approach in Evaluating Competitive Harm*, Vol. 5(2), JOURNAL OF ANTITRUST ENFORCEMENT, 299 (2017).

¹²⁸ Feroz Ali, *Picket Patents: Non-Working as an IP Abuse*, Vol. 12, THE INDIAN JOURNAL OF LAW AND TECHNOLOGY, 1 (2016).

¹²⁹ Organisation for Economic Co-operation and Development (OECD), Directorate For Financial, Fiscal and Enterprise Affairs Committee on Competition Law and Policy, *Policy Roundtables, Regulated Conduct Defence*, DAF/COMP (2011) 3 (September 1, 2011).

¹³⁰ Pradeep S. Mehta & Udai S. Mehta, *CCI vs TRAI: The Difference between Promoting Competition and Curbing Anti-Competitive Practices*, THE WIRE, August 1, 2017, available at <https://thewire.in/business/cci-trai-promoting-competition-anti-competitive-practices> (Last visited on December 22, 2019).

jurisdiction of the CCI and other sector regulators.¹³¹ The ministry's body, Indian Institute for Corporate Affairs, commissioned a report which studied various jurisdictions including the UK, South Korea, Spain and South Africa and recommended developing a concurrent framework, envisaging a mechanism for mandatory consultations between sector regulators and competition authorities.¹³² The report also provided that owing to the technical nature of competition law and work of sector regulators, both authorities must appreciate the behavioural differences or conflicting objectives that exist between the two. Lastly, the report recommended that sector regulators should have the lead in the ex-ante technical issues and competition authority in the largely behavioural ex-post issues.¹³³ Where regulators cannot resolve issues through mandatory consultations, either joint expert bodies can be set up or one regulator can be given jurisdictional primacy over the other.¹³⁴

Before the Airtel case was decided by the Supreme Court, recommendations for mandatory consultations to resolve the long standing dispute of CCI and TRAI surfaced.¹³⁵ They found their basis in the distinct roles of CCI and TRAI in their respective domains. While TRAI functions as a sector regulator to ensure orderly growth and maintenance of service standards in the telecom and broadcasting sectors in the country, CCI is an economy-wide regulator tasked with governance of anti-competitive malpractices in all sectors.¹³⁶ Thus, it was thought that issues arising from overlap of the domains of these two regulators may be resolved through voluntary and mutual consultations.

Support for mandatory consultations can also be drawn from foreign jurisdictions. In the *Government National Mortgage Assn.* case of the US,¹³⁷ a dispute arose between the Chicago Board of Trade and the Securities and Exchange Commission.¹³⁸ Instead of ruling that jurisdiction to try disputes rests solely with either authority, the Court recommended that the authorities consult each other and utilise their expertise to reach an amicable solution as the subject matter related to the intersection of the specific areas of interest of the two.¹³⁹ The Shad-Johnson accord, where both authorities decided their respective domains amicably, was the result of the first mandatory consultation recommended by the Court.¹⁴⁰

¹³¹ Rishika Mishra, *Harmonising Regulatory Conflicts*, CUTS CENTRE FOR COMPETITION, INVESTMENT & ECONOMIC REGULATION, November 2013, available at www.cuts-ccier.org/pdf/Harmonising_Regulatory_Conflicts.pdf (Last visited on March 8, 2021).

¹³² *Id.*

¹³³ *Id.*, 4.

¹³⁴ *Id.*

¹³⁵ Mehta, *supra* note 130.

¹³⁶ The Telecom Regulatory Authority of India (TRAI) Act, 1997.

¹³⁷ *Board of Trade of the City of Chicago v. Securities and Exchange Commission*, Fed. Sec. L. Rep. P 98,605, 1982 (United States Court of Appeals, Seventh Circuit, United States).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

The essence of mandatory consultation lies in cooperation and not competition between the two regulators.¹⁴¹ Similar to sector regulatory agencies, IP law authorities are required to regulate the grant of rights, licensing agreements and decide the extent of protection available to right holders while ensuring that the interests of market competition and consumer welfare are not compromised. CCI must acknowledge the possibility of conflicting operation of the two legal domains of IP law and competition law, and the resultant overlap.

The conditions under §3(5) are supposed to fulfil the twin requirements of reasonability and necessity to protect IPRs from the standpoint of both IP law and competition law in order to successfully avail of the exemption. Since the dispute lies at the intersection of IP laws and competition law, mandatory consultations between competition regulators and IP authorities on the extent of protection offered by IPRs will help ensure that the fulfilment of these requirements is determined with respect to both areas of law respectively. Therefore, even though the ultimate jurisdiction to govern §3(5) disputes would rest with the CCI, consultations regarding the extent and necessity of protection of rights may be held between the CCI and IP law authorities. Mandatory consultations will help implement the responsibility of every regulator to keep in loop other regulators exercising overlapping domain over the same issue and warrant that decisions of regulators are not arbitrary. This would help foster due process in the legal order and further the non-discriminatory attitude of law.

3. Compatibility to the Current Model

Both approaches find their basis in the reasoning that issues at the intersection of two conflicting areas of law must not be determined solely by one agency and that the agency which has more expertise in a particular domain should actively engage in the process of adjudication of the specific issue in the dispute. Thus, even though both the approaches operate on the same assumptions, adopting the requirement of consultations in IP-competition law disputes ensures greater accountability of regulatory bodies and adds clarity to jurisdictional issues.

Unless jurisdictional primacy is given to one body alone, the tiered procedure of the Airtel approach could be a cause for substantial delay in determination of liability of parties owing to long drawn processes involving multiple adjudicating agencies. This will also substantially increase costs for parties who would now be required to represent before two forums. Problems may also arise in cases of appeal and whether they would have to be made to NCLAT or Intellectual Property Appellate Board ('IPAB').

¹⁴¹ CUTS International, *Submission from CUTS International and CUTS Institute for Regulation & Competition (CIRC) to the Competition Law Review Committee*, CUTS CENTRE FOR COMPETITION, INVESTMENT & ECONOMIC REGULATION, available at https://cuts-ccier.org/pdf/CUTS-CIRC_Submission_to_Competition_Law_Review_Committee.pdf (Last visited on March 9, 2021).

This discussion is not unique to India; other jurisdictions have also been faced with the question of integration of a variety of roles to the same agency or the creation of an overarching policy bureau to ensure coordination of innovation policy across different sectors and regulatory agencies.¹⁴² Jurisdictions such as Peru have come up with authorities tasked with the regulation of IP and competition law enforcement such as the INDECOPI. While such a step may be contemplated by legislators in India in the future, ensuring coordination and consistency between the two agencies remains a prerequisite.

Therefore, as has been demonstrated above, primacy over issues that concern competition law and other sectors rests with CCI due to its role as the market regulator in the economy. Thus, it is not disputed that the primary jurisdiction for disputes under §3(5) would rest with CCI. However, it is proposed that accommodating consultations for IP-Competition law disputes within the existing competition law framework would yield to more fruitful and justifiable outcomes. CCI may invoke §21A of the Act and account for views and opinions of IP law authorities when determining reasonability of conditions under the provision. While it is true that there is no obligation on the CCI to take the recommendations of the relevant IP authorities into account when passing orders and determining liability of persons, following this approach would ensure that issues that lie at the intersection of two overlapping domains are determined in a conciliatory and equitable manner.

VI. CASES ON INTERPRETATION OF REASONABLE AND NECESSARY CONDITIONS

The jurisprudence on determining what would constitute reasonable and necessary conditions under §3(5) has been very limited. In its advocacy initiatives, the CCI provided a list of illustrative conditions that would be considered unreasonable under §3(5).¹⁴³ While it has been held that determining the reasonability of conditions depends on the facts of a particular case, there is still no guidance on the basis of which judicial trends or precedent could be ascertained. A list of factors based on an analysis of which a condition can be determined unreasonable has not been laid down by the CCI yet. Furthermore, despite the provision existing, till date, there has been no case where a condition in an agreement has been determined reasonable and necessary for the protection of IPR. Thus, in the parts herein, we analyse the cases where conditions have been held unreasonable and classify them into categories of price abuse and non-price abuse and accordingly derive a standard of *unreasonable* conditions under the provision.

¹⁴² Jenny, *supra* note 15; S.M. Benjamin & A.K. Rai, *Fixing Innovation Policy: A Structural Perspective*, Vol. 77(1), THE GEORGE WASHINGTON LAW REVIEW, 1 (2008).

¹⁴³ COMPETITION COMMISSION OF INDIA, *supra* note 98.

A. PRICING ABUSE

In the cases of *Intex*,¹⁴⁴ and *Micromax*,¹⁴⁵ against Ericsson it was observed that the conditions imposed by Ericsson in its agreements with third parties were unreasonable and violative of §3(5)(i). While the CCI did not go into a detailed discussion of how excessive and differential pricing in licensing agreements would constitute an unreasonable condition, it highlighted various facts based on which the determination of the non-reasonability was made.

Ericsson held a large number of GSM and CDMA patents and was also the largest holder of Standard Essential Patents ('SEPs') for mobile communications such as 2G, 3G and 4G patents. Since the subject matter included SEPs and there were no other substitutes available, Ericsson's conduct of charging excessive price for licensing the patents was deemed to be anti-competitive. The CCI held that the conditions in the license were unfair and unjustified. It was also found out pursuant to information filed by Micromax and Intex that the royalty rates being charged by Ericsson were discriminatory and exorbitant for the licensing of its patents.

Moreover, the CCI observed that the royalty rates requested by Ericsson had "no linkage to the patented product",¹⁴⁶ and were "discriminatory as well as contrary to FRAND terms".¹⁴⁷ Consequently it was implied that charging beyond what was necessary for the protection of Ericsson's patented technology would not be covered within the ambit of protection of either competition law or IP law. It was also found out that Ericsson charged the two manufacturers different prices for the same product and discriminated in its pricing strategy based on the pricing of their phones. Finally, the CCI held that increase in the royalty charge from the two licensees was not justified as there was no additional contribution to the product of the licensee.

Exploitation of IPR by means of excessive pricing was also held to be a misuse of the market power conferred upon the right holder by the relevant IP statute in the case of Super Cassettes Industries.¹⁴⁸ The point of contention in this case was whether charging excessive licensing fee from the radio operator was reasonable exercise of Super Cassettes IPRs and whether charging minimum commitment covers was anti-competitive. Super Cassettes contended that the conditions imposed were reasonable and did not amount to excessive pricing. It argued that cost-based analysis for setting a license fee is not possible since the cost of a sound recording is reflected in the acquisition price paid as royalty to the owners, and in the event the sound recording is developed in-house, the cost is recognised

¹⁴⁴ *Intex Technologies (India) Ltd. v. Telefonaktiebolaget LM Ericsson*, 2014 SCC OnLine CCI 8.

¹⁴⁵ *Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson*, 2013 SCC OnLine CCI 78.

¹⁴⁶ *Id.*, ¶ 17.

¹⁴⁷ *Id.*

¹⁴⁸ *HT Media Ltd. v. Super Cassette Industries Ltd.*, 2014 SCC OnLine CCI 120.

as a recording expenditure. The CCI did not endorse this contention and laid down that right holders are in a fit position to assess pricing through the cost that is incurred by them.

The CCI also held that the economic value of a particular product may be estimated through assessment of the popularity of the brand. Thus, in doing so, CCI hinted that an analysis of anti-competitive conduct may be made without reference to traditional factors such as license terms, royalty rates, etc. The imposition of minimum commitment charge as a form of minimum royalties was also held to be anti-competitive by the CCI, given that it was noted that Super Cassettes required radio operators to pay the charge irrespective of the actual number of needle hours of the music that they broadcast.

Moreover, only Super Cassettes was found to have engaged in charging a minimum cover from radio operators with no other company doing the same. Considering the strength of Super Cassettes, the radio operators had no choice but to accept the terms and conditions even though they were *prima facie* unreasonable. The CCI held that this practice of Super Cassettes Industries was exploitative and exclusionary in nature. The CCI further noted that the imposition of minimum commitment charge by Super Cassettes had an anti-competitive effect on the market as it foreclosed other competitors from a substantial share of the market. In doing so, the CCI applied a rule of reason analysis to determine reasonability of conditions under §3(5). Thus, to be considered as reasonable under §3(5), conditions in the agreement must relate closely to the subject matter of the agreement and have a nexus to the use or value of the licensed product/work.

B. ONEROUS LICENSING CONDITIONS

In *Micromax v. Ericsson* discussed above, it was also noted that Ericsson had entered into non-disclosure agreements with all its licensees.¹⁴⁹ This barred them from disclosing the terms of the license to other licensees and thus substantially reduced their negotiating power. CCI observed that the refusal to share commercial terms with the informant had fortified the accusation of alleged discriminatory commercial terms imposed by Ericsson on the informant *vis-à-vis* other licensees. Moreover, CCI also held that imposing onerous conditions in the agreement would make the same unreasonable. The non-disclosure agreement laid down that jurisdiction for all disputes arising out of the licensing agreement would lie in the Courts of Singapore. CCI held that imposing jurisdictional restrictions on licensees amounted to an unreasonable condition. Thus, in doing so, CCI reviewed the conduct of Ericsson as a whole.

Similarly, in the case of *Monsanto Biotech v. CCI*,¹⁵⁰ it was observed that if the termination conditions of a licensing contract are too harsh and harm

¹⁴⁹ *Micromax Informatics Ltd. v. Telefonaktiebolaget LM Ericsson*, 2013 SCC OnLine CCI 78, ¶8.

¹⁵⁰ *Monsanto Holdings (P) Ltd. v. CCI*, 2020 SCC OnLine Del 598.

the licensee disproportionately, then the same would not be considered reasonable under §3(5). The petitioners argued that §3(5)(i) consists of two mutually exclusive limbs — *first*, which provides a blanket exclusion in respect of rights to restrain infringement of Intellectual Property Rights (IPR); and the *second*, which relates to other reasonable conditions that may be necessary for protecting the IPR.¹⁵¹ Thus, the petitioners have an unrestricted right to impose conditions that they deem necessary for the protection of these rights. Negating such a submission, the Court held that the two limbs of §3(5) could not be divorced from each other, and could not be interpreted to allow the imposition of onerous conditions in licensing terms. It provided that the phrase “and impose reasonable conditions as may be necessary” must be interpreted so as to be placed in parenthesis and not disturb the meaning of the entire section which must be read a whole. Further, the rights given to persons under the provision were not absolute and limited by conditions of reasonability, necessity, and extent of protection required.¹⁵²

In the case of *Shamsher Kataria v. Honda Siel Cars India Ltd.*,¹⁵³ the Original Equipment Manufacturer (‘OEM’) contended that since they had invested heavily into the process of innovation and R&D, there strictions imposed by them upon the sale of their proprietary parts by the Original Equipment Supplier (‘OES’) to other third parties without their prior approval were reasonable. However, since evidence regarding the IPR was neither found nor provided, NCLAT did not venture into a discussion of whether such a condition would have been reasonable. It however, laid down that to protect rights under §3(5) of the Act, it was not necessary to impose restrictive conditions if the same could be protected by way of contracts. Thus, to determine whether a particular condition is truly necessary to protect certain IPR, the Court must analyse if the particular IPR can be protected without the condition.

The decisions above have been in furtherance of the position of the Working Group of the Planning Commission on Competition Policy, 2007,¹⁵⁴ as well as there commendations laid down by the Raghavan Committee.¹⁵⁵ The position of Courts on the interpretation of the provision can be understood to mean that

¹⁵¹ *Id.*, ¶36.

¹⁵² *Id.*, ¶48.

¹⁵³ *Shamsher Kataria v. Honda Siel Cars India Ltd*, 2014 SCC OnLine CCI 96.

¹⁵⁴ *Report of the Working Group of the Planning Commission on Competition Policy*, 2007, ¶4.1.13 provided that “IPR laws in India have provisions to take care of these potential IPR related competition abuses, including the provision for compulsory licensing. The Competition Act, 2002 does have a specific provision to deal with anticompetitive behaviour arising out of unreasonable restraint imposed by a holder of intellectual property beside being a factor to be considered while determining ‘dominance of an enterprise’ attained under a statute in the relevant market.”

¹⁵⁵ *Report of High Level Committee on Competition Policy and Law*, S.V.S. Raghavan Committee, ¶¶5.1.7 & 5.1.8 provided that “Intellectual Property provides exclusive rights to the holders to perform a productive or commercial activity, but this does not include the right to exert restrictive or monopoly power in a market or society. During the exercise of a right, if any anti-competitive trade practice or conduct is visible to the detriment of consumer interest or public interest, it ought to be assailed under the Competition Policy/Law.”

the rights of persons under the provision are not absolute. Although they are exempt from the application of provisions of §3, this does not enable them to impose onerous conditions in licensing terms or conduct pricing abuse. Courts have held excessive pricing for SEPs and goods with few substitutes, lack of a relationship between royalty rates and use of patented invention, discriminatory and unjustified pricing, exploitative and exclusionary conduct of right holders in the market for their IPR, foreclosure of other competitors from a substantial share of the market, as well as jurisdictional restrictions on licensees as *unreasonable* conditions in the past.

Therefore, it can be said that the *monopolies* arising out of IPR would be subject to competition law. However, the extent of the intersection, or the factors that must be taken into account while assessing the reasonability of the conditions have not been explicated clearly by the range of available judgements dealing with the issue. While courts have discussed various IP legislations and the extent of protection available to right holders in light of their respective provisions, an adequate assessment of conditions in licensing agreements from the standpoint of reasonability and necessity in light of the IP law provisions has not been made. Therefore, it can be concluded, that while the assessment of reasonability and necessity of conditions in agreements is a case-to-case based analysis, the jurisprudence on the topic has not led to the development of a fixed set of principles that could be used to carry out such an assessment equitably.

VII. COMPARATIVE ANALYSIS

From the earlier discussions, it is discernible that the relevant legal authorities as well as the Indian judiciary are acquainted with the issues which exist on account of the interaction and conflict between the domains of IP law and competition law. In the Indian context, the engagement of these two legal regimes with each other is specifically premised based on §3(5) of the Competition Act, 2002. Despite its relative importance due to it acting as the focal point of the intersection of IP-competition law in India, the development of guidance regarding its implementation remains woefully minimal. Resultantly, we turn to some other jurisdictions, including New Zealand, Australia, the USA, EU, Japan, and Canada — countries which have evolved innovative solutions to effectively reconcile the IP-competition law conflict.

A. NEW ZEALAND

The Commerce Act, 1986 of New Zealand ('CANZ') prohibits certain contractual arrangements which may lessen competition in the market, with the aim of promoting market competition.¹⁵⁶ However, under §37, CANZ establishes only one blanket prohibition where in any agreement to the concerned extent

¹⁵⁶ OECD, *supra* note 4.

would be prohibited irrespective of its impact on market competition.¹⁵⁷ This relates to resale price maintenance.¹⁵⁸ Strikingly, conduct such as the prevalence of exclusionary agreements between competitors, control on quality or quantity of output, etc. are expressly exempted.¹⁵⁹ Therefore, it is evident that New Zealand is wary of interfering with the legitimate exploitation of intellectual property rights, irrespective of its potentially anti-competitive effects.¹⁶⁰ However, it is now being realised that such a blatant exception breeds scope for unjust exploitation of IPRs. As a result, the New Zealand government on January 25, 2019, released a discussion paper on “the review of §36 of Commerce Act and other matters” proposing reforms to better analyse and resolve the IP and competition law overlap.¹⁶¹

Presently, on account of §36 of CANZ, dominant firms have to be cautious while engaging in conduct which might be perceived to have anti-competitive purposes.¹⁶² Strikingly, notwithstanding this, mere exercise of IP rights by these dominant firms is exempted from such a prohibition.¹⁶³ However, with the proposed reforms, this mere exercise of IP rights would also be subject to scrutiny.

Currently, under §36, a dominant firm is subjected to a three stage test. First, the firm must have a substantial degree of power in the market,¹⁶⁴ i.e. it must sustain the ability to profitably maintain prices beyond competitive levels, since this is possible only if the firm does not face substantial competition in the market. This assessment is undertaken considering factors such as market share, existing competition, potential competition, etc.,¹⁶⁵ an approach which is notably absent in the Indian regime. Second, this power must be *taken advantage of*, i.e. under the counterfactual test, it is checked whether the firm is engaging in such conduct as would not be engaged in if operating in a competitive market.¹⁶⁶ Third,

¹⁵⁷ The New Zealand Commerce Act, 1986, §37(N.Z.).

¹⁵⁸ *Id.*

¹⁵⁹ Global Compliance News, *Antitrust and Competition in New Zealand*, available at <https://globalcompliancencnews.com/antitrust-and-competition/antitrust-and-competition-in-new-zealand/> (Last visited on March 5, 2021) (“Global Compliance News”).

¹⁶⁰ OECD, *supra* note 4, at 37.

¹⁶¹ MINISTRY OF BUSINESS INNOVATION AND EMPLOYMENT, *Discussion Paper: Review of Section 36 of the Commerce Act and Other Matters*, January 2019, available at <https://www.mbie.govt.nz/have-your-say/review-of-section-36-of-the-commerce-act-and-other-matters/> (Last visited on March 5, 2021) (“NZ Discussion paper”); Minter Ellison Rudd Watts, *Section 36 of the Commerce Act Back in the Spotlight*, February 1, 2019, available at <https://www.minterellison.co.nz/our-view/section-36-of-the-commerce-act-back-in-the-spotlight> (Last visited on March 5, 2021).

¹⁶² New Zealand Law Society, *Competition Law and the Removal of Exceptions*, March 8, 2019, available at <https://www.lawsociety.org.nz/news/lawtalk/issue-926/competition-law-and-the-removal-of-exceptions/> (Last visited on March 5, 2021) (“NZ Law Society”).

¹⁶³ The New Zealand Commerce Act, 1986, §36(3)(N.Z.); *Australasian Performing Right Assn. Ltd. v. Cerdale (P) Ltd.*, (1990) 97 LR 497, ¶39 (Federal Court of Australia).

¹⁶⁴ The New Zealand Commerce Act, 1986, §36(2)(N.Z.).

¹⁶⁵ Commerce Commission New Zealand, *The Commerce Act: Taking Advantage of Market Power*, 2 (July 2018), available at https://comcom.govt.nz/data/assets/pdf_file/0041/89897/Taking-advantage-of-market-power-Fact-sheet-July-2018.pdf (Last visited on March 5, 2021).

¹⁶⁶ *The New Zealand Commerce Act*, 1986, §36(2)(N.Z.); *Commerce Commission v. Telecom*, (2008) 12 TCLR 168, 55 (Court of Appeal of New Zealand).

the conduct must have anti-competitive purposes, i.e. it must deter entities from entering a market, from engaging in competitive conduct or eliminating entities from the market.¹⁶⁷

This test has been subject to criticism since conduct is assessed against a purely hypothetical instance, i.e. assuming what a firm would do if it would have been in a different market situation.¹⁶⁸ Such an assumption can be complex and misleading since business decisions are taken considering multifarious factors such as market conditions, prevailing political scenarios, etc. This assessment may also include information which is sensitive and thus, confidential for the concerned business. Therefore, any assumption runs a high risk of misinterpretation. Considering this, the proposed reforms call for replacing this counterfactual test with an *effects* test, i.e. assessing whether any conduct may have anti-competitive impacts.¹⁶⁹ It is worthy to note that presently, §36(3) exempts a firm, merely exercising its legitimate IP rights, from such assessment. However, since the reforms also propose for the provision to be scrapped, IP holders will also be subjected to such a scrutiny.¹⁷⁰ Consequently, any enforcement of an IP right by a firm with *significant market power* which may have the likely effect of substantially reducing competition in the market could possibly be prohibited.

Currently §27 of CANZ explicitly prohibits contracts, arrangements or understandings which may have the likely effect of substantially reducing market competition.¹⁷¹

§30 of CANZ also lays bar to cartel provisions such as those related to allocation of markets, price fixing or restriction of supply.¹⁷² However, the applicability of both these provisions to IP enforcement is barred by the operation of §45, provided certain contingencies are met. If the imposition is such that it seeks to control the nature, extent, territory or period of exercise of IP rights, such an imposition will be protected,¹⁷³ i.e. it will be termed reasonable using the Indian equivalent. As a consequence, even if a restriction were imposed where the other party was permitted to operate with the protected technology or its related products within just one geographical area, such an imposition would not be prohibited.¹⁷⁴ Further, if the restriction relates to the type, quality or quantity of contracted goods and services, even then it shall be protected.

¹⁶⁷ The New Zealand Commerce Act, 1986, §36(2)(N.Z.); NZ DISCUSSION PAPER, *supra* note 161 at 5, ¶5.

¹⁶⁸ Commerce Commission v. Telecom, (2008) 12 TCLR 168, at 55 (Court of Appeal of New Zealand).

¹⁶⁹ Andrew Gavil, *Imagining a Counterfactual Section 36: Rebalancing New Zealand's Competition Law Framework*, 46 VUWLR 1043(2015); NZ DISCUSSION PAPER, *supra* note 155, at 15, ¶35.

¹⁷⁰ NZ Law Society, *supra* note 162.

¹⁷¹ The New Zealand Commerce Act, 1986, §27(N.Z.).

¹⁷² *Id.*, §30.

¹⁷³ *Id.*, §45(1).

¹⁷⁴ Pilkington Keene & McVeagh, *Restraints of Trade and Dominance in New Zealand: Overview*, THOMSON REUTERS, December 1, 2020, available at <https://uk.practicallaw.thomsonreuters>.

If the restrictions are imposed for the protection of the interests of the owner, licensor or seller, or if they consist of obligations to exchange experience or grant licenses for improvements such that these obligations are identical to that of the owner or seller of these rights, also in such instances too they shall not be prohibited.¹⁷⁵ Lastly, if the obligation is such that only market competition outside New Zealand would be impacted, it is not restricted by CANZ.¹⁷⁶ Therefore, these contingencies of §45 help carve out a scenario akin to reasonable conditions as discussed in the Indian context. However, strikingly, the proposed reforms seek to scrape the §45 exception. As a consequence, as has been discussed under §36, the effects test is sought to be made universally applicable by extending its application to IP enforcement also.

However, this does not mean that all conditions imposed by IP holders are currently afforded blanket protection from any anti-competitive prohibition. Under §37(1) of CANZ, resale price maintenance is prohibited *per se*.¹⁷⁷ This encompasses conduct such as persuasion or inducement to establish a minimum price for the goods, imposition of penalties such as withholding of supply should the goods be sold below the minimum price, etc.¹⁷⁸ However, it is noteworthy that as is the case with other jurisdictions, such a blanket prohibition on resale price maintenance is operative only for setting a minimum price level.¹⁷⁹ If the IP holder merely recommends a price or specifies a maximum price, such a recommendation will not be impaired by the bar under §37(1), only if such are commendation does not coagulate into a *de facto* actual price at which the good has to be sold.¹⁸⁰

An evident contrast is observed between the approach presently undertaken by the IP and competition regime in New Zealand *vis-à-vis* that in India. For instance, §36 of the CANZ first assesses if the concerned firm exercises *substantial market power*.¹⁸¹ In India, it is observed that the CCI in Super Cassettes Industries considered the strength of the firm exercised in the market when declaring the minimum cover charged to radio operators as anti-competitive.¹⁸² However, a formalised mechanism for such an assessment is notably missing. Similarly, while §37 of the CANZ establishes resale price maintenance as a blanket prohibition, the Indian approach identifies the effects of such restrictions

com/w-023-1436?transitionType=Default&contextData=(sc.Default)&firstPage=true (Last visited on March 5, 2021); NZ Law Society, *supra* note 162.

¹⁷⁵ NZ Law Society, *supra* note 162.

¹⁷⁶ OECD, *supra* note 4, at 37.

¹⁷⁷ The New Zealand Commerce Act, 1986, §37(1)(N.Z.).

¹⁷⁸ Global Compliance News, *supra* note 159.

¹⁷⁹ Andrew Peterson, *Resale Price Maintenance: Per Se Illegal, Or Best Considered Under a 'Rule of Reason'?*, MONDAQ, October 15, 2007, available at <http://www.mondaq.com/NewZealand/x/53228/Cartels+Monopolies/Resale+Price+Maintenance+Per+Se+Illegal+Or+Best+Considered+Under+A+Rule+Of+Reason> (Last visited on March 5, 2021).

¹⁸⁰ Global Compliance News, *supra* note 159.

¹⁸¹ The New Zealand Commerce Act, 1986, §36(2)(N.Z.).

¹⁸² HT Media Ltd. v. Super Cassettes Industries Ltd., 2014 SCC OnLine CCI 120.

on the market instead of prohibiting it *per se*.¹⁸³ Additionally, §45 of the CANZ bars restrictions such as those relating to quality control from competition law scrutiny. However, the Indian system adopts a contrary approach.¹⁸⁴

Accordingly, it is evident that New Zealand largely considers IP and competition law to be two separately operating fields, incompatible with each other.¹⁸⁵ This is evident from the explicit exceptions given to all IP related conduct from any anti-competitive prohibitions. However, a possible alignment between the Indian regime and proposed reforms in New Zealand is observed. For instance, with the increasing realisation of the evident interface of IP and competition law, the adoption of the effects based approach, as identical to the Indian system, is seen as a welcome move since it will now help counter any unjust anti-competitive IP enforcement. This proposed change is seen as a recognition of IP markets as a broader market category.¹⁸⁶ If these forms are implemented, apart from resale price maintenance which is already explicitly prohibited, all other IP related conduct will now be assessed for anti-competitive impact, akin to India. This would consequently erode the *safe harbours* provided to IPR by §45.

B. AUSTRALIA

On September 13, 2019, competition law in Australia underwent a sea change after the repeal of §51(3) of the Competition and Consumer Act, 2010 ('CCA' / 'the repeal').¹⁸⁷ Prior to the repeal, under §51, an automatic exemption, i.e. a safe harbour from the applicability of competition provisions was provided to activities already regulated under other statutes, such as IPRs.¹⁸⁸ Resultantly, most instances of exploitation of IPRs were awarded blanket exemptions from competition law. This is because IP and competition law were presumed to be in fundamental conflict,¹⁸⁹ since IP laws were seen either as granting market monopoly or economic monopoly in the form of monopoly profit. Since the purpose of competition law is to promote market competition, IP laws were seen to be in direct contradiction with it.¹⁹⁰ However, even §51 was limited in operation. It was

¹⁸³ M/S ESYS Information Technologies (P) Ltd. v. Intel Corpn., 2014 SCC OnLine CCI 10, ¶7.3.2.

¹⁸⁴ COMPETITION COMMISSION OF INDIA, *supra* note 98.

¹⁸⁵ Baldwins, *Review of Commerce Act: IP Exclusions Could Mean Changes for IP Owners*, 9 July 2019, available at <https://www.baldwins.com/news-resources/news/review-of-commerce-act-ip-exclusions-could-mean-changes-for-ip-owners-and-i> (Last visited on December 20, 2019).

¹⁸⁶ *Id.*

¹⁸⁷ Jones Day, *Australia Repeals IP Exemptions from Antitrust Rules*, September 13, 2019, available at <https://www.jonesday.com/en/insights/2019/09/australia-repeals-ip-exemptions-from-antitrust-rul#> (Last visited on March 5, 2021) ('Jonesday').

¹⁸⁸ *Id.*

¹⁸⁹ Productivity Commission, *Inquiry Report: Intellectual Property Arrangements*, September 23, 2016, available at <https://www.pc.gov.au/inquiries/completed/intellectual-property/report> (Last visited on March 5, 2021); Intellectual Property Arrangements, Inquiry Report, December, 2016, at 445.

¹⁹⁰ National Competition Council, *Final Report: Review of §51(2) and 51(3) of the Trade Practices Act 1974*, March 1999, available at <http://ncp.ncc.gov.au/docs/LESe-001.pdf> (Last visited on March 5, 2021).

applicable only to instances such as restrictions giving effect to a license or assignment of IPRs or authorisations for the use of certified trade marks.¹⁹¹ Further, despite the operability of §51, IPRs were still subject to two competition specific provisions — *first*, relating to misuse of market power,¹⁹² and *second*, pertaining to resale price maintenance.¹⁹³

However, following the repeal, conduct related to IP is also now subject to Australia's competition law provisions. Consequently, cartel provisions are no longer exempted from operating in relation to IPRs.¹⁹⁴ A cartel provision is strictly prohibited under the CCA and comprises of two conditions — *first*, the prevalence of a competition condition, and *second*, the assessment of the purpose or effect of this condition.¹⁹⁵ The competition condition is satisfied if the concerned parties in the transaction are or are likely to be competitors in relation to the goods or services which are the subject matter of the concerned restriction.¹⁹⁶

Further, the purpose of the condition may relate to price or non-price agreements. If it relates to a pricing agreement, the condition is satisfied if the purpose, effect or likely effect is to control, fix or maintain price.¹⁹⁷ If it is a non-price agreement, the condition is satisfied if the purpose relates to limiting output, i.e. preventing, ceasing or agreeing to limit the production of a particular type of good. Since these output restrictions limit the availability of goods and thereby increase the price, they are a cause of concern.¹⁹⁸ Further, since restrictions such as allocating customers or territories, or even bid rigging increase the prices of the concerned products or technologies, they are prohibited under cartel provisions.¹⁹⁹ Therefore, now, whenever a restriction is imposed as between two competitors, related to IPRs and the purpose or effect of such a restriction is as aforementioned, it shall be strictly prohibited under the CCA.

¹⁹¹ Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, *Licensing of IP Rights and Competition Law—Note by Australia*, ¶8 DAF/COMP/WD(2019)42, June 6, 2019; Guidelines on the Repeal of Subsection 51(3) of the Competition Consumer Act 2010, August 2019, ('Australia Guidelines').

¹⁹² The Australia Competition and Consumer Act, 2010, §46A (Australia).

¹⁹³ *Id.*, §48.

¹⁹⁴ Herbert Smith Freehills, *ACCC Issues Guidance on Competition Risks in IP Transactions: Beware the Inadvertent Cartel*, September 12, 2019, available at <https://www.herbertsmithfreehills.com/latest-thinking/accc-issues-guidance-on-competition-risks-in-ip-transactions-beware-the-inadvertent> (Last visited on March 5, 2021) ('HSF Australia').

¹⁹⁵ Davies Collison Cave, *The Removal of IP Safe Harbour*, available at <https://dcc.com/patents/the-removal-of-the-ip-safe-harbour/> (Last visited on December 30, 2019).

¹⁹⁶ *Id.*

¹⁹⁷ Clayton, *IP License Restrictions Losing their safe Harbour from Competition Laws – So Review Them Now*, February 22, 2019, available at <https://www.claytonutz.com/knowledge/2019/february/ip-licence-restrictions-losing-their-safe-harbour-from-competition-laws-so-review-them-now> (Last visited on March 5, 2021).

¹⁹⁸ OECD Australia Note, *supra* note 191 at ¶7.

¹⁹⁹ Breakspear, et. al., *IP Owners – Get Ready for the Competition Law – Update*, April 1, 2019, available at <http://www.mondaq.com/australia/x/794710/Patent/IP+owners+Get+ready+for+the+competition+law+Update> (Last visited on March 5, 2021).

After the repeal, licensing of IPRs is also subject to § 45 of the CCA under which any agreement which has the purpose, effect or likely effect of substantially reducing market competition will be subject to the CCA.²⁰⁰ Under §46, this assessment is also applicable to conditions related to exclusive dealing.²⁰¹ However, it is pertinent to note that the analysis as to whether a particular restriction would have the *likely* effect of reducing substantial competition in the market is subjected to a *with or without test*.²⁰²

Under this test, the current position is assessed against a hypothetical instance where the concerned restriction would not have been imposed, to analyse the likely impact on market conditions.²⁰³ The restrictions which are usually subjected to such an analysis include time restrictions, no-challenge provisions, output restrictions, etc.²⁰⁴ Therefore, all restrictions falling outside the ambit of cartel provisions are dealt with either under Article 46 of Article 47 of the CCA. As a consequence, each of these restrictions is subjected to the with or without, i.e. counterfactual test to determine their operability.

We observe that by making each IP restriction subject to the CCA, i.e. as an aftermath of the removal of IP safe harbour, Australian law has radically changed its stance and now looks at IP as helpful to the competitive process. As has been stated in the Australian Competition and Consumer Commission Guidelines ('ACCC Guidelines'), IP is said to promote competition since it enables parties to engage in different commercial activity by granting them access to licensed technology.²⁰⁵ It must be noted that since such a counterfactual analysis not only incentivises innovation but also prohibits unjust exploitation of IP rights, it seeks to strike a balance between IP and competition law and thus, furthers pro-competitive practices.²⁰⁶ Moreover, since restrictions such as those of cartel provisions seek to control product prices in the markets, along with pro-competitive practices, they also seek to further consumer welfare.²⁰⁷

However, the counterfactual test may be also seen to pose analytical problems. As has been recognised in New Zealand, a major criticism to this

²⁰⁰ The Australia Competition and Consumer Act, 2010 §45 (Australia); OECD Australia Note, *supra* note 191 at ¶21.

²⁰¹ The Australia Competition and Consumer Act, 2010, §46 (Australia); Rodney DeBoos, *Dealing with Australia's Challenge to Intellectual Property Arrangements*, August 19, 2019, available at <https://www.mondaq.com/australia/Anti-trustCompetition-Law/837774/Dealing-With-Australia39s-Challenge-To-Intellectual-Property-Arrangements> (Last visited on March 5, 2021); HSF Australia, *supra* note 194.

²⁰² Shelston Intellectual Property, *Changes to Australian Competition Laws may Impact your IP Arrangements*, September 5, 2019, available at <https://shelstonip.com/insights/news/changes-to-australian-competition-laws-may-impact-your-ip-arrangements/> (Last visited on March 5, 2021) ('Shelston').

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Australia Guidelines, *supra* note 191, at ¶2.2.

²⁰⁶ Shelston, *supra* note 202.

²⁰⁷ *Id.*

counterfactual test is that it assesses the current market against a hypothetical situation. Since such an assessment is undertaken purely on a presumptive basis, it is seen to be extremely complex. On the contrary, the effects based approach merely assesses the effects or likely effects on the market based on *status quo*. Therefore, this effects based approach is seen to afford more certainty. While Australia continues to oscillate between the two concerned simultaneously, New Zealand, akin to the current position in India, is proposed to shift solely to this approach to address the IP-competition law conflict.

Moreover, similar to the proposed repeal of §45 of the CANZ, Australia too has repealed its safe-harbours, subjecting all IP related conduct to competition law scrutiny, as is already the case in India. Interestingly, while the repeal does not establish what conditions may be considered reasonable, it extrapolates instances which are expressly prohibited. For instance, if cartel provisions are imposed between parties who are competitors or likely to become competitors and have the purpose or effect of harming market competition, they are prohibited.²⁰⁸ Here, restrictions have also been identified which would have such an impact. These include price agreements as well as non-price agreements which would impact the prices of the concerned product in the market.²⁰⁹ Accordingly, it may be said that in identifying these prohibitions, the Australian regime indirectly delineates the scope of reasonable conditions, as is currently absent in India and may be adopted accordingly.

C. UNITED STATES OF AMERICA

Akin to the Indian system, in the USA, IP holders are not immune from the applicability of US antitrust laws, should the exercise of their rights impede fair competition.²¹⁰ The viability of the overlap of these two rights has been codified under primarily three statutes. First, conduct such as unilateral restraint of trade and attempts to monopolise markets is governed by the Sherman Antitrust Act of 1890 Act.²¹¹ Second, all mergers, acquisitions and related transactions which may substantially reduce competition in the market are governed by the Clayton Antitrust Act of 1914.²¹² Last, all other acts which may constitute unfair methods or deceptive practices affecting commerce are governed under the Federal Trade Commission ('FTC') Act of 1914.²¹³ Moreover, the Department of Justice along with the FTC has released Antitrust Guidelines for the Licensing of Intellectual Property ('the Guidelines') to further clarify the overlap between IP and competition law.²¹⁴ Therefore, IPRs do not command a blanket exemption from the opera-

²⁰⁸ HSF Australia, *supra* note 194.

²⁰⁹ *Id.*

²¹⁰ Antitrust Guidelines for the Licensing of Intellectual Property, January 12, 2017, §2.1 ('USA Guidelines').

²¹¹ The Sherman Antitrust Act, 1890 (USA).

²¹² The Clayton Antitrust Act, 1914.

²¹³ The Federal Trade Commission Act, 1914.

²¹⁴ USA Guidelines, *supra* note 210.

tion of anti-trust laws in the USA. Rather, these are adjudged under the rule of reason,²¹⁵ i.e. a detailed analysis is undertaken of the circumstances and impacts of restrictions before declaring the same unreasonable and therefore, prohibited.

Licensing, under US law, is generally considered to be pro-competitive and is thus also adjudged under this rule of reason.²¹⁶ However, akin to the Indian reasonable conditions, the Guidelines also create certain safe harbours, also known as safety zones, for licensing agreements which remain exempt from such scrutiny.²¹⁷ These zones operate in situations where anti-competitive effects are so unlikely that the arrangements may be presumed to be pro-competitive.²¹⁸ Such safety zones are established in product markets primarily on two conditions — *first*, the restriction imposed must not *prima facie* be anti-competitive; and *second*, the market share of the licensor and the licensee must not collectively exceed twenty percent of each market that such a restriction is impacting.²¹⁹

However, if the concerned restriction is operating in a technology market or in the field of research and development and the market share of the concerned entities in such a market is indecipherable, we first see whether the restriction is *prima facie* anti-competitive. If such is the case and there are at least four other well established players in the market which can either substitute for the licensed technology at a reasonable cost in the case of technology markets or which possess the required assets and incentives to engage in research and development, the safety zone shall operate.²²⁰

Distinct from these safety zones, refusals to license may have anti-competitive implications. As has been held in *Image Technical Services, Inc. v. Kodak Co.*,²²¹ “even though a refusal to license is presumptively lawful as a legitimate exercise of the statutory right to exclude, the presumption can be overridden by evidence that the refusal was a pre-textual effort to harm rivals”.²²² Consequently, refusals to license, usually concerted in nature, are adjudged under the rule of reason.²²³ Such refusals may extend to instances such as restrictions on manufacturers to not license from a particular IP owner,²²⁴ or even restrictions on

²¹⁵ *American Needle v. National Football League*, 2010 SCC OnLine US SC 52.

²¹⁶ USA Guidelines, *supra* note 210, at 16.

²¹⁷ Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, *Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note by the United States*, ¶9 at 3, DAF/COMP/WD(2017) 85, December 5, 2017.

²¹⁸ USA Guidelines, *supra* note 210.

²¹⁹ *Id.*

²²⁰ Thomson Reuters, *FTC and DOJ Issue Updated Antitrust Guidelines for IP Licensing*, January 17, 2017, available at [https://uk.practicallaw.thomsonreuters.com/w-005-3881?lITS=20180917004508758&transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-005-3881?lITS=20180917004508758&transitionType=Default&contextData=(sc.Default)&firstPage=true) (Last visited on March 5, 2021) (“Thomson Reuters”).

²²¹ *Image Technical Services Inc. v. Kodak Co.*, 125 F 3d 1195 (1997) (Ninth Circuit, United States).

²²² *Id.*

²²³ *American Needle v. National Football League*, 2010 SCC OnLine US SC 52 (2010).

²²⁴ *SD3 v. Black & Decker*, 801 F 3d 412 (2015) (Fourth Circuit, United States).

granting license to a downstream licensee.²²⁵ Contrastingly, unilateral refusals to license are generally not subjected to liability in order to promote investment for invention and innovation.²²⁶

There also operate other circumstances which are usually subjected to the rule of reason adjudication. Vertical restraints, i.e. those imposed on customers rather than intermediaries are usually less likely to have anti-competitive effects.²²⁷ However, certain vertical restraints are deemed anti-competitive under certain state laws. These include resale price maintenance, tying arrangements, exclusive dealing, etc. which are also mostly subjected to the rule of reason analysis, apart from these certain states.²²⁸

Horizontal restrictions, i.e. those between producers to other sellers are not considered to be *prima facie* anti-competitive.²²⁹ These horizontal restrictions are also subjected mostly to the rule of reason analysis.²³⁰ However, some are considered to be *per se* illegal as blatant restrictions on competition.²³¹ For instance, while cross licenses²³² are usually considered to be pro-competitive, if these cross licenses contain certain ancillary restrictions such as output limitations or price restrictions, they are considered to be *per se* illegal.²³³ Likewise, territorial restrictions are also assessed under the rule of reason.²³⁴ Therefore, where an IP holder grants the right to exploit the IP only under a specific jurisdiction while reserving all other territories for itself, this restriction will not be *per se* illegal and will be prohibited depending upon the facts and circumstances of the imposition.

Furthermore, as is the case with several other jurisdictions such as Canada and New Zealand, acquiring substantial market power, also known as monopoly power brings along with it an IP-competition specific scrutiny. Such monopoly power is said to be conferred upon a firm if it is able to profitably maintain prices above or output below a certain market level for a considerable period of time. However, it was clarified before the Supreme Court of the USA in *Illinois*

²²⁵ *American Needle v. National Football League*, 2010 SCC OnLine US SC 52 (2010).

²²⁶ *United States v. Aluminium Co. of America*, 148 F 2d 416(1945) (Second Circuit, United States); USA Guidelines, *supra* note 210.

²²⁷ Delbaum & Higbee, *United States: IP and Antitrust Know-How 2018*, October 31, 2018, available at <http://www.mondaq.com/unitedstates/x/750422/Patent/IP+Antitrust+KnowHow+2018> (Last visited on March 5, 2021) ('Delbaum & Higbee').

²²⁸ Patrick J. Harrison, *Vertical Agreements-USA*, available at <https://gettingthedealthrough.com/area/41/jurisdiction/23/vertical-agreements-2019-united-states/> (Last visited on March 5, 2021); The Cartwright Act, 1907 (California, United States of America) continues to prohibit vertical resale price maintenance; *Darush v. Revision LP* No. CV 12-10296 GAF (AGR), 2013 WL 1749539 (C.D. Cal. April 10, 2013), (Central District of California, United States of America).

²²⁹ USA Guidelines, *supra* note 210, at §3.1.

²³⁰ *Id.*, §5.1.

²³¹ Delbaum & Higbee, *supra* note 227.

²³² Across-licensing agreement is a contract between two or more parties where each party grants rights to their intellectual property to the other parties.

²³³ USA Guidelines, *supra* note 210, at 30.

²³⁴ *Continental T.V. Inc. v. GTE Sylvania Incorporated*, 1977 SCC OnLine US SC 142.

*Tool Works Inc. v. Independent Ink, Inc.*²³⁵ that merely holding monopoly power does not presumptively imply anti-competitive practices.²³⁶ Consequently, in order to declare any unilateral conduct by a monopoly power to be prohibited, it must be assessed if the IP holder engaged in exclusionary conduct to harm competition in the market.²³⁷

From the aforementioned segment it is evident that in the USA, the economics based approach of the rule of reason is widely entrenched.²³⁸ This approach has also been adopted in India by the CCI in *Super Cassettes Industries*.²³⁹

Moreover, we observe that alongside this rule of reason analysis which is similar to the effects based approach as followed in India and other jurisdictions,²⁴⁰ the US regime also adopts certain blanket prohibitions in terms of horizontal restrictions.²⁴¹ Similar to cartel provisions in Australia, these prohibitions may be seen to delineate the framework within which appropriate restrictions may be imposed.

Interestingly, there also prevail safety zones in the USA. These safety zones, which operate similar to reasonable conditions under §3(5) of the Act, must be distinguished from those repealed or proposed to be repealed in Australia and New Zealand respectively. There, IP conduct was afforded blanket exemption from competition law scrutiny.²⁴² However, the US regime adopts this exemption on the basis of specific criteria, i.e. the restrictions must not appear *prima facie* anti-competitive and the firm's market share must not exceed twenty percent.²⁴³ In fact, where market share is not discernible, there must prevail at least four other comparable firms in the market for the safety zone to operate.²⁴⁴ Accordingly, a market share analysis is relevant in USA which provides the exemptions a rational under pinning. These safety zones are pertinent since they have been looked upon as enforcing efficiency in adjudicating upon the IP-competition law conflict and conferring certainty upon firms operating in markets. However, currently, the Indian regime does not adopt this market share analysis in determining the scope

²³⁵ *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 2006 SCC OnLine US SC 24.

²³⁶ *Id.*, 45-46.

²³⁷ Andrew J. Heimert, *Abuse of Dominance Involving Intellectual Property, the First International Seminar on Intellectual Property, Standards and Anti-Monopoly Law*, May 7, 2011, available at <https://www.ftc.gov/system/files/attachments/key-speeches-presentations/110527ipheimert.pdf> (Last visited on March 5, 2021).

²³⁸ Robert D. Anderson et. al., *Competition Agency Guidelines and Policy Initiatives Regarding the Application of Competition Law vis-à-vis Intellectual Property: An Analysis of Jurisdictional Approaches and Emerging Directions* (World Trade Organisation, Economic Research and Statistics Division, Staff Working Paper ERSD-2018-02, March 6, 2018), available at https://www.wto.org/english/res_e/reser_e/ersd201802_e.pdf (Last visited on March 5, 2021) ('Anderson').

²³⁹ *HT Media Ltd. v. Super Cassettes Industries Ltd.*, 2014 SCC OnLine CCI 120.

²⁴⁰ *Id.*

²⁴¹ USA Guidelines, *supra* note 205, at 30.

²⁴² NZ Discussion Paper, *supra* note 155; Jones Day, *supra* note 181.

²⁴³ USA Guidelines, *supra* note 210, at 30.

²⁴⁴ Thomson Reuters, *supra* note 220.

of reasonable conditions, which is left ambiguous. Accordingly, the lack of definition is seen as enforcing inefficiency, defeating the purpose of the operability of these reasonable conditions in the first place.

D. EUROPEAN UNION

As a corollary to the Indian conception of reasonable conditions, the European Union ('EU') provides for safe harbours to facilitate the exercise of IPRs without infringement of competition law.²⁴⁵ These have been developed in the form of block exemptions as an extension of Article 101 of the Treaty on the Functioning of the European Union ('the Treaty') which governs the applicability of EU competition law to agreements that restrict competition.²⁴⁶ If the exercise of IPRs is covered by the ambit of these block exemptions, entities are exempted from any competition specific scrutiny.²⁴⁷ The most notable block exemptions, as discussed in the succeeding parts of this paper, prevail under the forms of Technology Transfer Block Exemptions ('TTBE'), Vertical Block Exemption Regulation ('VBER') and Research and Development Block Exemption Regulation ('RDBER').

1. Technology Transfer Block Exemption

Technology Transfer Block Exemptions are provided for under Technology Transfer Commission Regulation No. 316/2014 ('TTCR'). They involve agreements encompassing the grant of a license by the IPR owner, authorising the licensee to exploit the license by allowing activities of manufacturing, selling and marketing goods and services by way of the IPR.²⁴⁸ For the purpose of this analysis, it must be noted that TTBEs apply only where the license has been granted to produce or sell contracted products.²⁴⁹ Therefore, where the concerned restriction merely pertains to situations such as the development of competitive technology, TTBEs will not be applicable.²⁵⁰

For the purpose of establishing such safe harbours within the TTBE, as a part of a three-stage process, the TTCR primarily establishes a distinction

²⁴⁵ Slaughter & May, *The EU Competition Rules on Intellectual Property Licensing*, January 31, 2018, available at <https://www.slaughterandmay.com/media/2536585/the-eu-competition-rules-on-intellectual-property-licensing.pdf> (Last visited on March 5, 2021) ('Slaughter & May').

²⁴⁶ Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, *Licensing of IP Rights and Competition Law—Note by the EU*, ¶18 DAF/COMP/WD(2019)52, May 22, 2019 ('OECD EU Note').

²⁴⁷ *Id.*

²⁴⁸ Eur-Lex, *Ensuring Technology Transfer Agreements Respect Competition Rules*, May 8, 2020, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A08010104_1 (Last visited on March 5, 2021).

²⁴⁹ Pinsent Mansons, *Technology Transfer Block Exemption*, October 21, 2014, available at <https://www.pinsentmansons.com/out-law/guides/the-technology-transfer-block-exemption> (Last visited on March 5, 2021) ('Pinsent Mansons').

²⁵⁰ *Id.*

between conditions imposed between competing and non-competing parties.²⁵¹ This is so because in an event where both parties are competing, any conditions imposed by one on another, restricting the business of such party would naturally have greater chances of giving rise to anti-competitive effects.²⁵² On the other hand, the possibility of such anti-competitive effects prevailing between non-competing entities is proportionately miniscule.²⁵³ Therefore, the constitution of safe harbours is pre-conditioned on competing relationships.

As a second step, market share is a crucial determinant of the operation of safe harbours or reasonable conditions.²⁵⁴ The market share is determined cumulatively on two counts— *first*, market share with respect to the protected technology, and *second*, market share with respect to the product incorporating this protected technology.²⁵⁵ In light of Article 3 of the TTCR, should market share exceed twenty percent in case of competing parties and thirtypercent in case of non-competing parties,²⁵⁶ any conditions imposed by IP shall be excluded from protection under the ambit of block exemptions. Where parties are unable to assess their market shares, they may seek expert advice to make such a determination.²⁵⁷

However, it must be noted that even after clearing market share requirements, as a final step to the three stage process, restrictions imposed by IP holders will continue to remain under scrutiny should their exercise impede fair competition and thus, qualify as hardcore restrictions.²⁵⁸ For competing and non-competing entities, such hardcore restrictions are elaborately stipulated under Article 4(1) and Article 4(2) of the TTCR respectively.

For competing entities, resale price maintenance, i.e. any stipulation on price for sale to third parties is a blanket prohibition.²⁵⁹ This relates to both direct controls, i.e. fixing a minimum, maximum or even a recommended price and indirect controls, i.e. disincentivising one party from price deviation by way of imposing conditions such as increase in royalty rate by way of increase in price.²⁶⁰ Additionally, restrictions which increase a licensee's own competing technology also qualify as hardcore restrictions. These may pertain to situations where

²⁵¹ Slaughter & May, *supra* note 239.

²⁵² *Id.*

²⁵³ *Id.*

²⁵⁴ Taylor Wessing, *The New Technology Transfer Block Exemption*, June 2014, available at https://united-kingdom.taylorwessing.com/synapse/ti_ttber.html (Last visited on March 5, 2021) ('Taylor Wessing').

²⁵⁵ OECD EU Note, *supra* note 246, at ¶4.

²⁵⁶ Technology Transfer Commission Regulation No. 316/2014 of March 21, 2014, Art. 3 (EU).

²⁵⁷ Pinsent Mansons, *supra* note 249.

²⁵⁸ Technology Transfer Commission Regulation No. 316/2014 of March 21, 2014, Art. 4 (EU).

²⁵⁹ Beret Sundet, *Technology Licensing – Competition Law Aspects*, Licensing Executives Society, January 14, 2016, available at <https://www.lesi.org/docs/default-source/scandinaviadocs/technology-licensing-competition-law-aspects.pdf?sfvrsn=0> (Last visited on March 5, 2021).

²⁶⁰ Slaughter & May, *supra* note 239.

royalties are calculated on the basis of product sales.²⁶¹ Interestingly, price restrictions amongst non-competing entities are marginally more flexible. This is because while imposition of a minimum price point may qualify as a hardcore restriction, stipulation of merely maximum or recommended price evades such scrutiny.²⁶²

Moreover, limitations on output²⁶³ and allocation of markets²⁶⁴ are also termed as hardcore restrictions, with differing qualifications for reciprocal²⁶⁵ and non-reciprocal agreements,²⁶⁶ with further differentiations between competing and non-competing entities. Limitations on output are viewed as blanket prohibitions for reciprocal agreements, where such limitations are imposed on both parties.²⁶⁷ However, when such limitations are imposed merely in non-reciprocal agreements or only on one party of a reciprocal agreement, they do not qualify as hardcore restrictions.²⁶⁸

Further, restrictions on allocation of markets qualify as hardcore restrictions when imposed exclusively on non-reciprocal agreements,²⁶⁹ subject to exceptions. These exceptions include an obligation to not produce or passively sell products in the exclusive territory or exclusive consumer group of the imposing party.²⁷⁰ Furthermore, when imposed between two licensees, if one of such licensees was not a competitor of the other licensee at the time of conclusion of the agreement and a prohibition is imposed on the sale by one into the exclusive territory of another, it does not qualify as a hardcore restriction.²⁷¹ Additionally, where a restriction is placed to produce only for a particular customer, as an alternate source of supply for that customer in a non-reciprocal agreement, it will qualify as a block exemption.²⁷² It must be noted that circumstances where restrictions are imposed on the licensee to only produce for their own use shall not be termed as hardcore restrictions for both reciprocal and non-reciprocal agreements alike.

For non-competing entities, all the aforementioned exceptions apart from restrictions as imposed between two licensees apply.²⁷³ Apart from this, there are also certain additional exceptions. Where restrictions are imposed on sale by a licensee, operating as a wholesaler to end users and on licensees who are members

²⁶¹ *Id.*

²⁶² Pinsent Mansons, *supra* note 249.

²⁶³ Lexis Nexis, Technology Transfer Block Exemption—Overview, available at https://www.lexisnexis.com/uk/lexispsl/competition/document/391329/5CBP-TFB1-F187-50HT-00000-00/Technology_Transfer_Block_Exemption (Last visited on March 5, 2021).

²⁶⁴ *Id.*

²⁶⁵ *Id.*, reciprocal agreements are usually cross licenses where the licensed technologies are wither competing or may be utilised to produce competing products.

²⁶⁶ *Id.*, Non-reciprocal licenses are usually one-way arrangements.

²⁶⁷ Pinsent Mansons, *supra* note 249.

²⁶⁸ *Id.*

²⁶⁹ Slaughter & May, *supra* note 239.

²⁷⁰ Pinsent Mansons, *supra* note 249.

²⁷¹ Slaughter & May, *supra* note 239.

²⁷² Taylor Wessing, *supra* note 254.

²⁷³ *Id.*

of a selective distribution system for sale to unauthorised dealers, they will not be termed as hardcore restrictions.²⁷⁴

While the prevalence of such restrictions makes the agreement on the whole invalid, excluded restrictions merely make the particular restriction inoperable, if severable.²⁷⁵ These are provided for under Article 5 of the TTCR, which encompasses instances such as requirements of assignment of exclusive grant-back of any improvements made to the licensed technology by the licensee²⁷⁶ or even no-challenge clauses.²⁷⁷ Further, if the parties are not competitors, if the restriction is such that the licensee is not permitted to exploit its own technology or carry out its own research and development, provided such is not crucial to the confidentiality of know-how, such a restriction will be deemed as an excluded restriction.²⁷⁸

2. Vertical Block Exemption Regulation

VBERs apply to vertical agreements concerning IPRs, i.e. agreements between undertakings operating at different levels of the production or distribution chain such as relationships between manufacturers and retailers or whole salers.²⁷⁹ Conditions for this category of exemptions as under Article 101 of the Treaty are provided for in Articles 2, 3 and 4 of the Commission Regulation No. 330/2010 ('VCR').

Akin to TTBEs, the applicability of the VBERs also follows a three-step process, namely; first, there must prevail a vertical agreement between the parties; second, the market share of each of the concerned parties must not exceed thirty percent;²⁸⁰ third, there must exist no hardcore restrictions in the agreement.²⁸¹ While the processes under stages one and two are succinct, stage three affords detailed analysis. As mentioned earlier, a hardcore restriction is such a restriction, the presence of which bars the applicability of VBERs to the whole agreement. Such restrictions pertain to price, sales as well as market determinations.

Restrictions on the buyer to determine its own price of resale may qualify as a hardcore restriction. This is the case if a minimum or fixed price has been imposed by the IPR holder.²⁸² Yet if such a restriction merely relates to de-

²⁷⁴ *Id.*

²⁷⁵ OECD EU Note, *supra* note 246, at ¶3.

²⁷⁶ Technology Transfer Commission Regulation No. 316/2014 of March 21, 2014, Art. 5 (EU).

²⁷⁷ *Id.*

²⁷⁸ Pinsent Mansons, *supra* note 249.

²⁷⁹ OECD EU Note, *supra* note 246.

²⁸⁰ Vertical Block Exemption Commission Regulation No. 330/2010 of April 20, 2010, Art. 3(EU).

²⁸¹ Pinsent Mansons, *The Vertical Agreements Block Exemption*, May 27, 2008, available at <https://www.pinsentmansons.com/out-law/guides/the-vertical-agreements-block-exemption> (Last visited on March 5, 2021) ('Pinsent Mansons II').

²⁸² Slaughter & May, *The EU Competition Rules on Vertical Agreements*, January 15, 2018, available at <https://www.slaughterandmay.com/media/64575/the-eu-competition-rules-on-vertical-agreements.pdf> (Last visited on March 5, 2021) ('Slaughter & May II').

ceding upon a maximum or recommended price of retail, VBERs may be applicable.²⁸³ Further, sales restrictions pertain to restrictions on the sale of components. Where buyers are prohibited from selling the components to the seller's competitors, such restrictions may not be termed hardcore restrictions. However, if the seller is barred from selling spare parts to end users after purchase by such seller, such a restriction will be barred from the applicability of VBERs.²⁸⁴

As for restrictions pertaining to market allocations, territories of operation and customers, they generally bar the applicability of VBERs and thus qualify as hardcore restrictions. However, if these merely restrict a territory or a consumer group that has exclusively been reserved for the supplier, such a restriction qualifies for safe harbour protection.²⁸⁵ Additionally, if sales are restricted in a selective distribution system in such away that buyers are selected based on a pre-determined criteria, such restrictions qualify as hardcore restrictions. However, within this framework it must be noted that sellers are permitted to restrict sales to unauthorised dealers in a selective distribution framework.²⁸⁶

While in the aforementioned analysis, any hardcore restriction would merely make the restriction inoperable while saving the entire agreement, there are certain excluded restrictions which also operate in IPR agreements. Such excluded restrictions are stipulated under Article 5 of the VCR²⁸⁷ and encompass restrictions which prevent the buyer from making purchases of competing products for over five years,²⁸⁸ restrictions barring members of selective distribution systems from selling particular competing brands²⁸⁹ and restrictions preventing the buyer from engaging in competition with the IPR holder.²⁹⁰ While most of these restrictions operate as blanket prohibitions on the applicability of VBERs, for the last of such restrictions if the limitation is restricted to one year and is necessary for the protection of know-how, it may be operable.²⁹¹

3. Research and Development Block Exemption Regulation

The Commission Regulation No. 1217/2010 ('RDCER') pertains to Research and Development agreements. An R&D agreement is one in which the parties contract in relation to joint or paid-for R&D for contract products or technologies and decide upon the joint exploitation of the same.²⁹² Such agreements

²⁸³ Guidelines on Vertical Restraints, 2010, ¶228, (EU) ('VBER Guidelines').

²⁸⁴ *Id.*, ¶55.

²⁸⁵ Slaughter & May II, *supra* note 282.

²⁸⁶ *Id.*

²⁸⁷ Vertical Block Exemption Commission Regulation No. 330/2010 of April 20, 2010, Art. 5(EU).

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *Id.*

²⁹¹ VBER Guidelines, *supra* note 283, at ¶68.

²⁹² KU Leuven, *R&D Agreements and EU Competition Law: When can Companies be 'Safe'?*, August 7, 2018, available at <https://www.law.kuleuven.be/citip/blog/rd-agreements-and-eu-competition-law-when-can-companies-be-safe/> (Last visited on March 5, 2021) ('KU Leuven').

may also exclude joint exploitation of the R&D results.²⁹³ Furthermore, they may also pertain to previous agreements carried on between parties.²⁹⁴

R&D exemptions operate only for limited durations. A distinction has been made between competing and non-competing entities in relation to this duration. For non-competing entities, this exemption is applicable for the duration of the R&D, regardless of market share.²⁹⁵ Further, if the contract provides for joint exploitation of the R&D results, the RDBER is applicable for seven years, counting from when the product or the concerned technology is first put on the EU market.²⁹⁶ It must be noted that for non-competing entities, under Article 4(2) of the RDCER, the same durations for applicability of exemptions operate. However, these durations are subject to certain conditions of market share.²⁹⁷ These conditions include the combined market share of a joint R&D agreement must not exceed twenty-five percent of the technology or product market,²⁹⁸ or for a paid-for R&D agreement, the market share of the financing party and all other parties with which the financing party has entered into such an agreement must not exceed twenty-five percent of the relevant product or technology markets.²⁹⁹

It must be noted that the applicability of RDBER is itself subject to certain conditions as stipulated under Article 3 of the RDCER.³⁰⁰ Firstly, the R&D agreement must expressly stipulate that both parties have full access as well as rights of exploitation to the result of the R&D.³⁰¹ However, it must be noted that this condition is waivable if all contracting parties expressly limit their right to exploitation.³⁰² Secondly, if access to previous know-how of the parties is necessary to exploit the results of the current R&D, the agreement must expressly provide for access to such previous know-how.³⁰³ Lastly, any joint exploitation may only pertain to products which are validly protected IPRs or constitute know-how and are by their nature indispensable for the production of contracted products or technologies.³⁰⁴

²⁹³ *Id.*

²⁹⁴ *Id.*

²⁹⁵ Slaughter & May, *EU Competition Rules on Horizontal Agreements*, January 2018, available at <https://www.slaughterandmay.com/media/64578/the-eu-competition-rules-on-horizontal-agreements.pdf> (Last visited on March 5, 2021).

²⁹⁶ Research and Development Block Exemption Commission Regulation No. 1217/2010 of December 14, 2010, Art. 4(1)(EU).

²⁹⁷ KU Leuven, *supra* note 292.

²⁹⁸ Stevens & Bolton, *Horizontal Agreements*, December 12, 2016, available at <https://www.stevens-bolton.com/site/insights/publications/horizontal-agreements> (Last visited on March 5, 2021) ('Stevens & Bolton').

²⁹⁹ *Id.*

³⁰⁰ Research and Development Block Exemption Commission Regulation No.1217/2010 of December 14, 2010, Art. 3(EU); *Id.*

³⁰¹ KU Leuven, *supra* note 292.

³⁰² Stevens & Bolton, *supra* note 298.

³⁰³ *Id.*

³⁰⁴ *Id.*

The applicability of RDBERs is further restricted by the prevalence of certain hardcore restrictions.³⁰⁵ If parties are restricted from carrying out R&D with third parties or independently in an unrelated field,³⁰⁶ resale prices are fixed,³⁰⁷ restrictions pertain to territories of operation and sales to a particular consumer group provided they have not been exclusively reserved for the imposing party³⁰⁸ or restrictions are imposed making it difficult for retailers or users to obtain the contracted products in the internal market, each of these limitations would qualify as hardcore restrictions.

Furthermore, limitations of output also fall in the ambit of such restrictions, subject to certain exceptions. Firstly, if the agreement pertains to joint exploitation of R&D products, any restriction relating to imposing joint production targets is exempted.³⁰⁹ Secondly, where the joint exploitation of R&D results relates to joint distribution of the same, the setting of sales targets is also exempted.³¹⁰ Thirdly, if a practice constitutes specialisation in the context of exploitation or fourthly, if the restriction pertains to the manufacturer, sale, assignment or license of contracted product or technology, it shall be reasonable.³¹¹

RDBERs also operate under certain excluded restrictions. If restrictions prohibit the right to challenge the IPRs which are relevant to the present R&D and the parties hold valid IPR in the EU, the same qualify as excluded restrictions. Further, if such restrictions prohibit the right to challenge the validity of the IPR protecting the results of the R&D between the parties in the internal market, such will also qualify as excluded restrictions.³¹² Additionally, if the restrictions impose a requirement that licenses may not be granted to third parties to manufacture the contracted products or produce the contracted technologies till the time the R&D agreement provides for exploitation by any one of the parties and such exploitation takes place in the internal market as against third parties, they will also be termed as excluded restrictions.

³⁰⁵ Research and Development Block Exemption Commission Regulation No.1217/2010 of December 14, 2010, Art. 5 (EU).

³⁰⁶ Dorsey & Whitney, *Compliance of Research and Development Agreements with EU Competition Law— A New R&D Block Exemption Comes Into Force*, February 3, 2011, available at <https://www.dorsey.com/newsresources/publications/2011/02/compliance-of-research-and-development-agreement> (Last visited on March 5, 2021) ('Dorsey & Whitney').

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ Mark Anderson, *EU Block Exemption Regulation 2010: Checklist of Requirements or an Agreement to Fit With in the EU R&D Block Exemption Regulation 2010*, March 2011, available at http://www.andlaw.eu/downloads/EU_Block_Exemption_Regulation_2010.pdf (Last visited on March 5, 2021).

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² Dorsey & Whitney, *supra* note 306.

4. Instances Outside The Scope of Block Exemption Regulations

It is essential to note that any agreement falling outside the scope of the block exemption regulations is not deemed to be unlawful. All such agreements are subjected to an individual analysis where the rationale and effect of the concerned restriction is assessed, i.e. the effects based approach is followed for such restrictions.³¹³ If the restrictions improve the production or distribution of goods or they promote technical or economic progress or, if a fair share of the resulting benefit is provided to the consumers, such restrictions shall not be deemed to be anti-competitive.³¹⁴ Further, if these restrictions do not allow for a substantial elimination of competition from the markets, then they shall not be deemed to be anti-competitive.³¹⁵

5. Overview

As a step further from the US regime, the EU, by explicitly delineating block exemptions and providing detailed guidelines has been successful in compartmentalising safe harbours, providing concrete definitions and highlighting those instances which fall beyond the ambit of such safe harbours. As a consequence, the scope for ambiguity remains limited, a problem which is yet to be overcome in the Indian system. Further, we observe EU law to be consumer friendly. This is evident from instances such as prohibition of minimum price recommendations but permissibility of maximum price recommendations, thereby establishing a check on price levels in the market and consideration of consumer welfare as one of the determinants in the effects based approach. Moreover, by establishing a distinction between competing and non-competing entities, akin to the USA and concretely defining approaches to both these instances, the EU instils effective clarity in anti-competitive analyses. We also witness a distinctive feature of excluded restrictions. These excluded restrictions if limited to one year, do not qualify as hardcore restrictions and save the agreement in case of non-operability of a particular restriction. Therefore, along with market share determination and assessing the level of competition in the market, the EU permits certain restrictions provided they are time-bound, an approach completely overlooked by Indian courts. This instils efficiency as well as ensures the maintenance of the incentive to invent and innovate.

³¹³ Stevens & Bolton, *supra* note 298.

³¹⁴ Thomson Reuters, *Commission Adopts New Vertical Agreements Block Exemptions and Vertical Restraint Guidelines*, April 20, 2010, available at [https://uk.practicallaw.thomsonreuters.com/9-502-0673?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/9-502-0673?transitionType=Default&contextData=(sc.Default)&firstPage=true) (Last visited on March 5, 2010).

³¹⁵ *Id.*

E. JAPAN

Article 10 of the Intellectual Property Basic Act, 2002 of Japan secures the fair exploitation of IP for the promotion of free and fair competition as well as creation, protection and exploitation of IP.³¹⁶ Further, Article 21 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade, 1947 ('the Antimonopoly Act') stipulates that the provisions of the Antimonopoly Act, i.e. those dealing with anti-competitive practices, shall not be applicable to acts recognisable as being in the nature of enforcement of IPRs.³¹⁷ This is because well-protected IP systems and competition law work in tandem since the former promotes research and development and thus, aids in fostering competition.³¹⁸

However, such competition may stand diminished if the IPR holder imposes such conditions which deviate from the intent of IP systems and thus negate development, production, sales and other business activities.³¹⁹ Therefore, the Antimonopoly Act, while partially following the effects approach, recognises such restrictions as unreasonable³²⁰ and declares them to be anti-competitive. The reasonability of such restrictions depends on a multitude of factors such as market share of the parties, price restraints, output restraints, etc which shall be discussed in the succeeding parts of the paper.

For the purpose of determining reasonable restrictions, market share, i.e. share in the market for that particular product, as controlled by the imposing party, plays a crucial role. Under general circumstances, if restrictions are imposed by a party whose share in the market is twenty percent or less, such restrictions are not considered to be anti-competitive.³²¹ In a case where it is not possible to determine market share, restrictions shall be valid only if there are at least four other parties in the market which hold rights to substitute technologies with no substantial detriment to business activities.³²² Nevertheless, it must be noted that qualifying for the permissible market share threshold is not equivalent to a blanket exemption. We observe, as discussed later in this segment, that even with a less than twenty percent market share, if restrictions pertain to price control, output control, research and development or compel the assignment of

³¹⁶ Intellectual Property Basic Act, No. 122 of 2002, Art. 10 (Japan).

³¹⁷ Acton Prohibition of Private Monopolisation and Maintenance of Fair Trade, No. 54 of 1947, Art. 21 (Japan).

³¹⁸ Max Planck Institute for Intellectual Property and Competition Law, *Copyright, Competition and Development*, ¶9, December 2013, available at https://www.wipo.int/export/sites/www/ip-competition/en/studies/copyright_competition_development.pdf (Last visited on March 5, 2021).

³¹⁹ Guidelines for the Use of Intellectual Property under the Antimonopoly Act, 2009, ('Japan Guidelines').

³²⁰ *Id.*, 5.

³²¹ *Id.*, 7.

³²² *Id.*, 9.

rights or grant of exclusive licenses for improved technology, such shall be deemed anti-competitive.³²³

Therefore, to determine reasonability of exercise of IPRs, along with market share, conditions imposing restrictions on price are taken into consideration.³²⁴ Such conditions may not be termed reasonable if they are likely to reduce price competition, having an adverse impact on one of the most essential determinants of a healthy competitive market.³²⁵ Therefore, any restriction on sale or resale prices of products incorporating the protected technology is principally considered as an unfair trade practice³²⁶ and thus, is not exempted.

Further, restrictions imposed by IP holders may also pertain to output restraints. Such restraints do not objectively qualify as unfair trade practices. They are often analysed on a case to case basis in light of factors such as nature and purpose of restrictions and consequent impact on market competition.³²⁷ If such conditions are imposed to secure a minimum royalty income, they shall be considered as reasonable.³²⁸ However, if such restrictions exercise control over the forces of demand and supply in the market, they qualify as unfair trade practices³²⁹ and are thus, prohibited. Furthermore, such restrictions may also prohibit the licensees from selling *competitive products*. In such a paradigm, it is well established that if these stipulations are imposed by influential manufacturers and restrict fair business by limiting viable alternative trade partners, they are considered anti-competitive and hence, prohibited.³³⁰

Conditions may also take the form of restrictions to sell the concerned product to only a specific consumer group. Such conditions which restrict the freedom of the seller to determine sales outlets have an adverse effect on competition and are thus considered to be unreasonable. Interestingly, if the restrictions limit merely the geographical limits of operation of the seller, they may constitute an unfair trade practice only if the IPR has been exhausted in Japan or if such an exercise of the right has the tendency to impede fair competition.³³¹ Furthermore, limiting counterparties, i.e. distributors of the product with incorporated technology would also be reasonable until there is an impediment to fair competition.³³²

³²³ Global Competition Review, Japan, available at <https://globalcompetitionreview.com/jurisdiction/1004798/japan> (Last visited on December 20, 2019).

³²⁴ AMERICAN BAR ASSOCIATION, ANTITRUST ISSUES IN INTERNATIONAL INTELLECTUAL PROPERTY LICENSING TRANSACTIONS, 518 (2012) ('ABA').

³²⁵ Japan Guidelines, *supra* note 319, at 20.

³²⁶ *Id.*

³²⁷ Nishimura & Asahi, *Intellectual Property and Competition Law—Japan*, 2011, available at <https://www.acc.com/resource-library/intellectual-property-and-competition-law-global-practice-guide> (Last visited on March 5, 2021) ('Nishimura & Asahi').

³²⁸ *Id.*

³²⁹ Japan Guidelines, *supra* note 319, at 20.

³³⁰ *Id.*

³³¹ Nishimura & Asahi, *supra* note 327.

³³² *Id.*

This impediment may be *prima facie* determined if the IP holder either has more than ten percent market share or is one of the top three market players.³³³

Once an IP has been licensed, the licensor may also impose conditions on any further improvements made to the protected technology or product by the licensee. Such restrictions may undertake varying forms and their permissibility is contingent upon the same. If the restrictions pertain to assignment of the improved technology to the licensor or the grant of an exclusive license for the same, they are expressly prohibited on account of unequivocally impeding fair competition.³³⁴ This is because such an exclusive grant would demotivate licensees from further developing technology since they themselves would be constrained from accessing the same.³³⁵ Moreover, while disincentivising innovation, such restrictions also unfairly enhance the market position of the primary licensor.³³⁶ However, if the stipulation of the licensor is with respect to the grant of a non-exclusive license, such a stipulation is considered to be reasonable under the Japanese competition law regime, as long as the licensee and other parties, as wished by the licensee, have access to such technology.³³⁷

We observe that Japan follows a mixed approach towards resolving a probable IP and competition law overlap. While similar to New Zealand and the USA, it considers certain conduct such as resale price maintenance as *prima facie* anti-competitive, it undertakes an effects analysis where such a *prima facie* implication fails, such as in the case of output restraints. It is analysed whether the intent or impact of the restriction imposed runs counter to the intent of IP systems, i.e. to foster innovation and thus, competition. Consequently, if any restriction is considered to impede fair competition, it cannot be perceived to foster the intent of IP systems and thus, is termed anti-competitive.

Along with the mixed approach, we also witness that Japan, while merely defining certain conduct as anti-competitive and hence, prohibited, is more permissive towards an IP and competition law overlap. This runs sharply in contrast to the Indian system and also that in Australia and proposed to be adopted in New Zealand, which carve out a scope for *reasonable conditions* and thus, establish merely a limited scope of operation. Japan, on the other hand, permits general operability allowing wide-exercise of IPRs, while delineating certain express limitations. As a consequence, it may be inferred that the Antimonopoly Act establishes a healthy breeding ground for IP systems and thus, innovation as is evident from the extensive development of Japan.

³³³ *Id.*

³³⁴ ABA, *supra* note 324, at 528.

³³⁵ Organisation for Economic Co-operation and Development (OECD), Directorate for Financial and Enterprise Affairs Competition Committee, *Licensing of IP Rights and Competition Law—Note by Japan*, at 4, DAF/COMP/WD (2019) 6, June 6, 2019 ('OECD Japan Note').

³³⁶ *Id.*, 25.

³³⁷ *Id.*

F. CANADA

The jurisprudence regarding the interface of competition law and IP law is highly developed in Canada. The National Competition Bureau of Canada ('Bureau') regulates the intersections of IP and competition law. While the Canadian approach to the subject is similar to the US approach, there are a few key differences that have been adopted by Canada owing to the region's economic context and policy.

Similar to the approach followed in other jurisdictions such as Australia, New Zealand and USA, till recently, the Bureau considered the grant of IPR equivalent to the presence of market power and monopoly rights.³³⁸ Endeavours were undertaken so as to contain the impact of the exercise of these statutory rights on other stakeholders. However, the beginning of the 1980s marked a considerable shift in Canadian policies on the issue of IP law-competition law conflict.³³⁹ This change in policy was subsequently reflected in the Bureau's treatment of anti-competitive conduct arising out of the exercise of IPRs by rightholders.³⁴⁰

Canada reconciled the conflict between competition law and IP law by working along objectives common to both. These included innovation and long term economic efficiency.³⁴¹ Similar to the Indian position, Canada recognised the role of restrictions in licensing agreements as having pro-competitive effects as they would ultimately further the dissemination of technology.³⁴² The role of rewards as an incentivising mechanism for innovation was also recognised.³⁴³

The competition regulation in Canada, the Canadian Competition Act, 1986, explicitly recognises the intersection of IP law and competition law and includes specific provisions addressing the same.³⁴⁴ The Competition Bureau of Canada also releases periodic guidelines on enforcement of policies called the Intellectual Property Enforcement Guidelines.³⁴⁵ These guidelines contain provisions addressing situations in which the intervention of the national competition law regulatory authority is warranted in competitive markets so as to protect

³³⁸ Carolyn N. Naiman & Jennifer Manning, *The Competition Law and Intellectual Property Interface*, Issue 1 ANTITRUST REPORT (2006).

³³⁹ Anderson, *supra* note 238, at 12.

³⁴⁰ *Id.*, p. 12.

³⁴¹ Khemani, *supra* note 39.

³⁴² Jeffrey Brown, *The Interface between Competition and Intellectual Property Law: A Canadian Perspective*, May 3, 2011, available at http://www.cba.org/cba/cle/PDF/SPCOMP11_Brown_Slides.pdf (Last visited on March 5, 2021).

³⁴³ Anderson, et al., *The Competition Policy Treatment of Intellectual Property Rights in Canada: Retrospect and Prospect* in CANADIAN COMPETITION LAW AND POLICY AT THE CENTENARY, 497-538(1991).

³⁴⁴ Competition Act, R.S.C. 1985, §79(5) (Canada).

³⁴⁵ The Intellectual Property Enforcement Guidelines, 2019, ('Canada Guidelines').

them from adverse effects arising from the exercise of IPRs in an anti-competitive manner.³⁴⁶

While the Enforcement Guidelines maintain that the analysis of each case should be done using a case to case approach, they prescribe certain safeguards which may be adopted while undertaking such an analysis.³⁴⁷ The Guidelines also recognise the need for evolution of the law governing this area in light of rapid technological advancement.³⁴⁸ The 2016 Enforcement Guidelines accordingly address novel issues concerning anti-competitive patent settlement, enforcement of standard essential patents, the legality of patent assertion entities among others.³⁴⁹

The underlying assumption inherent in these guidelines is that IP can be treated like other forms of property as far as the scope of protection offered by competition law is concerned. However, they also acknowledge that the two guiding principles that must be applied when subjecting IPR agreements to competitive scrutiny is that IP can be reproduced at a low cost and that IP is non-rivalrous in terms of consumption.³⁵⁰

The approach adopted by these Enforcement Guidelines in Canada requires the Bureau to undertake a step by step analysis. These Guidelines divide agreements into two broad categories: first, relating to exercise of IPR as granted by relevant IP law statute, and second, where the subject matter of the agreement is in addition to mere exercise of IPRs.³⁵¹ For agreements that fall in the latter category, the Bureau has complete jurisdiction to subject such agreements to the general application of competition law. Moreover, agreements are also subjected to competition law in situations where the enforcement of the agreement has anti-competitive effects, however, the same are due to the agreements and not the exercise of IPRs.³⁵² Agreements which create market power are also prohibited.³⁵³ Refusal to license an IPR is considered as a legitimate exercise of IPR and does not invite competitive scrutiny.³⁵⁴

³⁴⁶ *Id.*, ¶5.

³⁴⁷ *Id.*

³⁴⁸ *Id.*, ¶8.

³⁴⁹ *Id.*, §7.4.

³⁵⁰ Competition Bureau Canada, *Competition Bureau Recognized for Innovative Approach to Intellectual Property*, March 27, 2017, available at https://www.canada.ca/en/competition-bureau/news/2017/03/competition_bureaurecognizedforinnovativeapproachtointellectualp.html (Last visited on March 5, 2021).

³⁵¹ Canada Guidelines, *supra* note 345, at ¶48.

³⁵² ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, *Licensing of IP Rights and Competition Law— Note by Canada*, 6 (June 11, 2019), available at [atone.oecd.org/document/DAF/COMP/WD\(2019\)1/en/pdf](https://atone.oecd.org/document/DAF/COMP/WD(2019)1/en/pdf) (Last visited on January 20, 2021).

³⁵³ Canada Guidelines, *supra* note 345, at ¶32.

³⁵⁴ Canada Guidelines, *supra* note 345, at ¶34.

VIII. RECOMMENDATIONS

§3(5) of the Competition Act, 2002, allows rights holders to impose reasonable and necessary conditions to protect the irrelevant IPRs and prevent their infringement by exempting the agreements from application of §3. However, neither does the statute specify the scope of reasonable and necessary conditions nor has case law developed adequately so as to reveal practices that would be considered reasonable and necessary for the protection of IPRs in India. Thus, there remains a lacuna in the regulation of the intersection of IP and competition law in India.

Owing to the effects that regulation of licensing agreements and competition law can have on the economy, it is vital that such regulation be rooted in sound economic analysis. A preliminary question that must be determined by law makers is whether determining conditions valid under §3(5) entails solely a competition law analysis, IP law analysis or an amalgamation of the two. It is our submission that determining there as on ability of conditions involves consideration of a combination of IP and competition law factors. Agreements over use of IP benefit general competition, increase the incentives to innovate, make the innovation accessible to others and allow the innovator to reap benefits out of the innovation.

Contrarily, such agreements may be used as a vehicle by the right holders to exploit licensors, or to cartelise the industry along with the competitors. The former is a result of vertical agreements, as between the manufacturer of a good or service and a player in a different supply chain, and the latter is caused by a horizontal agreement, where producers of the same good or service enter into agreements to cartelise their industry. These are prohibited by §3(3) and §3(4) of the Competition Act, 2002 respectively. However, §3(5) provides a limited carveout and lays down that horizontal or vertical agreements that fulfil the conditions mentioned therein shall be exempt from the application of §3 without specifying the scope of qualifying criteria. Thus, while determining whether a particular condition in an agreement is valid as under §3(5), regulators must assess whether it is in blatant violation of competition law and IP law. We propose that the reasonability of restrictions based on IPR in commercial agreements should be determined from the dual perspective of IP law and competition law. Thus, it is necessary to balance the objectives of the two such as consumer welfare, economic efficiency and innovation while undertaking such an analysis. Specifically, in such analysis, regulators must weigh the pro-competitive and anti-competitive effects of a particular restriction in IPR agreements, including but not limited to licensing agreements, and assess its impact of the outcome on innovation and dynamic efficiency, borrowing from jurisdictions such as the EU where such practices are the norm.

It must be noted that §3(5) is meant to play a pivotal role in such regulatory determination. The lack of clarity surrounding such a provision thus poses key challenges for regulators in assessing whether a particular condition in an agreement is reasonable from the competition law standpoint or not. We acknowledge that such an assessment would majorly be a case to case analysis as specific conditions and positions of right holders in markets may differ.

An analysis of the positions of other jurisdictions on the issue has revealed a variety of approaches in which the IP — Competition law conflict is reconciled therein. It can be deduced that factors such as public interest, termination conditions, nexus between restriction and IPR, and rule of reason are involved in assessing the nature of usage of IPRs from a competition law lens. Taking inferences from the discussion above, in this Part, we provide recommendations regarding key pointers which may be considered by regulators while assessing the competitive effects of restrictions in IPR licenses. Drawing from foreign approaches, we also discuss factors and assessment criteria that may be incorporated into an analysis made under §3(5).

A. *COMPETITIVE EFFECTS OF CONDITIONS IN LICENSING AGREEMENTS*

Usage of IPRs may have pro-competitive and anti-competitive effects, depending on how these rights are exercised. We have taken the example of licensing agreements to demonstrate how reasonable conditions may be interpreted in an attempt to reconcile objectives of IP and competition law. We also suggest how these two can be balanced by regulators while undertaking a §3(5) analysis.

1. Pro-Competitive Effects of Certain Licensing Restrictions

It would be presumptuous to assume that all conditions imposed by licensors in licensing agreements would be detrimental to competition. Certain conditions in licensing agreements may also be used by licensors in furtherance of pro-competitive objectives. For instance, conditions or restrictions in agreements for furthering sales of innovation, clarifying or standardising licensing agreements and subsequent contracts, or increasing profit margins and productive efficiency have all been considered as pro-competitive effects of restrictive terms in license agreements.³⁵⁵ Further, it has also been viewed that the act of the licensor of capturing consumer surplus generated by the innovation is not anti-competitive in nature.³⁵⁶

³⁵⁵ OECD, *supra* note 4.

³⁵⁶ W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS, 242(1981). It has been argued that for the invalidation of a particular license term, it must be demonstrated how that term reduces competition beyond the monopoly granted by the patent.

By achieving dissemination of improved technology, licensing agreements serve the dual purpose of allowing the licensor to capture profits of one's intellectual labour, and allowing licensees to gain productive efficiency and consumer welfare. Awarding protection to IPRs also provides incentive to innovate and increases competition in the long run. The pro-competitive effects of restrictions in licensing are mainly maximisation of profits, development of IP law regimes and maintaining the reputation of rightholders.

a. The Maximisation of Profits

From the perspective of the licensor, profits derived from licensing one's innovation can be maximised if customers can be classified as per their demand or willingness to pay and be charged accordingly. If the licensor is able to perform perfect price discrimination as in the scenario above,³⁵⁷ output would be enhanced in the sameway as in a perfectly competitive industry.³⁵⁸ However, if perfect price discrimination cannot be performed by the licensor or is prohibited by competition law, the licensor would charge a single price for the output where the latter would either rise or contract.³⁵⁹

This price discrimination can be performed in a variety of manners. This includes charging licensees according to their degree and intensity of use of the IP.³⁶⁰ Tie-ins could also be performed by charging less than the single monopoly price for protected product or process whereas charging higher than the usual market price for the tied product. This has been found to be pro-competitive as it results in greater diffusion of the protected property than would have taken place had the right holder charged a single monopoly price.³⁶¹ Charging customers as per their willingness to pay also allows those customers to use the invention who would not have otherwise been able to access the same owing to single monopoly price. Capitalising on differences in territorial markets helps achieve higher output and greater returns through price discrimination.³⁶²

Thus, if performed correctly, price discrimination would require discriminating against customers based on their geographic market or field of use. Restrictions may also be imposed against resale of the invention or price restraints on sale of unpatented inventions made with the help of patented property. Resale price maintenance though might be pro-competitive in the context where the primary aim of doing so is to ensure that the price discrimination is effective for the final customer.

³⁵⁷ Price discrimination is a strategy where the seller might charge customers different prices for the same product or service based on their capacity and willingness to pay coupled with what the seller thinks they can get the customer to agree to.

³⁵⁸ J. Gregory Sidak, *Debunking Predatory Innovation*, Vol. 83(5), COLUMBIA L. REV., 1132 (1983).

³⁵⁹ J. ROBINS ON, *THE ECONOMICS OF IMPERFECT COMPETITION*, 188-195 (1st ed., 1933).

³⁶⁰ W.S. BOWMAN, *PATENT AND ANTITRUST LAW*, 62, 65 (1973).

³⁶¹ *Id.*

³⁶² *Id.*, 111-112.

b. Maintaining Goodwill

Conditions protecting the goodwill of the licens or may also be included in agreements. These include tying-in products or processes that impact the efficiency of the protected property.³⁶³ Moreover, conditions requiring timely maintenance could also be introduced for complex protected properties where unsatisfactory performance could be traced to inferior quality inputs thereby affecting the licensor's reputation.³⁶⁴ When the cost of specifying certain prescribed procedures is more than actually performing the quality control functions themselves, licensors are likely to do the latter.

However, it must be noted that effects which do not disrupt competition and benefit both right holders, licensees and end consumers while furthering objectives of IP and competition law arise only in cases of vertical agreements, when the protected property is used as an input or as a complement for the sale of the licensor's goods or services. If the same restrictions are reflected in horizontal agreements, they might be used to further cartel behaviour. This can be attributed to the fact that restrictions in licensing agreements with competitors may allow competitors to act in a colluded manner while harming the end consumers and creating barriers to entry for other firms.

Therefore, while analysing the pro-competitive effects against the anti-competitive effects of licensing agreements, attention must be paid to the relationship between the licensor and licensee, and the kind of the agreement.

2. Anti-Competitive Effects of Certain Licensing Restrictions

When the licens or and licensee are competitors themselves and enter into horizontal agreements, then restrictions in licensing agreements would be subject to greater scrutiny owing to the impact they may have on competition. The potential impact and consequences have been discussed below.

³⁶³ Sidak, *supra* note 358; For instance, tying the use of a protected product or process to the purchase of some other input affecting the product's operation or the efficiency of the process is the subject of case-by-case analysis by the Competition Regulations, and could be considered to be unfair. However, certain jurisdictions such as Japan expressly permit tie-in sales if the licensor is able to satisfactorily demonstrate that such a restriction is necessary for maintaining the goodwill of the licensed property etc. The licensor may be required to show that quality control of raw materials or components is insufficient for this purpose. See Organisation for Economic Co-Operation and Development, *Competition Policy and Intellectual Property Rights*, 1999, available at www.oecd.org/regreform/sectors/2376247.pdf (Last visited on March 9, 2021).

³⁶⁴ *Id.*

a. Cartelisation

Horizontal agreements between competitors or manufacturers of the same good or service may be used as a means of collusion or cartelisation.³⁶⁵ This may be done to limit flow of output in markets, divide markets, and fix prices. The market which is to be cartelised can either be the one for protected property or the one where it is used as an input good or service.³⁶⁶ Therefore, restrictive conditions in licensing agreements including patent pooling or cross licensing, may impact competition. Conditions in such agreements may be with respect to price, territory, customers, field of use or output.³⁶⁷

It has been suggested that to truly assess if horizontal agreements between parties to licensing agreement are being used to further cartel behaviour, it is important to analyse the strength of the technology in the given market.³⁶⁸ This would involve examining the purpose and subject matter of the licensing agreement in light of the usage of invention to the licensor. This would also clarify the intentions of the parties and whether the purpose of licensing was to veil endeavours to perform anti-competitive activities. Even the IP authorities should assess whether a particular license may be used to further certain objectives of licensors that may inherently be anti-competitive. Competition regulators may assess whether there is a potential of cartelisation and to what extent would the same be achieved through the licensing agreement and how much of the relevant market is subject to such restrictions.

b. Exclusionary effects

The exclusivity associated with IPRs if exercised disproportionately in licensing agreements can create competition law related concerns. A restrictive licensing agreement focused on excluding other competitor firms by creating market power in the primary market for good or service or markets where it is used as an input or facilitating collusive conduct would be anti-competitive. Restrictions in licensing agreements such as tie-ins may operate so as to create barriers to entry for other firms which would have to enter the market at the same levels as the primary licensor.³⁶⁹

³⁶⁵ Pathshala & MHRD, Government of India, *Horizontal agreements and their types*, available at https://epgp.inflibnet.ac.in/epgpdata/uploads/epgp_content/law/03_competition_law/10_horizontal_agreements_and_their_types/et/8133_et_et.pdf (Last visited on March 10, 2021).

³⁶⁶ R. B. Andewelt, *Analysis of Patent Pools under the Antitrust Laws*, Vol. 53, ANTITRUST L. JOURNAL, 611, 625 (1984).

³⁶⁷ VALENTINE KORAH, MONOPOLIES AND RESTRICTIVE PRACTICES, 230-241 (1968).

³⁶⁸ P. DEMARET, PATENTS TERRITORIAL RESTRICTIONS AND EEC LAW: A LEGAL AND ECONOMIC ANALYSIS, 46-62 (1978).

³⁶⁹ Organisation for Economic Co-Operation and Development (OECD), *Competition Policy and Intellectual Property Rights*, 1999, available at www.oecd.org/regreform/sectors/2376247.pdf (Last visited on March 9, 2021).

Exclusivity in licensing agreements prohibiting use of substitute property has also been held to give rise to anti-competitive effects in cases where there is a horizontal relationship among licensors, licensees, or between the licensor and its licensees.³⁷⁰ In certain cases, this may be said to give rise to anti-competitive concerns owing to instances of cross-licensing by competitors who collectively possess market power, grant backs, and acquisitions of intellectual property.³⁷¹ Thus, agreements which hamper the development of substitute technologies in a particular market would be considered anti-competitive in nature.³⁷² Moreover, situations where the licensor acquires control over substitute technology would be viewed with the lens of horizontal mergers.³⁷³ Thus, regulators must consider the effects of restrictions in licensing agreements on competitors of the licensor, and whether these restrictions result in complete exclusion of the competitors from their respective domains by creating barriers of entry or disincentivising innovation.

c. *Non-price misuse*

Right holders can also exploit their IPRs so as to perform non-price predation. The acts of excluding rivals on factors other than price include abusive litigation or any other practice which has the effect of excluding rivals, increasing costs or impacting efficiency.

Abusive litigation involves initiating bad faith litigation so as to exclude competitors.³⁷⁴ Use of abusive enforcement of licensing terms, even though not anti-competitive *prima facie*, may have appreciable adverse effects on the market.³⁷⁵ A competitor's entry may be delayed or entirely made impossible if they lack these sources to sustain prolonged court proceedings and would be impacted disproportionately.³⁷⁶

A distinction between abusive litigation and good faith enforcement of IPRs must be made. The strength of an IPR is measured by how well it can be protected and shielded from related claims. Thus, litigation and dispute settlement become important aspects of enforcement in effective IPR regimes. Non-price misuse also includes incorporating conditions or certain restrictions in licensing agreements that are disproportionate and cannot be enforced without incurring

³⁷⁰ Antitrust Guidelines for the Licensing of Intellectual Property, January 12, 2017, §2.1 ('USA Guidelines').

³⁷¹ In the case of *United States v. Singer Mfg. Co.*, 1963 SCC OnLine US SC 153 (Supreme Court, United States of America), the court held that cross-license agreements that were a part of a broader combination to exclude competitors of the licensor were anti-competitive.

³⁷² Andewelt, *supra* note 366.

³⁷³ OECD, *supra* note 369.

³⁷⁴ James T. Halverson, *Vertical Restraints after GTE Sylvania: Current Confusions: An Overview of Legal and Economic Issues and the Relevance of the Vertical Restraints Guide*, Vol. 52(2), ANTITRUST L. JOURNAL, 49 (1983).

³⁷⁵ OECD, *supra* note 369.

³⁷⁶ *Id.*

extra costs. For instance, the inclusion of termination conditions that were particularly harsh by Monsanto was considered to be unreasonable under §3(5), as it was considered to be unfair to the licensees.³⁷⁷

3. Balancing Agreements

While certain restrictions in licensing agreements may have pro-competitive effects, the same restrictions if used solely to exclude competitors, impact the efficiency of their products or raise costs, would become anti-competitive. We submit that a restriction cannot be classified as pro-competitive or anti-competitive by itself. It is rather the effect of that restriction or condition which leads to such a determination. This is similar to the effects based approach that has been adopted by multiple jurisdictions in acknowledgement of the fact that the determination of licensing agreements as pro-competitive or anti-competitive would depend on their terms and position of the licensor and licensee in their respective domains.

For instance, while the inclusion of tie-in clauses would be pro-competitive in certain situations, the same could have anti-competitive effects if it has the effect of excluding competitors. This indicates that weightage must be given to the likely outcome and intention of including certain restrictions in licensing agreements. Moreover, an assessment of the position of the licensor and licensee in the market and of their horizontal or vertical agreement must also be made. Such an assessment would thus involve balancing the risks of excluding competitors through vertical or horizontal agreements with pro-competitive effects of licensing agreements.

A. MARKET POWER

It must be noted that multiple jurisdictions, including Canada, USA, Australia, and New Zealand, have moved away from equating the grant of IPR with the presence of monopoly rights and market power. Such power was previously said to be acquired by a firm depending on its ability to profitability maintain prices or output below a certain market level. However, the development of competition law regimes in these jurisdictions has revealed that the presence of IPRs would not by itself lead to presence of market power.³⁷⁸

It is important that regulators do not perceive the granting of IPRs as equivalent to granting market power. Market power of a particular firm depends on a variety of factors, including the role of the good or service in the market, whether

³⁷⁷ Monsanto Holdings (P) Ltd. v. CCI, 2020 SCC OnLine Del 598.

³⁷⁸ Heimert, *supra* note 237, at 21.

the particular good is used as an input for other goods or services, and the presence of other substitute and complement goods.³⁷⁹

A parallel may be drawn between regular property rights and IPRs in this context. While property rights allow the right holder to exclude others from using one's property and grant one exclusive control of the same, market power of the property would be determined with reference to the demand and elasticity of the property.³⁸⁰ Thus, the mere presence of certain rights over property does not translate into market power. The demand for the property would depend on determinants including the characteristics of the property, whether it is used as an input or a finished good or service, the presence of other substitutes, complements and cross price elasticity of the property.³⁸¹ It has previously been found that IPRs are poor proxies for monopoly power because the presence of these rights, by itself, does not confer enough monopoly power in order to be categorised as an antitrust concern.³⁸²

It has been found that if an invention is commercially viable and can be exploited, innovation is likely to take place in that particular industry at an exceedingly rapid rate owing to the profit margins available to innovators.³⁸³ Thus, if an invention is commercially viable, it is likely to be competing with similar substitute technologies. Thus, as the market grows more competitive, returns from the protected property decrease. Significant market power arising from grant of patents has been previously seen as exception rather than the natural outcome.³⁸⁴

The acknowledgement of such a distinction, between granting of IPRs and existence of market power, by regulators is important to the antitrust assessment of particular agreements. Assuming that all right holders have market power would severely limit the scope of permissible restrictions in agreements valid under §3(5). Such a presumption would further concretise the assumption that all agreements entered into by right holders would be anti-competitive as it would be an exercise of their market power. Thus, regulators must be cautioned that IPRs are not to be equated with market power and not all agreements entered into by right holders would be anti-competitive.

³⁷⁹ Meloria Meschi, Montek Mayal & Avinash Mehrotra, *Assessing the Importance of Market Power in Competition Investigations*, available at https://www.cci.gov.in/sites/default/files/whats_newdocument/2.Assessing%20the%20Importance%20of%20Market%20Power%20in%20Competition%20Investigations.pdf (Last visited on March 10, 2021).

³⁸⁰ *Id.*

³⁸¹ BOWMAN, *supra* note 360.

³⁸² Richard A. Posner, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE, 172 (1976).

³⁸³ Forum on Creativity and Inventions – A Better Future for Humanity in the 21st Century organized by the World Intellectual Property Organization (WIPO), October 5-7, 2000, *Inventions And Innovations: Key Elements In Strive For Competitive Advantages Conditions Necessary For Creating An Innovation Friendly Environment*, WIPO/IP/HEL/00/11(2000).

³⁸⁴ Michael J. Meurer, *An Economic Analysis of Royalty Terms in Patent Licenses*, Vol. 67(6), MINNESOTA L. REV., 1198 (1983).

Further, restrictions in licensing agreements may even have pro-competitive effects as demonstrated above; the same may be considered reasonable under §3(5). Even if an innovation gives its creator market power, the presumption of the use of market power being anti-competitive must not be made by itself. As discussed above, it would depend on the position of the protected property in its market, and available substitute as well as complementary goods. An analogy may be drawn with the fact that even if a particular firm is dominant, not all conduct by the firm would be an abuse of that dominant position under §4.

B. ABUSE OF DOMINANCE AND §3(5)

§3(3) and §3(4) regulate forms of anti-competitive agreements whereas §4 governs the abuse of a dominant position. While it is common for anti-competitive agreements to also result in an abuse of dominance, it is necessary to acknowledge certain agreements, that might otherwise be anti-competitive under §3(3) or §3(4) but are valid under §3(5), would not always constitute an abuse of the right holder's dominant position.

For instance, if an IPR holder enters into a licensing agreement with a tie-in clause,³⁸⁵ that is otherwise reasonable and necessary for the protection of one's rights and hence valid under §3(5), regulators must note that the presence of a tie-in clause in such a circumstance would not always result in an abuse of dominance. The distinction between §3 and §4 must be kept in mind when evaluating whether a condition is valid under §3(5) in this regard. Thus, anti-competitive effects arising out of agreements and anti-competitive conduct must be distinguished in a manner that there is a possibility of recognising an instance of a valid agreement under §3(5) not resulting in an abuse of dominance.

Therefore, while a particular agreement centred around the usage of IPR may be anti-competitive, it may still not be an abuse of the right holder's dominant position under §4. This may be because of two reasons; first, the right holder does not have a dominant position to begin with, and second, even though the right holder has a dominant position, the agreements entered into by that right holder would not be an abuse of that position. A question of abuse may arise when the right holder's agreement or conduct are anti-competitive.

The Competition Amendment Bill, 2020, has sought for extending the safe harbour available to IPRs under §3, to §4 as well. This would be in congruence with positions of foreign jurisdictions,³⁸⁶ where it is acknowledged that the

³⁸⁵ The Competition Act, 2002, §3(4) provides that "tie-in arrangements" includes any agreement requiring a purchaser of goods, as a condition of such purchase, to purchase some other goods. Thus, these arrangements typically tie in the use of a protected product or process to the purchase of some other input affecting the product's operation or the efficiency of the process.

³⁸⁶ USA, EU, and New Zealand, inter alia, acknowledge the possibility of abuse of the right holder's dominant position.

intersection of IPRs with competition law may be in the form of anti-competitive agreements as well as abuse of a dominant position acquired as a result of the IP. While the discussion of the validity and effects of the proposed provision are outside the scope of this paper, it highlights the possibility of usage of IPRs being pro-competitive without the abuse of a dominant position, if held by the right holder.

C. *HORIZONTALV. VERTICAL*

Regulators must also exercise caution and analyse horizontal and vertical agreements differently. What might be considered reasonable or necessary in a vertical agreement may not fit the same criteria in an agreement with the licensor's competitors. This is primarily because of the nature of the impact such restrictive clauses may have on competition. The increase of market power through certain restrictions in agreements depends on whether the agreement is between competitors or not.³⁸⁷

Generally, restrictive clauses in horizontal agreements tend to have less pro-competitive effects as opposed to vertical agreements. This can be attributed to the fact that these arise out of licensing agreements between competitors. Thus, these agreements may act as a shield for cartel activity, the presence of which outweighs any pro-competitive benefits.³⁸⁸ Restrictions in horizontal agreements on production level, geographic markets, price level and customer base affect the market directly. This is because in licensing agreements between competitors, the licensor gains control over the technology and subsequently a considerable market share. Therefore, when analysing the reasonability of restrictions in horizontal agreements under §3(5), consideration must be given to the extent of market controlled and the commercial viability of technology licensed.

However, the possibility of having pro-competitive restrictions in licensing agreements is not completely ruled out. Conditions relating to efficiency, dispute settlement or grievance redressal may be considered reasonable for the purpose of §3(5) as even though they are imposed for the protection of rights under relevant IPR Statutes, they do not have any significant anti-competitive outcomes and help promote and sustain competition generally. Moreover, cross-licensing and technology transfer can also be pro-competitive in circumstances where it increases the diffusion of technology.³⁸⁹ Thus, attention must be paid to the restriction, and means of enforcement of terms in the license.

It must be noted that certain restrictions such as exclusivity requirements, tie-in clauses, grant back clauses, cross-licensing can have both

³⁸⁷ OECD, *supra* note 369.

³⁸⁸ ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT (OECD), DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS COMPETITION COMMITTEE, Licensing of IP Rights and Competition Law Background Note by the Secretariat, eDAF/COMP (2019) 3, June 6, 2019.

³⁸⁹ *Id.*

anti-competitive and pro-competitive effects. While these may be used to foreclose competition, reduce incentives to innovate, or increase market power of licensor, these may also benefit the market by lowering prices, increasing investment in R&D, increasing output and the licensor's profit margins reasonably.

Right holders should be exempt from competitive scrutiny with respect to transaction cost minimisation or pre-competitive cooperation in their licensing agreements.³⁹⁰ Conditions in licensing agreements are prohibited if they contain “naked restraints of trade unrelated to development of the intellectual property”³⁹¹ or are used to further cartel activity amongst owners. Moreover, conditions restricting creation of competing technology are also treated strictly under US competition law. While the EU provides a list of permissible block exemptions, US provides a list of restrictions in licensing agreements that would be deemed anti-competitive. Thus, it can be seen that the determination of restrictions in horizontal and vertical agreements over IP as anti-competitive depends on the intention of the parties, the purpose of there striction, and the effect of the said restriction on consumers or competitors of the right holder.

IX. CONCLUSION

§3(5) of the Competition Act provides that IPR holders may introduce certain conditions or restrictions in their agreements with third parties so as to protect their IP rights. As per law, in order to avoid conflict with the competition law regime, conditions imposed must be reasonable and necessary and may either be imposed for prevention of infringement or for the protection of these rights. Although seemingly simple, due to lack of sufficient legal discussion and absence of precedence specifically outlining factors for §3(5) analysis, the actual process of determination to be pursued for such conditions to be legally viewed as valid under the provision remains obscure.

Are view of the past cases on §3(5) and surrounding issues, and the many unanswered questions which still remain indicates the requirement to revisit competition policy concerns over IPR agreements in India. Irrespective of the kind or nature of the restriction, it may operate so as to create both anti-competitive and pro-competitive effects depending on the context. While we agree with the proposition that restrictions should be reviewed on a case to case basis, we believe that there needs to be greater clarity and predictability in the procedure of determination of such a condition.

It has been observed that restrictive clauses in agreements over the use of IPR can have both anti-competitive and pro-competitive benefits. The same must be balanced in order to determine if such a condition is reasonable in the given context. In order to resolve the jurisdictional conflicts arising out of

³⁹⁰ CUTS INTERNATIONAL, *supra* note 22.

³⁹¹ OECD, *supra* note 4.

IP-Competition law disputes, the requirement of mandatory consultations may be introduced for competition law authorities. Accordingly, IP law authorities may also be consulted to determine the extent of protection offered by rights and which conditions are necessary in order to protect them. This may be followed by an examination of whether the condition is reasonable from a competition-law perspective, and furthers the objectives of competition and IP law. While the exemption found in §3(5) applies to §3 as a whole, we noted that restrictions in vertical agreements apply and are enforced differently as opposed to restrictions found in horizontal agreements. Thus, regulators must pay heed to a variety of factors including public interest, positions of licensor and licensee, strength of innovation, alternatives, effect on competition and any other overriding economic interests that may exist. It is suggested that the commission should come up with more comprehensive guidelines in consultation with stakeholders clarifying the way in which an assessment under the provision is to be undertaken in order to strengthen the application of competition law and IP law in India.