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ESSAYS

CASE COMMENT

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CONTENTS

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SANDBOXES AND CONSUMER PROTECTION: THE EUROPEAN PERSPECTIVE

—*Cristina Poncibò*[*] *and Laura Zoboli*[**]

Abstract: *The paper explores the consumers' perspective on regulatory sandboxes and their increasing deployment by authorities in Europe to regulate financial innovation ('FinTech') ex ante. In particular, this article will shed a light on the conditions for regulatory sandboxes to be considered consumer-friendly environments. To this end, the paper briefly introduces the concept of the regulatory sandbox and discusses it within the framework of consumer law. Specifically, this study outlines risks and benefits that a regulatory sandbox poses to consumers. Furthermore, the authors provide an analysis of the current European framework and the role that consumers have taken within the various regulatory sandboxes that have been recently established. Therefore, the article intends to contribute to the academic debate on the interplay between technological innovation, new markets and consumer law.*

Keywords: Regulatory Sandboxes, Consumer Protection, Banking Services Financial Services, etc.

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I. INTRODUCTION

Regulation is widely seen as an obstacle to innovation, especially in the financial services sector – a fact often cited as a reason for delays in the adoption of new technologies, or as an argument against regulatory activities in general. However, from the United Kingdom and, in particular, from the efforts to regulate their growing financial technology (hereinafter 'FinTech')[1] Market, there comes a new methodology that – supporters argue – should ensure consumer protection and mitigate market risks, while encouraging much-needed innovation.[2]

According to the FSB these activities can be organized into five categories of financial services: (a) payments, clearing, and settlement (eg Alipay, PayPal, blockchain and crypto currencies, infrastructure for derivatives and securities trading and settlement); b) deposits, lending and capital raising (egcrowd funding; P2P lending); (c) insurance (e.g. mobile and web-based financial services);(d) investment management (e.g. e-trading, robo-advice, digital ID verification); and (e) market support (eg robo advice, smart contracts, big data analysis).[3]

Just like our children's cherished playground, a regulatory sandbox is a safe area. In these 'protected regulatory spaces', innovative financial products and services are tested and developed, before they are offered on the market. Importantly, these testing activities involve real market players and consumers, under close scrutiny from the authorities.[4]

More precisely, the Financial Stability Board (hereinafter 'FSB') notes that: '(…) to support the benefits of innovation through shared learning and through greater access to information on developments, authorities should continue to improve communication channels with the private sector and to share their experiences with regulatory sandboxes, accelerators and innovation hubs, as

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1 For a definition of the concept, FSB, 'Financial Stability Implications from FinTech. Supervisory and Regulatory Issues that Merit Authorities' 27 June 2017, 7. EBA, *Discussion Paper on the EBA's Approach to Financial Technology (FinTech)* (EBA/DP/2017/02, 4 August 2017) 4-6. EBA, *The EBA's FinTech Roadmap* (15 March 2018) 9 <https://www.eba.europa.eu/documents/10180/1919160/EBA+FinTech+Roadmap.pdf> accessed 4 April 2020.

2 The different possible approaches – from absent to complete regulation – are discussed by DA Zetzsche and others, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' (2017) 23 Fordham J Corp & Fin L 31. For a United States-based perspective, *see* also, H.J. Allen, 'Regulatory Sandboxes' (2019) 87 George Washington Law Review, 579 fs.

3 Financial Stability Board (FSB), *Implications from FinTech: Supervisory and Regulatory Issues that Merit Authorities' Attention,* (FSB, 2017) 3 <https://www.fsb.org/wp-content/uploads/R270617.pdf> accessed 4 April 2020.

4 W-G Ringe and C. Ruof, *A Regulatory Sandbox for Robo Advice* (EBI Working Paper Series 26/2018, 2018).

well as other forms of interaction. Successes and challenges derived from such approaches may provide fruitful insights into new emerging regulatory engagement models'.[5]

In this context, the paper tries to ascertain if sandboxes are consumer-friendly environments (**Para V**), in particular by analyzing the role that consumer issues play in the design and management of sandboxes. The paper takes the EU legal landscape into account (**Para II**), as well as the CGAP and World Bank survey of 2019 (**Para III**), and the UK Financial Conduct Authority regulatory sandbox (**Para IV**), with a focus on their impact on consumers. In the authors' view, the UK's case is of particular interest as a case study, being the first and most advanced FinTech regulatory sandbox – a truly pioneering project.

Knowledge and application of this tool have spread since its debut in 2015, so that currently we count more than 50 countries with a regulatory sandbox in place.[6] Regarding the European Union, as of January 2020, seven regulatory sandboxes are in operation,[7] with several more joining the fray sooner or later.[8] For those that are active already, the competent authorities confirmed that their regulatory sandboxes followed the statutory objectives of contributing to financial stability, promoting confidence in the financial sector and protecting consumers.[9]

The majority of the ongoing regulatory sandboxes operate in the FinTech field, defined by the European Central Bank as 'an umbrella term for any kind of technological innovation used to support or provide financial services. It is

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5 Financial Stability Board (FSB) (n 3).

6 A list of the active sandboxes is available in *EBI Working Paper Series 2019* (No. 53), appendix A.Ross P Buckley and others, 'Building FinTech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond'; For the EU area, *see* European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (University of New South Wales Law Research Series, Report JC 2018 74, 2019) ¶ 2.2.

7 In the United Kingdom in May 2016 by the Financial Conduct Authority, in the Netherlands in January 2017 by De Nederlandsche Bank in a joint initiative with the Autoriteit Financiële Markten, in Denmark in October 2017 by Finanstilsynet, in Lithuania in September 2018 by Lietuvos Bankas, in Poland in October 2018 by Komisja Nadzoru Finansowego, in Hungary in January 2019 by Magyar Nemzeti Bank.

8 In Italy, a regulatory sandbox has been approved by Law 58/2019 and should be adopted by the relevant Italian authorities (the Minister for Economic Affairs and Finance, consulting the Bank of Italy, the National Commission for companies and the stock exchange, - CONSOB and the Institute for Supervision on insurance - IVASS), within 180 days of the date of entry into force of the law (30 June 2019). Further regulatory sandbox proposals have been drafted or discussed, for example, in Austria, Estonia and Spain. In particular, on 18 February 2020, the Spanish Council of Ministers approved the Spanish Draft Bill for the Digital Transformation of the Financial System, with the purpose of creating a Spanish 'sandbox'.

9 European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019) 19.

leading to many changes in the financial sector, giving rise to a range of new business models, applications, processes and products. FinTech firms put technology-driven innovation at the core of their business. They may be particularly active in areas such as payment services, credit scoring and automated investment advice, using artificial intelligence, big data or blockchain'.[10]

In the context of this article, we should note that the FinTech is a disruptive sector *per definition*, and that its companies' innovations often come from exploiting areas that are free from regulation.[11]

II. CONSUMERS' PROTECTION AND REGULATORY SANDBOXES IN THE EUROPEAN LANDSCAPE

A. Preparing the Field

The main objective of sandboxes is to provide a safe space to test innovative products. More specifically, through a sandbox the regulator aims to promote innovation by lowering regulatory barriers. A regulatory sandbox is therefore a tightly defined safe space that automatically provides clearance from certain regulatory requirements – provided that the applicants meet certain criteria. It is important to understand to what extent the regulatory barriers can be lowered, and which pieces of regulation limit a State's decisional autonomy in this regard. Within this scenario, one could consider consumer protection as one of the categories which can be damaged by the regulatory sandbox dimension, even if the majority of the adopted sandboxes provide for mechanisms to ensure that consumers are not negatively affected.

Generally, regulators stress that regulatory sandboxes allow firms to test innovative products, services and business models in a live market environment, while ensuring that appropriate safeguards are in place.[12] These safeguards include consumer protection and they can come in different forms. One example could be the limitation of the number of participants via tight entry conditions, since it helps in keeping the surveillance manageable, and therefore in avoiding a lax consumer protection.[13]

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[10] *European Central Bank* <https://www.bankingsupervision.europa.eu/about/smexplained/html/fintech.en.html> accessed 4 April 2020.

[11] F. Di Porto and G. Ghidini, '"I Access Your Data, You Access Mine": Requiring Data Reciprocity in Payment Services' (2020) 51 IIC, 307-329.

[12] L. Bromberg, A. Godwin and I. Ramsay, 'Fintech Sandboxes: Achieving a Balance between Regulation and Innovation' (2017) 28:4 Journal of Banking and Finance Law and Practice, 314-336.

[13] D. Zetzsche, and others, 'Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation' (2017) 23 Fordham I. Corp. Finac. Law 31-103.

Among these entry conditions, usually we see a requirement for the measure under test to have a beneficial effect for consumers. In addition, the time limitation of the sandbox can be similarly interpreted. Furthermore, there are several measures that can be implemented to specifically protect those customers who participate in sandbox testing. Indeed, once included in the sandbox, it is vital that any consumer willing to test a product or a service is appropriately protected, and this should apply regardless of whether retail or institutional customers are involved.[14] For example, in two jurisdictions (Denmark and the UK) testing should be limited, pursuant to the testing plan, to consumers in the local market.

The rationale for such restrictions is that, to the extent that testing within the regulatory sandbox involves cross-border activity, an absence of any prior coordination or interaction with the host authority could pose risks, for example, to compliance with local customer disclosure or with other consumer protection requirements. Moreover, the competent authority scrutinizing the sandbox test may not have sufficient proximity to monitor the testing outside the jurisdiction. The authorities explained that the imposition of such a testing parameter does not give rise to legal issues. Put simply, by agreeing to participate in the sandbox in accordance with the testing parameters set out by the authority, the firm voluntarily agrees to carry out the test just with customers of the local market.

B. Regulatory Sandboxes and the EU

Over the past several years, the European Commission has been pursuing two strategic objectives that are of particular interest to the FinTech sector: the establishment of a Digital Single Market,[15] and the building of a capital markets union and of a true single market for consumer financial services.[16] In general, the EU Commission has been adapting EU rules with the rapid progress of technologies, and in particular with those that are causing structural changes in the financial sector.[17]

In November 2016, the Commission set up an internal Task Force on Financial Technology to address the potential opportunities and challenges

[14] *See*, for example, the remarks of the EBA Banking Stakeholder Group in s 2.3 of the BSG's *Report on Regulatory Sandboxes* (July 2017) <https://eba.europa.eu/sites/default/documents/files/documents/10180/807776/dc1d5046-e211-4b24-aadf-33fc93949017/BSG%20Paper%20on%20Regulatory%20Sandboxes_20%20July%202017.pdf?retry=1> accessed 20 April 2020.

[15] Commission, 'A Digital Single Market Strategy for Europe' (Communication) COM (2015) 192 final.

[16] Commission, 'Building a Capital Markets Union' COM (2015) 63 final.

[17] Commission, 'FinTech Action Plan: For a More Competitive and Innovative European Financial Sector' (Communication) COM (2018) 109 final.

posed by FinTech. After a public consultation on FinTech in 2017, to gather stakeholders' views on the impact of new technologies on financial services,[18] the Commission published a FinTech Action Plan.[19] Furthermore, the European Commission's March 2018 FinTech Action Plan mandated the European Supervisory Authorities (ESAs) to carry out an analysis of innovation facilitators and to identify their best practices.

This resulted in the ESAs[20] publishing a joint report on innovation facilitators (regulatory sandboxes and innovation hubs) in January 2019.[21] The report provides a comparative analysis of the innovation facilitators established to date within the EU and suggests best practices for the design and operation of innovation facilitators. In the opinion of the authors, a likely next step will be the publication of a set of guidelines by the Commission on the organization of the Member States' regulatory sandboxes, the types of activities concerned, and how the supervision should be conducted.[22]

Although there is little experience to support any decision on innovative financial services, it should be stressed that the EU remains steadfast in its commitment to competition, consumer welfare and market stability.[23] Such objectives must underlie all activities that national regulators carry out with innovative firms, including regulatory sandboxes. That is, the EU is willing to encourage new regulatory approaches toward innovative firms as long as consumers remain protected and market dynamics undistorted.[24] In this regard, the

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[18] Commission, 'FinTech: A More Competitive and Innovative European Financial Sector' (Consultation Document, 16 March 2017). In particular, the consultation was structured along four broad policy objectives that reflect the main opportunities and challenges related to FinTech: (1) Fostering access to financial services for consumers and businesses; (2) Bringing down operational costs and increasing efficiency for the industry; (3) Making the single market more competitive by lowering barriers to entry; and (4) Balancing greater data sharing and transparency with privacy needs.

[19] Commission, 'FinTech: A More Competitive and Innovative European Financial Sector' (Communication) COM (2018) 109 final.

[20] In particular, pursuant to the mandate in the FinTech Action Plan and to art 9(4) of the founding regulation, each of the ESAs had to establish a committee on financial innovation bringing together all relevant competent national supervisory authorities with a view to achieving a coordinated approach on the regulatory and supervisory treatment of new or innovative financial activities and providing advice to present to the European Parliament, the Council and the Commission.

[21] European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019).

[22] Commission, 'Frequently Asked Questions: Financial Technology (FinTech) Action Plan' (Factsheet) MEMO/18/1406.

[23] Commission, 'Consumer Financial Services Action Plan: Better Products, More Choice' (Communication) COM (2017) 139 final, 12.

[24] Commission, 'FinTech Action Plan: For a More Competitive and Innovative European Financial Sector' (Communication) COM (2018) 109 final, 3.

first tool to reduce risks for consumers are the limitations imposed on regulatory sandboxes' lifespan and number of clients that can be involved.

The FinTech Action Plan is entirely in line with this general approach. From its introduction, it clarifies that even though European's regulatory frameworks should allow firms that operate in the EU Single Market to benefit from financial innovation and to provide their customers with the most suitable and accessible products, these same frameworks should also ensure a high level of protection for consumers and of market confidence.[25]

In other words, it is conceded that consumers might benefit from advancements of the financial sector – that could happen *via* regulatory sandboxes activated in highly innovative sectors – but consumer protection should not be compromised in any way by these operations. In this sense, Mariya Gabriel, Commissioner for the Digital Economy and Society, commenting the FinTech Action Plan, stated: '*Digital technologies have an impact on our whole economy – citizens and businesses alike. (...) We need to build an enabling framework to let innovation flourish, while managing risks and protecting consumers.*' (emphasis provided).[26]

For the scope of this article, then, the ESAs joint report provides an interesting read for understanding how potential risks could be managed and consumers protected. This is linked to a matter of liability raised by some competent authorities during the above-mentioned public consultation, ieon their possible legal liability in the event of consumers suffering detriment because of services received while participating in a sandbox.[27]

The risks for consumers are present mainly during the testing phase of regulatory sandboxes, when the participating firms actually elaborate and test their proposals. The ESAs clarified that the competent authority should verify that applicants to regulatory sandboxes adopt the necessary measures to mitigate said risks. The ESAs also identified tools that, in theory, may reduce consumers' risk exposure, identifying best practices based on existing regulatory sandboxes.

First, firms taking part in a regulatory sandbox should be required to provide appropriate disclosures to consumers, for them to have a clear

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[25] Commission, 'FinTech Action Plan: For a More Competitive and Innovative European Financial Sector' (Communication) COM (2018) 109 final, 3.

[26] Commission, 'FinTech: Commission Takes Action for a More Competitive and Innovative Financial Market' (Press Release) IP/18/1403.

[27] European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019), 35-6.

understanding of the nature of the test and of all its relevant features. In discussing best practices, the ESAs specify that participating firms should clearly disclose to potential consumers whether their services or products are provided within a regulatory sandbox and what the implications for consumers are.[28]

In particular, participating firms should openly lay out how consumers will be treated upon exiting the test environment, and they should include a provision for compensation or redress in case consumers suffer a loss during the testing phase. As per the above-mentioned liability issue for competent authorities, the ESAs clarified that the disclosure may include a clarification that the competent authority had no responsibility for the test, but that the authority itself should consider the ongoing activities on a case-by-case basis and that participating firms should not be allowed to communicate at any stage that the competent authority endorsed their testing activity.[29]

Second, participants to a regulatory sandbox should have adopted appropriate measures to mitigate any potential risk from the test, and testing parameters may be imposed by the competent authority in this sense. In the opinion of the Authors, the joint reading of this best practice with the overall report and the FinTech Action Plan allows us to consider consumer protection safeguards or consumer suitability tests as examples of testing procedures for mitigating risks to consumers who interact with the participating firms during the sandbox. Furthermore, the competent authorities should always be allowed to end the test if any detriment to consumers were to emerge.[30]

Therefore, the best practices described in the ESA's report are aimed to encourage applicants to employ regulatory sandboxes and to orient them when it comes to consumers' interests. However, applicants should carefully consider how they will safeguard consumers while testing their product or service. In this context, the ESAs identified the mentioned best practices but also noted that appropriate additional measures would need to be identified on a case-by-case basis.

Finally, the ESAs provide us with a broad warning: regulatory sandboxes should not allow the dis-application of regulatory requirements under EU law. However, levers for proportionality in the application of said regulatory requirements may be made available in the context of regulatory sandboxes

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[28] European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019), Annex B, 45-6.

[29] Indeed, the competent authority should always be considered as the one monitoring the testing in line with the parameters of the regulatory sandbox.

[30] European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019), 19.

and employed in the same way as for firms outside the sandbox. This best practice is clear when it comes to the scenario where a firm needs to satisfy the requirements to obtain a license before providing certain financial services.[31]

In this sense, the Payment Services Directive (PSD2)[32] established an exemption for *small* payments institutions[33] and these could be exempted both inside and outside a sandbox. However, the application of licit levers of proportionality within the sandbox could produce an indirect impact on consumers interacting with the sandbox and on the competitive dynamics of the market.

While the EU legislator has carried out the specific balancing act within PSD2, each regulatory sandbox must be activated and monitored by the competent local authorities, and *ad hoc* consumer and competition safeguards should be established on a *sandbox-by-sandbox* basis.Lastly, in the Study on Blockchain carried out for the European Commission,[34] one can read that regulatory sandboxes would be valuable tools when it comes to blockchain use cases. In this sense, it is recognized that initially the sandboxes were used in the FinTech context mostly, but we should not exclude their employment in other domains, as for example the British Information Commissioner's Office did.[35]

While discussing the role of regulatory sandboxes in the blockchain scenario, the Study published in 2020 stresses another positive aspect of sandboxes: they foster collaboration between innovators and regulators. In turn, this ensures that while innovators can experiment with new technologies, regulators

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[31] European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019), Annex B, 46.

[32] European Parliament and Council Directive (EU) 2015/2366 on Payment Services in the Internal Market [2015] OJ L337/15 (PSD2 Directive).

[33] Art 32 of PSD2 Directive: '1. Member States may exempt or allow their competent authorities to exempt, natural or legal persons providing payment services as referred to in points (1) to (6) of Annex I from the application of all or part of the procedure and conditions set out in ss 1, 2 and 3, with the exception of arts 14, 15, 22, 24, 25 and 26, where: (a) the monthly average of the preceding 12 months' total value of payment transactions executed by the person concerned, including any agent for which it assumes full responsibility, does not exceed a limit set by the Member State but that, in any event, amounts to no more than EUR 3 million. That requirement shall be assessed on the projected total amount of payment transactions in its business plan, unless an adjustment to that plan is required by the competent authorities; and (b) none of the natural persons responsible for the management or operation of the business has been convicted of offences relating to money laundering or terrorist financing or other financial crimes. (…)'.

[34] *Study on Blockchains, Legal, Governance and Interoperability Aspects* (SMART 2018/0038) 111.

[35] 'ICO Selects First Participants for Data Protection Sandbox' (*ICO*, July 2019)<https://ico.org.uk/about-the- ico/news-and-events/news-and-blogs/2019/07/ico-selects-first-participants-for-data-protection-sandbox/> accessed 2 June 2020.

are better able to determine early what changes are needed (if any). On the other hand, the Study identifies the risk to consumer protection as one of the main potential disadvantages of regulatory sandboxes. In this sense, the study makes the point that sandboxes should be carefully designed from a consumer protection perspective, since consumers may be brought to believe that the general consumer protection law applies in full, whereas the sandbox may actually provide the participating company with some exemptions.[36]

III. THE JOINT STUDY OF CGAP AND WORLD BANK

The CGAP (Consultative Group to Assist the Poor) and World Bank study (2019) offers some preliminary findings in understanding the relationship between consumer protection and regulatory sandboxes. The survey was conducted between February and April 2019, with 62 financial sector regulators inquired, 31 total responses collected (27 fully completed) and 28 countries covered around the world. According to the study, sandboxes present the opportunity for nascent FinTech firms and regulators to engage and build mutually beneficial relationships at an early stage – enabling firms to better understand the regulatory requirements they will face; and enabling the regulator to assess the firms' characters and stay abreast of FinTech innovations.

According to the CGAP-WB study, almost 70 percent of the 23 surveyed regulators dealing with sandboxes had put safeguards in place to ensure consumer protection. This applies to both the pre-contractual phase, by placing information disclosure requirements, and the execution phase, by providing consumers with mechanisms for handling complaints.

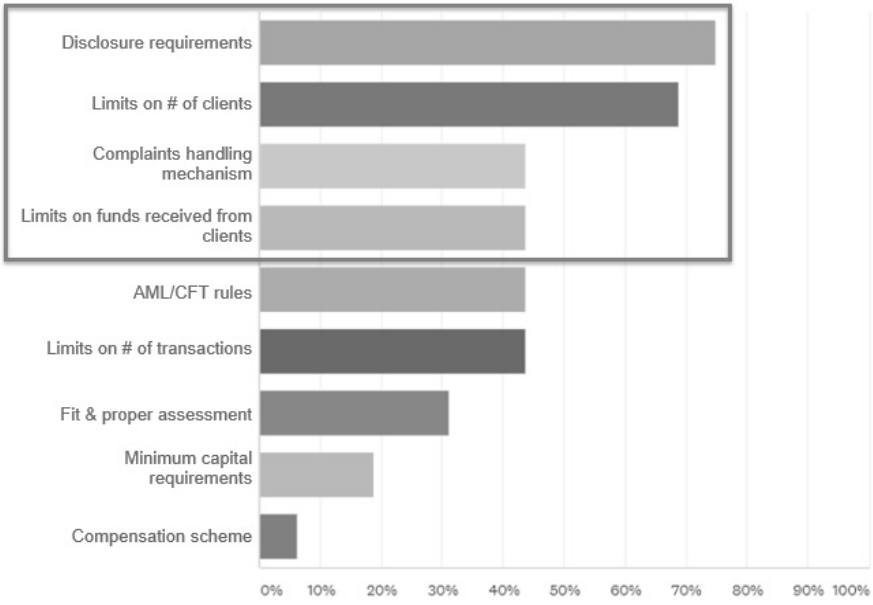
In particular, authorities require an appropriate disclosure with selected consumers of the firm during the testing phase. For example, in two jurisdictions (Denmark and the UK) firms may be required to use standardized wording to inform consumers from the outset that the firm is participating in a sandbox. Denmark requires firms to include wording to clarify that the authority has not endorsed the proposition, and to explain potential risks and the rights of recourse against the firm should the consumer suffers detriment as a result of the test. As for the testing parameters, a breach of the agreed communication arrangements can result in the termination of the test, or in other enforcement or supervisory action.

To be clear, participating firms should disclose to any consumers running the test the fact that the services are being provided in the context of sandbox,

[36] *Study on Blockchains, Legal, Governance and Interoperability Aspects* (SMART 2018/0038) 112.

and what this implies for the consumers (e.g. in terms of measures to mitigate risks from testing and on conditions for leaving the sandbox).

While 52 percent of the surveyed regulators do grant temporary waivers from full consumer protection regimes, most respondents also require full authorization at the end of testing.[37]



Source: CGAP-World Bank study (2019)

Interestingly, the CGAP-World Bank study (2019) helps to understand which consumer services are sold to consumers within regulatory sandboxes. It confirms that companies innovating in payments services, especially those testing crypto-based solutions, dominate sandboxes. About 30 percent of sandbox projects involve payments (including remittance or digital transaction accounts) and nearly 30 percent deals with market infrastructure (exchanges, clearing and settlement, escrow services) and wholesale financial services. Perhaps not surprisingly, blockchain and crypto-asset projects collectively make up almost 25 percent of projects accepted. These business models range from digital asset exchanges to blockchain-enabled trade finance or to settlement infrastructure for cross-border remittances.

[37] S. Appaya and I. Jenik, *CGAP-World Bank: Regulatory Sandbox Global Survey* (July 2019) <https://www.findevgateway.org/sites/default/files/publication_files/surevy_results_ppt_cgap_wbg_final_20190722_final.pdf> accessed 20 April 2020.

In addition, it appears that regulatory sandboxes do not properly address poor consumers, usually. Indeed, most sandbox-tested innovations do not target excluded and underserved customers. Less than 25 percent of sandbox tests focus on business models or technologies that explicitly address barriers to financial inclusion or that address the financial needs of poor people. Aside from certain sandboxes in Sierra Leone and Mozambique, only a handful of sandbox tests — including NOW Money (Abu Dhabi and Bahrain sandboxes) and Rahi Payment Systems (Rwanda) — overtly focus on projects for the unbanked. Arguably, this number would be higher if we counted all services that may be relevant also to the excluded and underserved, regardless of the actual goals of the firms using sandboxes.

IV. THE PIONEERING PROJECT OF THE UK FINANCIAL CONDUCT AUTHORITY

In the authors' view, the UK FCA sandbox[38] deserves an in-depth analysis, considering that it is truly a pioneer in the sector – in chronological order and in terms of advancement.[39] Indeed, the FCA is an uncontested leader when it comes to the development of the sandbox structure for the efficient testing of innovative financial products and services, and in its approach to consider consumers as protagonists.

As discussed, applicants to a regulatory sandbox must propose and adopt appropriate measures to protect consumers and to restore them should they suffer any detriment within the testing phase. All the competent authorities supervising the active regulatory sandboxes in the EU agree that these *ad hoc* measures represent a precondition for testing in a sandbox.[40] Only the Financial Conduct Authority (FCA) – competent for the UK sandbox – considered that the regulatory sandbox should also follow the objective to promote effective competition in the interests of consumers.[41] In terms of consumer protection, the FCA has indeed set a high bar with respect to the many various regulatory sandbox frameworks that are now in place.

From the feasibility report published in November 2015, we can see that the FCA's objective was to promote effective competition *in the interests of*

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[38] Financial Conduct Authority, Regulatory Sandbox, Marginal No. 3.4 (2015) <https://www.fca.org.uk/publication/research/regulatory-sandbox.pdf> accessed 20 April 2020.

[39] *See* D.W. Arner, Janos Barberis and R.P. Buckley, 'FinTech and RegTech in a Nutshell, and the Future in a Sandbox' (2017) 3(4) CFA Institute Research Foundation 1-16.

[40] European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019) 19.

[41] The statutory 'competition' objective; European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019) 19.

consumers.[42] The same report points out that the sandbox must enable the FCA to cooperate with innovators to ensure that sufficient consumer protection safeguards are integrated into the new products and services before these reach a mass-market.

Since the sandbox is intended for testing new solutions in real-life situations, the FCA considers any risk of consumer detriment very carefully, as well as the need to respect legal rules. Within the acceptance criteria for joining – and staying within – the sandbox the FCA specifically lists *consumer benefits*, in the sense of offering a good prospect of identifiable benefits to consumers.

Therefore, from the start of the process, successful applicants for FCA sandbox will have demonstrated that they have genuinely innovative solutions which, *inter alia,* provide consumers with a clearly identifiable benefit, and whose effects last for the overall duration of the sandbox.

In general terms, the FCA requires that the 'type of customers has to be appropriate to the tested products and to the exposed risks'.[43] Consumer protection should always be granted on a case-by-case basis, but the FCA sets default parameters that help to create licit trial environments, which are mainly the following:

(a) *Duration*: Generally three to six months is adequate.

(b) *Customers*: The number of customers should be sufficient to generate statistically relevant data. Customers should be selected according to certain criteria that are appropriate for the product and service. In particular, 'retail customers' should not bear the risks of sandbox testing, so they should always have the right to complain first to the company, then to the Financial Ombudsman Service. And, in the event of company's bankruptcy, they should have access to the Financial Services Compensation Scheme (FSCS). It may also happen that the process is limited to 'sophisticated customers' who have agreed to limit their claim.

(c) *Disclosure*: Customers should be accurately informed of the test and of available compensations (if necessary). In addition, the indicators, benchmarks and milestones that are used during the testing phase should be clear from the outset.

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[42] FCA, *Regulatory Sandbox Lessons Learned Report: Regulatory Sandbox* (October 2017) <www.fca.org.uk/publication/research/regulatory-sandbox.pdf> accessed 20 April 2020.

[43] FCA, *Default Standards for Sandbox Testing Parameters* [hereinafter 'Default Standards'], Customer Selection (2017) <https://www.fca.org.uk/publication/policy/default-standards-for-sandbox-testing- parameters.pdf> accessed 20 April 2020.

Concluding the assessment of the FCA regulatory sandbox from a consumer perspective, we can distinguish four alternative approaches to protect customers that take part to a sandbox testing phase: (i) participants should test their new solutions only with customers who have given informed consent to be included in testing and who are properly informed of potential risks and available compensation; (ii) an appropriate disclosure, protection and compensation during the testing phase should be agreed with the FCA on a case-by-case basis; (iii) customers have the same rights of customers who engage with other authorized firms; (iv) any loss to customers should be compensated by sandbox participants and the latter should demonstrate to possess the necessary resources.

The FCA expressed its preference for the second approach, since it enables flexibility in setting appropriate customer protections for the testing activities. Therefore, the case-by-case assessment of consumers' safeguards – already discussed within the EU framework – finds balanced application within the FCA sandbox.

Looking at the specific safeguards in favor of consumers, the FCA puts in place a set of *standard safeguards for all sandbox tests* and develops *additional safeguards* where these are relevant. For example, it requires all firms in the sandbox to develop an *exit plan* to ensure tests can be shut down at any point whilst minimizing potential damages to participating consumers.[44] These safeguards also include extra capital requirements, systems penetration testing and secondary review of robo-advice by a qualified financial adviser, among others.[45]

V. REGULATORY SANDBOXES: BENEFITS AND RISKS FOR CONSUMERS

It is acknowledged that consumers could benefit from progress in the financial sector, including from innovations brought about by regulatory sandboxes. However, consumer welfare should not be undermined in any way by such operations.[46] The association of consumer associations in the EU (hereinafter: 'BEUC') has also considered them by noting that: 'Sandboxes allow innovators

[44] FCA underlines, for example, that in many instances where firms were testing the use of digital currencies in money remittance, the authority required the firms to guarantee funds being transmitted to deliver full refunds in the case of funds being lost. FCA discusses the cases of Application Programme Interfaces (APIs), biometrics,

[45] W-G Ringe and C. Ruof, 'A Regulatory Sandbox for Robo Advice' (2018) (European Banking Institute Working Paper Series 2018, No. 26).

[46] Commission, 'FinTech: Commission Takes Action for a More Competitive and Innovative Financial Market' (Press Release) IP/18/1403.

to trial new products, services and business models in a real-world environment, without some of the usual rules applying. Examples of sectors where regulatory sandboxes have been established include the FinTech area and the energy market'.[47]

Indeed, just recently legal scholars have started to discuss how consumer law and policy should be redesigned in the wake of financial innovation.[48] Recent findings raise the question as to whether sandboxes are living up to their potential and whether their impact can be improved with a focus on consumers' interests.[49] For the scope of this article, the above mentioned ESAs' joint report provides an interesting read for understanding how to manage risks and protect consumers.[50]

With regard to consumer protection, the ESAs clarified that the competent authority should verify that applicants to regulatory sandboxes adopt the necessary measures to mitigate risks for consumers, and that there are tools in place for reducing consumers' risk exposure. In this sense, the ESAs identified best practices based on existing regulatory sandboxes and, at the same time, it clarified that appropriate measures would need to be identified on a case-by-case basis.[51]

Moreover, as mentioned in paragraph III, a particular aspect of the ESAs' report stands out: by analysing the safeguards of the different European regulatory sandboxes adopted in the FinTech, only the one of the UK Financial Conduct Authority (FCA) explicitly lists the promotion of effective competition in favour of consumers among its objectives.[52] In the light of the above, we can now draw some preliminary reflections on the interplay between regulatory sandboxes and consumer protection in the EU.

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47 BEUC, When Innovation Means Progress. BEUC's View on Innovation in the EU, 2019 <https://www.beuc.eu/publications/beuc-x-2019-073_when_innovation_means_progress-view_on_innovation_in_the_eu.pdf> accessed 20 April 2020.

48 S. Schubert, 'FinTech and Consumer Protection: How to Guide a Consumer towards a Better Decision' (*SSRN*, 4 May 2018) <https://ssrn.com/abstract=3173609> or <http://dx.doi.org/10.2139/ssrn.3173609> accessed 20 April 2020.

49 European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019), 35-6.

50 *Ibid*.

51 European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019), annex B, 45-6.

52 The statutory 'competition' objective; European Supervisory Authorities, *FinTech: Regulatory Sandboxes and Innovation Hubs* (Report JC 2018 74, 2019) 19.

A. Benefits for Consumers

(a) New Players in the Field

New FinTech sandboxes may lead to more decentralization and diversification in financial services which may reduce market concentration and thus give 'more choice' to consumers among big and small players and typologies of services. In particular, we note that SMEs and, particularly, start-up companies may enter sandboxes to test their innovative services and, after, establish themselves as new players in the field. At the same time, FinTech innovations, when fruitfully tested in a sandbox, could promote the efficiency of the financial system by reducing costs and granting faster completion of transactions for clients.

(b) Ex Ante Regulation v Ex Post Regulation

Regulatory sandboxes represent a quite innovative form of *ex-ante* regulation aimed at preventing risks for consumers in the emerging FinTech markets for banking and financial services. By developing sandboxes, authorities are trying to overcome the failures of traditional regulation, especially with respect to banking and financial services.[53] In our view, the shift towards testing and prevention should be considered a positive development, especially if we consider that in the past the EU showed a tendency to overregulated with the goal of safeguarding the internal market.

However, this approach does not represent a novelty in consumer protection where the EU *acquis* primarily concerns ex-ante regulation, including, for example, mandatory pre-contractual information disclosure and right of withdrawal.[54] The new approach may find a number of practical applications given that the notion of FinTech includes a variety of different services, such as for example, crowd funding and the application of technology to insurance contracts ('InsurTech'), but also various market support services and technologies applicable in multiple and different sectors - data management, aggregators of financial data and services, comparison websites, artificial intelligence , big data, cloud computing, distributed-ledger technology).[55]

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[53] J. Kálmán, 'Ex Ante Regulation? The Legal Nature of the Regulatory Sandboxes or How to Regulate before Regulation Even Exists' in *European Financial Law in Times of Crisis of the European Union*, Dialóg Campus 2018, 215-226.

[54] S. Weatherill, *EU Consumer Law and Policy* (Edward Elgar 2014).

[55] IOSCO, *Research Report on Financial Technologies (FinTech)*, (February 2017) <www.iosco.org/library/pubdocs/pdf/IOSCOPD554.pdf> accessed 20 April 2020; Basel Committee on Banking Supervision (BCBS), *Sound Practices Implications of FinTech Developments for Banks and Bank Supervisors* (February 2018) <https://www.bis.org/bcbs/publ/d431.pdf> accessed 20 April 2020.

(c) Financial Inclusion

The FCA reports that the sandbox has enabled tests from firms with innovative business models that address the needs of consumers particularly at risk of financial exclusion. The House of Lords Select Committee on Financial Inclusion published a report in March 2017 that cited the FCA sandbox as an incentive for FinTech solutions to deal with financial exclusion.[56] Studies also seem to confirm the potential of financial innovation with respect to consumer banking and lending in the United States. The authors note: '(…) these innovations both hold the promise of reducing racial and ethnic disparities in lending and bring concerns that they may be exploited in ways that perpetuate inequality'.[57]

B. Risks for Consumers

The paragraph explores a number of issues where regulatory sandboxes, especially those concerning innovative banking and financial services, may raise some concern in relation to consumer protection. The question is whether the particular environment of sandboxes for innovative services poses new risks to consumers. Accordingly, BEUC stresses: 'consumers expect a level of supervision that strikes the right balance between enabling innovation and ensuring it poses no unacceptable risks to health, safety, security, the environment, or people's values (eg democracy, right to privacy)'.[58]

(a) Data Protection

Regulatory sandboxes often include innovative financial services that use data intensively.[59] Innovation and experimentation in data mining and analytics, including in relation to personal data, are both defining characteristics of FinTech and the backbone of its services. As with any data-intensive ecosystem, regulatory sandboxes carry security concerns for hacking and data breaches, as well as – in banking– thefts of identity and of assets.

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[56] 'Tackling Financial Exclusion: A Country that Works for Everyone?' <https://publications.parliament.uk/pa/ld201617/ldselect/ldfinexcl/132/13202.htm> accessed 20 April 2020.

[57] P. Foohey and N. Martin, 'Reducing The Wealth Gap Through FinTech 'Advances' in Consumer Banking and Lending' (March 2020) <https://ssrn.com/abstract=3551469> accessed 20 April 2020; *See* also, wrt the US: C.K. Odinet, 'Consumer Bitcredit and Fintech Lending' (2018) 69 Alabama Law Review <https://ssrn.com/abstract=2949456> accessed 20 April 2020.

[58] BEUC (n 47).

[59] ET Tjin Tai, 'Data Ownership and Consumer Protection' (2018) 4 Journal of European Consumer and Market Law, 136-140; R. Macmillan, 'Big Data, Machine Learning, Consumer Protection and Privacy' (July 26, 2019). Accessed on April 20, 2020 at https://ssrn.com/abstract=3427206; B. Chugh, 'Financial Regulation of Consumer-Facing Fintech in India: Status Quo and Emerging Concerns' (19 September 2019) <https://ssrn.com/abstract=3520473> or <http://dx.doi.org/10.2139/ssrn.3520473> accessed 20 April 2020.

The ever-growing appetite of the FinTech sector for data on consumer behaviors and conditions also fuels some privacy concerns. We can easily observe that banks and insurers are moving from a reliance on credit agencies and volunteered information, towards mining social-media profiles, web-browsing, loyalty cards and phone-location trackers. Moreover, the Economist reported that during a test FICO, the main US credit-scorer, found that words used in his Facebook status could help predict his creditworthiness.[60]

Even facial expressions and voice tones are being studied for risk-analysis. Facebook itself carried out experiments for gauging its users' creditworthiness in 2016; these tests were abandoned in light of regulatory concerns. While supporters of personal data mining argue that consumers benefit from personalized products and more tailored pricing, the potential for consumer detriment is significant. One may question whether new lending services based on FinTech could actually increase financial exclusion: consumers might see them as risky, and those lacking a digital footprint might be priced out. There is also the possibility – especially in relation to insurance – that providers will make consent to tracking a pre-condition for coverage.

The use of closed, proprietary algorithms could also lead to a situation where consumers are denied access to a service (eg credit or insurance), based on an inaccurate correlation and with no possibility of determining, let alone correcting, the underlying assumptions. Beyond consumer privacy and financial inclusion concerns, scholars noted that, despite such approaches becoming commonplace, the innovative use of data is still in its early days. Although a wide range of experimentation is taking place, the actual robustness of the new approaches is still unknown.[61]

(b) Price Discrimination

As noted above in relation to data, regulatory sandboxes allow financial services firms to gain insights into the circumstances and behaviors of consumers and prospective consumers. This brings about the possibility that some providers may seek to offer services only to the most profitable, or the least risky, segments and shut others out of the market. Specifically, in the UK, the FCA has already expressed concerns that big data could exclude consumers that the insurance market recognizes as too risky.

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[60] 'Big Data, Financial Services and Privacy' (*The Economist*, 11 February 2017) <https://www.economist.com/finance-and-economics/2017/02/09/big-data-financial-services-and-privacy> accessed 20 April 2020.

[61] E.T. Tjin Tai (n 59).

The data practices outlined above can also give rise to price discrimination, where a provider offers incentives to its preferred segments and charges premier rates to the rest. This practice would hamper comparisons and it risks negating the benefits from an increase in choice and competition that were outlined above. The FCA points to instances of discrimination where, rather than data mining leading to offers for consumers that tailored to their individual behaviors, individuals were denied opportunities based on the actions of others.

(c) Complaints Handling Mechanisms

We also deem important to underline that if the test is terminated prematurely due to some issue that came up during the testing, the agreed exit plan comes into effect. This may involve the discontinuation of the product or service under test, or the continuation outside the regulatory sandbox, or inside the sandbox if a prolonged testing period is agreed. Importantly, the firm will be required to implement measures to protect the interest of consumers (eg to arrange for a smooth off-boarding of consumers, payment claims, etc) and, if any detriment to consumer has occurred, to take as many remedial steps as appropriate.

In addition, the competent authorities noted that, as a precondition for testing in a sandbox, an applicant must first prepare *appropriate measures to restore consumers* in case they suffer any detriment in the course of the sandbox test. If a detriment does occur, then the authorities are entitled to end the test.

VI. HOW INNOVATION AND CONSUMER PROTECTION CO-EXIST IN THE SANDBOXES?

Regulators have reacted to FinTech according to four main strategies.[62] The first approach involves doing nothing or laissez-faire. The second approach consists in approaching these innovations on a case-by-case basis. The third strategy provides for the development of new regulations or the application of the existing ones. The fourth approach (ie structured experimentalism) occurs when the regulators can provide a structured piloting exercise, a regulatory 'safe space' for experimentation with new approaches involving the application of technology to finance. The case here discussed of regulatory sandboxes fits perfectly in the fourth approach. Legal scholars and policymakers are just

[62] P. Fáykiss, and others, 'Regulatory Tools to Encourage FinTech Innovations: The Innovation Hub and Regulatory Sandbox in International Practice' (2018) 17(2) Financial and Economic Review 43–67.

getting acquainted with regulatory sandboxes, but it is not clear whether the impact consumers and how.[63]

Surely, traditional approaches to regulation may hinder innovation, especially in the new banking and financial services sector. This is often cited among the reasons for the slow technological adoption in financial services, or as an argument against the regulators' activities and rules. For the purposes of our paper, we note that together with the idea that innovation and regulation are intrinsically opposed against each other, there lies another assumption: innovation cannot be a central part of a regulator's mandate, as this would amplify any risk stemming from new technologies and undermine the regulator's duty to protect consumers.

Following this argument, regulators can hardly engage in innovation, nor can they support or manage it, and often find their hands tied when faced with the proliferation of 'risky' technologies – such as digital banks and payments, artificial intelligence and block-chain. Given the breadth and variety of the FinTech phenomenon and the issues mentioned above and since it is not possible to give a single regulatory response to the same, the EU deemed necessary to examine the different articulations of FinTech, paying particular attention to the functions performed, to the characteristics of the activity and of the risks and of the protection needs.

This is in order to verify if it is possible to bring individual innovations back into existing categories and assess whether the disciplines currently in force are suitable for protecting the interests at stake or whether it is necessary to make adjustments to them or, again, adopt ad hoc regulations or other new approaches, such as the case here considered of regulatory sandbox. In this sense, sandboxes are the best way to ensure consumer protection and to mitigate market risks, while also encouraging innovation, which serves the interest of the entire market, consumers included. For example, many firms propose the application of new technologies to reduce operational costs from traditional processes and favor consumers through lower prices.[64]

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[63] C-Y Tsang, 'From Industry Sandbox to Supervisory Control Box: Rethinking the Role of Regulators in the Era of FinTech' (2019) Journal of Law, Technology and Policy <https://ssrn.com/abstract=3420539> accessed 20 April 2020; Also *see* H.J. Allen, (n 2) 579; J. Truby, 'FinTech and the City: Sandbox 2.0 Policy and Regulatory Reform Proposals' (2018) International Review of Law, Computers & Technology, 2-31.

[64] For example, DLT is a rapidly developing technology with exciting potential to enable firms to meet the needs of consumers and the market more effectively. DLT can be used to reduce costs, improve security and trust between groups of participants, and enable services to be provided at a greater speed.

Moreover, a key aspect of effective competition is that it drives useful innovation, pushing firms to invest in the next generation of technologies to improve their effectiveness on the market – thus increasing the same market's effectiveness. One may expect improvements in competition to deliver better value for consumers and other users of financial services. Our point here is that regulators will be required to manage the tensions that arise from supporting innovation that complements their competition objectives, while at the same time recognizing that some of those innovations will inevitably either create new risks (iecryptocurrency manipulation), or shift existing risks into the digital realm (ie financial criminal activity turns into financial cybercrime).[65] One author noted, 'Each type of collaboration presents certain risks or governance issues to the consumers, the participating firms, and the financial market as a whole, and hold different ramifications for the existing regulatory regime'.[66]

VII. CONCLUSION

We are still riding on the long wave of the fourth industrial revolution, which has overwhelmed boundaries (between services and products) and traditional categories (legal and economic). The financial sector is not immune to these disruptions, and it experiences profound changes in terms of the subjects, processes and services (unbundled), markets (disinter-mediated), models (marketplace model) and relationships (no longer fiduciary). In such a complex and evolving picture, the impact of regulatory sandboxes for consumer protection is still uncertain. Yet, as the preceding sections have shown, it is already reshaping large financial services markets in ways that deliver benefits for consumers, but that can also magnify existing risks and detriments, as well as introduce new ones. Some of these risks and detriments are already becoming apparent.

Others will emerge as innovative banking and financial services become more widespread, or as innovations further transform what the market offers. Beyond the reports mentioned here, we should notice that evidence on the impact of regulatory sandboxes remains scarce. In particular, proof of sandbox-driven regulatory change is weak. Indeed, there is little evidence that sandbox programs have generated formal regulatory change or modernization. Of course, the impact from sandbox programs may be occurring at a more informal level (eg, by helping regulators to reconsider the interpretation of existing rules), or it may actually be too early for any considerable effect to

[65] R.P. Buckley and others, 'Building FinTech Ecosystems: Regulatory Sandboxes, Innovation Hubs and Beyond' (2019) (University of New South Wales Law Research Paper No. 19-72). The authors point out the limitations of these regulatory tools.

[66] C-Y Tsang (n 63).

manifest itself.[67] Put it differently, innovation is not an end in itself, nor is it always beneficial for consumers. For innovation to be consumer-driven, policy makers and academics must pay greater attention to consumer concerns, needs and expectations.[68]

[67] ESMA, 'FinTech: Regulatory Sandboxes and Innovation Hubs' (2018) JC 2018 74 <https://www.esma.europa.eu/sites/default/files/library/jc_2018_74_joint_report_on_regulatory_sandboxes_and_innovation_hubs.pdf> accessed 20 April 2020.

[68] BEUC (n 47).

CONSUMER PROTECTION ACT 2019 – A REVIEW OF CRIMINAL SANCTIONS PROTECTING CONSUMERS

—A Nagarathna[*]

Abstract: *Indian Consumer Protection Act, 1986 which was once enacted to provide timely relief to consumers affected with defective products and deficient services, apart from providing both legal as well as institutional framework for protection of consumer's rights came under criticism for being ineffective on certain fronts. On the other hand, increase in the cases of unfair trade practices and misleading advertisements necessitated changes to the law.*

Hence the new Consumer Protection Act, enacted in 2019 aims to bring in stringent measures so as to effectively protect the consumers. It for the first time, provides for remedies that are 'criminal' in nature by way of criminalising few wrongs. This paper is an attempt to assess these criminalising provisions in general and more specifically from criminalisation perspective. It also explores the scope and ambit of such criminal liability imposing provisions, apart from examining its related procedural aspects.

Keywords: Consumer Protection Act 2019, Criminal Sanction, Criminal Liability, Recall of Goods, Deceptive Advertisements, Unfair Trade Practice, Product Liability, etc.

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I. INTRODUCTION

The Indian Consumer Protection Act of 1986 despite being a socio-beneficial legislation had limitations in terms of sanctions it could impose for acts of "defects in products" or "deficiency in service" since it mostly provided for civil remedies. Various forms of victimization of consumers including due to unfair trade practices and illegal and deceptive advertisements were not sufficiently addressed under the enactment. Further it was not clear enough on aspects relating to product liability. There were also reports including that of CUTS International,[1] IIPA,[2] which indicated certain loopholes in the institutional mechanism established under the Act. Some were even highlighted through decisions of dispute redressal forums. Hence the Act underwent extensive changes in 2019, thereby replacing the original 1986 enactment.

The Consumer Protection Act 2019 which was notified in August 2019 apart from bringing in various changes to the lawcriminalizes certain wrongs committed against consumer. This paper is an attempt to analyze the enactment's criminal law provisions both substantive as well as procedural so as to assess its importance, scope and its possible impact.

II. CONSUMER PROTECTION ACT OF 1986 – A SOCIO-BENEFICIAL LEGISLATION THAT WAS

The United Nation's Guidelines for Consumer Protection adopted in 1985 and further developed though its 2016 guidelines[3] reinstated States to adopt 'valuable set of principles' through consumer protection legislation. It insists

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1 Including CUTS, *International's Report on State of Indian Consumer 2012* <https://cuts-cart.org/pdf/Overview-State_of_the_Indian_Consumer-2012.pdf> accessed 28 June 2020, which highlights lack of awareness about the legal remedies amongst consumers in India; .. 'State of Consumer Safety in India' 2016, which highlights many problems including laxity in the implementation of the orders passed by authorities under the Act, as available <https://cuts-cart.org/pdf/Report-State_of_Consumer_Safety_in_India_2016.pdf> accessed on 28 June 2020.

2 Including *IIPA's Evaluation Report on Impact and Effectiveness of Consumer Protection Act 1986* (2013), summary available on <http://www.consumereducation.in/ResearchStudy Reports/cpa_exec_sum.pdf.> accessed 10 April 2020.

3 UN Guidelines for Consumer Protection, UNCTAD, United Nations, New York (2016).

States to try to meet certain requirements in this regard, including protection of vulnerable and disadvantaged consumers and protection of consumers from hazards to their health and safety.

Indian Consumer courts – the 3 consumer forums at District, State and National level, under the 1986 Act, in most of the cases have delivered decisions that have many times not just been effective in strictly implementing the law in favor of the consumers but also in widening the scope of law through wider judicial interpretations. In a beneficial legislation, the intention is to do away with the technicalities of law.[4] The importance of this legislation can be accessed through the observations made by the Supreme Court in *LDA* v *M.K. Gupta*,[5] which is as follows:

> '*To begin with the preamble of the Act, which can afford useful assistance to ascertain the legislative intention, it was enacted, 'to provide for the protection of the interest of consumers'. Use of the word 'protection' furnishes key to the minds of makers of the Act. Various definitions and provisions which elaborately attempt to achieve this objective have to be construed in this light without departing from the settled view that a preamble cannot control otherwise plain meaning of a provision. In fact the law meets long felt necessity of protecting the common man from such wrongs for which the remedy under ordinary law for various reasons has become illusory. …….*
>
> *The importance of the Act lies in promoting welfare of the society …. It attempts to remove the helplessness of a consumer which he faces against powerful business, described as, 'a network of rackets' or a society in which, 'producers have secured power' to 'rob the rest' and the might of public bodies which are degenerating into storehouses of inaction where papers do not move from one desk to another as a matter of duty and responsibility but for extraneous consideration leaving the common man helpless, bewildered and shocked. The malady is becoming so rampant, widespread and deep that the society instead of bothering, complaining and fighting against it, is accepting it as part of life. The enactment in these unbelievable yet harsh realities appears to be a silver lining, which may in course of time succeed in checking the rot.*

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4 *Oriental Insurance Co. Ltd* v *Shri Mohanlal Agarwalla*, [CA No 6 (M) of 1998] [2003], 2003 (1) CPC 449, MANU/SV/0008/2003 State Consumer Disputes Redressal Commission, Meghalaya, Shillong.

5 (1994) 1 SCC 243, AIR 1994 SC 787.

> *A scrutiny of various definitions such as 'consumer', 'service', and 'trader ',' unfair trade practice indicates that legislature has attempted to widen the reach of the Act. Each of these definitions is in two parts, one, explanatory and the other expandatory. The explanatory or the main part itself uses expressions of wide amplitude indicating clearly its wide sweep, then its ambit is widened to such things which otherwise would have been beyond its natural import.' (emphasis added)*

Since the Consumer Protection Act 1986 was a 'social benefit-oriented legislation', it facilitated widening interpretations of the legal provisions so as to protect the interests of consumers as against violations of their rights.

III. LIMITATIONS IN THE THEN EXISTING LEGAL APPROACH

The 1986 Act aimed at protecting consumer's rights and interests. But its provisions as well as its institutional framework did suffer with certain limitations. Despite having specific provisions to protect consumers against unfair trade practices and other forms of consumer rights violations, the Act failed in regulating certain wrongs committed against consumers. One such issue was in relation to product liability.

Allegations of impermissible quantity of lead content in Maggie noodles, defects in Volkswagen cars, etc., are some of such cases that raised alarm about ineffectiveness of laws in preventing such incidences. Since defect in products like food items could also cause 'harm' to consumers, need was felt to have a stringent and deterrent legal mechanism with which liability could be imposed upon manufacturers, distributors and others dealing with such products.

Another issue that required legal response was in relation to celebrities endorsing brands through their advertisements thereby influencing and at times misleading the consumers on their choice making decisions. According to Srinivasan K Swamy, Chairman, Advertising Standards Council of India (ASCI), 'Celebrities have a strong influence on consumers and are guided by the choices they make or endorse. It's important that both celebrities and advertisers are aware of the impact and power of advertising and therefore make responsible claims to promote products or services'.[6]

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[6] *See* Ratna Bhushan, 'Advertising Standards Council of India Issues Guidelines on Celebrity Advertising' (*Economic Times Bureau*, 14, April 2017) <https://economictimes.indiatimes.com/industry/services/advertising/advertising-standards-council-of-india-issues-guidelines-on-celebrity-advertising/articleshow/58173475.cms?from=mdr> accessed 7 May 2020.

False and misleading advertisements in fact violate several basic rights of consumers: the right to information, the right to choice, the right to be protected against unsafe goods and services as well as unfair trade practices.[7] The ASCI's Consumer Complaints Council in Mumbai had in fact examined complaints against 344 advertisements and upheld complaints against 229 misleading advertisements in March 2019.[8]

The Advertising Standards Council of India (ASCI) has also issued guidelines in this regard.[9] Additionally there are certain laws which seek to regulate such advertisements including the Drugs and Cosmetics Act of 1940 and the Drugs and Magic Remedies (Objectionable Advertisements) Act 1955. But these are sector specific laws that regulate misleading advertisements relating to particular products or services specifically dealt under such laws.

Recently the National Consumer Dispute Redressal Commission imposed punitive damages of Rs. 1,50,000/- upon Tata Motors for alluring a consumer with misleading advertisement.[10] Misleading advertisements though could be regulated through the previous Consumer Protection Act, yet the law lacked express provision to regulate the same since it had to be read as a form of unfair trade practice. Despite several laws meant to protect consumers against such unfair trade practices, false and misleading advertisements continue to exploit the consumer.[11] Hence a need was felt to address all of these concerns with the amended law especially by way of criminalizing some of its related issues.

A. Review of the Institutional Framework

'Effective grievance redressal systems are vital for a democracy'.

—Narendra Modi[12]

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7 Pushpa Girimaji, *Misleading Advertisements and Consumer* (Consumer Education Monograph Series 2, Centre for Consumer Studies Indian Institute Of Public Administration, 2013) <available at https://consumeraffairs.nic.in/sites/default/files/file-uploads/misleading-advertisements/misleading_advertiesment_and_consumer%20%281%29_0.pdf.> accessed 29 April 2020.

8 'ASCI Upholds Complaints Against 229 Misleading Advertisements' *Economic Times* (Mumbai, 22 May 2019) <https://economictimes.indiatimes.com/industry/services/advertising/asci-upholds-complaints-against-229-misleading-advertisements/articleshow/69445293.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst> accessed 29 April 2020.

9 Ratna Bhushan (n 4).

10 *Tata Motors Ltd* v *Pradipta Kundu*, National Consumer Disputes Redressal Commission, Revision Petition No 2133 (2015), decided on 2 March 2020.

11 *Brief on Misleading Advertisements* <https://www.mygov.in/frontendgeneral/pdf/brief-on-misleading-advertisement.pdf> accessed 26 April 2020.

12 International Conference on Consumer Protection for East, South and South-East Countries with the theme of "Empowering Consumers in New Markets" (*narendramodi.in*,

The Consumer Protection Act of 1986 provided for a three tier consumer grievance redressal mechanism with agencies at District, State and National level. The following table **[as on 7**th **May 2020]** shows that the number of disputes redressed by the consumer courts is above 90%:[13]

Sl. No.	*Name of Agency*	*Cases filed since inception*	*Cases disposed of since inception*	*Cases Pending*	*% of total Disposal*
1	National Commission	132596	111597	20999	84.16%
2	State Commissions	943620	818719	124901	86.76%
3	District Forums	4301258	3959149	342109	92.05%
	TOTAL	5377474	4889465	488009	90.92%

While the above statistics shows disposal of more than 90% of the cases by grievous redressal agencies under the Act, yet pendency of cases for longer time is a concern that required legal response. Large numbers of complaints are pending in the three tier mechanism and the pendency is only growing.[14] The purpose of the three tier quasi-judicial structure was to give quick and inexpensive justice to the consumers; however, the machinery is riddled with many problems making it difficult for the complainant to get justice in the prescribed time.[15]

There are also issues pertaining to the way these quasi-judicial agencies are administered, including relating to the manner in which redressal agency's members are appointed, their method of functioning, time taken for redressal, etc. The Supreme Court of India while hearing a matter raising concerns about paucity of infrastructure in the consumer fora, constituted a three Member Committee to look into the issues relating to Consumer Disputes Fora/ Commissions, its members, their appointment, etc., so as to make them more effective, efficient and their process speedy.[16] The court recognized the need to ensure that proper infrastructure is made available at all levels of the consumer fora across the country.[17] Later, the Court referring to the report submitted by the 3 member committee made the following important observation which helps in understanding the need for change in law:

> '*The facts which have emerged from the interim report submitted by the Committee on 17 October 2016 constitute a sobering reflection of how far removed reality lies from the goals and objectives which Parliament had in view while enacting the Consumer Protection Act 1986. The Committee has observed that the fora*

New Delhi 2017) <https://www.narendramodi.in/we-want-to-move-ahead-from-consumer-protection-towards-best-consumer-practices-consumer-prosperity-pm-537502> 22 April 2020.

> *constituted under the enactment do not function as effectively as expected due to a poor organizational set up, grossly inadequate infrastructure, absence of adequate and trained manpower and lack of qualified members in the adjudicating bodies.*'[18]

The Apex Court in the above case took note of the 'pathetic' state of infrastructure of the country and stated '*A systemic overhaul of the entire infrastructure is necessary if the* Consumer Protection Act*, 1986 is not to become a dead letter*' (emphasis added) and hence recommended various administrative changes to the Consumer Protection Act.[19] The court thereafter apart from recommending administrative changes also suggested for framing of rules and regulations under the Act.[20]

Thus one of the main reasons to bring in a new enactment was to remove the limitations with which the earlier institutional mechanism was suffering from. The new law also establishes new and additional institutional framework equipped with powers of investigation and inquiry.

IV. WRONGS CRIMINALISED UNDER THE 2019 ACT

Though Indian Consumer Law has been to a large extent catering to the need of consumers affected due to unfair trade practices and other wrongs committed against consumers, it lacked criminal sanctions as against all such wrongs. The Consumer Protection Act 2019 has for the first time recognized certain wrongs committed against consumers as crimes, which are as follows:

(a) Violation of Consumers Rights: Section 2(9) of the new Act recognizes various rights of the consumers expressly, including the following:
   - right to be protected against the marketing of goods, products or services that cause hazard to life and property,
   - right to be protected against unfair trade practice,
   - right to information about the products and services, including about their quality, quantity, potency, purity, standard and price,
   - Right to be assured of access to a variety of goods, products or services at competitive prices, etc.

(b) Unfair Trade Practice: Section 2(47) of the new Act defines unfair trade practice as that which includes use of any unfair method or unfair or

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[18] *State of U.P.* v *All U.P. Consumer Protection Bar Assn.*, (2017) 1 SCC 444.
[19] *Ibid.*
[20] (n 14); *State of U.P.* v *All U.P. Consumer Protection Bar Assn.*, (2018) 7 SCC 423.

deception practice for promotion of sale, use or supply of any goods or services.

(c) Misleading or False Advertisement: Section 2(28) defines 'misleading advertisement' quite widely. It includes advertisement relating to any product or service that falsely describes such product or service or gives false guarantee about the same and thereby misleading the consumers about such product's or service's nature, substance, quantity or quality. It also includes advertisements that convey an express or implied representation made by the manufacturer or seller or service provider thereby constituting to be an unfair trade practice. It also includes advertisements which deliberately conceal important function of such product or service.

All the above three wrongs are subjected to criminal liability under Section 88 and 89 of the new Act. According to the Act, if an investigations reveals with sufficient evidence acts of 'violation of consumer rights' or 'unfair trade practice', the Central Consumer Protection Authority [Central Authority] under Section 20, may pass an order of recalling of goods or withdrawal of services that are dangerous, hazardous or unsafe or for reimbursement of prices of such goods or services so recalled, or for discontinuation of such unfair and other practices prejudicial to a consumer. It is necessary to note that the recalls as a measure against dangerous products is provided as a remedy already under BIS Act 2016, Drugs and Cosmetics act 940, Medical Devices rules 2017, etc.

Additionally in India, some recalls were done voluntarily by manufacturers. Even the guidelines issued by the Food Safety and Standards of Indian in 2019 imposed obligation on the manufacturers of food products to recall food products that are unsafe. It provides: 'Food Business Operators carry the prime responsibility of implementing the recall, and for ensuring compliance with the recall procedure at its various stages including follow-up checks to ensure that recalls are successful and that subsequent batches of the food products are safe for human consumption'.[21]

Between 2010 to 2017, around 29 recall events had taken place in the India in the domain of automobile, drugs and food sectors but still the numbers indicates it to be a meager one as against the extent of dangerous and deficient products available in the market. Hence it was important to provide a better law enforcement mechanism for 'recall' orders.[22] The new Consumer law pro-

[21] FSSAI, *Guidelines for Food Recall* (2017) <https://www.fssai.gov.in/dam/.../Guidelines_Food_Recall_28_11_2017.pdf> accessed on 28 June 2020.

[22] *See* Vijaya Chebolu-Subramanian and Parthajit Kayal, 'Consumer Deserve Better Product – Recall Norms' (*Hindu BusinessLine*, 5 August 2019) <https://www.thehindubusinessline.com/

vides this as an immediate legal remedy to a consumer as against a dangerous product, by empowering the Authority to issue such orders.[23]

If an investigation reveals that an advertisement is false or misleading or is prejudicial to the interest of any consumers' or is in violation of any rights of the consumers, the Central Authority under Section 21 may order for 'discontinuation or modification of such advertisement by the concerned trader or manufacturer or endorser or advertiser or publisher.

Failure to comply with such orders issued by the Central Authority under Section 20 and 21 are criminalized under Section 88, which is punishable with imprisonment up to 6 months or with fine up to Rs 25,000 or with both.

According to Section 89, a manufacturer or service provider who makes a false or misleading advertisement which is prejudicial to the consumers' interests is punishable with imprisonment extending up to 2 years or with fine extending up to 10 lakh rupees. Every repeated offence is punishable with imprisonment extending up to 5 years and with fine extending up to 50 lakh rupees.

Adulteration of food and drugs can be dealt with under the following provisions of the Indian Penal Code:

- Section 272 - adulteration of any article of food or drink which makes such article noxious, knowing that it will be sold as food or drink;
- Section 273 – sale of any noxious article as food or drink or is in a state that makes it unfit for being a food or drink and knowingly or having reason to believe it to be so, still sells it or offers or exposes it for sale;
- Section 274 – adulteration of any drug or medicinal preparation and
- Section 275 – sale of such adulterated drug or medicinal preparation.

All the above offences under IPC are made punishable with imprisonment which may extend up to 6 months or with fine which may extend up to Rs. 1000/- or with both. They are made non-cognizable and bailable and hence lack deterrent effect.

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opinion/consumers-deserve-better-product-recall-norms/article28818925.ece> accessed on 28 June 2020.

[23] *See* Kevin LaCroix, 'India: The Consumer Protection Act, 2019 – Exposures & Liability Insurance Protection' (*The D&O Diary*, 9 October 2019) <https://www.dandodiary.com/2019/10/articles/consumer-protection/guest-post-india-the-consumer-protection-act-2019-exposures-liability-insurance-protection/> accessed 28 June 2020.

Under the amended Consumer Act, offences relating to adulterants are dealt with under Section 90. The Statutory explanation to this section defines an 'adulterant' as 'any material including extraneous matter which is employed or used for making a product unsafe'. According to this provision, a person who manufactures for sale or stores or sells or distributes or imports any product containing an adulterant can be punished with:

- Imprisonment extending up to 6 months or fine which may extend to 1 lakh rupees,
- Imprisonment extending up to 1 year and fine extending up to 3 lakh rupees if such act also results an injury
- Imprisonment extending up to 7 years and with fine extending up to 5 lakh rupees if such act results in grievous hurt to a consumer and
- Imprisonment of not less than 7 years but extending up to life imprisonment and fine of not 10 lakh rupees, if such offence leads to death of a consumer.
- Additionally the court under Section 90(3), in case of first conviction may also suspend for a period extending up to 2 years, any license issued under any law to such manufacturer, seller, distributor and the one who imported such product. For repeated offenders, the Court can also cancel such license.

The Act defines spurious goods under Section 2(43) as 'goods which are falsely claimed to be genuine'. According to Section 91, a person who manufactures any spurious goods for the purpose of its sale or the one who stores or sells or distributes or imports such spurious goods can be punished with:

- Imprisonment extending up to one year and with fine extending up to 3 lakh rupees, if the consumption of such goods results in an injury however not resulting in grievous hurt[24] to such consumer.
- Imprisonment extending up to 7 years and with fine extending up to 5 lakh rupees if such consumption causes grievous hurt to such consumer.
- Imprisonment of not less than 7 years but extending up to life imprisonment and with fine of not is less than 10 lakh rupees if such consumer dies due to such consumption.
- Further, the Act other than prescribing criminal sanctions also under Section 91(3) provides for suspension of the license issued to a person who manufactures for sale, stores or sells or distributes. Such suspension

[24] Grievous hurt under this Act will carry the same meaning provided to it under Indian Penal Code.

can be for a period of up to 2 years. It also provides for cancellation of such license for second or subsequent convictions.

Failure to comply with the Consumer Commission's order according to Section 72 of the Act is a crime and is subject to criminal liability. It is punishable with imprisonment which shall not be for less than one month, but which might extent to three years, or with fine of not less than 25,000 rupees, but which might extend up to lakh rupees, or with both imprisonment and fine.

V. CONSTITUTION OF THE CENTRAL CONSUMER PROTECTION AUTHORITY & CRIMINAL PROCEDURAL ASPECTS

In order to implement most of its provisions including penal provisions, the Act constitutes the Central Consumer Protection Authority [Central Authority] and establishes other offices and positions of importance. It aims to safeguard the 'interests of consumers' in a more comprehensive and effective manner and attempts to provide a wider and effective institutional mechanism. As mentioned earlier this Central authority is empowered with powers of investigation and inquiry.

According to Section 10, the Authority is empowered:

- to regulate matters relating to violation of rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of public and consumers and,
- to promote, protect and enforce the rights of consumers as a class.

According to Section 14, the Authority has powers of general superintendence, direction and control in respect of all of its administrative matters. According to Section 15 the Central Authority will have an Investigation Wing headed by a Director-General. The Wing is empowered to conduct inquiry or investigation under this Act when directed by the Central Authority.

Additionally the District Collector under Section 16 can inquire or investigate complaints relating to violation of rights of consumers as a class, on matters relating to violations of consumer rights, unfair trade practices and false or misleading advertisements. Such procedure may be conducted by the District Collector either on a Complaint or on Central Authority's or Regional Office Commissioner's reference. Upon such inquiry or investigation, a report must be submitted to the Central Authority.

According to Section 17, a consumer can file complaints relating to violation of consumer rights or unfair trade practices or false or misleading advertisements which are prejudicial to the interests of consumers as a class, either in writing or in electronic mode, to:

- the District Collector or
- the Commissioner of regional office or
- the Central Authority.[25]

The Central Authority under Section 18(2) is in itself empowered to inquire or cause an inquiry or investigation to be made into violations of consumer rights or unfair trade practices. Such inquiry or investigation can be conducted by the authority either *suo moto* or on receipt of a complaint or upon the Central Government's directions. The authority can even file complaints before the District, State or National Commission if necessary.

According to Section 19, the Central Authority either on its own or upon receipt of any information or complaint or directions from the Central Government can conduct or cause to be conducted a preliminary inquiry to find out the presence of a *prima facie* case of violation of consumer rights or any unfair trade practice or any false or misleading advertisement. If such prima facie case is made out, it can get the case further investigated by the Director General or by the District Collector.

A. Cognizable and Non-Bailable Offences

Offences made out under Section 90(1)(c) and (d) and Section 91(1) (b)and (c) that is, offences in relation to an adulterant and a spurious goods which causes grievous hurt or death of a consumer are declared by the Act as 'cognizable' and 'non-bailable' under Section 90(2) and 91(2) respectively. Declaring an offence as cognizable would mean that the same can be legally investigated by appropriate authority and when essential even by arresting the accused.

Declaring an offence as 'non-bailable' would mean that if an offender is arrested in the course of such alleged offence's criminal procedure, he shall not claim bail as a matter of his right. Bail in such cases is to be granted by the court exercising its discretionary power.

[25] *See* s 17.

B. Power to Call for Documents and Records

Investigation meaning 'collection of evidence' implies ample power on the part of investigating agency. This includes power to summon a person or summon production of a record or a document or material evidence essential for such investigation. The 2019 Act under Section 19(*3*) brings under the purview of power of investigation, the power of the Central Authority, the Director General or the District Collector to call and direct a person to produce any document or record available in his possession.

C. Search and Seizure

According to Section 22, the Director General or any other officer authorized by him or the District collector, while conducting an investigation if has reason to believe that any person has violated any consumer rights or committed unfair trade practice or causes any false or misleading advertisement to be made can use powers of search and seizure. Such search and seizure may be conducted as per the procedure prescribed under Criminal Procedure Code.

The Act takes care of the concern of illegal and unwarranted search and seizure. According to Section 93, if search or seizure is vexatious, that is, conducted without reasonable grounds, the concerned Director General and such other officers who knowingly conduct such search and seizure shall be punished with imprisonment up to one year or with fine up to Rs. 10,000 or with both.

However if such acts are done in 'good faith' or in pursuance of this Act or under its rule or orders, such officer shall not be subjected to any suit or prosecution or other legal proceedings according to Section 98. With these provisions we can see that the enactment intends to balance the rights of individuals as well as the powers of authorities.

D. Post-Investigation Procedure

As mentioned earlier, under Section 20, if upon investigation the Central Authority is satisfied about the evidence showing violation of consumer rights or unfair trade practice, it can pass necessary orders including the following orders of:

- recalling goods or withdrawing services that are found to be dangerous, hazardous or unsafe;
- reimbursing prices to the consumers of goods or services that were recalled

- dis-continuing unfair practices or practices that are prejudicial to the interests of the consumers.

Similarly under Section 21, Central Authority is empowered to issue order for discontinuation or modification of advertisements which, upon investigation are found to be false or misleading or prejudicial to consumer's interest or for violating rights of consumers.

E. Criminal Trail Procedure

According to Section 92 of the Act, a court can take cognizance of offences under Section 88 and 89 only upon a compliant being filed by Central Authority or an officer authorized by such authority.

An offence under Section 72 must be tired summarily, by the District Commission or the State Commission or the National Commission upon whom the powers of a Judicial Magistrate of first class are conferred. Appeals from these criminal proceedings according to Section 73 lie from an order of District Commission to the State Commission, from the State Commission to the National Commission and from the National Commission to the Supreme Court. While Sections from 260 to 265 of Criminal Procedure Code lays down the procedural rules in relation to summary proceedings, Section 72 of the Act provides for the same under the new Act.

According to Section 262, CrPC, the procedure for a summary trail may be the same as that of the summons case except with certain restrictions. A court here can convict a person on his plea of guilt and in case of absence of such plea; it shall record the substance of evidence. The court's judgment shall contain a brief statement of the reasons for finding.[26] For the purpose of conducting these summary proceedings under the new Consumer Law, the Commission is empowered with the powers as that of a Magistrate of First Class, under Criminal Procedure Code.[27]

F. Compounding of Certain Offences

According to Section 96, offences punishable under Section 88 and 89 may be compounded on payment of a prescribed amount, not exceeding the amount of fine prescribed for the said offence. Such compounding may either be done before or after the institution of prosecution. Compounding however is not allowed if the accused commits same or similar offence within a period of 3

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[26] *See* Criminal Procedure Code 1973, s 264.
[27] *See* s 72(2).

years from the date on which the first offence was committed by him which he got compounded. An accused will be deemed to be acquitted upon such compounding followed with acceptance of the sum of money paid for such compounding.

G. Act to Apply with Other Applicable Laws

According to Section 100, this enactment applies in "addition to and not in derogation of the provisions of any other law for the time being in force". Hence offences covered herein if additionally constitutes to be offences under other laws including Indian Penal Code, the same shall be tried under all applicable laws. This means that offences under this Act which results in injury, hurt, grievous hurt and death of a consumer can also be subjected to criminal process under the Indian Penal Code's applicable provisions.

VI. CRIMINALISATION APPROACH OF THE ACT – A CRITIQUE

The new Act focuses largely on criminalization of various wrongs. Most of these wrongs were in fact being dealt with under the pre-amended law but with civil remedies. The question of whether a wrong should be criminalized or not must be decided on the basis certain principles of criminalization. One of the objects of criminalization is to prevent harm on a person. This principle of harm propounded by John Stuart Mill is fulfilled by the new Consumer law which aims to prevent certain harms caused on consumers due to their rights being violated or due to unfair trade practices or deceptions caused by misleading advertisements. Jeremy Bentham's utilitarian theory of punishment justifies punishment, that is, criminal liability only if it is beneficial to larger number. This theory may also justify the new consumer law approach of criminalization. However the question is as to whether criminalization was the only way these menaces could be regulated.

Criminalization should be the ultima ratio, that is, the last resort, which further means there must be no effective alternative remedies as against such criminalization. These restrictions on criminalization are also because it involves stringent sanctions such as criminal liability in form of imprisonment. Under the newly amended consumer law, the criminalization effect can be seen in form of sanctions as well as procedural rules prescribed. While the Consumer Commissions on one hand are empowered with powers of a criminal court, on the other hand, sentences such as imprisonment and fine makes the wrongs 'criminal' in nature.

Criminalization generally is restricted in its ambit as it involves in the process of investigation and inquiry, State machineries and infrastructure, thereby adding the burden on the State. Hence criminalization approach must be sparingly used. Looking at the way the earlier consumer law was drafted to be a social welfare and beneficial legislation and the way the consumer forums were interpreting the provisions, criminalization parallel to the then existing remedial measures fails to get justified. However the fact that today's consumers both on online as well as offline platforms are suffering due to various forms of frauds and unfair trade practices cannot be ruled out too.

The new law by way of specifically recognizing menaces of misleading advertisements, violations of consumer rights and by expounding the forms of unfair trade practices has widened its substantive provisions. It however has over-stretched criminalization approach and hence raises the question as to whether criminalization was even essential. Also by way of creating the Central Authority which though has wider powers, yet by adding provisions that complicates its procedural aspects, the new Act seems to bring uncertainty to the law's implementation aspects.

Shri. Narendra Modi, the Prime Minister of India while addressing an international conference 2017, referring to the new Act which was undergoing reforms said:

> '*The proposed Act lays great emphasis on consumer empowerment. Rules are being simplified to ensure that Consumer grievances are redressed in a time-bound manner and at least possible cost. Stringent provisions are proposed against misleading advertisements. A Central Consumer Protection Authority with executive powers will be constituted for quick remedial action.*'[28]

Though the new act is enacted with wider powers to achieve the above mentioned objectives, yet the approach of criminalization fails to get justified for various reasons, as discussed in this paper. Additionally the procedural rules are complicated and might pose more challenges in its implementation. Multiple offices are established in addition to already existing ones.

VII. CONCLUSION

The limited impact and the ineffectiveness of the Consumer Protection Act 1986 to a large extent is not due to inadequacy of the law or its provisions but it is due to the poor implementation of the Act and the apathy of the

[28] *See* (n 10).

governments and other stakeholders including the consumers.[29] The need of the day was better implementation of the laws and updating of the laws only to the extent essential to fill in the gaps that exited earlier. Though some specific provisions necessary to protect consumer interests in true spirit was essential, this required amendment to certain extent.

Thus the Act unlike the previous enactment doesn't just lay down the rights of consumers but also provides for legal provisions essential to protect such rights by declaring violation of some of such rights as crimes. It was also essential to regulate endorsement of misleading advertisements and to impose product liability against goods harming consumers. However imposing criminal liability parallel to civil sanctions is the major change brought in through the new law. This approach was probably not inevitable nor was completely justifiable. Will this approach result in intended 'deterrent' effect is a question that might get answered in due course.

However the object of the new law being to safeguard consumer's interests as against all possible ways of unfair trade practices is important aspect to be considered. Clarify of legal provisions and implementation must be bought in through the regulation currently under draft process. If implemented in proper spirit and with effectiveness this enactment might go a long way in realistically protecting the consumers of today who have been long time victims of illegal advertisements, unfair trade practices and other deceptive trade activities.

[29] *See* (n 12).

SMART CONTRACTS & BLOCKCHAIN: THE PANACEA TO THE UNEQUAL BARGAINING POWER OF CONSUMERS?

—Ajar Rab[*]

Abstract: *The growing use of technology, apps, and internet-of-things is pushing innocent consumers to the bottom of the chain when it comes to freely negotiated contracts. Consumers click 'I Agree' without knowing the terms and conditions of the contract. However, this rise in technology may hold the cure to the unequal bargaining power in standard form consumer contracts. This paper highlights the current issues existing in consumer law jurisprudence and explains Blockchain or Decentralised Ledger Technology, and Smart Contracts.*

The paper argues that the application of such technologies, especially Ricardian Contracts, has the potential to level the playing field and provide equal bargaining power to consumers, without comprising their privacy. It surveys the current use of such technology in areas of insurance, flight compensation and service contracts and demonstrates how issues of consent, legal certainty and enforcement of consumer rights can be better addressed by Blockchain and Smart Contracts.

The paper argues that such technologies foster trust, confidentiality, and efficiency and remove jurisdictional barriers in international trade and commerce. However, before such technologies can be given legal sanction for in the area of consumer law, many legal thresholds and statutory requirements will have to be revamped by legislatures. It concludes that Blockchain and Smart Contracts can

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help in creating freely negotiated consumer contracts if consumer rights receive support from policymakers.

Keywords: Bitcoin, Blockchain, Decentralized Ledger Technology, Smart Contracts, IoT, Privacy, Ricardian Contract, etc.

I. INTRODUCTION

It is no secret that technologies have permeated the lives of humans more than ever before. Every cynic of the 90's who had called the internet a 'fad'[1] is now hooked on to it, either by choice or by necessity. Trade and commerce have quadrupled their potential, and cross border transactions are increasing by the day. Caught in between this rocket science is the innocent consumer clicking 'I agree' on contracts running into mini novels or downloading apps on the Smartphone and signing up for apps that do much more than their described purpose. In a certain sense, technology has made the otherwise powerless consumer even more powerless.

Adding to this helplessness is the new trend, the Internet of Things (hereinafter 'IoT').[2] Devices are connected to each other, interdependent, and connected to the consumer through an app or a URL. Buying an IoT gadget means signing up for an entire system of things.[3] For example, Tesla announced that

[1] David Williams, 'That Internet Thing? It's Just a Fad' (*NBR. Co. Nz*, 31 January 2013) <www.nbr.co.nz/article/internet-thing-its-just-fad-ns-135266> accessed 5 April 2020.

[2] Liz Coll and Robin Simpson, 'Connection and Protection in the Digital Age: The Internet of Things and Challenges for Consumer Protection' (2016) Consumers International <https://www.consumersinternational.org/media/1292/connection-and-protection-the-internet-of-things-and-challenges-for-consumer-protection.pdf> accessed 2 April 2020.

[3] The language of this Article is sufficiently broad to cover also cases of so-called automated contracting, i.e. where the parties agree to use a system capable of setting in motion self-executing electronic actions leading to the conclusion of a contract without the intervention of a natural person, *See*, UNIDROIT Principles of International Commercial Contracts 2016, art 2.1.1 (3).

its cars would be able to order spare parts on its own.[4] IBM and Samsung created a smart washing machine that can trigger service calls, etc.[5] The consumer is being pushed further and further down to the bottom of the ladder in terms of freely negotiated contracts, actual consent, and bargaining power. Based on this, technology may sound like the death knell for consumers and a mammoth task for consumer law.

However, this poison pill of technology may well bethe vaccine to consumer rights and bargaining power. Mass consumer contracts which are simple, standardised and based on simple facts are executed millions of time every day.[6] The advent of Blockchain or decentralised ledger technology (hereinafter 'DLT' or 'Blockchain') may serve as the knight in shining armour for consumer protection and regulation of consumer contracts.

Coupled with this is the use of smart contracts, ie, automated contracts prepared in computer code that execute themselves based on pre-defined conditions (hereinafter 'Smart Contracts'). For a quick reference point, smart contracts have been around for a long time. A vending machine dispensing a can of coca-colaafter payment of money is a typical example of Smart Contracts.[7] However, the machine cannot consider if the purchaser is being forced to put the money in the machine, (ie, there is coercion).[8]

On the other hand, DLT, which is the technology used in crypto currencies or what is commonly referred to as 'Bitcoins', is a transparent system that prevents asymmetry of information. Smart Contracts have created a buzz only because of blockchain technology,[9] primarily Bitcoins,[10] where the user has

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4 Fred Lambert, 'Tesla Vehicles can now Diagnose Themselves and Even Pre-Order Parts for Service' (*Electrek*, 6 May 2019) <https://electrek.co/2019/05/06/tesla-diagnose-pre-order-parts-service/> accessed on 5 April 2020.

5 Amitranjan Gantain, Joy Patra and Ayan Mukherjee, 'Integrate Device Data with Smart Contracts in IBM Blockchain' (*IBM Developer*, 1 June 2017) <https://developer.ibm.com/articles/cl-blockchain-for-cognitive-iot-apps-trs/> accessed on 5 April 2020.

6 Miklos Boronkay and Philip Exenberger, 'Blockchain, Smart Contracts and Arbitration Overrated Hype or Chance for the Arbitration Community?' in Christian Klausseger and others (eds), *Chapter IV: Science and Arbitration in Austrian Yearbook on International Arbitration 2020* (MANZ Verlag Wien, Stampfli, C.H. Beck 2020) 413.

7 Nick Szabo, 'Formalizing and Securing Relationships on Public Networks' (1997) 2 First Monday <https://firstmonday.org/ojs/index.php/fm/article/view/548> accessed 7 April 2020.

8 Mateja Durovic and Andre Janssen, 'The Formation of Smart Contracts and Beyond: Shaking the Fundamentals of Contract Law?' (2018) Research Gate <https://www.researchgate.net/publication/327732779_The_Formation_of_Smart_Contracts_and_Beyond_Shaking_the_Fundamentals_of_Contract_Law> accessed 2 April 2020.

9 *Ibid*.

10 It should be noted that Bitcoins led to the establishment of *Ethereum* which is a more sophisticated blockchain platform allowing more complicated transactions beyond just transfers

access to the entire ledger, and hence, in a certain sense, the consumer is actually 'the king'.[11] DLT does away with problems of trust, privacy concerns, and most importantly, intermediaries.[12]

There is an exact record of the goods from the manufacturing, to delivery to the end consumer, including its current working status.[13] More importantly, the record is accessible by everyone, including the consumer.[14] Therefore, claims of manufacturing defect, etc. might be easier to make and much easier to prove. Alternatively, the DLT may trigger an error, the moment a non-conforming good is produced. Therefore, DLT holds the potential for increasing efficiency at every level of the supply chain and legal rights, including the elimination of counterfeits.

Further, these technologies can be combined and deployed in favour of consumers. Think of compensation for a delayed flight.[15] No human intervention is required; the contract requires no legal interpretation and enforcement can be instantaneous. The moment the website of the airline is updated with the information of flight delay; compensation can be transferred to the consumer, either in Bitcoins, or to their bank accounts linked through a payment app like GooglePay. *Smart, isn't it?* Such a concept has already been implemented by the insurance giant AXA.[16] Additionally, Blockchain may be used for identity credentials, voter records, permissions, security transactions, property/land use records, interbank settlement records, firmware updates,[17] and cloud storage in the future.[18]

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of currency, or bitcoins. *See*, L.H. Scholz, 'Algorithmic Contracts' (2017) 20 Stanford Technology Law Review 101, 120; TFE Tjong Tjin Tai, 'Smart contracts En Het Recht' (2017) 93 Nederlands Juristenblad 176, 177; Ethereum even developed its own coding language called Solidity <https://solidity.readthedocs.io/en/develop/> accessed 2 April 2020.

11 Vijay Raghunathan, 'Smart Contracts - Putting the Customer Back into "Customer Service"' (*Medium*, 19 October 2018) <https://medium.com/@vijay./smart-contracts-putting-the-customer-back-into-customer-service-c2670234e916> accessed 7 April 2020.

12 Clifford Chance, 'Smart Contracts: Legal Agreements for the Digital Age' (2018) Briefings Clifford Chance <https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/12/smart-contracts-april-2018.pdf> accessed 4 April 2020.

13 Boronkay and Exenberger (n 6) 413.

14 *Ibid*.

15 C Buchleitner and T Rabl, 'Blockchain und Smart Contracts' (2017) Ecolex 4, 7.

16 Zibin Zheng and others, 'An Overview on Smart Contracts: Challenges, Advances and Platforms' (2020) 105 Future Generation Computer Systems 475, 486.

17 K Christidis and M Devetsikiotis, 'Blockchains and Smart Contracts for the Internet of Things' (2016) 4 IEEE Access 2292.

18 Da'Morus Cohen and Anthony DiResta, 'Bitcoin, Blockchain and Consumer Protection Laws' (*Holland & Knight*, 10 January 2018) <https://www.jdsupra.com/legalnews/bitcoin-blockchain-and-consumer-20912/> accessed on 5 April 2020.

However, smart contracts and Blockchain still have many legal hurdles to cross. The first one is that of a legal regime supporting such contracts. *Does a legal system recognise consent through electronic means, digital signatures, app-based consent?* Second, *who drafts the contracts, and how?* Consumers are unequipped to create coded contracts. *So do we again permit companies and commercial entities to draft lop-sided smart contracts, and that too self-executing?*[19] *Can such contracts be tested, read, or modified? Can one party unilaterally modify such contracts? How does a consumer file a dispute? How do government bodies regulate such contracts?*

It has been argued, although surprisingly, that consumer law does not apply to Smart Contracts.[20] However, this paper argues otherwise,[21] and analyses these questions in the context of consumer law and attempts to find potential solutions, if not the right answer. It must be clarified at the outset, though, that without suitable amendments to contract law statutes and support from courts, this dream empowering consumers through smart contracts and Blockchain will only remain a dream. Therefore, the scope of this paper is confined to analysing consumer rights and how the same can be strengthened through technology. Issues of contract law, the validity of such contracts, etc. have not been addressed.

Part I of the paper describes the current issues in consumer protection law and technology. **Part II** of the paper explains the different technologies that can be used in fostering consumer rights. **Part III** of the paper will attempt to address those issues through the application of smart contracts and Blockchain. **Part IV** of the paper highlights the legal issues that will have to be addressed by countries to implement these technologies. Lastly, the paper concludes that smart contracts and Blockchain can address issues of privacy, enforcement, standard-form contracts, unequal bargaining power, and provide a fillip

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[19] For the reasons *see* Tjong Tjin Tai, 'Smart Contracts En Het Recht' (n 10) 182; For different views, *see*: Alexander Savelyev, 'Contract Law 2.0: "Smart Contracts" as the Beginning of the End of Classic Contract Law' (2017) 26 Information and Communications Technology Law 116, 120. According to him, the main field of applicability of smart contract are the business to business and consumer to consumer transactions. The exact impact of development of smart contracts on consumer law and policy is of course yet uncertain. It should also be pointed out that because to draft and enter smart contracts have high initial costs and require infrastructure and expert knowledge (coding) the access to it is not equal. Only those who can afford the powerful hardware and know how to computer-code or can afford to hire a programmer can (as of now) utilise the technology, though certain startups exist to allow 'laymen' to draft their own smart contracts.

[20] Savelyev (n 19) 120.

[21] Pete Rizzo, 'Consumers' Research: Blockchain Tech Will Boost Consumer Protection' (*Coindesk*, 8 August 2015) <www.coindesk.com/consumers-research-blockchain-tech-will-boost-consumer-protection> accessed on 5 April 2020.

to international trade and commerce across jurisdictions. Most importantly, the use of smart contracts and Blockchain may be the answer to the perennial problem of the unequal bargaining power of consumers.

II. PART I: CURRENT ISSUES IN THE USE OF TECHNOLOGY & CONSUMER LAW

Consumer laws across jurisdictions have struggled to keep with the frequent changes in technology. With new inventions, creative modifications, and the digitisation movement, consumer rights have not received sufficient attention.

Currently, a typical consumer contract executed over the internet works in the following manner. A consumer logs on to a website, or opens an app on the Smartphone. He/She then completes a user registration form providing his/her email address, or phone number. A standard form contract running into pages and pages is displayed, or hyperlink is provided next to the checkbox, 'I understand the terms and conditions and agree to the same'. Consent is provided to these pre-defined terms and conditions by clicking the 'I agree' button, or ticking the checkbox.

For registrations through phone numbers, a One-Time-Password ('OTP') is generated and entered by the consumer. The consumer then proceeds to shop and makes payment through his/her credit card, debit card, a payment app, or internet banking. Subsequently, goods are delivered to him/her.

If this transaction is broken down for a moment:

(a) Consent: The consumer has consented to terms and conditions about which he/shehas no idea. Popularly known as 'shrink-wrap' contracts, or 'click-wrap' contracts, the consumer has no choice but to agree.[22] In such cases, traditional jurisprudence from across countries suggests that the courts are likely to uphold such contracts,[23] unless enforcement would be unreasonable under the circumstances, or the contract is prima facie unconscionable.[24] The act of signing up and providing an

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[22] Nathan J Davis, 'Presumed Assent: The Judicial Acceptance of Clickwrap' (2007) 22 Berkeley Technology Law Journal 577.

[23] *Thornton* v *Shoe Lane Parking Ltd.* (1971) 2 QB 163 (Lord Denning MR); *R (Software Solutions Partners Ltd)* v *H.M. Customs & Excise* (2007) EWHC 971 [67]; UNIDROIT Principles of International Commercial Contracts 2016, art 2.1.19.

[24] William J Jr Condon, 'Electronic Assent to Online Contracts: Do Courts Consistently Enforce Clickwrap Agreements' (2003) 16 Regent University Law Review 433.

OTP is considered to be sufficient consent.[25] Even the vending machine is an example of a 'wrapper contract' made unilaterally by the owner of the machine.[26]

(b) Unequal Bargain: Tied to the idea of consent is the unequal bargaining power of the consumer. Not only does the consumer have no idea of what he/she has agreed upon, but he/she also has no option to change the terms and conditions.[27] He/She cannot make a fair bargain,[28] cannot alter the terms of warranties, etc.

(c) Privacy: In agreeing to pre-defined terms, the consumer, without knowing, has surrendered his/her privacy. The seller now has access to his/her contacts, location, browsing history, sometimes even photographs.[29]

(d) Confidentiality: While making payment for the goods, the consumer has provided his/her card details, bank account details, etc., and has risked phishing of the information.[30]

(e) Trust: Despite having compromised so much, the consumer still does not trust that the goods will be delivered in time, that they will conform to what was demonstrated online, that they would be free from defects. This deficit of trust is only compounded in international transactions.[31] *Moreover, how will disputes be resolved? Will the seller refund the money? Alternatively, replace the product?*

The questions consumer law regulators have struggled with, therefore is *can the same transaction be done without the consumer comprising his/her rights, privacy, confidentiality, and instead build more trust?* This is where smart contracts and Blockchain may have the answer.

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[25] Trilegal, 'Electronic Signatures in India'(*Adobe*, September 2017) <https://acrobat.adobe.com/content/dam/doc-cloud/en/pdfs/electronic-signatures-in-india-uk.pdf> accessed 8 April 2020.

[26] Durovic and Janssen (n 8) 12.

[27] Marcos Loos and Joasia Luzak, 'Wanted: A Bigger Stick. On Unfair Terms in Consumer Contracts with Online Service Providers' (2016) 39 Journal of Consumer Policy 63.

[28] *Ibid* 67.

[29] Miriam J Metzger, 'Privacy, Trust, and Disclosure: Exploring Barriers to Electronic Commerce' (2004) 9 Journal of Computer Mediated Communication.

[30] Gregory Megaw, 'Phishing Within E-Commerce: Reducing the Risk, Increasing the Trust' (2010) <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.460.2623&rep=rep1&type=pdf> accessed 14 April 2020.

[31] Metzger (n 29) 4.

III. PART II: UNDERSTANDING SMART CONTRACTS AND BLOCKCHAIN

There has been great euphoria around Bitcoins and crypto currency across the world.[32] While many regimes have made all efforts to ban them, some jurisdictions have welcomed the technology with open arms.[33] Insome jurisdictions, like India, the government had completely banned them,[34] but the judiciary has set it aside.[35] Technology lovers have painted a beautiful future of artificial intelligence and crypto currency.[36] For the common man, Blockchain means Bitcoins. However, that is only the tip of the iceberg. The potential of DLT to a consumer is tremendous, and it may even reverse the long-held tradition of unequal bargaining power against the consumers.

However, it is vitalto first understand these technologies, by governments and consumers, in order to prevent prejudice against their use and implementation:

(a) Smart Contracts: The term was coined before 1990 by their creator, Szabo,[37] and only meant contracts that could be executed by the computer protocols.[38] In the words of Szabo, Smart Contracts are 'computerised transaction protocol that executes the terms of a contract. The general objectives of smart contract design are to satisfy common contractual conditions (such as: payment terms, liens, confidentiality, and enforcement etc.), minimise exceptions both malicious and accidental, and minimise the need for trusted intermediaries like banks or other kind of agents'.[39] To put it simply, a computer code that is created to automatically execute contractual duties upon the occurrence of

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[32] *See*, Global Legal Research Centre, 'Regulation of Cryptocurrencies around the World' (2018) The Law Library of Congress <https://www.loc.gov/law/help/cryptocurrency/cryptocurrency-world-survey.pdf> accessed 12 April 2020.

[33] For example, Japan, United States of America, Germany, Netherlands, United Kingdom, New Zealand etc. *See*, *Ibid*.

[34] Reserve Bank of India, 'Prohibition on Dealing in Virtual Currencies (VCs)' Circular Bearing Number DBR.No.BP.BC.104/08.13.102/2017-18 <https://rbidocs.rbi.org.in/rdocs/notification/PDFs/NOTI15465B741A10B0E45E896C62A9C83AB938F.PDF> accessed on 12 April 2020.

[35] *Internet and Mobile Assn. of India* v *RBI*, (2020) SCC OnLine SC 275.

[36] Ahmed Banafa, 'Blockchain and AI: A Perfect Match?' (*BBVA Open Mind*, 6 May 2019) <https://www.bbvaopenmind.com/en/technology/artificial-intelligence/blockchain-and-ai-a-perfect-match/> accessed on 9 April 2020.

[37] Nick Szabo, 'Smart Contracts' (1994) <http://www.fon.hum.uva.nl/rob/Courses/InformationInSpeech/CDROM/Literature/LOTwinterschool2006/szabo.best.vwh.net/smart.contracts.html> accessed 7 April 2020.

[38] Nick Szabo (n 37).

[39] Nick Szabo (n 37).

a trigger event,[40] or agreements wherein execution is automated, usually by a computer programme.[41]

It should be noted that there is nothing 'smart' about 'smart contracts.' They are not even contracts in the real sense, and their binding nature has been questioned.[42] There are considered to be a disruptive legal innovation which may make traditional jurisprudence on the formation of contract redundant.[43] Hence, 'smart contracts' isa misnomer[44] as Smart Contracts do not contain any obligations,[45] and there is no consideration.[46] Smart Contracts are essentially embedded contracts in all sorts of property that is valuable and controlled by digital means.[47]

Thus, once parties agree on a smart contract, the execution of the contract is not under the control of the parties.[48] The discretion in performance and enforcement is deemed to have been exercised.[49] However, when Smart Contracts are used along with Blockchain or DLT, they are not only executed 'smart' but are also concluded 'smart' through the Blockchain.[50] Thus, the algorithms work something similar to an 'artificial agent' in the context of the formation of a contract.[51]

Today, examples of such protocols are everywhere, auto-debit for credit card payments, subscriptions to stream services, such as Netflix, agreement to deliver goods through Amazon, etc. All of the e-commerce industry today would fall within the traditional notion of Smart Contracts. However, the reference to Smart Contracts here means the

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40 P. Paech, 'The Governance of Blockchain Financial Networks' (2017) 80 Modern Law Review 1072, 1082.

41 Max Raskin, 'The Law and Legality of Smart Contracts' (2017) 1 Georgetown Technology Review 305, 306; T Söbbing, 'Smart Contracts und Blockchain: Definitionen, Arbeitsweise, Rechtsfragen' (2018) IT-Rechts-Berater 43, 44.

42 S Bourque and S Fung Ling Tsui, *A Lawyer's Introduction to Smart Contracts* (Scientia Nobilitat, 2014) 4; Reggie O'Shields, 'Smart Contracts: Legal Agreements for the Blockchain' (2017) 21 North Carolina Banking Institute 178.

43 Durovic and Janssen (n 8) 19.

44 Buchleitner and Rabl (n 15) 6; Söbbing (n 41) 46; Durovic and Janssen (n 8) 19.

45 Savelyev (n 19) 132.

46 Kevin Werbach and Nicolas Cornell, 'Contracts Ex Machina' (2017) 67 Duke Law Journal 314.

47 N Szabo (n 7)

48 Stuart D Levi and Alex B Lipton, 'An Introduction to Smart Contracts and their Potential and Inherent Limitations' (2018) Harvard Law School Forum on Corporate Governance <https://corpgov.law.harvard.edu/2018/05/26/an-introduction-to-smart-contracts-and-their-potential-and-inherent-limitations/> accessed on 5 April 2020.

49 Paech (n 40) 1077.

50 Buchleitner and Rabl (n 15) 7.

51 Scholz (n 10) 108.

use of computer code, with 'if-then' scenarios that require no human intervention, (ie, transacting parties leave the performance of the contract to the software). For example, if goods are not delivered by a scheduled date, a penalty of 10% of the contract price shall automatically be debited from the account of the seller and paid to the buyer.

The tricky area, however, is how will a computer code receive the input that goods have not been delivered since the real world exists outside the computer code. This input can be given to the computer code in two ways, (a) through an Oracle, ie, a website which will contain that input, like the tracking of a courier, or consignment bill; or (b) through the use of Blockchain or DLT which will automatically upload the ledgers as soon as delivery is made. It is pertinent to point out that Smart Contracts can work without Blockchain, something that is commonly not understood.[52]

(b) Blockchain or DLT: A distributed ledger is a decentralised, peer validated crypto-ledger, consisting of a network of nodes that provides a permanent chronological record of all prior changes.[53] Think of a public register in which everyone can access, and everyone can make an entry. However, once the entry is made, it cannot be changed without the consent of every single person. Therefore, there is no information asymmetry, no chances of fraud, no data being corrupted or manipulated, and there is no intervening party who controls the register. This, in essence, is Blockchain or DLT.

An excellent example of the use of this technology is the logistics business. Every shipment is connected to sensors and updates the entire record of delivery. The moment the goods are shipped, in transit, delivered, etc., each user on the Blockchain has access to that information.[54]

(i) *Permissioned Blockchain*: A permissioned Blockchain is where only a certain group of people with a 'key' can make changes.

(ii) *Permission less Blockchain*: A permission less Blockchain is where anyone can make changes, subject to the approval of all others.

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[52] Durovic and Janssen (n 8) 6.

[53] Sloane Brakeville and Bhargav Perepa, 'Blockchain Basics: Introduction to Distributed Ledgers' (*IBM Developer*, 18 March 2018) <https://developer.ibm.com/technologies/blockchain/tutorials/cl-blockchain-basics-intro-bluemix-trs/> accessed on 5 April 2020.

[54] Zheng (n 16) 476.

(c) Oracle: Blockchain or DLT is not connected to the internet.[55] Hence, it needs an Oracle, i.e. Oracles are trusted data feeds that interface smart contracts with the external world, thus allowing a smart contract to be more flexible (adjustable between coded parameters).[56] To go back to the airline example, if a flight is delayed or cancelled, the website of the airline will be updated with the information. The Oracle would extract the data from the website and feed it to the Smart Contract. Even currently, streaming services get suspended if monthly payments are not made. Without realising, consumers are already surrounded by Oracles and Smart Contracts. There are also platforms such as Town Crier[57] which scrape data from reliable websites and feed the data to the smart contracts.

Therefore, an Oracle, as a bridge to the outside world and the world of computer code, will supply this information to the variable in the contract. This will, in turn, trigger the obligation for compensation, etc. The problem, however, is what if the cancellation or delay is due to force majeure event,[58] or there is unreasonable delay.[59] All such cases where an interpretation is required, DLT or Smart Contracts find their application limited.

(d) Ricardian Contracts: According to its creator, Ian Grigg, a Ricardian Contract is '*a digital contract that defines the terms and conditions of an interaction, between two or more peers, that is cryptographically signed and verified. Importantly it is both human and machine readable and digitally signed*'.[60] To put it simply, a Ricardian Contract is a one that exists both in paper and code form. A person can read the contract

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[55] The reason is that for blockchains to function at each node the result of an equation must be the same. If, using our example of a stock price as a variable in an equation, the result at each node would be different, because they would be able to verify the price of the stock in real time, the blockchain would not be able to function.

[56] The trust worthiness of oracles and the related sources of information are crucial for the correct functioning of smart contracts. Since oracles are not part of the distributed ledger, they need to be designed and programmed in such a way to be sufficiently reliable.

[57] F Zhang and others, 'Town Crier: An Authenticated Data Feed for Smart Contracts' (Proceedings of the 2016 ACM SIGSAC Conference on Computer and Communications Security, 2016) 270.

[58] N Guggenheim, 'The Potential of Blockchain for the Conclusion of Contracts' in R Schulze, D Staudenmeyer and S Lohse (eds), *Contracts for the Supply of Digital Content: Regulatory Challenges and Gaps* (Nomos, 2017) 83, 95.

[59] Falco Kreis and Markus Kaulartz, 'Smart Contracts and Dispute Resolution – A Chance to Raise Efficiency?' in Matthias Scherer (ed), *ASA Bulletin* vol 37 (Association Suisse de l'Arbitrage; Kluwer Law International, 2019) 336, 339.

[60] Dmitri Koteshov, 'Smart vs Ricardian Contracts: What's the Difference?' (*EliNext*, 28 February 2018) <www.elinext.com/industries/financial/trends/smart-vs-ricardian-contracts/> accessed 5 April 2020.

just like he/she would ordinarily. However, the terms and conditions of the contract are self-executing based on 'if-then' conditions, like a Smart Contract. Therefore, a Ricardian Contract is a Smart Contract that exists in code as well as readable text.

It should be noted that not all Smart Contracts are Ricardian Contracts, and not all Ricardian Contracts are Smart Contracts. Smart Contracts are digital agreements which have already been agreed upon. Ricardian Contracts, on the other hand, record 'intentions' and 'actions' like an ordinary contract, whether it has been executed, or not.[61] There are also reverse engineering tools like E-rays, which convert an encoded contract into readable form.[62] Similarly, new languages such as IELE are now being developed to bridge the gap between machine code and human language.[63]

IV. PART III: USE OF SMART CONTRACTS AND BLOCKCHAIN

Anyone reading this paper, may, in fact, be convinced after reading the above, that 'this is too much tech'. *How an ordinary consumer who does not understand standard form contracts is, be reasonably be expected to understand all these technologies?* That is a fair question. However, as consumers seek more simplicity, transparency and accessibility at a lesser cost,[64] Smart Contracts and Blockchain may just be the solution to these concerns:

(a) Trust: Since Smart Contracts are self-executing, the problem of enforcement becomes minimal, if not zero. Therefore, there is no need for trust between the consumer and the seller before undertaking the transaction.[65] The trust is digitised through certainty of execution.[66]

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61 *Ibid*.

62 Zheng (n 16) 479.

63 C Lattner and V Adve, 'LLVM: A Compilation Framework for Lifelong Program Analysis & Transformation' (Proceedings of the International Symposium on Code Generation and Optimisation: Feedback-Directed and Runtime Optimisation, IEEE Computer Society, 2004) 75; M Coblenz, 'Obsidian: A Safer Blockchain Programming Language' (Proceedings of the 39th International Conference on Software Engineering Companion, ICSE-C '17, 2017) 97.

64 G Vannieuwenhuyse, 'Arbitration and New Technologies: Mutual Benefits' (2018) 35 Journal of International Arbitration 119, 120.

65 This has led some authors to the convinction that only 'the code is the law' and that law is obsolet for smart contracts *see* L. Lessig, *Codes and Other Laws of Cyberspace* (Basic Books, 1999) 24. However, this opinion did not gain sufficient support as it is obvious that (contract) law remains to play an important role for smart contracts. *See*, M Kaulartz and J Heckmann, 'Smart Contracts – Anwendung der Blockchain-Technologie' (2016) Computer Und Recht 618; Tjong Tjin Tai, 'Smart Contracts En Het Recht' (n 10) 179.

66 I-H Hsiao, 'Smart Contract on the Blockchain-Paradigm Shift for Contract Law' (2017) 14 US-China Law Review 685, 687.

If the consumer receives defective goods,or the shipment is delayed, conditions within the Smart Contract will be triggered, and the consumer will immediately receive refunds, or compensation. Consumers may even communicate directly with the Smart Contract, feeding it data about the delivery.[67] This reduces the chances of malicious behaviours like fraud and also, significantly reduces the turnaround time.[68]

For replacements, the consumer can always be requested to provide input on whether he/she wants a refund, or a replacement through the website, or app (the Oracle). Something like this is currently done by Amazon,[69] or the PayPal Dispute Resolution Process.[70] Therefore, the consumer is assured that his/her money is safe and that he/she has a sufficient remedy in case his/her rights are violated. By virtue of their tamper-proof, time-stamped and immutable character, smart contracts offer a viable option to create and strengthen trade relationships.[71]

(b) Self-Enforcement: The self-enforcement and lack of non-compliance ensure that warranties are not subject to interpretation, that consumers are not harassed by legal jargon of the burden of proof and procedural rules. This also lowers the overall costs of enforcement and litigation of consumer rights.[72]

There is no verification of rights. If the good purchased, for example, is a watch and the watch has stopped working, the DLT or Blockchain would have recorded that the watch is not working, and hence, the breach of warranty is *ex facie* proved. The only condition remaining to be fulfilled is the replacement of the watch, or the refund of the money. The instant remedy of violation of rights would also limit claims for compensation on account of harassment, mental agony, and unfair trade.[73]

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67 Tjong Tjin Tai, 'Force Majeure and Excuses in Smart Contracts' (2018) Tilburg Private Law Working Paper No. 10/2018, 4 <ssrn.com/abstract=3183637> accessed 10 April 2020.

68 Zheng (n 16) 476.

69 *See* <https://www.amazon.in/gp/help/customer/display.html?nodeId=201819090> accessed 10 April 2020.

70 The exact process is explained under the following link: <https://www.paypal.com/us/brc/article/customer-disputes-claims-chargebacks-bank-reversals> accessed 10 April 2020.

71 Oscar Borgogno, 'Usefulness and Dangers of Smart Contracts in Consumer Transactions' in Larry A DiMatteo, Michel Cannarsa and Cristina Poncibò (eds), *The Cambridge Handbook of Smart Contracts, Blockchain Technology and Digital Platforms* (Cambridge University Press 2019) 288.

72 Hsiao (n 66) 687.

73 Cohen and DiResta (n 18).

(c) Legal Certainty: One of the key advantages of Smart Contracts would be the reduction of costs of enforcement, but more important issues of cross border legal frameworks and rules of civil procedure will not arise as Smart Contract is independent of applicable law.[74] Consumer disputes, especially in cross border transactions, would substantially drop[75] as they would be detached, to a certain degree from the constraints of national laws.[76]

(d) Consent: By legal systems recognising consent through electronic means, and the UNCITRAL Model Law on E-Commerce along with UNIDROIT Principles sanctioning consent to a system of things in the case of IoT,[77] consumers would be more willing to undertake transactions if they can see the terms and conditions and actually consent to them along with the added advantage of self-enforcement. How such consumers will see the code is discussed in Part IV.

(e) Privacy: Since Blockchain or DLT does not require the identity of the party holding the asset but applies to the asset itself, there is no need for the consumer to provide his/her name, contact details, GPS location, etc. A physical address may be sufficient, without electronic access to his/her private data.[78]

(f) Confidentiality: Similarly, there is no need for linking bank accounts, or digital payments, or paying commissions. Crypto currency can directly be debited and credited without the need for any financial intermediary.

(g) Bargaining Power: The most significant advantage of Smart Contracts is that the consumers may be able to negotiate a specific contract.[79]

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[74] C Lim, TJ Saw and C Sargeant, 'Smart Contracts: Bridging the Gap Between Expectation and Reality' (2016) Oxford Business Law Blog <www.law.ox.ac.uk/business-law-blog/blog/2016/07/smartcontracts-bridging-gap-between-expectation-and-reality> accessed 10 April 2020.

[75] Shereen Khan, Olivia Tan Swee Leng and Nasreen Khan, 'Legal Challenges of Consumer Protection in Blockchain Transactions' (33rd IBIMA Conference Proceedings, Granada, 10 April 2019).

[76] Vannieuwenhuyse (n 64) 129.

[77] UNIDROIT Principles of International Commercial Contracts 2016, art 2.1.1; UNCITRAL Model Law on Electronic Commerce 1996, art 11.

[78] Zheng (n 16) 477.

[79] Kaulartz and Heckmann (n 65) 622; *When describing the actual process of formation of on-chain smart contracts, the concept can be well explained through the Ethereum's process. This process is as follows: The user first types out the contract in coding language, which the user has to download the Ethereum software and be part of its network. Then he will 'propose' a specific contract by making it available in the system. The contract will have its own identification number and 'function as an autonomous entity within the system, somewhat similar to how a website may operate on Internet'. Another user may then 'accept the*

> This can be achieved through options being given to the consumer through form filling links. Something akin to current consumer purchases online.[80] Such forms with minimal data input from consumers can be supported by statutory representations and warranties and hence, not required in the contract *per se*. This would minimise the size of the contract to the essentials which actually require agreement between the parties.

Moreover, if Ricardian Contracts are used (as opposed to just Smart Contracts), consumers will in effect draft the contracts and companies will then consent to the clauses, along with national statutory protections which will be pre-defined and accessible to both parties.

Since contracts would self-execute if money is debited from the account of the seller and is not refunded, it will be company filing the claim against the consumer and hence, the burden of proof would stand reversed. This may limit, if not end consumer harassment by big corporate with deep pockets to fund endless litigation compelling the innocent consumer to settle with the company out of frustration, lack of funds to continue fighting, especially for small claims.

V. PART IV: LEGAL HURDLES & VIABLE OPTIONS

While the scenario above raises hope of a pro-consumer regime, such a regime is far from reality. Many legal hurdles have to be crossed before such an implementation can become a reality. How Smart Contracts are implemented in the future will depend on the following, (a) the level of automation in the execution of the Smart Contracts;(b) the variance between actual agreed terms and the code of the Smart Contract; and (c) the custodial right and/or discretion in the Smart Contract and its execution.[81]

That is not to say that the current legal framework is entirely inapplicable to Smart Contracts and Blockchain. Most traditional contract law concepts can still be applied to Smart Contracts. Firstly, the traditional concept of contract

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proposed contract' by communicating to it. For instance, he communicates by making a payment. See, Durovic and Jannsen (n 8) 8; Tjong Tjin Tai, 'Force Majeure and Excuses in Smart Contracts' (n 67) 4.

[80] Once the broker in that case put the criteria into a software, the software would seek and conclude contracts on the broker's behalf with no further requirement of human action. The court found that a contract was completed, *R (Software Solutions Partners Ltd)* v *HM Customs & Excise* (2007) EWHC 971 [67].

[81] Bourque and Fung Ling Tsui (n 42) 4.

formation, i.e. offer and acceptance equally applies to Smart Contracts. Using Blockchain, the use of cryptographic private keys is proof of commitment and consent.[82] Even otherwise, acceptance can also be demonstrated by conduct. One party transfers control of a digital asset, say Bitcoin, then, it by conduct communicates an unequivocal acceptance.[83] Therefore, a meeting of the mind expressed in code and consent expressed by the use of keys does not violate the legal requirement of *consensus ad idem*,[84] as long as it can be demonstrated that both parties had read and understood the terms of the contract.[85] Moreover, the contract should also be readable by the adjudicating authority. This is where the Ricardian Contracts can be useful.

Secondly, though there are disagreements by academicians about there being a promise and consideration in Smart Contracts[86] since unilateral contracts have been enforced by courts for a long time, there is no reason, why the same should not be enforced today. Exchange of a digital asset on the Blockchain can thus be a gift.[87]

One author argues that by choosing to use Smart Contracts, parties opt for an alternative regulatory system and not traditional contract law. Therefore, parties do not have the intention to create legally binding obligations,[88] (ie, *vinculum juris*).[89] However, the end result remains the same, i.e., enforcement

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[82] G. Jaccard, 'Smart Contracts and the Role of Law' (2017) Jusletter IT 22; JJ Szczerbowski, 'Place of Smart Contracts in Civil Law: A Few Comments on Form and Interpretation' (Proceedings of the 12th Annual Scientific Conference, Czech Republic, 9 November 2017) <ssrn.com/sol3/papers.cfm?abstract_id=3095933> accessed 10 April 2020; Werbach and Cornell (n 46) 368. Since one party must post his (on-chain smart) 'contract' on the blockchain on platforms (for example Ethereum) and the other party accepted by the cryptographic key, such communication (the posting of the on-chain smart 'contract' on the blockchain) will likely be held as to be an offer.

[83] P Catchlove, 'Smart Contracts: A New Era of Contract Use' (2017) SSRN <ssrn.com/abstract=3090226> accessed 11 April 2020.

[84] *However, problems arise if at least one of the contracting parties does not understand the computer code but nevertheless conclude the smart contract. In this scenario the party who did not understand the computer code could try to advocate in hindsight for the existence of a 'mistake' and to rewind the smart contract. In German legal scholarship this case has been discussed but has always been rejected so far as an 'Inhaltsirrtum' according to § 119(1) BGB. It is said that in principle it is the risk of the parties to conclude a contract not knowing the underlying computer code. See*, M Jünemann and A Kast, 'Rechtsfragen beim Einsatz der Blockchain' (2017) Kreditwesen 531, 533; Kaulartz and Heckmann (n 65) 622.

[85] Maneck Mulla, 'Validity of Electronic Contracts in India' (*Mondaq*, 4 May 2018) <https://www.mondaq.com/india/contracts-and-commercial-law/699022/validity-of-electronic-contracts-in-india> accessed on 12 April 2020.

[86] Werbach and Cornell (n 46) 341.

[87] Werbach and Cornell (n 46) 370.

[88] Savelyev (n 19)125.

[89] JW Salmond, *Salmond on Jurisprudence* (PJ Fitzgerald ed, 12th edn, Sweet and Maxwell 1966).

of the bargain between the parties.[90] Moreover, since 'click-wrap' and 'shrink-wrap' contracts are permissible, Ricardian Contracts' acknowledgement that the Smart Contract is a valid legal agreement should also be legal.[91] In fact, mainstream law firms are still advising their clients that for the sake of certainty, a legal 'wrapper' ought to be created.[92] A similar 'wrapper' of 'I Agree' can be created for Smart Contracts and Ricardian Contracts.

Unfortunately, that is as far as traditional notions can be applied to Smart Contracts and Blockchain. The technology does not address issues of capacity and free consent. Though restitution remains a remedy, the contract cannot per se be void as it will remain on the Blockchain[93] and most likely will have self-executed.

Similarly, there exist issues of suspension and termination of the contract. Smart Contracts cannot be stopped voluntarily by parties, not by a central entity, court or any other supervisor,[94] even when there is a change of circumstances, or intent of the parties.[95] Therefore, even if a contract were to hold the contract illegal, it will be performed nonetheless.[96] However, there may be a solution. An Oracle can provide for court decisions, or arbitration awards to be communicated to the contract.[97]

Alternatively, a 'Dispute Resolution Library' may be provided in the Smart Contract where the arbitrators can not only instruct the Smart Contract but also amend it.[98] Furthermore, the keys can be crucial. While two parties would have the key, the third can be with the regulator, court, or arbitrator. Hence, if two parties use their keys, the contract can be modified.[99]

Another issue with Smart Contracts is that parties may not be able to anticipate all scenarios and prepare the code in advance. Though, in theory, all such questions can be left for Oracle, how many such Oracles should a contract

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90 Savelyev (n 19) 125.
91 Durovic and Janssen (n 8) 16.
92 Clifford Chance, 'Are Smart Contracts Contracts?' (2017) *Talking Tech Clifford Chance* <https://talkingtech.cliffordchance.com/content/micro-cctech/en/emerging-technologies/smartcontracts/are-smart-contractscontracts/_jcr_content/text/parsysthumb/download/file.res/Are%20smart%20contracts%20contracts.pf> accessed 4 April 2020.
93 J Schrey and T Thalhofer, 'Rechtliche Aspekte Der Blockchain' [2017] Neue Juristische Wochenschrift 1431, 1436.
94 Raskin (n 41) 309.
95 Savelyev (n 19) 129.
96 Werbach and Cornell (n 46) 373.
97 Durovic and Janssen (n 8) 20.
98 Kreis and Kaulartz (n 59) 346.
99 Werbach and Cornell (n 46) 345.

contain, will remain uncertain. A possible solution to the problem may be that the parties by law will be required to use their keys and terminate the contract. On such termination, the self-execution will stop, and parties will have to resort to traditional litigation and enforcement mechanisms.

The other hurdle that Smart Contract faces is the current statutory protection granted to consumers in EU and UK Law where consumers are permitted to withdraw from the contract within a specified period, or return a good within seven days without assigning any reason.[100]

Similarly, how do regulators check for unfair trade terms? Also, there are requirements to draft consumer contracts in plain readable language under UNCTD, England.[101] These questions will require creative solutions. One such solution, as mentioned above, is the creation of certification bodies along with the statutory protections.

VI. CONCLUSION

The preceding paragraphs reveal the potential for the use and implementation of Smart Contracts and Blockchain. The biggest hurdle appears to be drafting such complex contracts and the consumer understanding what she is signing up for. In a world where consumers already struggle with legal jargon and lengthy contracts, the use of Smart Contracts and Blockchain may actually be the panacea.

If Ricardian Contracts are formed with minimum terms and conditions, driven by Blockchain technology, consumers may be able to key in such requirements in a form. Such form can then be used to define the terms and conditions in the smart contract, while it continues to exist in a readable form. Hence, it fulfils traditional requirements of contract law. Such forms can be supplemented with exhaustive statutory protections which can be 'deemed' to be included in the Smart Contract. For rights arising out of such 'deeming provisions', the consumer can continue pursuing traditional litigation remedies. However, to the extent, the transaction can be 'if-then' conditions, the enforcement may be automated. Though this solution may appear to be 'piece-meal,' it is nonetheless, a step forward in levelling the lop-sided playing field of consumer contracts and rights.

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[100] Durovic and Janssen (n 8) 25.

[101] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ No. L95/29, art 5.

Similarly, Oracles can be a viable bridge between code and the real world. Creative use of such Oracles may fill gaps in the contract, especially when the parties are faced with questions of interpretation such as force majeure, good faith, etc. Alternatively, the use of cryptographic keys may permit suspension, termination, modification and regulation of these contracts.[102]

The prime advantage of self-enforcement is that it will lead to a role reversal as the consumer will be provided instant redressal and then a big company will determine whether it is worth pursuing a claim against a small consumer for restitution. While the solutions proposed in this paper are not foolproof, they nonetheless open possible frontiers in the empowering a consumer who has hitherto been receiving many statutory protections, but little effective remedy.

[102] Kreis and Kaulartz (n 59) 342.

CENTRAL CONSUMER PROTECTION AUTHORITY–A CRITICAL ANALYSIS

— *Vagish K Singh*[*] *and Ashish K Singh*[**]

Abstract: *The Consumer Protection Act, 2019 paved the way for a familiar yet new regime of consumer governance in India by creating the Central consumer Protection Authority. As opposed to the Consumer Councils, the CCPA's mandate of regulation has been empowered with a heavy arsenal of investigation, inquiry and injunctive actions. The powers of the CCPA are overarching and have the potential of bridging the gaps left by statutory restrictions and narrow interpretations adopted by the Consumer Fora and Commissions under the previous regime.*

This paper would examine the potential of the CCPA's legislative mandate and discuss the interaction of these powers with those of the quasi-judicial Consumer Commissions. The paper would further attempt to suggest prudent manners of exercise of powers by the CCPA by examining the experience of similar foreign regulators such as the Federal Trade Commission, United States of America.

Keywords: Central Consumer Protection Authority, Consumer Protection Act 2019, Consumer Protection Councils, etc.

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I. INTRODUCTION

The Consumer Protection Act 2019 (No.35 of 2019) received the assent of the President on the 9th of August, 2019 thereby paving way for a familiar yet new regime of consumer governance in India. While engulfing several vital areas of consumer rights such as e-commerce, online intermediaries, misleading advertisements and product liability within its domain, the Act also mandated creation of a Central Consumer Protection Authority (hereinafter 'CCPA').

Under Section 10 of the Act, 2019 the CCPA or the Central Authority has a regulatory mandate as opposed to the advisory domain of the Consumer Protection Councils under Chapter II of the Act. However, even on a broad reading of Chapter III of the Act, it can be unequivocally concluded that the CCPA's mandate of regulation has been empowered with a heavy arsenal of investigation, inquiry and injunctive actions. The powers of the CCPA therefore are overarching and have the potential of bridging the gaps left by statutory restrictions and narrow interpretations adopted by the Consumer Fora and Commissions under the previous regime.

The CCPA's interaction with the array of Consumer Commissions however is a subject matter of speculation and discussion. This paper would examine the potential of the CCPA's legislative mandate *vis-a-vis* powers of the Consumer Commissions and further attempt to suggest prudent manners of exercise of its powers by examining the experience of similar foreign regulators such as the Federal Trade Commission, United States of America.

II. CENTRAL CONSUMER PROTECTION AUTHORITY-POWERS & JURISDICTION

The Act of 2019 inter alia provides for three different statutory bodies namely:

1. Consumer Protection Councils
2. Central Consumer Protection Authority
3. Consumer Disputes Redressal Commissions (ie the District Commission, State Commission and National Commission).

The jurisdiction and duties of each of these bodies prima facie appear to be distinct and theoretically operate in different contexts. The Consumer Protection Councils similar to the ones that existed in the Act, 1986; are sought to be purely advisory, with a hierarchy of the district, state and national

council and presided over by ex-officio members of the executive or ministers in charge. The councils have no power of enforcement, adjudication or investigation and it would be prudent to view them as a primary policy making body created by the statute. The Disputes Redressal Commissions under the new act are a minor reimagining of the *fora* that preceded it under the Act, 1986 with some substantial changes in clauses pertaining to cause of action and jurisdiction. The commissions however are still quasi judicial bodies with powers to adjudicate upon consumer disputes and pass enforceable awards.[1]

The CCPA, unlike the Councils or the Commissions is neither a purely regulatory, advisory nor policy making body, nor is entirely adjudicatory & quasi judicial in nature. The structure of the CCPA is also mostly central and besides providing for creation of regional offices, the Act does not mandate creation of any State or District Authorities.[2] The CCPA would comprise of the Chief Commissioner, Commissioners and team of subject matter experts and professionals[3] besides an investigation wing headed by a Director - General.[4]

A. Advisory & Regulatory

The CCPA has been given a general mandate to regulate matters related to violation of consumer rights, unfair trade practices and misleading advertisements.[5] It is vital to note that this right to regulate appears to be conditioned by the plurality of the terms used in act i.e. as opposed to an inter se dispute between a consumer & a service provider/manufacturer/seller; the regulatory right of the CCPA should only be called into action when the rights of consumers in general or as a class are being or could be adversely affected. Under Section 18 of the Act it has been made unambiguously clear that the CCPA has the power to protect, promote and enforce rights of 'consumers as a class'.

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1 Consumer Protection Act 2019 (hereinafter 'CPA 2019'), ch IV.

2 CPA 2019, s 10. The Act, 2019 creates one Central Authority consisting of a Chief Commissioner and other commissioners. The Authority would be located in New Delhi and would have regional and other offices as may be required.

3 CPA 2019, s 13(3). Though the qualifications of the Chief Commissioner or other Commissioners are not prescribed by the Statute and would be laid down by the Central Government by appropriate rules, the Act, 2019 specifically provides for engagement of subject matter experts who have special knowledge and experience in the areas of consumer rights and welfare, consumer policy, law, medicine, food safety, health, engineering, product safety, commerce, economics, public affairs or administration.

4 CPA 2019, s 15. The investigation wing has been exclusively created for the purpose of conducting inquiry or investigation under the Act. Headed by the Director-General, the investigation wing would comprise of Directors, Joint Directors, Deputy Directors and Assistant Directors who have experience in investigations. Qualifications are to be provided by way of separate rules.

5 CPA 2019, s 10(1).

The CCPA also has the power to review safeguards provided under laws other than the Act, 2019 and recommend remedial measures for such factors which inhibit enjoyment of consumer rights.[6] It may also identify best international practices on consumer rights and recommend adoption of international covenants.[7] The CCPA can undertake and promote research in the field of consumer rights and also encourage NGOs and other consumer protection agencies to work in cooperation with each other.[8] Besides, its role as a statutory think tank, the CCPA in its advisory capacity can assist the central and state governments on measures to ensure consumer welfare and best practices.

One of the primary regulatory powers of the CCPA is to issue necessary guidelines to prevent unfair trade practices and protect consumer interests. The CCPA by combining experiences of various stakeholders, international experiences and expertise of its own subject matter experts, can effectively lay down best practices, model rules & regulations to regulate the otherwise ambiguous and unfamiliar domain of unfair trade practices.[9]

These guidelines would also act as guiding principles for Courts, Quasi-Judicial Bodies such as the Consumer Commissions, as well as concerned departments of various State Governments. There has always been criticism of the rule/policy making of the Central Government under the Act, 1986 since the Ministry dealing with Consumer Affairs is not a standalone ministry and is often plagued with delays due to other urgent portfolio.

The advisory role of the CCPA as illustrated under Section 18 of the Act, 2019 does attract attention towards the similarities of these objectives with those of the Consumer Protection Councils under the Act, 1986 as well as the present act. Under the Act, 1986 the Councils were entrusted with the task of promoting and protecting consumer rights as enunciated therein. Examination of those rights such as, right to be protected against marketing of hazardous goods, unfair trade practices, competitive pricing etc does suggest several similarities with the advisory role of the CCPA.[10]

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6 CPA 2019, s 18(2)(d).

7 CPA 2019, s 18(2)(e).

8 CPA 2019, s 18(2)(h).

9 CUTS International - Centre for Competition, Investment & Economic Regulation and Deutsche Gesellschaft fur Internationale Zusammenarbeit (GIZ), "Unfair Trade Practices and Institutional Challenges in India - An Analysis" (Research Report, 2013) <https://cuts-ccier.org/pdf/Unfair_Trade_Practices_and_Institutional_Challenges_in_India-An_Analysis.pdf> accessed 20 April 2020.

10 Consumer Protection Act 1986, ch II. The Consumer Protection Councils under the earlier enactment were headed by ex-officio Chairman - the Minister In-charge of Consumer affairs of the respective Government. There were separate councils at the District, State and National Level. The Councils were primarily deliberative and recommendatory bodies.

However what the Council lacked in enforceability and punitive action has been compensated with investigative and punitive powers of the CCPA. It can however be a subject matter of discussion whether creation of a separate statutory body with its own requirement of physical infrastructure, manpower, internal regulations etc would lead to further complications. It can be argued that the current hierarchy of Consumer Protection Councils could have been empowered with an investigative wing along with the entire remainder of punitive powers as is in the present act.

B. Inquiry & Investigation

It would not be out of place to state that the most potent and overarching power of the CCPA has been granted in the form of its powers to conduct inquiries and carry out investigations. The Act, 2019 provides for creation of a dedicated Investigation Wing comprising a Director General, Additional Director General and such other directors and additional directors. This hierarchy of enforcement officers appears to have its own pyramidal structure for reporting and conducting its duties under the act.[11]

Under the scheme of the Act, 2019 inquiry and investigation can be made in the following cases:

1. Violation of consumer rights,
2. Unfair trade practices,
3. False or Misleading advertisements.

Upon careful examination of Section 17 and 19 of the Act, it is clear that right to conduct inquiry and investigation is conditioned upon 'prejudice to the public interest or to the interests of consumers as a class'. Whether imposition of this condition would restrict the jurisdiction of the CCPA to only cases which involve multiplicity of claims or matters affecting interests of a large number of consumers is a subject matter of interpretation and judicial review. However it would be prudent to observe that the repetitive usage of phrases such as 'public interest' or 'consumers as a class' cannot be assumed to be without reason.

It also ensures by implication that *inter se* disputes between a consumer and service provider/manufacturer/seller which do not have ramifications on public interest or consumers as a class; would be the subject matter of adjudication before the Consumer Commissions. This is not to mean that merely because

[11] CPA 2019, s 15.

a dispute is inter se between a consumer and service provider/manufacturer/seller; it would automatically lose its significance on public interest or consumers as a class. The decision therefore whether public interest or consumer rights as a class are affected, should be upon the wisdom of the CCPA. It is needless to state that such a decision of the CCPA would be subject matter of judicial review in case it violates principles of administrative or constitutional law.

The procedure for conducting inquiry or investigation can be divided into the following steps:

1. Preliminary inquiry
2. Investigation by the Investigation Wing, District Collector or a Statutory Regulator.

A preliminary inquiry can be initiated by the CCPA either *suo motu*(ie on its own motion), on a complaint received or on the directions of the Central Government.[12] The complaint jurisdiction of the CCPA can be invoked by way of a written complaint under Section 17 of the Act addressed directly to the Commissioner of the Regional Office or the CCPA directly. The Section also provides a complaint to be addressed to the district collector and in case such a complaint is made, the district collector may after appropriate inquiry submit his report to the CCPA or Regional Commissioner. It is unclear whether upon receipt of a 'positive report' i.e. a report alleging violation of consumer rights etc; the CCPA would be bound by the inquiry and conclusion of the district collector.

More so because under Section 19, after conduct of the preliminary inquiry the CCPA is mandated by the use of the phrase 'shall cause investigation' to direct an investigation be conducted by the DG or the District Collector. Therefore, if a consumer or group of consumers forward a complaint to the District Collector who thereupon conducts a inquiry or investigation under Section 16 of the Act, 2019; the District Collector's report forwarded to the CCPA would possibly lead to multiple investigations i.e. first by the district collector, secondly by the CCPA and thirdly by either the Investigation Wing or the District Collector himself.

It would therefore be proper to harmoniously enforce these provisions of law and upon receipt of a complaint; the district collector must not of his own volition conduct inquiry or investigation without prior intimation to the CCPA. Only after the report is forwarded and the CCPA is satisfied of existence of a

[12] CPA 2019, s 17. Definition of 'Complaint' under s 2(6) would also be applicable to this provision and hence a complaint would mean a written allegation by a complainant [s 2(5)].

prima facie case under Section 19 of the Act, the subsequent procedures would be adopted i.e. investigation by the Investigation Wing or the District Collector himself.

The manner of conduct of preliminary inquiry has not been specifically provided by the Act and the only guidance available is use of the phrase 'existence of a prima facie case'. The satisfaction of the CCPA therefore must be guided by general principles for ascertaining existence of a prima facie case.[13] The CCPA shall therefore upon receipt of a complaint examine whether on the face of the record and available documents the allegations made in the complaint are fit for investigation.

The CCPA may before recording its satisfaction give an opportunity of being heard to the erring party; however such option should only be exercised where in the wisdom of the CCPA there exists a lacunae capable of being ascertained in a prima facie inquiry as to the truth of the allegation and not in the manner of a detailed fact finding exercise at the preliminary stage. This was not the intention of the legislature, since the investigation is to be carried out by the Investigation Wing or District Collector subsequent to a preliminary inquiry; while strictly adhering to principles of natural justice and provisions of the Code of Criminal Procedure wherever applicable.

As discussed in the foregoing paragraphs the CCPA after concluding the preliminary inquiry and upon recording satisfaction of existence of a prima facie case, can direct either the Investigation Wing, District Collector or any statutory regulator for conduct of an investigation. The Act does not provide a definition of the term 'investigation', however borrowing interpretations of the CrPC.[14] it can be stated that investigation within the meaning of the Act, 2019 would imply collection of evidence by the investigating authority i.e. the Investigation Wing or District Collector. The Act however would not be able to guide investigation carried out by a statutory regulator if a reference is made to such regulator; since such investigation would be governed by applicable Act & Rules.

The Act, 2019 does provide some guidance as to the manner in which investigation is to be carried out. The investigating agency is empowered to direct production of any document or record in possession of a person. It is however pertinent to note that Section 19(3) of the act only empowers the investigating agency to direct production of documents or record in possession of a person 'referred to in sub section (1)'. Subsection (1) while using the word 'person'

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[13] *Nirmala J Jhala* v *State of Gujarat*, (2013) 4 SCC 301.

[14] Code of Criminal Procedure 1973, s 2(h).

refers to the person who has allegedly violated consumer rights, or carried out unfair trade practices or misleading advertisements.

The investigating agency therefore has authority for production of documents in custody of only such a person or persons. Needless to state the term person as defined in Section 2(31) of the Act would mean an individual, firm, HUF, Society, AoP, Company etc; however even the overarching definition of person would not overcome the limitation artificially inserted by Section 19(3). The custody of documents and records in India has been a matter of concern due to the lack of punitive provisions for lack of maintenance of such records; unlike stricter rules in jurisdictions such as the USA.[15] There is a potential of abuse of such a provision leading to litigation due to the complex corporate structures of several companies. It would have been prudent to provide the investigating agency with an overarching power of production of documents Similar to powers of the civil court for production of documents and summoning of witnesses.[16]

The investigative powers of the CCPA are most akin to powers granted to statutory bodies such as the National Women's Rights Commission or the National Commission for protection of Child Rights. The National Women's Rights Commission Act, 2005 provides the commission powers to conduct investigation and inquiry upon receipt of complaint or on *suo motu* cognizance. The act also empowers the commission with the powers of the civil court specifically for production of documents, summoning of witnesses, requisitioning public documents and receiving evidence on affidavits.[17] Similar powers have been granted to the National Commission for protection of Child Rights under its parent enactment.[18]

It is therefore unclear why the powers of the CCPA have been restricted in the manner aforementioned. Collection of evidence whether by way of production of documents by interested persons or by requisitioning of government records can perhaps be one of the most vital activities to be carried out by a fact finding body such as the CCPA. Whether the introduction of such a power by way of subordinate legislation would be constitutional or not can become a subject matter of litigation since the parent Act does not grant any such power to the CCPA. However without such powers, the CCPA is bound to struggle in the efficient recording of evidence.

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[15] Bradley J Schaufenbuel, *E-Discovery and the Federal Rules of Civil Procedure* (IT Governance Publishing, 2007) 10.

[16] Civil Procedure Code 1908, Or. XI, XIII and XVI.

[17] National Commission for Women Act 1990, s 10(4).

[18] National Commission for Protection of Child Rights Act 2005, s 14.

The collection of evidence as aforementioned is statutorily mandated to be accompanied with grant of an opportunity of being heard to the person against whom allegations have been made. The opportunity must not be a mere formality or illusion and the CCPA should follow strict rules while granting an opportunity of hearing. The statute however does not mandate grant of opportunity of cross examination of witnesses or examination of all relevant documents on the basis of which either show cause has been issued or investigation is being carried out. Inclusion of these rights would defeat the purpose of the investigation and make it slow & cumbersome.

On the other hand, since the investigation process is not followed by a trial or a formal adjudication, one would argue that lack of grant of opportunity of cross examination would vitiate the entire process and take away the right of the accused/erring person to confront the evidence. Parity can be drawn with similar investigative and quasi judicial proceedings conducted by tax authorities where lack of grant of opportunity of cross examination has been held to be fatal to the entire assessment process.[19] Since the investigation process of the CCPA falls in an ambiguous category of proceedings, the rules of procedure governing the investigation need to find a balance between the sanctity of the investigative process and the rights of the erring person.

C. Search & Seizure

To supplement the powers of investigation granted to the CCPA and the investigation wing, the Act, 2019 grants powers of search and seizure to the Director General, authorized subordinate officers or District Collector as the case may be.[20] The parameter for exercising the power of search and seizure under the act, is the existence of a 'reason to believe' of violation of consumer rights, unfair trade practices or misleading advertisements. The term reason to believe has been interpreted by Hon'ble Courts of law in several *para materia* legislations.[21]

It is an established principle of law that before grant of authorization of a search and seizure, reason to believe must be established based upon the available facts and recorded by the relevant authority.[22] Such reason to believe should be based upon reasonable facts and cannot be fanciful or arbitrary.[23]This thereby means that powers of search and seizure should not be exercised

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[19] *CCE* v *Milton Polyplas (I) (P) Ltd.*, 2019 SCC OnLine Bom 545 : (2019) 3 Bom CR 459.

[20] CPA 2019, s 22.

[21] Income Tax Act 1995, Central Excise Act 1944, Central Goods and Services Tax Act 2017.

[22] *Union of India* v *Agarwal Iron Industries*, (2014) 15 SCC 215.

[23] *Tata Chemicals Ltd.* v *Commr. of Customs*, (2015) 11 SCC 628. The Hon'ble Supreme Court held that, "Statutes often use expressions such as 'deems it necessary', 'reason to believe', etc.

by the CCPA in a routine manner without application of mind. The power of search and seizure are further conditioned by application of the provisions related to search and seizure under the Code of Criminal Procedure 1973.[24]

It is pertinent to note that though the CCPA has not been granted powers of a civil court to ensure production of relevant documents as aforementioned; under Section 22(1)(c) a provision has been made whereby the CCPA can require any person to produce any record, document or article. The power of production of relevant documents therefore has been granted to the CCPA only after recording its satisfaction for reason to believe and issuing appropriate warrant as per the CrPC; which is admittedly a higher threshold.

D. Injunction & Penalty

The powers of inquiry granted to the NCW or NCPCR appear prima facie to be similar to those granted to the CCPA. However substantial differentiation between these authorities arises from the consequences of such inquiries or investigation. Whereas the NCW or NCPCR are regulatory authorities with powers of merely recommending criminal action or requesting injunctive orders from the State[25]; the CCPA has been legislatively endowed to issue enforceable orders. Under the Act, 2019 the CCPA has the power to issue the following orders:

(a) Recalling of goods or withdrawal of services;

(b) Reimbursement to purchasers;

(c) Discontinuation of unfair practices;

(d) Discontinuation of advertisements;

(e) Penalty for misleading advertisements;

(f) Prohibitory order against endorser of misleading advertisements;

(g) Penalty on publisher of misleading advertisements.

Noncompliance of the aforementioned orders would warrant criminal action (ie imprisonment and/or fine).[26] In addition to the power to issue the aforementioned orders, the Act, 2019 also empowers the CCPA to be the sole authorized

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Suffice it to say that these expressions have been held not to mean the subjective satisfaction of the officer concerned. Such power given to the officer concerned is not an arbitrary power and has to be exercise in accordance with the restraints imposed by law".

[24] Code of Criminal Procedure 1973, ch VII.

[25] Swagata Raja and Archana Mehendale, 'Children's Commissions - A Case of State Apathy' (2014) 49(3) Economic & Political Weekly 17.

[26] CPA 2019, s 88.

complainant for filing criminal complaints against manufacturers or service providers who cause publication of a false or misleading advertisement.[27] This provision is very strongly worded and mandates punishment with imprisonment and fine.

III. CCPA & CONSUMER COMMISSIONS - AN OVERLAP?

Besides the creation of the CCPA, the Act, 2019 also refurbishes the adjudicatory bodies under the Act, 1986. The hierarchy of District Forum, State Commission and National Commission has been given a second birth by creation of the District, State and National Consumer Disputes Redressal Commissions under the new enactment. Besides the superficial change in nomenclature, there has been an increase in pecuniary limits of each commission as well as introduction of more convenient rules of territorial jurisdiction. While beyond the scope of this paper, it is apt to state that most of these are welcome changes in favor of the consumer.

Upon examination of the regulatory, investigative and injunctive powers of the CCPA under the Act, 2019 as aforementioned, it is inevitable to make a comparison of these powers with the adjudicatory powers of the Consumer Commissions. The standing committee on Food, Consumer affairs and public distribution in its Ninth Report on the Consumer Protection Bill, 2015 expressed serious concerns of overlaps between the judicial powers of the consumer commissions and quasi-judicial powers if granted to the CCPA. This concern was primarily fueled by the objections received from stakeholders from the industrial sector.[28]

On the one hand it is naive to assume that the two are exclusive to each other and would not overlap, but on the other hand it cannot be stated that the overlap would be intrusive in nature. The jurisdiction of the consumer commissions, whether in the case of deficiency or unfair trade practices is invoked by a consumer or class of consumers upon filing of a complaint.[29] The underlying factor therefore is the existence of a subsisting cause of action and a locus standing to file the complaint. The rules governing who can file a complaint are therefore strictly regulated by the act and the Consumer Commissions being a creature of statute cannot relax such rules.

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[27] CPA 2019, s 92.

[28] Standing Committee on Food, Consumer Affairs and Public Distribution - Sixteenth Lok Sabha, Ministry of Consumer Affairs, Food and Public Distribution (Department of Consumer Affairs), *The Consumer Protection Bill, 2015* (9th Report, April 2016).

[29] CPA 2019, s 35.

Unlike a public interest litigation where there is no requirement for *locus standi* in the strict sense, the consumer commissions can only entertain a complaint disclosing a cause of action which has violated the right of a consumer. Such a requirement however is not present in a complaint envisaged to the CCPA. The only requirement under the Act, 2019 for filing of a complaint is the existence of facts and evidence which prima facie suggests violation of rights of consumers or misleading advertisements affecting consumers as a class.

Assuming a complaint affecting a large number of consumers is admitted by the Consumer Commissions, the next step in the adjudicatory process would be adducing of evidence in support of such a claim. Such evidence would primarily have to be produced by the Complainants themselves. However there is an inherent power asymmetry between the parties. The corporate entity against whom the complaint has been filed is a professional organization with more resources to defend the complaint. It is seen from the past experience of consumer litigation in India that dispute resolution *fora* heavily rely on the submissions made by the parties to decide the complaint.

In the present scenario, with complex products, designs and corporate policies, it becomes extremely difficult to collect and produce data related to consumer litigation before commissions. Discovery and production of relevant documents and evidence therefore becomes extremely cumbersome and time consuming. This situation worsens further when the documents are claimed to be privileged, confidential or trade secrets by the entity defending the complaint.

The consumer commissions therefore lack the powers of inquiry and investigation which the CCPA has been given under the Act, 2019. The dedicated investigation wing headed by a Director General is required to be a highly specialized body whose function is to work with the help of subject matter experts (industry wise) in order to investigate complaints. From the experience of FTC, in imposing sanctions inter alia on Cambridge Analytica[30] and Facebook,[31] it is

[30] *Cambridge Analytica LLC, a Corporation* (Federal Trade Commission USA, 25 November 2019). Allegations of collection of Facebook data from users of Facebook application and that users were falsely told the app would not collect users names or other identifiable information. The Federal Trade Commission, USA prohibited such misrepresentation and directed adherence to EU-US privacy shield frameworks. It further directed deletion of data in violation of such standards.

[31] *United States of America* v *Facebook, Inc., a Corporation* (United States District Court for the District of Columbia, 24 July 2019). In 2012 the Federal Trade Commission had charged Facebook with eight privacy related violations. Facebook agreed to settle that case and among other things agreed to implement a privacy program. However on discovery of violations of the order by Facebook, enforcement action was initiated by the FTC which resulted in

clear that subject matter expertise is critical in the ever-changing technology oriented world. Without the powers of the CCPA, it is not possible (or highly unlikely) that a consumer body or a class of consumers on their own can collect information to successfully make and sustain a complaint before the consumer commissions.

Most day to day products and services that a common consumer interacts with are low cost items (ie the compensation paid by a consumer is a meager amount). The maximum number of issues however arises out of such low cost products such as soaps, diet supplements, food delivery services etc. Whether it is the misleading advertising about these products/services or the quality of the product itself, the majority of such consumer grievances are not taken up by the consumer due to the low cost paid. The total time, money and energy involved in approaching a complex set of dispute resolution commissions is therefore too great a cost for a common consumer.

It is often difficult for most consumers to retain evidence such as purchase invoices or wrappers with regard to these low cost - high volume goods. The experience in consumer commissions is further unsatisfactory since the principle being followed by most consumer *fora* is calculation of injury mostly on the basis of irrelevant factors including cost of the product/service. A major portion of consumer grievances thus go unaddressed due to the quasi judicial and formal nature of the Consumer Commissions. The CCPA however can play a major role in dealing with such grievances which affect a large number of consumers even though the initial compensation paid for an individual product/service is much lower.

The power to conduct a preliminary inquiry upon complaint can be put to good use by prima facie establishing whether a low cost good has overarching ramifications on the entire market and on a large number of consumers. If such a prima facie case is found, a full-fledged investigation by the CCPA can be initiated. These measures would effectively control the menace of false and misleading advertising for low cost goods as well as large scale quality issues affecting the common public.

It can thus be argued that it is entirely possible for the Consumer Commissions and CCPA to co-exist and complement each other. The CCPA has also been granted the power to file appropriate complaints before the Consumer Commissions or act as a necessary party or intervener wherever it deems fit in the interest of the public at large. It is clear from the experience of

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imposition of one of the largest penalties in the history of consumer governance. Facebook agreed to make payment of $5 billion dollars for its violations.

the erstwhile consumer *fora* that even while following the principle of *staredecisis*, each consumer forum appears to have operated in its own silo. This has a profound effect when issues with regard to a product or service arise across the country owing to a deficiency which affects the public at large.

In such a circumstance there is no singularity of investigation or evidence and each case proceeds at its own pace and subject to the amount of information available to each complainant. This lack of any organic relation between similar disputes in various consumer *fora* is further aggravated by the methods of calculation of compensation which appear to be very personal and specific to each consumer; often leading to meager compensation amounts. The erring respondent therefore is never penalized or corrected in any manner which has a long lasting effect on the entire marketplace.

It is also pertinent to note that a Consumer Commission's power of granting of a relief is primarily limited to inter se the parties to the dispute. The consumer commission therefore while granting declaratory relief *in rem* is perhaps stretching its own jurisdiction to better deter the erring respondent from continuing an activity. The CCPA actively fills these lacunae in the earlier law as well as the present enactment. The investigation process is now streamlined and unified and the consequences can be overarching with the consequence of governing the whole market.

IV. FEDERAL TRADE COMMISSION - LESSONS TO BE LEARNT

The powers of the CCPA as discussed in the foregoing paragraphs seem to draw inspiration from the Federal Trade Commission (hereinafter 'FTC') of the United States of America. The FTC is a creature of the Federal Trade Commission Act, 1914 which came into force on September 26, 1914.[32] The FTC replaced the already existing Bureau of Corporations and took over all pending investigations of the Bureau in 1914.[33] The FTC however was originally created as a body to primarily deal with unfair methods of competition. The Act, 1914 as it stood originally provided the FTC the right to conduct inquiry and issue cease and desist orders to persons or corporations found indulged in unfair methods of competition.[34] However the FTC has since evolved into a behemoth with three distinct bureaus i.e. the Bureau of Competition, Bureau of Consumer Protection and the Bureau of Economics.

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[32] Federal Trade Commission Act 1914 (Ch 311 of the 63rd Congress, 38 Stat. 717, 26 September 1914).

[33] Federal Trade Commission Act 1914, s 3.

[34] 'The Federal Trade Commission Act of 1938' (1939) 39(2) Columbia Law Review 259.

The Bureau of Consumer Protection of the FTC shares several key features with the CCPA under the Indian Consumer Protection Act, 2019. The Bureau of Consumer Protection enforces laws related to Consumer Protection in the USA such as the Consumer Protection Act, 2005, Children's Online Privacy Protection Act, Consumer Leasing Act, Consumer Review Fairness Act among many others. The Bureau also enforces specific laws related to unfair trade practices and misleading advertisements such as the Fair Packaging and Labeling Act, Federal Cigarette Labeling and advertising act, Fur Products Labeling Act, Packers and Stockyards Act, Petroleum Marketing Practices Act among others.

The FTC and Bureau of Consumer Protection enforce the aforementioned mandate by separate divisions dedicated to Privacy, Advertising, Consumer Education, Marketing, Financial Practices as well as a dedicated Division of Enforcement. The various divisions of the Bureau conduct investigations into their respective areas of jurisdiction which are then enforced by the enforcement division.

The primary law enforcement power of the FTC is derived from Section 5 of the Act which declares that all unfair methods of competition and unfair or deceptive acts affecting commerce are unlawful. It is also pertinent to note that the term "interest of the public" is found in Section 5 of the Act quite akin to similar terminologies used in the Indian Act, 2019 while granting powers to the CCPA. As suggested in the foregoing paragraphs with reference to the exercise of powers by the CCPA, the FTC while interpreting Section 5 has interpreted the requirement of "interest of the public" to mean that individual disputes between a consumer and a company or between competitors are beyond the scope of Section 5.[35]

There are several lessons which can be learnt by the long and rich history of the FTC which now spans more than 100 years. The Indian CCPA has been given a substantial burden of regulatory and enforcement duties which need to be carried out in a scientific and systematic manner. However if the experience of the FTC is to be taken cognizance of, then it is quite evident that merely a regime of investigative and injunctive action against offending persons by initiating individual cases has limited effect on the overall fairness of the market. The FTC soon realized that the litigation or investigative resources

[35] Anne V Maher and Lesley Fair, 'The FTC's Regulation of Advertising' (2010) 65(3) Food and Drug Law Journal 589.

of its bureau were insufficient to address the large number of fraud and misrepresentations in the market.[36]

It was thus found that to effectively govern and control the marketplace to benefit each consumer, the FTC has to adopt proactive measures to control the behavior of the manufacturer or service provider. The 'Holder in Due Course Rule', 'Care Labeling Rule' and the 'Octane Rule' adopted by the FTC in the late 1970s are some examples of creative usage of the rule making powers of the FTC to achieve high levels of compliance while consuming low levels of resources of the agency.[37] These innovative and proactive methods adopted by the FTC need to carefully examine by the CCPA and its functionaries to fulfill its mandate which admittedly is enormous and overarching.

In the examination of the powers of the CCPA in the foregoing paragraphs, it is evident to note that the Act, 2019 is surprisingly silent on powers of interim injunctions or temporary injunctions during the pendency of any complaint or investigation process. This is problematic since the CCPA is not a court of law or a constitutional court with inherent powers to prevent abuse of its process during the pendency of an investigation. Being a creature of statute, the CCPA is bound to follow the mandate of the Act, 2019 and can pass orders of injunction, penalty, compensation etc only upon completion of the inquiry and investigation process. This however is contrary to the experience of the FTC in several instances.

Prior to 1973, the FTC did not possess any powers of issuing temporary restraining orders or preliminary injunctions. This however led to a chaotic situation because the only recourse left to the FTC for addressing the large number of consumer wrongs was to initiate and complete lengthy investigations and administrative inquiries. As aforementioned, such an exercise burdens the machinery of a regulating authority and thus the FTC had to resort to hybrid methods of regulation to govern its wide mandate.[38] This undoubtedly led to a rich development of policies and rule making exercises by the FTC, but given the difficulties faced by its authorities, the Federal Trade Commission Act was amended in 1973 to grant powers of issuing temporary restraining orders and preliminary injunctions.[39]

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[36] Richard A Posner, 'The Federal Trade Commission: A Retrospective' (2005) 72(3) Antitrust Law Journal 761.

[37] Jodie Z Bernstein and David A Zeetony, 'A Retrospective of consumer protection initiatives' (2005) 72(3) Antitrust Law Journal 970.

[38] Ibid.

[39] Federal Trade Commission Act 1914 [15 USC s 53(b) amended by Pub I. No. 93-153].

It is unfortunate to note that even after the experience of the FTC is well recorded and deliberated by several jurists, the Indian CCPA has not been granted any express powers of grant of temporary injunction during the pendency of the investigation process. This lacunae is more damaging in instances such as misleading advertisement where the shelf life and purpose of the advert is fulfilled even before the preliminary inquiry is completed or investigation initiated. To further dampen the enforceability of the Act, 2019 the monetary penalty under Section 21 of the Act has been statutorily limited to Rs.10,00,000/- (First Offence) and Rs. 50,00,000/- for subsequent offences.[40]

Meaning thereby that firstly the CCPA would be unable to pass any interim orders restricting circulation of a purported misleading advertisement and Secondly even if the advertisement is found to be misleading the same would result in a minor penalty of a maximum of Rs.50,00,000/-. It is noted that Section 89 of the Act, 2019 provides for criminal action (ie imprisonment and fine); however the burden of proof in such criminal cases would be even higher and the procedure more cumbersome and complex.

Once the FTC has concluded its investigation and it is found that a service provider, manufacturer or advertiser has committed an unfair practice or deceptive act, the approach of the FTC is both restitutive and deterrent. The restitutive part of the approach is consumer centric (ie to say that the Order of the FTC should restitute aggrieved consumers due to the loss caused by the deceptive practice). The deterrent is of course focused upon the erring individual or corporate and simply aims to deter future violations. For instance, in a complaint involving misleading advertisements the Order of the FTC can be a cease-and-desist order, requiring the advertiser to stop disseminating deceptive claims and payment of monetary compensation.[41]

However the most important lesson to be learnt from the FTC experience is the development of the 'Fencing-in remedy' which has been affirmed by the Supreme Court of the United States of America in the Ruberoid Company Case[42] and several subsequent orders. Fencing-in remedy is simply provisions directed not only against the form of deception under question, but also against other forms of violations that reasonably relate to the past deception.[43] The

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[40] CPA 2019, s 21.

[41] David Balto, 'Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies' (2005) 72(3) Antitrust Law Journal 1113.

[42] *Federal Trade Commission* v *Ruberoid Co.*, 1952 SCC OnLine US SC 70: 96 L Ed 1081: 343 US 470 (1952).

[43] Anne V Maher and Lesley Fair, 'The FTC's Regulation of Advertising' (2010) 65(3) Food and Drug Law Journal 589.

orders of the FTC therefore laid down several standards across the industry irrespective of the complainant or respondent involved.

Another aspect of the orders of the FTC which should be adopted by the CCPA is the prospective nature of its cease-and-desist orders. In several examples, the Orders of the FTC have directed erring respondents to ensure periodic compliance for as long as the next 20 years by filing of yearly compliance reports with regard to its marketing activities and steps taken to ensure future compliance.[44]

Section 21 of the Indian Act, 2019 provides a rather interesting power of modifying any advertisement which is found to be misleading or false. The power of modification however should not be merely exercised to delete portions of advertisements which are misleading. The FTCs approach of informational remedies i.e. corrective advertising needs to be encapsulated by the CCPA under its power of modification under Section 21. The principle behind corrective advertising has consistently been that mere ceasing or terminating an advertisement does not undo the injury inflicted by a misleading advertisement or representation.[45]

Affirmative steps are sometimes mandated to terminate continuing ill effects of a misleading or false advertisement. These affirmative steps may be in the form of a disclosure in an advertisement or a label to alert consumers of possible risk.[46] In the Indian context, corrective advertising is even more important since the perceptions created by false advertisements have long lasting impacts on persons from low income and low education backgrounds. If corrective advertising is read into Section 21 of the Act, 2019, it may possibly undo the legislative lacunae of lack of interim orders and limited penalties.

V. CONCLUSION

The Act, 2019 has created a behemoth regulatory body in the form of the CCPA. Its powers of investigation and injunctive action are capable of having huge ramifications in the manner in which the Indian market is perceived by manufacturers, sellers, service providers and advertisers alike. In a way, the competence and efficiency of the CCPA has the potential of equalizing the disparity between corporate giants and consumers from all walks of life including less privileged, backward or less educated persons.

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[44] *Pfizer Inc*., (1998) 126 FTC 847.

[45] Michael B Mazis, 'FTC v Novartis: The Return of Corrective Advertising?' (2001) 20(1) Journal of Public Policy & Marketing 1147.

[46] Peter R Darke, Laurence Ashwroth and Robin JB Ritchie, 'Damage from Corrective Advertising: Causes and Cures' (2008) 72(6) Journal of Marketing 81.

However, as discussed in the present paper, to achieve this utopian condition the CCPA needs to tread extremely cautiously and efficiently utilize all the weapons in its arsenal. It needs to learn from the mistakes and best practices of similar regulators such as the FTC and build upon the foundation of consumer welfare which has been laid down by consumer welfare organizations in India over the past 4 decades.

On the other hand, draconian exercise of the powers of the CCPA to coerce the market and its players can be more harmful than the evil such exercise aims to address. A free, fair and competitive market is the best self regulator and *suo motu* creates ideal conditions and options for a consumer. The CCPA therefore must not act merely as an enforcer or henchman for consumer protection, rather it must balance its powers of regulation, rule-making, investigation and injunction to create a better marketplace.

The overlaps with powers of the consumer commissions are incidental and if the provisions are read harmoniously as stated in the preceding paragraphs, the CCPA and CDRCs will complement each other's functioning. Cooperation of these two regulatory and adjudicatory bodies can further achieve the intended goal of the Act, 2019.

LEGAL FRAMEWORK REGULATING FOOD SAFETY: A CRITICAL APPRAISAL

—*Sushila*[*]

Abstract: *Food safety is crucial for progress and the economic growth of a country. With rapidly increasing urbanization, population and rising economy, India faces many challenges in its quest for food safety. Use of excessive pesticides, growth hormones, exposure to toxic waste etc, results in food contamination at the farm level. Additives, contaminants, chemicals, environmental pollutants, adulterants, toxic colorants or preservatives, etc. render the food unsafe for consumption. At any stage of food production, right from the primary production to processing, packaging and supplying, the quality of the food can be compromised. Every step, thus, poses a challenge for enforcement of food safety regulations.*

The present legislation dealing with food safety in India, ie, the Food Safety and Standards Act (FSS Act) was passed in 2006 after repealing various central Acts relating to food safety. The FSS Act 2006 and Rules were notified and commencement of new regime started from August 2011.In the last few years of its coming into force, FSSAI has done a lot of ground work to effectively enforce the new food safety regime. However, based on the working of FSSAI and a review of the literature including the Report of Comptroller and Auditor General of India conducting the performance audit of the implementation of the FSS Act and the Report of the Parliamentary Standing Committee on Health and Family Welfare on functioning of FSSAI, it is imperative that various measures are required to be undertaken to strengthen the regulatory framework for robust enforcement of the FSS Act.

In this paper, the researcher intends to critically examine the working of the present Indian Food Safety Regime. The researcher has also used the experience gained during a recently conducted

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survey in the National Capital Region under a UGC funded project in the area of food safety.

Keywords: Adulteration, Codex Alimentaries, Food Safety, FSSAI, Food Labeling, etc.

I. IMPORTANCE OF FOOD SAFETY

Food safety is crucial for progress and the economic growth of a country. With rapidly increasing urbanization, population and rising economy, India faces many challenges in its quest for food safety. Use of excessive pesticides, growth hormones, exposure to toxic waste etc, has resulted in food contamination at the farm level. Additives, contaminants, chemicals, environmental pollutants, adulterants, toxic colorants or preservatives etc, render the food unsafe for consumption. At any stage of food production, right from the primary production to processing, packaging and supplying, the quality of the food can be compromised. Every step, thus, poses a challenge for enforcement of food safety regulations.[1]

Food adulteration has been reported widely in the country. In the present scenario, when food adulteration is so common, one cannot be sure of the quality of food he/she eats. Several manufacturing units have been accused of not adhering to the food safety norms and many more are still indulging in unfair practices and resort to supply of sub-standard quality food to the consumers. Our country has a large food sector which is unorganized that provides affordable food to the economically weaker sections. The street food is popular for its rich aroma and complex flavors but the hygiene and sanitary practices are a matter of grave concern. One of the most common adulterated foods is milk and milk products.[2]

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[1] *One Hundred Tenth Report of Department Related Parliamentary Standing Committee on Health and Family Welfare on Functioning of Food Safety and Standards Authority of India* presented to the *Rajya Sabha* on 9 August 2018. As per the data available with WHO, contaminated food is the main cause behind spread of over 200 diseases including diarrhea and even cancers. The burden of food borne diseases on South East Asia is second highest after Africa. Contaminated food or drinking water is responsible for over two million deaths occur every year from.

[2] *Ibid.*

Food Safety is important for maintaining overall health and well-being. The Food Safety & Standards Act 2006 defines 'food safety' in section 2(q) thereof as an 'assurance that food is acceptable for human consumption according to its intended use'. Food safety ensures that food is safe for human consumption and involves handling, preparation and storage of food in ways that prevent food borne illness. Food safety considerations include the origins of food including the practices relating to food labeling, food hygiene, food additives and contaminants, as well as policies on biotechnology and food and guidelines for the management of import and export, inspection and certification systems for foods.[3]

Food safety is also important to prevent microbes and contaminants from getting into foods and water. Microbes or contaminants not only cause diseases to human beings, but they also destroy valuable nutrients in the food. Millions of people fall ill every year and may die as a result of consuming unsafe food. Proper food preparation can prevent most of the food borne diseases. Infections caused due to consumption of unsafe food have a bigger impact on populations with poor and fragile health, infants, elderly, etc, and are usually more severe and may be fatal.[4]

There are various opportunities for food contamination to take place. Food supply chain involves a range of stages including on farm production, harvesting, processing, storage, transportation, distribution etc. before it reaches the consumers and hence opportunities for food contamination increase. Further, globalization of food business is making the food supply chain longer and complicates food-borne disease outbreak investigation and product recall in case of emergency.[5]

Food contamination has far reaching effects beyond direct public health consequences - it undermines food exports, tourism, livelihoods of food handlers and economic development, both in developed and developing countries.[6] Food safety is multi-sectoral and multi-disciplinary. To improve food safety, a multitude of different professionals need to work together, making use of the best available science and technologies. Different governmental departments and agencies, encompassing public health, agriculture, education and trade, collaborate and communicate with each other and engage with civil society including consumer groups.[7]

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3 FSSAI, *Manual for Food Safety Officers* (2017).
4 *Ibid*.
5 *Ibid*.
6 *Ibid*.
7 *Ibid*.

Food safety is a shared responsibility between governments, industry, producers, academia and consumers. Everyone has a role to play. Achieving food safety is a multi-sectoral effort requiring expertise from a range of different disciplines - toxicology, microbiology, parasitology, nutrition, health economics, and human and veterinary medicine. Local communities, women's groups and school education also play an important role. Consumers must be well informed on food safety practices. People should make informed and wise food choices and adopt adequate behaviors. They should know common food hazards and how to handle food safely, using the information provided in food labeling.[8]

II. FOOD SAFETY – A CONSTITUTIONAL MANDATE

Recognizing the importance of pure food, the Hon'ble Supreme Court in the case of *Centre for Public Interest Litigation* v *Union of India*[9] had held that right to life also includes right to pure food and thereby raised the status of this right to that of fundamental right.[10]

Right to Life, the most important fundamental right of every citizen guaranteed under art 21 of the Constitution includes in it the right to healthy food and therefore any food article which is hazardous or injurious to public health is a potential danger to fundamental right to life.[11] Art 21 read with art 47 of the Constitution casts a primary duty on the state and its authorities to achieve an appropriate level to protect human life and health.[12]

Availability of food without insecticides and pesticides residues, veterinary drugs residues, antibiotic residues and other harmful substances is one of the essential consumer rights covered under the United Nations Guidelines on Consumer Protection adopted by United Nations in the year 1985. However, there are still many food articles such as milk, rice, meat, fish, vegetables, fruits containing harmful substances which can cause serious health hazards. Due to physiological immaturity of the children and greater exposure to soft drinks, they are uniquely susceptible to pesticides' effects.

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8 *Ibid*.

9 (2013) 16 SCC 279. This writ petition dealt with the harmful effect of soft drinks on human health. While referring to various the provisions of FSS Act 2006, the Supreme Court held that there is a paramount duty cast on the States and its authorities to achieve an appropriate level of protection to human life and health which is a fundamental right guaranteed to the citizens under art 21 read with art 47 of the Constitution of India.

10 *Ibid*.

11 *Food Safety and Standards Authority of India* <https://www.fssai.gov.in/> accessed 2 June 2020.

12 Constitution of India, arts 21and 47.

The Supreme Court in its judgment in the abovementioned case[13] also referred to art 12 of the International Covenant on Economic, Social and Cultural Rights 1966 to highlight the role of State in ensuring food safety.[14]

III. BACKGROUND TO PRESENT FOOD SAFETY LAW

Multiplicity of food laws, standard setting and enforcement agencies pervaded different sectors of food, which created confusion in the minds of consumers, traders, manufacturers and investors. Detailed provisions under various laws regarding admissibility and levels of food additives, contaminants, food colors, preservatives etc., and other related requirements had varied standards under these laws. The standards were often rigid and non-responsive to scientific advancements and modernization. Such ecosystem was having detrimental impact upon the growth of the nascent food processing industry and was not conducive to effective fixation of food standards and their enforcement.[15]

A subject group on Food and Agro Industries (appointed by the Prime Minister's Council on Trade and Industry in 1998), had recommended a comprehensive framework on food with a Food Regulatory Authority concerning both domestic and export market. Besides, a Joint Parliamentary Committee on Pesticide Residues had emphasized in its report in 2004, on the need to converge all existing food related laws and to have a single regulatory body in this area. A great concern over condition of public health and food safety in India was expressed by this Committee in its report. Thereafter, in April 2005, the Standing Committee of Parliament on Agriculture in its 12th Report recommended that the process for passing the much-needed legislation on Integrated Food Laws should be expedited.[16]

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[13] *Ibid*.

[14] The International Covenant on Economic, Social and Cultural Rights 1966 states that, *Article 12*

(1) The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

(a) The provision for the reduction of the still birth-rate and of infant mortality and for the healthy development of the child;

(b) The improvement of all aspects of environmental and industrial hygiene;

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to a medical service and medical attention in the event of sickness.'.

[15] Food Safety and Standards Act 2006, Statement of Objects and Reasons.

[16] *Ibid*.

The then Member-Secretary, Law Commission of India was tasked to comprehensively review of the food laws of developed and developing countries and other relevant international agreements and instruments on the subject. The Member-Secretary after in-depth survey of the laws and policies of various countries, recommended that the approach of the new food law must include the overall perspective of promoting nascent food processing industry given its income and export potential.

Besides as per the international trend towards modernization, it was also suggested that an integrated food law should be passed after repealing all the existing acts relating to food. There was also intention to shift the approach of food law from regulation and control to self-regulation and focus was more on the responsibility of manufacturer, recall, genetically modified and functional foods, emergence control, food safety and good manufacturing practices and process control.[17]

In this background, the Group of Ministers constituted by the Government of India, held extensive deliberations and approved the proposed Integrated Food Law with certain modifications. The Integrated Food Law was named as 'The Food Safety and Standards Bill, 2005'. The main objective of the Bill was to bring out a single statute relating to food and to provide for a systematic and scientific development of Food Processing Industries.

It proposed to establish the Food Safety and Standards Authority of India (FSSAI), which would fix food standards and regulate/monitor the manufacturing, import, processing, distribution and sale of food, so as to ensure safe and wholesome food for the people. The Food Authority would be assisted by Scientific Committees and Panels in fixing standards and by a Central Advisory Committee in prioritization of the work. The enforcement of the legislation was to be through the State Commissioner for Food Safety, his officers and Panchayati Raj/Municipal bodies.[18]

The Bill *inter alia* incorporated the salient provisions of the Prevention of Food Adulteration Act 1954 and was based on international legislations, instrumentalities and Codex Alimentaries Commission (which related to food safety norms). In a nutshell, the Bill took care of international practices and envisaged an overarching policy framework and provision of single window to guide

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[17] *Food Safety and Standards Authority of India* <https://www.fssai.gov.in/> accessed 2 June 2020.

[18] Food Safety and Standards Act 2006, Statement of Objects and Reasons.

and regulate persons engaged in manufacture, marketing, processing, handling, transportation, import and sale of food.[19]

The main features of the Bill were[20]:

(a) Movement from multi-level and multi-departmental control to integrated line of command;

(b) Integrated response to strategic issues like novel/ genetically modified foods, international trade;

(c) Licensing for manufacture of food products, which is presently granted by the Central Agencies under various Acts and Orders, would stand decentralized to the Commissioner of Food Safety and his officer;

(d) Single reference point for all matters relating to Food Safety and Standards, regulations and enforcement;

(e) Shift from mere regulatory regime to self-compliance through Food Safety Management Systems;

(f) Responsibility on food business operators to ensure that food processed, manufactured, imported or distributed is in compliance with the domestic food laws; and,

(g) Provision for graded penalties depending on the gravity of offence and accordingly, civil penalties for minor offences and punishment for serious violations.

The Bill was contemporary, comprehensive and intended to ensure better consumer safety through Food Safety Management Systems and setting standards based on science and transparency as also to meet the dynamic requirements of Indian Food Trade and Industry and International trade.[21] Accordingly, the Food Safety and Standards Act 2006 (FSS Act) was passed in 2006 and FSSAI, established under this Act, became functional from January 2009. The FSS Act and Rules were notified and commencement of new regime started from August 2011. With the commencement of this Act, various central Acts[22] relating to food safety were repealed.

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19 *Ibid*.

20 *Ibid*.

21 *Ibid*.

22 Acts such as Prevention of Food Adulteration Act 1954, Milk and Milk Products Order 1992, Meat Food Products Order 1973, Vegetable Oil Products (Control) Order 1947, Edible Oils Packaging (Regulation) Order 1988, Fruit Products Order 1955 Solvent Extracted Oil, De-Oiled Meal and Edible Flour (Control) Order 1967, etc, stood repealed with the passing of the FSS Act 2006.

IV. WORKING OF FSSAI AND MEASURES TO MAKE THE ENFORCEMENT MECHANISM MORE ROBUST AND EFFECTIVE

FSSAI is the apex regulatory body for food safety in the country and the Preamble to FSS Act *inter alia* seeks to lay down science-based standards for articles of food and ensure availability of safe and wholesome food for human consumption. Food safety is thus a specialized job and FSSAI being a science-based organization should be equipped with proper tools and capabilities and headed by someone with the requisite technical acumen and appropriate expertise to address the challenging task of food regulation for a country like India. Engaging man-power with technical skill and competence, therefore, becomes imperative for effective rendering of important mandate given to FSSAI.[23]

The FSS Act was operationalized with the notification of Food Safety and Standards Rules 2011 and six Regulations[24] w.e.f. 5th August 2011. In the last few years of its coming into force, FSSAI has done a lot of ground work to effectively enforce the new food safety regime. However, based on the working of FSSAI and a review of the literature including the Report of Comptroller and Auditor General of India conducting the performance audit of the implementation of the FSS Act[25] and the Report of the Parliamentary Standing Committee on Health and Family Welfare[26] on functioning of FSSAI, it is imperative that various measures are required to be undertaken to strengthen the regulatory framework for robust enforcement of the FSS Act and the same are detailed in the succeeding paragraphs.

Firstly, there is an imperative need to scale up the advocacy and capacity building initiatives undertaken by FSSAI which would not only spread awareness of the new food safety regime amongst consumers but would also help industry comply therewith. Such efforts would not only minimize the enforcement task of food safety authorities but would also supplement the enforcement efforts and together would go a long way in ensuring availability of safe and wholesome foods. No doubt, FSSAI has taken a series of initiatives, yet the

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[23] *See* (n 12).

[24] Six principal Regulations came into force on 5 August 2011. In addition to the Six principal regulations five more regulations are notified. These relate to Food or Health Supplements, Nutraceuticals, Foods for Special Dietary Uses, Foods for Special Medical Purpose, Functional Foods and Novel Food, Food Recall Procedure, Import, Approval for Non-Specified Food and Food Ingredients and Organic Food.

[25] *Report of the Comptroller and Auditor General of India on Performance Audit of Implementation of Food Safety and Standards Act, 2006* [Report No. 37 of 2017].

[26] *One Hundred Tenth Report of Department Related Parliamentary Standing Committee on Health and Family Welfare on Functioning of Food Safety and Standards Authority of India* presented to the *Rajya Sabha* on 9 August 2018.

advocacy and outreach efforts have not fructified in achieving the desired outcomes which is reflected from the low visibility of the new regime amongst the stakeholders.

Advocacy initiatives of FSSAI have achieved little results in educating the stakeholders of the new food safety regime and the capacity building initiatives undertaken by FSSAI are not sufficient. It is important to develop specific training modules for manufacturers, importers, sellers, distributors and FBOs. The training should be industry specific and for a shorter period. Regular trainings should be conducted for FBOs and small industries to adequately equip them to comply with the standards of the FSS Act.

In this regard, it is suggested that a combination of advocacy and enforcement initiatives by food safety authority would mutually supplement each other in attaining the objectives of the FSS Act. Hence, the FSSAI should start its outreach activities with schools so that children can be imparted adequate knowledge about importance of healthy foods and food safety.[27]

During a survey conducted recently[28] it was found that many FBOs were operating without obtaining license/registrations. Particularly, in the rural areas and informal sectors, the compliance was almost non-existent. The unregistered FBOs pose a threat to public health. A robust and reliable database on FBOs needs to be prepared for effective monitoring of FBOs. Food authorities need to conduct surveys in this regard to create a reliable database of FBOs in all the areas their jurisdiction which will also help in proper implementation and enforcement of the law.

FBOs are the backbone of the food safety regime and it is the responsibility of the FSSAI to ensure that their problems and queries are immediately solved. Accurate knowledge about food safety practices and procedures will help in better compliance by FBOs which will in turn ensure production of safe food. FSSAI should provide Guidance Notes and a mechanism for consultations so as to address the queries and concerns of FBOs relating to compliance with

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[27] FSSAI has launched various outreach programmes including the 'Eat Right India' Movement. As reported in the newspapers, it has also started programme in collaboration with various resident welfare associations to train the domestic workers and to make them aware about practices that need to be adopted for safe, hygienic and nutritious food at home. Such programmes are commendable which are needed to be conducted across India. The authority conducts regular street food festivals under 'clean street food hub programme'. In this process street food clusters are identified across the country that would be jointly audited with state authorities for cleanliness and hygiene. Clusters are encouraged to comply with food safety standards and those meeting the criteria are given 'clean street food hub certificate'.

[28] Survey conducted by NLU Delhi in the National Capital Region under UGC funded project in the area of Food Safety and Standard Act.

law. A pro-active, rather than reactive, approach would be in alignment with the philosophy of new law.

For success of a regime, there is also a need that decision-making body should be manned by experts. FSSAI should be headed by people experts in the field of food safety and scientists who should run the authority with bureaucratic and administrative support. Professionals with domain expertise should be selected as Chairman and CEO for this regulatory responsibility. Therefore, there is proper review of the process of appointments. Besides, section 5, FSS Act mandates appointment of two representatives from consumer organizations who shall be Members ex officio.

This provision strengthens consumers to be heard/right to representation at every decision-making authority dealing with consumer issues. For strengthening right to be heard of consumers, the above vacancies should be given proper publicity in newspapers so that consumer activists working for consumer welfare may be appointment. Most of the time it is observed that such vacancies go vacant due to non-availability of candidates.

The data available on the website of FSSAI indicates a huge gap between the total number of cases filed and total number of convictions as the rate of conviction seems to be quite low. This indicates that FBOs involved in supplying adulterated or misbranded food products are not successfully prosecuted and therefore, they get away easily without punishment.

Licenses for FBOs should not be issued/ renewed in a mechanical manner. A well-established mechanism should be developed for scrutinizing such FBOs who apply for licenses or renewal thereof. FSSAI should examine the FBO's previous track record with regards to compliance with the FSS Act. Any previous non-compliance should be taken seriously. Expediting the development of an e-portal that will create a compliance history of food business which the Food Authority can refer while renewing licenses, would greatly help in this process of due diligence, before grant or renewal of licenses.

Food safety infrastructure has lack of uniformity across the country. In some areas, food safety authorities including appellate tribunal and food safety departments have not been established. In some states, either there are no laboratories or if they are in place, they are not equipped with functional equipments and trained manpower. Therefore, there is a need of a uniform food safety regime in all the states. Food testing laboratories across the country are not following uniform procedures and methodology due to which lab test results are inconsistent. There is a need for the food safety regulator (FSSAI)

to oversee and ensure that uniforms procedure and guidelines are followed by all laboratories.

Many of the harmful components and contaminants enter the food system at the time of primary production whereas such primary food production is exempted from the coverage of the law. Exclusion of farmer/fisherman or farming operations including fisheries, livestock from the FSS Act is a major challenge and lacuna in the Act because unless the raw material is of good quality, the good quality of final product cannot be ensured. The legislature needs to revisit this legislative vacuum by making appropriate changes in the law.

There is very poor visibility of food safety regime amongst vendors operating in unorganized sector, it is important for the manufacturers/importers/distributors to purchase/sell food items from/to licensed/registered sellers only. This would not only spread the reach of law up to the last mile, but would also help realize such vendors about the importance and benefits of compliance. It is recommended that the State Licensing Authorities and Food Safety Officers (FSOs) should ensure through timely inspections that these conditions are being followed by FBOs.

Inspections form the core of a food safety network and therefore FSSAI or the State Food Authorities should conduct inspections before issuance of any license or make inspections mandatory post-issuance of license/registration. Very fewer random checkings are conducted by food officials. In a country like India that has a large unorganized food sector with many small food businesses; it becomes more important to conduct inspections in a time bound manner.

The field officers should inspect the premises of FBOs and guide the manufacturers to maintain proper hygienic conditions. There should be surprise inspections. Every effort must be made so that the FBOs do not evade the inspection process. Further, the inspection process should be streamlined to ensure that the same is used to regulate and monitor food safety and not harass FBOs.

The analysis of the sample in the food testing labs will be successful only when the sample that is picked up by a FSO is properly stored and transported to the laboratory. The guidelines on sampling have to be followed. The FSOs have to be trained, qualified in the procedure of lifting, keeping and sending samples properly so that the samples that are sent to the labs give accurate results. It is necessary to specify a time limit by which a FSO should submit the samples to the Food Analyst for laboratory analysis. In this regard, it is commendable that FSSAI has prepared a comprehensive manual for guidance

of food safety officers. The same needs to be constantly and dynamically updated based upon the feedback received from field officers and stakeholders.

FSSAI should put in place a comprehensive network of certification and accreditation agencies to certify and audit food laboratories. Most food labs including NABL accredited (the National Accreditation Board for Testing and Calibration Laboratories) lack facilities for testing food articles on all parameters. For ensuring food safety, the food samples have to be tested for toxic chemicals, heavy metals contamination, bacterial contamination, pesticide residues, etc; therefore, it is important that the laboratories are functional, well equipped and adequately staffed.

FSSAI should prepare a model food safety compliance manual for the benefit of FBOs particularly those who are operating in informal and unorganized sector of the economy. An easy to understand compliance programme in different local languages would greatly help the FBOs in understanding the nuances of the new law. An effective compliance programme which is regularly updated to meet the emerging and evolving regulation is key to successful corporate governance. It should broadly have the following three main objectives: prevention of infringements, promotion of a culture of compliance; and encouraging good corporate citizenship.

Further, absence of a mechanism to monitor NABL empanelled labs is a matter of grave concern as the reliability and accuracy of results of testing for various parameters remain questionable. The very purpose of accreditation of labs is defeated if they are not able to execute their mandate efficiently. The FSSAI should inspect, monitor and investigate these labs at periodic intervals so that their efficacy in testing samples on the requisite parameters is maintained.

Despite passing of more than a decade of enactment of FSS Act, a regulatory vacuum exists in the import of GM Food. FSSAI has neither put the regulations for such approvals in place nor taken any measures to stop the imports. The FSSAI should urgently finalize 'Guidelines for safety assessment of food derived by GM Technology'. FSSAI should also work to upgrade the GM food testing infrastructure and make use of the already present laboratories in the country and equip them with latest technology. Whereas, for organic food, the FSSAI has recently framed regulations which makes it mandatory for the domestic producers to certify their food as organic. This will remove non-certified/fake products from the market. A separate certification mechanism should be in place for small farmers to minimize their costs.

FSSAI should take steps to ensure that every eatery including hotels, fast food chains, restaurants and e-commerce food sellers should provide all statutory information concerning packaging and labeling of food item on menu cards, advertisement and display panels and also mandatorily print calorie information on their menu so that the consumer makes informed choice and healthy eating is promoted.

Multiplicity of standards and certification from different agencies is a cumbersome compliance and process for the industry. There is a need to address the existing overlap between standards. BIS and AGMARK Standards should be reviewed to explore the extent to which they can be merged into the FSS Act/Standards/Regulations. The main idea behind FSS Act was consolidation of food laws but varied standards defeat this very idea. It is important to have only one certification procedure under the FSS Act.

Any changes in the Packaging and Labeling regulations should be timely disclosed to the FBOs so that they get enough time to conform to the changed standards. The regulations should be implemented in a phased manner rather than haphazardly. Proper training to the FBOs is essential for enforcement of the labeling norms.

The FSSAI should work on labeling based on colors and symbols. The traffic light labeling system as practiced in other countries for packaged food items in India may be adopted. This labeling will enable people specially the less educated consumers to have a better idea of the nutritional content of the packaged foods. Food with high salt, sugar and fat content will be marked red which is a sign for unhealthy food, amber for moderate, and green for low (healthy).

Food safety enforcement is a shared responsibility and requires constant interactions and engagements amongst all stakeholders. The FSSAI needs to upgrade its level of engagement with the market participants so that compliance and enforcement burdens can be reduced. Steps should be taken to encourage voluntary compliance/self-regulation which would help in reducing enforcement frictions and would, in turn, incentivize the firms to introduce innovative food products through faster approvals.

Consumer protection cannot be protected by only focusing sampling and analyzing the food products at final stage. It is important to have in place *ex ante* preventive measures at all stages of the food production, distribution and retailing chain.[29] This helps in early identification and detection of unsafe

[29] *Food Safety and Standards Authority of India* <https://www.fssai.gov.in/> accessed 2 June 2020.

food products well before they reach the market at the final retail stage. The food safety plan should focus its shift to preventive stage to minimize the enforcement efforts and attendant health hazard by blocking entry of unsafe food in the retail market. The FSSAI should adopt this approach in prioritizing its enforcement tasks.

Preserving traditional food is also important to maintain the cultural heritage of the country. A modern blend of science would help upgrade the knowledge of traditional food without diluting the culinary heritage. It is necessary for FSSAI to formulate vertical standards for traditional food which can be developed.[30] Regulation of small unorganized players such as street vendors is a challenging task in a vast country like India. The informal and unorganized-nature of such players further accentuates and strains the enforcement efforts. A number of awareness initiatives need to be undertaken by FSSAI to sensitize them about the importance of food safety. The entire approach should be persuasive than coercive.

E-commerce is one more area where FSSAI should remain watchful of the fast evolving landscape of new business practices adopted by online food aggregators. Proper compliance of food safety norms is important in e-commerce as the buyers do not directly come in contact with the sellers. Role of consumer movement in ensuring food safety is also very important. Civil society and consumer movement are crucial not only for ensuring accountability of erring FBOs but also for creating awareness about food safety issues. FSSAI should help the efforts of civil society in this regard by making them partners in its outreach activities.

Lastly, FSSAI should use extensive use of digital media for its outreach activities instead of adopting the traditional modes. This would not only minimize the cost of advocacy efforts but would also enhance their efficacy in fast emerging digital economy.

V. CONCLUSIONS

Mahatma Gandhi had once said, 'It is health that is real wealth and not pieces of gold and silver'. This rings true as safe and nutritious food is the foundation of good health. Food affects us all in myriad ways. Food, in its varied forms, is not just a means of sustenance - it is a central, defining aspect of cultures across the world. Apart from nutrition and taste, a less glamorous but perhaps more important part of food is the safety standards that people adhere

[30] *Ibid*.

to while preparing, selling, serving and eating food. Unsafe food is being perceived as a growing global threat today.[31]

India as a welfare State has primary responsibility to take a key role in establishing a robust food safety mechanism for the welfare of its citizens but time and again the State has failed to address the same. The policies and the existing food laws are inadequate and are weakly enforced. This poor implementation of the Food Law has resulted in rampant food adulteration and various food scandals. Substandard quality food has been reaching the market and causing irreparable damage to public health. The fundamental right to pure food has been compromised and long since forgotten. Food Safety, nutrition and food security are intricately interlinked. Poor food safety infrastructure inadvertently poses a threat to public health as nutritious and safe food is fundamental to good health.[32]

The passing of the FSS Act led to the establishment of FSSAI. It marked a paradigm shift from a multi-level to a single line of control with focus on self-compliance rather than a pure regulatory regime. It also introduced uniform licensing/registration regime across the Centre and the States. One of the major responsibilities of the FSSAI is the development of science based food standards by harmonizing the same with Codex Standards, wherever possible. The setting of food standards is undertaken through various Scientific Panels and the Scientific Committee of the FSSAI and final approval by the Authority itself.[33] The FSS Act envisages regulation of manufacture, storage, distribution, sale and import of food to ensure availability of safe and wholesome food for human consumption and for consumers connected therewith.[34]

This modern legislation provides for decentralization of licensing for food products. It empowers States to issue Registration and State License. Effective, transparent and accountable regulatory framework is the avowed objective of the law. It has well-defined functions, powers and responsibilities of various food authorities, bodies and committees. It emphasizes on gradual shift from regulatory regime to self-compliance.[35] Besides, it also provides for regulation of food imported in the country; provision for food recall; surveillance;

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[31] Pawan Agarwal, 'Vision Statement: "FSSAI Ready with Roadmap for the Future"' in *Food Safety and Standards Act 2006: Commemorating a Decade* (FSSAI Publication, 2006).

[32] *One Hundred Tenth Report of Department Related Parliamentary Standing Committee on Health and Family Welfare on Functioning of Food Safety and Standards Authority of India* as presented to the *Rajya Sabha* on 9 August 2018.

[33] *Food Safety and Standards Authority of India* <https://www.fssai.gov.in/> accessed 2 June 2020.

[34] Food Safety and Standards Act 2006, Long Title.

[35] *Food Safety and Standards Authority of India* <https://www.fssai.gov.in/> accessed 2 June 2020.

envisages large network of food laboratories; new justice dispensation system for fast track disposal of cases; provision for graded penalties and consistency between domestic and international food policy measures without reducing safeguards to public health and consumer protection. Lastly, the law emphasizes on training and awareness program regarding food safety for business operators, consumers and regulators.[36]

A new regulatory regime, particularly when it makes a significant departure from the previous regime, requires massive capacity building initiatives by the regulator to educate the stakeholders in order to make the enforcement robust. This is a work in progress. It is hoped that the legislature would suitably revisit the law in light of the difficulties faced and experience gained including the suggestions and recommendations made in this paper.

[36] *Ibid*.

FREE SERVICES OR PRIVACY: FORMULATING THE CHOICE FOR CONSUMERS IN ZERO-PRICE MARKETS

— *Pankhudi Khandelwal*[*]

Abstract: *Zero-priced markets have become important in the present digital society. The revenue models of Facebook and Google use targeted advertising for revenues. Based on this, it can be argued that zero-priced products are not free as consumers 'pay' in form of attention to these advertisements. Zero-priced markets have the potential to be harmful for the consumers in form of less privacy. While the data protection law deals with the protection of personal data, however, this data is acquired by the companies on the basis of consent, performance of a contract or legitimate interests.*

Most consumers are either not aware about how their data is being used or do not value their data enough to give up the zero-priced services. In light of this changing technological environment, the article suggests whether this choice should be made on behalf of the consumers through regulation under the consumer welfare standard whereby companies are either required to change their current business model or provide for better provisions for privacy. The article aims to provide an improved legal framework of competition law, consumer protection law and data protection law to provide a balance in regulating digital markets.

Keywords: Consumer Protection, Competition Law, Consumer Welfare, Data Protection, Privacy, Zero-priced, etc.

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I. PART I INTRODUCTION

A number of companies today provide their services for free to consumers. Social media networks, search engines, music streaming services, content sharing services etc. provide their services for free by using targeted advertising for revenues. This involves using large amounts of consumer's data which can be pay for these free services in the form of their data which is then transferred to advertisers and third parties. It has been seen that while consumers do want services with better privacy provisions, very few of them are willing to pay for such services. Digital players are not incentivized to come up with models which provide for data protection due to this 'privacy paradox'as consumers are not willing to shift to a different service provider which provides for better privacy provisions in exchange for a payment.

While the data protection law deals with the protection of personal data, however, this data can be acquired by the undertakings on the basis of consent, performance of a contract or legitimate interests.[1] The data protection law proves to be inadequate since undertakings can rely on these grounds which provide for lawful processing of data. Most of the times it is seen that even if consumers value their privacy, it is not possible for them to read the privacy policies of each and every website or platform that they use.

Even if they do, the terms of service do not give any control to the consumers to negotiate on how much of their data they are willing to give to these companies. Even under the consumer protection law, the consumers cannot lodge complaints against such digital giants as they are not made aware of the way that their data is being used. This limitation of the data protection law and consumer protection law is why we require the intervention of other laws in digital markets to protect privacy of consumers.

In numerous jurisdictions, there is a growing tendency by competition law authorities to intervene in the market to correct abusive practices by dominant

[1] General Data Protection Regulation (EU) (GDPR), art 6. The GDPR has been taken as model regulation of data protection law across jurisdictions since most data protection laws are based on GDPR.

undertakings. However, it is still debated whether competition law should be used to correct these practices. The research work argues that it should be. It has been seen that the digital undertakings gain dominance due to distinctive features of digital markets such as network effects which creates a 'winner takes all' situation. Because of having a huge market share, these dominant companies then abuse their position by gaining excessive consumer data and sharing it with advertisers and third parties. The harm to consumers due to large market share can be effectively corrected through competition law.

Intervention by competition law authorities is based on a consumer welfare standard i.e. the authorities intervene in a market only if they feel that non-intervention will cause consumer harm. Earlier, under the consumer welfare standard, the harm was restricted to high price ie to ensure that undertakings are not indulging in anti-competitive conducts which would increase prices for consumers. However, this is not the main concern of competition law in digital markets where services are provided for free in lieu of consumer's privacy. The article talks about this shift in the way that the consumer welfare standard is undergoing from price to privacy and what more can be done under this standard.

The article is divided into 5 parts: **Part II** of the article discusses the harms to consumers in digital markets due to network effects because of which platforms provide their services on zero prices. **Part III** then discusses how data protection law and consumer protection law are insufficient to deal with zero-price platforms. **Part IV** provides suggestions to improve the present consumer protection law framework to deal with the digital markets by bringing in the balance of regulation through data protection law, consumer law and competition law. **Part V** concludes the work.

II. PART II: POSSIBLE HARM TO CONSUMERS IN DIGITAL MARKETS

Since the digital platforms work on the revenue model of targeted advertising, companies provide their services on zero prices to enlarge their consumer base. This is because the digital markets have strong network effects.[2] Since most of the zero-priced platforms depend on advertising for their revenue, the success of the platform depends on the increased number of users. Larger consumer base makes the platform more lucrative for advertisers to advertise their

[2] Network effects occur when the value of the platform increases with the increase in the number of users on the platform.

products. Therefore, companies try to gain as much data as they can to use it for their own commercial advantage without the consumers knowing about it.

As per the Report of the Australian Competition and Consumer Commission (ACCC), Facebook stores activity information, such as photos and comments posted on Facebook and names and phone numbers of the user's contacts from the user's mobile device, even if the contacts are not user's Facebook friends. Facebook also links numerous ad interests to the user's profile and matches user to contact lists provided by advertisers. Similarly, it was seen that Google stores data from its products and services accessed in the past 7 years. Location data is collected by all these different products and services. Google also stores copies of photos without the consent of the user.[3]

These apps collect location data and store photos even if the location tracking settings and syncing of photos is turned off. The users have no control over the collection of their data. Users also have no control over the amount of advertisements that they have to see while using the platform. For instance, Facebook and Google policies clearly state that the user can only change the type of advertisements that it wishes to see but the number of advertisements would remain the same. Therefore, services are offered at an 'all or nothing' basis where consumers have no negotiating or bargaining power. Users are not allowed to opt out of any type of data collection or usage practices.

Due to network effects, it becomes easier forone undertaking to have a lot of data from its users which it can then use to its own advantage. An example of this can be seen in the case of *Google Shopping* case in EU where Google was giving more favorable positioning and display, in Google's general search results pages, of Google's own comparison-shopping service compared to competing comparison-shopping services.[4] This can be detrimental for other sellers and for consumers in form of less choice. Similar practice of search bias by Google can also be seen in the Indian context as well in the case of *Matrimony.com Ltd.* v *Google LLC*,[5] where its own specialized search services ranked higher than other vertical search services in the Search Engine Results Page. It gives Google the power to decide which businesses should succeed which creates entry barriers for new players trying to enter the market, thus stifling innovation.

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3 ACCC, *Digital Platforms Inquiry* (Final Report, June 2019) (hereinafter 'ACCC Report').

4 Commission Decision of 27 June 2017, Google Search (Shopping), Case AT.39740.

5 2018 SCC OnLine CCI 1 <https://www.cci.gov.in/sites/default/files/07%20&%20%2030%20of%202012.pdf> accessed 27 June 2020.

Usually these entities are present in more than one market. For instance, Google develops mobile operating systems such as Android. In the case of *Google* Android in EU, Google required manufacturers to pre-install the Google Search app and browser app (Chrome), as a condition for licensing Google's app store (the Play Store).[6] All these services are also provided to consumers free of charge. This allows Google to accumulate data from all its services, thus, acquiring large amounts of data which then helps Google in providing more targeted advertisements.

As seen from cases such as *Google Shopping* and *Google Android*, consumers might suffer due to reduced choice and harm to privacy. Dominant undertakings such as Google do not give incentives to new players to enter the market. This can then result in lower quality due to lack of viable alternatives for consumers.[7] As seen from cases such as *Google Shopping* and *Matrimony* v *Google*, consumers are harmed as they no longer receive the most relevant results. This then leads to preference shaping through algorithmic manipulation by the dominant undertakings where the consumers are manipulated into buying a product or availing services of a website which is less suitable for them.

These undertakings also transfer the data to third parties without consumer's informed consent as seen from the *Facebook Cambridge Analytica* case where Facebook transferred user profiles to the data analytics firm Cambridge Analytica without consent. The Facebook's privacy policy says that while Facebook does not sell the personal data however, it has to 'work' with third parties to provide free services which means that the information with Facebook is still shared with third parties. While Facebook did get widespread negative press coverage which led to a 'Delete Facebook' campaign, it has been seen that only 1%-3% users deleted their account.[8] Users sticking to the same platform despite such a big scale harm to privacy is an indicator of lack of other alternatives.

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6 'Antitrust: Commission Fines Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine' (*europa.eu*, Press Release, 18 July 2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4581> accessed 27 June 2020.

7 For an analysis of how dominant undertakings harm the market by creating exclusionary effect, see Pankhudi Khandelwal, 'Interface between Competition Law and Data Protection Law in Monitoring Zero-Price Markets: Achieving the Balance of Regulation' (2020) 5 Indian Competition Law Review <http://iclr.in/wp-content/uploads/2020/05/INTERFACE-BETWEEN-COMPETITION-LAW-AND-DATA-PROTECTION-LAW-IN-MONITORING-ZERO-PRICE-MARKETS-ACHIEVING-THE-BALANCE-OF-REGULATION.pdf> accessed 27 June 2020.

8 Len Sherman, 'Why Facebook Will Never Change its Business Model' (*Forbes*, 16 April 2018) <https://www.forbes.com/sites/lensherman/2018/04/16/why-facebook-will-never-change-its-business-model/#208a182464a7> accessed 20 March 2020.

III. PART III: INSUFFICIENCY OF DATA PROTECTION AND CONSUMER PROTECTION LAW

Data protection law can help in prohibiting the illegal transfer of data. However, most data protection laws around the world is based on the GDPR which allows the transfer of data on the basis of consent, performance of a contract or legitimate interests.[9] Accordingly, most of the platforms draft their data collection clauses broadly. For instance, Facebook states that it has to collect data to provide its services for free which qualifies it to collect data for the performance of a contract.

Usually, it is providedin the terms and conditions that if the consumers agree to use the services of the platform, they agree to the collection, usage and transfer of their data. These terms and conditions are long and not easily readable. Therefore, even if consumers are consenting to the privacy policies while using a platform, that consent is not informed or meaningful. Moreover, since the terms and conditions are provided on a 'take it or leave it' basis, the only option that the consumers have is to discontinue the use of the platforms if they are unhappy with the breach of their privacy. However, it is not possible for consumers to shift to any other platform due to network effects. For instance, users cannot use other platform except Facebook if all their friends are also on Facebook.

This leaves the consumers with no choice but to accept the terms and conditions. However, this does not mean that the consumers would not prefer an alternative which provides for better data protection provision. There is also an unequal bargaining position between consumers and giant techs which makes it more difficult for consumers to file cases against them. It is clear that companies such as Facebook and Google would not change their model as it would not be able to earn as much from consumers on subscription-based model as it can earn from advertisers through targeted advertising. Further, due to the distinctive features of online markets discussed above, it becomes difficult for other players to compete on a different model.

This situation can also not be corrected under the consumer protection law since, for consumer protection law to work; the consumers should be made aware of the way that their data is being used. Most companies do not share this information. For this reason, consumers do not feel the requirement to lodge complaints against these digital giants. This also brings in the problem

[9] GDPR (n 1).

of 'privacy paradox' where the consumers do not value their data or are willing to forego some of their data in exchange of these services.

One reason why consumers do not act to protect their privacy is they are not made aware about the costs of sharing their personal data. Therefore, it is argued that consumer's choice for privacy is not always expressed through their actions and the choices for consumers have to be formulated by regulatory bodies. For this purpose, along with data protection law and consumer protection law, the intervention of competition law is required to regulate these markets.

This can be seen in the case of Whatsapp/Facebook merger. After the acquisition of Whatsapp by Facebook, Whatsapp introduced new privacy policy which allowed for the sharing of information on Whatsapp to other Facebook family of companies. Whatsapp gave the option to the consumers to delete their Whatsapp account within 30 days if they do not want their data to be shared. Therefore, consumers were given an 'all or nothing' option where they had no bargaining power if they wanted to continue using the services of Whatsapp with better privacy provisions.

Numerous cases against this policy were filed across jurisdictions. The Italian Competition Authority fined Whatsapp under its consumer code for forcing the users to accept in full the new Terms of Use, and specifically the provision to share their personal data with Facebook, by inducing them to believe that without granting such consent they would not have been able to use the service anymore.[10]

Similarly, in Germany, the competition law authority formally initiated proceedings against Facebook and found that the social network was abusing its market power by violating data protection rules.[11] While this decision was stayed by the Higher Regional Court saying that violation of data protection rules does not fall within the jurisdiction of competition law, the Federal Court of Justice of Germany upheld the decision of the competition law authority stating that there were no serious doubts that Facebook was

[10] AGCM, 'WhatsApp Fined for 3 Million Euro for having Forced its Users to Share their Personal Data with Facebook' (Press Release, 12 May 2017) <https://en.agcm.it/en/media/press-releases/2017/5/alias-2380> accessed 16 March 2020.

[11] FCO, Case B6-22/16, *Case Summary, Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3> accessed 16 March 2020.

abusing its dominant position with the terms of use prohibited by the FCO.[12] The decision was based on the fact that the terms do not leave any choice for Facebook users.[13]

The difference between the Italian and German proceedings is that while the German authority had proceeded under competition law, the Italian authority fined Whatsapp under the consumer code. The decision of the Federal Court of Justice of Germany has given way for competition law authorities around the world to intervene in the conduct of dominant companies to ensure better privacy policies. One advantage of regulating through competition law is it provides for special responsibility on dominant companies to not abuse their position. Therefore, it puts more burden of compliance on larger companies than smaller companies thus making it easier for small companies to enter the market. More platforms in the market would provide more alternatives to the consumers. Further, more choice in the market would lead to companies competing on the basis of privacy protection.

In some countries, the competition law authority and the consumer protection body are the same. For instance, AGCM in Italy, FTC in USA and ACCC in Australia. The issues of competition law and consumer protection law are quite similar due to the consumer welfare standard under the competition law. Therefore, it is essential that where the regulatory bodies for the two areas of law are different, for instance, in India, both the authorities should work together to ensure protection of consumers from abusive or unfair practices leading to breach of consumer's privacy.

When the same practice by Whatsapp was challenged in India, in the case of *Shri Vinod Kumar* v *Whatsapp*,[14] the Competition Commission of India (CCI) held that data sharing from Whatsapp to Facebook is to improve the experience on Facebook. Users who do not want their data to be shared have the option to delete their Whatsapp account and therefore, it does not constitute an abusive practice. The CCI completely neglected the network effects of Whatsapp which makes it difficult for consumers to shift to any other platform even if they do not like the new privacy policy.

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[12] 'Germany: Federal Court Summary Judgment: FCO Achieves Stage Victory against Facebook' (*DLA Piper*,25 June 2020)<https://blogs.dlapiper.com/privacymatters/germany-federal-court-summary-judgment-fco-achieves-stage-victory-against-facebook/> accessed 27 June 2020.

[13] *Ibid*. Since the decision of the Federal Court of Justice is in German, the translation of the decision by the above blog has been relied upon.

[14] Case No. 99 of 2016.

Further, CCI held that breach of privacy fell under the Information Technology Act and so it does not have the jurisdiction to decide violations under the same. This kind of decisions is precisely the reason why there is a requirement for competition law, consumer protection law and data protection law to work together in zero-price markets. The CCI, in such instances, should refer the issue relating to privacy to consumer court which can then decide whether the terms offered by Whatsapp are unfair to the consumers.

IV. PART IV: IMPROVED LEGAL FRAMEWORK FOR DIGITAL MARKETS

Most of the consumer protection law is modeled on protecting consumers from exploitation in monetary services. In the digital age, 'personal data' should be seen as equivalent to price or money that the consumer has to pay to avail services. This kind of change can be seen in EU in the Directive of the European Parliament on certain aspects concerning contracts for the supply of digital content and digital services.[15]

The Directive describes 'price' as money or a digital representation of value that is due in exchange for the supply of digital content or a digital service. It has been suggested that user data can also be viewed as an asset for digital platforms that can be sold, licensed, disclosed or exchanged with third parties[16] and thus using data more than required for the main activity of the platform should be deemed as an abusive or unfair trade practice under competition law and consumer protection law respectively as per the consumer welfare standard.

The data protection law should ensure that users are made aware of how and by whom their data is being used. For this purpose, we will need a stricter data protection law which does not allow companies to take more data than required through consent based on take it or leave it strategy. Further, the default settings on digital platforms should ask for consumers to 'opt in' rather than asking them to 'opt out'. Subscription based models such as those of Netflix; Amazon prime etc. should be promoted. Though such models might not be suitable for all kinds of consumers, however, there might be some consumers who might be willing to pay some amount of money for a platform with better privacy policies. It is essential that such consumers should

[15] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services.

[16] ACCC Report (n 3).

be provided with alternative platforms where they do not have to worry about their data being misused.

Consumer protection law should be made stricter to provide consumers more bargaining power against digital giants. Further under competition law, authorities should be careful while assessing data – driven mergers. Merger regulation should include privacy as one of the considerations for competition. In the Facebook/WhatsApp merger case, while the European Commission stated that privacy and data security constitute key parameters of competition[17], it failed to assess the merger on the basis of harm to privacy. This omission by the Commission paved the way for WhatsApp to change its privacy policy to collect and share data with Facebook.[18] Therefore, while analyzing such mergers, it must be assessed whether the transaction would leave any incentives for digital players to compete based on privacy.[19] Further, as an ex post measure, companies should not be allowed to share data from one platform to another.

However, the authorities will have to be careful while regulating since some consumers actually prefer getting targeted advertisements and specialized services. Too much regulation might either lead to no incentives for the companies to innovate or if the platforms start charging high fees, it might prove to be too expensive for some consumers. Services such as social media and search engines have become essential in today's times and it is relevant that we do not create more problems than necessary for such platforms. It is, therefore, essential that such services are provided based on clear and informed consent and only the amount of data that is absolutely essential to provide these kinds of services is collected.

V. PART V CONCLUSION

Formulating the choice for consumers in digital markets should ensure both free services along with better privacy provisions. This would require stricter data protection rules and joint enforcement of consumer protection law with competition law. The laws presently are based on a non-interventionist approach. However, some regulation would be required to make sure that the

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[17] *Facebook/WhatsApp* (Case No COMP/M.7217) Commission Decision C (2014) 7239 [2014].

[18] Case M.8228 - Facebook / Whatsapp, Merger Procedure Regulation (EC) 139/2004 (17 May 2017).

[19] Pankhudi Khandelwal, 'Interface between Competition Law and Data Protection Law in Monitoring Zero-Price Markets: Achieving the Balance of Regulation', (2020) 5 Indian Competition Law Review <http://iclr.in/wp-content/uploads/2020/05/INTERFACE-BETWEEN-COMPETITION-LAW-AND-DATA-PROTECTION-LAW-IN-MONITORING-ZERO-PRICE-MARKETS-ACHIEVING-THE-BALANCE-OF-REGULATION.pdf> accessed 27 June 2020.

consumers do not suffer harm due to their lack of awareness about the way that their data is being used.

Data protection law already provides for data minimization and purpose limitation i.e. data should only be collected for specified, explicit and legitimate purposes and should be relevant and limited to what is necessary to the purposes.[20] It should be monitored that these principles are followed under the privacy policies. Also, there should be a fixed time period for data retention. Further, privacy policies should give consumer the choice to negotiate whether they want extremely personalized services which requires access to unlimited data or personalization which is limited to the data that they have willingly provided. Collection of disproportionately large amounts of data should be considered an abusive practice. Further, the consumer welfare standard should be redefined to not just include price but also privacy and choice for consumers.

[20] GDPR (n 1) art 5(1).

PROTECTING THE HEALTH DATA OF CONSUMERS: NEED FOR AN IRON-CLAD LAW IN INDIA

— *Ashutosh Tripathi*[*] *and Tushar Behl*[**]

Abstract: *One of the major concerns for all countries presently dealing with COVID-19 pandemic is to strike a balance between the privacy rights of the patients and public health surveillance, which is being done through various apps like* Aarogya Setu *in India, which is needed in the larger interest of the society. Public health Surveillance system although with good intention has to respect the privacy of the people. Supreme Court of India has recognized right to privacy as a part of right to life under the art 21 of the Constitution of India in the* Puttaswamy *judgment.*

In this essay, it is argued that the present legal framework regarding the health protection data in India is not sufficient for protecting the sensitive data of the patients although certain steps have been taken but all are in the forms of the bill, namely, Digital Information Security in Healthcare and Personal Data Protection Bill 2019. The essay will also be looking at some of the best practices in the world regarding the protection of health data mainly that of USA and Australia. The essay explains why India will be well ahead in terms of health protection data if we implement all the laws, which are still at the draft stage.

Keywords: Consumer Protection, Data, Constitution, Health, Privacy, etc.

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I. INTRODUCTION

The continuous proliferation and evolution of new technologies expose the electronic health records (hereinafter 'EHR') of consumers, to an inordinate risk. Conceivably, it is the digital health data (hereinafter 'DHD'), containing the personal health information of patients, which is vulnerable to serious risks of privacy and security.[1] While the use of DHD was promising enough to revolutionize the healthcare system in India, in addition to the personal information supplied voluntarily, online behavior tracking is on the verge without informed consent of consumers.[2]

The porous interface between right to privacy and the need for medical treatment makes personal health data protection, a prime concern. A patient's personal health information from his first admission/attendance at the hospital, to his final laboratory tests is entered and stored online at the point of care over the patient's lifetime. The information is readily available and accessible by all healthcare providers in charge of the patient, however, the extent and nature of data collection is totally unprecedented. Not to forget, the potential risks which can arise when this information is pooled with other sources like drug companies, leading to manipulative marketing, data breaches, discriminatory profiling and re-selling of personal information in lieu of online trading activities.[3]

Administrative and physical safeguard standards do exit for industries handling medical and personal health information, but certain gaps emerge with

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1 Fouzia F. Ozair and others, 'Ethical Issues in Electronic Health Records: A General Overview' (2015) (6)(2) PICR <http://www.picronline.org/temp/PerspectClinRes6273-5763666_160036.pdf > accessed 2 April 2020.

2 Stephen Corones and Juliet Davis 'Protecting Consumer Privacy and Data Security: Regulatory Challenges and Potential Future Directions' (2017) 45 Fed L Rev 65.

3 Kathryn C. Montgomery and others, 'Health Wearable Devices in the Big Data Era: Ensuring Privacy, Security, And Consumer Protection' (CDD Report, 2017). <https://www.democratic-media.org/sites/default/files/field/public/2016/aucdd_wearablesreport_final121516.pdf> accessed 2 April 2020.

the advancement of new technologies[4] and it becomes essential that security and privacy standards work closely to craft suitable controls and protections.

A related problem is the use of health-monitoring tools, i.e. wearable fitness technology such as bands, smart watches, pedometers and other wearable ECG monitors.[5] The rising trend in wearable fitness technology revolves around this critical question of how to safeguard a user's privacy, in a better way.

In 2015, The Ministry of Health and Family Welfare (hereinafter 'MoHFW') published a note establishing a National e-Health Authority (hereinafter 'NEHA') to ensure promotion and development of e-health ecosystem in India. Acting on the same vision and mission, the Ministry, in March 2018, ratified the draft of "Digital Information Security in Healthcare, Act (hereinafter 'DISHA') in public domain. The intention behind DISHA was to establish NEHA and other health information exchanges, including the State e-health authorities (hereinafter 'SEHA'), standardizing the process of DHD collection and to ensure the much needed privacy and security of DHD.

India's current regulatory approach to this issue has been to draft its own data protection law, ie Data Protection Bill. The much awaited bill, which started its journey full of controversies, was expected to be approved by the end of 2019, however as one would say, India's first attempt to nationally legislate a promising mechanism for data protection seems to be moving two steps forward and six steps backward.[6] Indian data protection and privacy laws are extremely patchy. This is a big concern when we talk about securing personal health data of a population more than 1.3 billion.

The structure of this note is to consider first, in **Part II**, the current framework pertaining to the existing health data protection legislation in India. **Part III** broadly discusses the international practice of privacy protection, drawing out a comparative analysis with Australia and the United States of America. **Part IV** discusses the constitutional framework and whether India should re-consider strengthening the protection for health information privacy and **Part V** proposes recommendations and modifications to the existing law that may address disquiets concerning privacy and security of individuals.

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4 Terence M. Durkin 'Health Data Privacy and Security in the Age of Wearable Tech: Privacy and Security Concerns for the NFLPA and WHOOP' (2019) 19 J High Tech L 279.

5 Alicia Phaneuf, 'Latest Trends in Medical Monitoring Devices and Wearable Health Technology' (*Business Insider India*, 19 July 2019) <https://www.businessinsider.in/science/latest-trends-in-medical-monitoring-devices-and-wearable-health-technology/articleshow/70295772.cms> accessed 2 April 2020.

6 Rudra Srinivas 'All You Need to Know About India's First Data Protection Bill' (*CISOMAG*, 3 January 2020) <https://www.cisomag.com/all-you-need-to-know-about-indias-first-data-protection-bill/> accessed 2 April 2020.

II. HEALTH DATA PROTECTION LEGISLATION IN INDIA

The health care industry in India is on the rise and is changing constantly. Personal health data of the patient is in the hand of healthcare institutions. The National Health Policy 2017 suggested creating a digital health technology ecosystem, involving large scale collection, organization and sharing of health data.[7] Health data means the data related to the state of physical or mental health of the data principal and includes records regarding the past, present or future state of the health of such data principal, data collected in the course of registration for, or provision of health services, data associating the data principal to the provision of specific health services[8].

The initial step regarding this ecosystem was taken in 2012 when the government made it mandatory for the clinics to maintain electronic health records of their patients under Clinical Establishment Rules[9]. With this changing landscape, the first thing that strikes into one's mind is regarding the prevention of the disclosure of the personal and critical medical information. Now the question is: *how we strike a balance between security, privacy and development?*

Till date, there is no legislation in India which protects the healthcare data. India took the first step when the Ministry of Health and Family Welfare proposed 'DISHA' (hereinafter 'Digital Information Security in Healthcare Act') in March 2018. DISHA expects to be an enactment concentrated on data protection, secrecy, and security. DISHA aims to make administrative specialists, both at the central and state level, to carry out the rights and obligations as given under the said legislation.

At the central level, the setting up of a National Electronic Health Authority (hereinafter 'NEHA') was proposed, which would be the topmost authority dealing with setting standards, issuing guidelines, and regulating the collection, organization, and transfer of the health data. At the state level, the State Electronic Health Authority (hereinafter 'SEHA') will be answerable for guaranteeing that the necessities of DISHA are followed by the institutions[10]. DISHA is going with the consent based approach, giving significant rights to

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7 'DISHA and the Draft Personal Data Protection Bill, 2018: Looking at the Future of Governance of Health Data in India' (*Ikigai Law*, 25 February 2019) <https://www.ikigailaw.com/disha-and-the-draft-personal-data-protection-bill-2018-looking-at-the-future-of-governance-of-health-data-in-india/#acceptLicense> accessed 27 April 2020.

8 The Personal Data Protection Bill (2019), cl 3(21).

9 Clinical Establishments (Central Government) Rules 2012, r 9(iv).

10 Milind Antai and others, 'DISHA the First Step towards Securing Patient Health Data in India' (*Mondaq*, 3 August 2018) <https://www.mondaq.com/india/healthcare/723960/disha-the-first-step-towards-securing-patient-health-data-in-india> accessed 27 April 2020.

the owner of the data, where he can decide what should, and can be done to his personal data.[11]

Another draft that was proposed was the Personal Data Protection Bill 2019 which would create the first cross-sectoral legal framework for data protection in India.[12] This bill also deals with protecting the personal data of the individual.[13] This bill is concerned with many other forms of data, one of them being, the health data. The health data comes under the head of 'sensitive personal data'.[14] As the name itself suggests, the data of such special category must be treated with extra care and caution. The authorities under this regime have a duty to protect the data and the principal agent giving the right to access, erase, and correct the personal health information.[15]

Both the bills were introduced for protecting the personal healthcare data, however, these legislations have not been implemented yet. The reason being, the increasing concern regarding security as the principle of privacy; this principle has been developed over a period of past few years. In line of this, the Apex Court propounded that 'The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21'.[16] In addition, the informational privacy is a subdivision of it.[17]

The present legal provisions dealing with such protection clearly provide that at whatever point a corporate body has or manages any delicate individual information or data, and is careless in keeping up security to protect such information or data, which in this way makes a wrongful gain or loss to any individual. And at that point of time, such body corporate will be subject to pay damages.[18] However, the major drawback is that it deals with only 'corporate bodies' and it not sufficient enough to cover the entire data dominion.

In present time, due to the outbreak of novel corona virus (hereinafter 'COVID-19'), the government came up with '*Arogya Setu*' App, which provides medical information about other people. Along with this, the issue of privacy also comes into picture. Many people claim that it violates privacy of the

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[11] Digital Information Security in Healthcare Act 2018, s 28.

[12] Anirudh Burman, 'Will India's Proposed Data Protection Law Protect Privacy and Promote Growth' (*Carnegie India*, 9 March 2020) <https://carnegieindia.org/2020/03/09/will-india-s-proposed-data-protection-law-protect-privacy-and-promote-growth-pub-81217> accessed 3 April 2020.

[13] PRS Legislative Research, 'The Personal Data Protection Bill, 2019' <https://www.prsindia.org/billtrack/personal-data-protection-bill-2019> accessed 3April 2020.

[14] The Personal Data Protection Bill (2019), cl 3(36)(ii).

[15] The Personal Data Protection Bill (2019), cl 17 and 18.

[16] *K.S. Puttaswamy v. Union of India,* (2017) 10 SCC 1.

[17] Anirudh Burman (n 12).

[18] The Information Technology Act 2000, s 43-A.

patient but if we look at the other side, the government is just giving public interest, an upper hand over private interest. As per to the Epidemic Diseases Act, the government can take necessary steps to tackle the spread of the disease,[19] which may include infringing the right of privacy. Moreover, the protection of the personal data bill says that in case of medical emergency, the protection of data may be waived off without the consent of the individual.[20]

At last, we can say that data related to health issues is a matter of great concern, especially the right to privacy, which is enshrined under Article 21 of Indian Constitution. It is high time to implement Digital Information security in Healthcare Act (DISHA) so that the digital health data of a person is completely secure and remains in privacy.

III. INTERNATIONAL BEST PRACTICES AND REFERENCES

A. The United States of America

USA has been following a sectoral approach to data protection legislation so far. At the federal level, currently, USA does not have any formal legislation regulating the collection and use of personal information. In fact, there is no explicit 'right to privacy' enshrined in the US Constitution, but there are certain sectors creating overlapping protections. The following rules which govern health information and privacy, illustrate this problem.

The Health Insurance Portability and Accountability Act 1996 ("HIPAA") **and the Health Information Technology for Economic and Clinical Health Act 2009 ('HITECH')**

HIPPA[21] was introduced as a response to the digitization of data in the U.S. health care industry and the mounting distress concerning the privacy and security of personal health information. HIPPA established national security standards for 'use' of such health information and privacy standards for the 'protection'.[22] After a span of time, in 2009, HITECH was introduced in order to promote the eloquent use of technology facilitating personal health information. It required a 'notice' to be served to the patients and the US Health and Human Services department (hereinafter 'HHS') in case of a breach of an unsecured and protected health information.

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[19] The Epidemic Disease Act 1897, ss 2 and 2 (a).

[20] The Personal Data Protection Bill, 2019, cl 12.

[21] Health Insurance Portability and Accountability Act of 1996, Pub L No. 104191, 110 Stat 1936 (1996), (codified as amended at 42 USC § 1320 d (2012).

[22] The National Academies, 'Beyond the HIPAA Privacy Rule: Enhancing Privacy, Improving Health Through Research' Washington (DC): National Academies Press (US) (2009).

Pursuant to this, the 'Privacy Rule'[23] and 'Security Rule'[24] promulgated by the HHS created certain individual rights and commanding restrictions on use and disclosure of health information. Ultimately, both these rules created a federal floor of health information privacy protection.

HIPAA and HITECH being the primary health privacy and security law in the U.S. are self-contradictory in nature. Both these regulations including the HHS regulations only apply to organizations and entities which fall under the definition of 'covered entity'.[25] A covered entity within the meaning of HHS regulations can be defined[26] as:

(a) A health plan;

(b) A healthcare clearing house; or,

(c) A health care provider capable of transmitting personal health information in electronic form.

This means that the consumers are not even aware about their personal health information. They never know at what point of time their information is secure and when it isn't because of overlapping and contradictory patchwork of existing protections where separate privacy laws govern specific areas of U.S. healthcare system.[27] However, these separate pieces have been instrumental in securing health data and efficient data collection and transfer.

B. Australia: The Privacy Act 1988

In Australia, the Privacy Act,[28] so far as it regulates the Commonwealth public sector and the national private sector, provides extra protection around handling of health information by controlling how the health service providers collect and handle personal health information. Even though, there is no absolute 'right to privacy' in Australia just like the United States, the nation has a comprehensive law dealing with the sectoral regulations of the right to privacy.[29]

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[23] HIPAA Security and Privacy Regulations 2018, ss 160.101 and 164.104.

[24] General Security and Privacy Provisions 2018, ss 160.103 and 164.306.

[25] Covered Entities and Business Associates, US Department of Health and Humans Services (16 June 2017) <https://perma.cc/4SWX-KLBH> accessed 3 April 2020.

[26] 45 C.F.R. § 160.103 (Defining 'covered entity').

[27] Nuala O'Connor, 'Reforming the US Approach to Data Protection and Privacy' (*Council on Foreign Relations*, 30 January 2018) <https://www.cfr.org/report/reforming-us-approach-data-protection> accessed 3 Apr 2020.

[28] The Privacy Act 1988 <https://www.legislation.gov.au/Series/C2004A03712> accessed 3 April 2020.

[29] Tanvi Mani, 'Privacy in Healthcare: Policy Guide' (*The Centre for Internet & Society*, 26 Aug, 2014) <https://cis-india.org/internet-governance/blog/privacy-in-healthcare-policy-guide>

All health service providers including the ones that merely hold the health information fall within the Privacy Act. The manner, in which health information is collected and handled, is regulated by the Act. Since the act is administered by the Office of the Australian Information Commissioner (hereinafter 'OAIC'), there are regulations within the Act which create a balance between protecting health information from unexpected uses beyond healthcare and advancing public health through medical research.[30] In lieu of this, there are two binding set of guidelines issued by the National Health and Medical Research Council within the meaning of Section 95 and 95A of the Act.[31]

The guidelines refer to:

(a) The procedures that medical researchers must follow in case of disclosure of personal health information from a Commonwealth organization for research purposes.[32]

(b) The framework to assess proposals to handle personal health information held by organizations without the informed consent of individuals.[33]

It is pertinent to note, that the Privacy Act cannot stop a health service provider when informed consent has been obtained from the individual, however, in the absence of such consent, the Act allows disclosure of genetic information in limited instances such as cases where health service needs to be provided to that respective patient.[34] Also, where there is a serious threat to life of a genetic relative of the patient and when the health service provider is in compliance with the guidelines provided under Section 95AA of the Act.[35]

IV. RE-EVALUATING CONSTITUTIONAL PROTECTION FOR HEALTH INFORMATION PRIVACY

These are extraordinary times for a strong and independent India, where a public healthcare disaster has taken the world to a position where almost everybody is becoming submissive and where countries are giving up and losing all hopes. For all that we know, the last time such global panic and terror prevailed was during the World Wars. The discussion on human culpability in light of the COVID-19 outbreak has just started and is probably going to

accessed 3 April 2020.

30 Australian Government, Office of the Australian Information Commissioner <https://www.oaic.gov.au/privacy/the- privacy-act/health-and-medical-research/> accessed 3 April 2020.

31 *Ibid*.

32 The Privacy Act 1988, s 95.

33 The Privacy Act 1988, s 95-A.

34 Tanvi Mani (n 29).

35 The Privacy Act 1988, s 95-AA.

overwhelm global talk and governmental issues for times to come.[36] The main aim of India is to focus on the prevention, mitigation and control of Covid-19. For this purpose, both the Central and the State Governments have taken a number of measures and both of them are working in harmony with each other.

COVID-19 has been declared as a pandemic as it has hit more than 4.4 million people across the world, and has taken over 3,00,000 lives till date. Emerging from China, the novel virus has affected most of the world including the greatest superpower, U.S.A where close to 1.45 million people have been affected and 85,000 people have died. Even in India, the total number of affected people as per official records is around 80,000, with the death toll being over 2,600. Since, no vaccine or effective treatment is available for treatment; most of the countries have adopted the method of lockdown as social distancing has proven to be an effective tool, which can stop the spread from spreading. India is also under lockdown since 25th March 2020 which is recently extended for another two weeks and now it will last till 17th May 2020.

Looking at this current situation, some states in India published an online database of people who have been infected with this disease or are quarantined in their respective homes or in government centers. Some states even went ahead and pasted notice outside the houses of those people who are quarantined probably in good faith that it will alert the other people who are living in the vicinity.

The whole issue of stopping the pandemic by the State through different measures like these will face an obstacle in the form of privacy of the people or at the time of pandemic, the issue of privacy will take a backseat to give way to a larger public interest.

In Justice *K.S. Puttaswamy* v *Union of India*,[37] right to privacy was recognized as an integral part of right to life under Article 21 of the Constitution of India and later on reinforced in *Puttaswamy II*.[38] However, the right to privacy is not an absolute fundamental right like any other fundamental rights under the Constitution of India and therefore, it can be curtailed by the State as per the Constitution. Even in the *Aadhaar* case, three conditions were laid down to test the validity of an Act infringing any right; first activity must be endorsed by law (lawfulness). Second, the activity must be essential for a real

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[36] Wendy K. Mariner, 'Reconsidering Constitutional Protection for Health Information Privacy' (2016) 18(3) University of Pennsylvania Journal of Constitutional Law 975 <https://scholarship.law.upenn.edu/jcl/vol18/iss3/6> accessed 27 April 2020.

[37] (2017) 10 SCC 1.

[38] Writ Petition (Civil) No 494 of 2012.

point (need). Third, the activity (infringing privacy) must be proportionate to the requirement for such activity.[39]

The judgment in *Puttaswamy II* further stressed on the doctrine of proportionality by articulating four sub-parts:

(a) A measure restricting a right must have a legitimate goal.

(b) It must be a suitable means of furthering this goal.

(c) There must not be any less restrictive but equally effective alternative.

(d) The measure must not have a disproportionate impact on the right holder[40].

Any State, which has published the names and addresses of people who are suffering from COVID 19 and also pasted the so called notice outside the homes of the people who are quarantined seem to be violating the right to privacy of such people. The action of the States will lead to a constitutional question, whether all these measures adopted by the States can withhold the judicial scrutiny as laid down by the Supreme Court in the *Puttaswamy* Case.

Today, as India fights this dangerous pandemic, The Central Government launched the 'Arogya Setu' mobile app to alert users if they are into contact of a COVID-19 positive patient and what kind of precautions can they take in such case. However, the cyber security experts raised this issue that 'Arogya Setu' could violate the right to privacy of a COVID-19 positive patient.[41] As per the privacy policy of the app, it collects the personal data of its users and discloses such health data to the Government with necessary details for 'carrying out medical and administrative interventions necessary concerning COVID-19'.[42]

The app is also more invasive. It collects multiple and personal sensitive data which raises a threat to privacy. However, it is also justifiable to say, that during the outburst of any epidemic disease, the Central Government has the

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[39] Vikram Koppikar, 'Covid-19: Data Privacy in these Testing Times' (*Money Control:India*, 27 April 2020) <https://www.moneycontrol.com/news/economy/policy/covid-19-data-privacy-in-these-testing-times-5120201.html> accessed 27April 2020.

[40] Soutik Banerjee and others, 'Privacy in Times of Corona: Problems with Publication of Personal Data of COVID-19 Victims' (*Live Law*, 26 March 2020) <https://www.livelaw.in/columns/privacy-in-times-of-corona-154360?infinitescroll=1> accessed 27 April 2020.

[41] Manavi Kapur, 'The Corona Virus App Narendra Modi Endorsed is a Privacy Disaster' (*Quartz India*, 15 April 2020) <https://qz.com/india/1838063/modis-aarogya-setu-coronavirus-app-for-india-a-privacy-disaster/> accessed 27 April 2020.

[42] Kashish Aneja and Nikhil Pratap, 'Implement Arogya Setu but Only through Law' (*The Hindu*, 21 April 2020) <https://www.thehindu.com/opinion/op-ed/implement-aarogya-setu-but-only-through-law/article31391708.ece> accessed 27 April 2020.

power to take all the 'necessary measures' to prevent the spread of such disease for the interest of the public at large.[43]

If at all the right to privacy of a person has to be restrained, it must be through a valid and sanctioned law which should be passed by the legislature. On examining the relevant laws including The Epidemic Diseases Act, 1897, and The National Disaster Management Act, 2005, there appears to be no legal provision which lays out for the personal health data of the consumer to be published in a public database. This preliminary illegality notwithstanding, the State's action also falls foul of the test of 'proportionality'.[44]

Any action of the Central or State government, which violates the Fundamental rights of its citizens, in order to satisfy the test of proportionality, must ensure that it is not 'excessive'. What it means is that, there should not be any existing measures that are equally effective with a lesser degree of encroachment.[45] *Puttaswamy*[46] calls this the 'necessity stage'. The policy followed by some of the Governments has been to use indelible ink to stamp those people who have been tested positive or have been quarantined.

The action of the States may have a reasonable goal, (ie to prevent and control the spread of Covid-19 by minimizing contact of people and following social distancing). Given that the State's main aim is that the people who have been affected by the virus do not come in contact with the other people, it would appear that physical stamping and identification of homes completely achieves the said aim, and the publication of a database of the patients is entirely excessive.

There are a number of problems with the publication of an online database which consists of personal health data of the COVID-19 patients. With no specific Data Protection law in the country which prima facie is a continuous violation of the order of the Supreme Court while upholding the constitutionality of the *Aadhaar Act*,[47] the personal data of these people, without their consent, is being set out in the public domain and is exposed to being misused and abused.

This pandemic has also seen a rise in xenophobia, prejudice and racial violence, and there have been reports of hate crime, mob lynching in that respect.

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[43] Epidemic Diseases Act 1897.

[44] Soutik Banerjee and others, 'Privacy in Times of Corona: Problems with Publication of Personal Data of COVID-19 Victims' (*Live Law,* 26 March 2020) <https://www.livelaw.in/columns/privacy-in-times-of-corona-154360?infinitescroll=1> accessed 27 April 2020.

[45] V.N. Shukla, *Constitution of India* (11th edn, Eastern Book Company 2008).

[46] Writ Petition (Civil) No 494 of 2012.

[47] *K.S. Puttaswamy* v *Union of India*, (2017) 10 SCC 1.

Along with the infected patients and quarantined people, the doctors and nurses who are the only ones treating Covid-19 patients are reportedly facing hate, abuse, and discrimination. All this is making the patients and their families, a lot more vulnerable.

We are living in the time where once any information is uploaded for public eyes on the internet; it is never capable of being completely removed from there. The personal information of those who are quarantined for Covid-19 will outlast the present virus and will remain in the public domain forever. Then what happens to the rights of these humans to be forgotten on the internet, and what happens with their identification once it is reduced to an entry on a stigmatized database? Stigma, as we recognize from history, tends to a long way to outweigh rationality and sagacity, and has a lifespan of its own.

It is mostly the propensity of States to consider civil liberties as crucial in times of such crisis, war, or emergency. Some people advocate that it is the right thing to do, and arguably, the Constitution recognizes this by providing for art 352-360[48] which envision a very different society in times of emergency. Nonetheless, in dealing with COVID-19, we must acknowledge that civil liberties and rights are not at all the gift of the Executive, and the true test of any democratic Government is to deal this crisis with least possible deviance.

The whole world including India is fighting an invisible enemy in the form of Covid-19. It is not the first time the world is dealing with such a pandemic. There are a number of instances in the past where the World has dealt with many such pandemics e.g. the first reported yellow fever in Yucatan in 1648 to the Ebola Virus and the 2003 SARS outbreak in Toronto. Just like any medical emergency, even in this emergency some of the civil rights are taking a backseat in public interest and like all the viruses in the past, even this virus will also leave us one day or will subsidize to such an extent that we can get back to our normal life but we all need to be guarded against any excessive abuse on our liberties by the executive in this regard.

V. CONCLUSION

Consumer privacy, in the context of healthcare is extremely vital. While India continues to extend its lead in the race towards a culture of privacy, it can also fall for a poor second in no time. The amount of consumer health data collection is increasing exponentially and very little is known about the extent to which this data is being shared with third parties especially when we are dealing with an invisible enemy in the form of COVID-19.

[48] Constitution of India, pt 18.

Some well renowned commentators like Edward Snowden and Yuval Noah Harari have already warned the world that increasing surveillance for tackling the present healthcare crisis can make surveillance state the 'new normal' thereby threatening the privacy of the people. A responsible and democratic state will only collect that much information as it is needed for achieving the specific objectives and once the objectives are achieved shall delete such data. While DISHA and NEHA sound promising enough, their implementation and enforcement chiefly remains untested, not to forget the Personal Data Protection Bill of 2019, which still remains a hesitation.

Implementing DISHA and NEHA as a regulatory response would make India, a front runner in the regulation of healthcare data, in this crucial hour, when governments all around the globe are still scrambling to narrow down a proper definition of 'personal information' in their respective legislations along with the rights and controlling access of such information.

Since India is stepping up to create an overarching legislation on data privacy and security, the timing of both the drafts seem to be questionable. If such a lack of coordination and consistency exists between the ministries, it could lead to irregularities athwart to sectoral regulations of health data and also shift back India in the race towards attaining the much awaited 'culture of privacy'.

TAJ MAHAL HOTEL V UNITED INDIA INSURANCE CO. LTD.: RE-ALIGNING THE FOCUS ON CONSUMER PROTECTION ACT

—*Sharad Bansal*[*]

I. INTRODUCTION

What is the liability of a five-star hotel for the theft of a car parked in its premises through valet parking? This question was answered by the Supreme Court of India in its recent decision in *Taj Mahal Hotel* v *United India Insurance Co. Ltd*.[1] The Court held that the hotel was liable for the loss of the car. In order to arrive at this conclusion, the Court was required to look into certain legal i+ssues pertaining to consumer protection law and contract law which had never arisen for its consideration in the past.

In this case note, I discuss:(a) the relevant facts of the case; (b) the Court's findings on the legal issues; (c) I argue that while the Court analyzed the issues in a lucid manner, it overlooked the provisions of the Consumer Protection Act 1986 ('1986 Act') and rendered its findings purely from a contract law perspective. Although this flaw did not affect the outcome in the facts before the Court, it has curtailed the rights of a consumer under the 1986 Act.

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[1] (2020) 2 SCC 224.

II. FACTUAL BACKGROUND

An individual (the 'Consumer') went to Taj Mahal Hotel (hereinafter the 'Hotel') in his Maruti Zen car. The Consumer handed over the car keys to the Hotel valet for parking and went inside the Hotel. He was provided a parking tag by the valet who stipulated that the car was being parked at the guest's own risk and responsibility and the Hotel would not be responsible for any loss, theft or damage to the car (hereinafter 'Exclusion of Liability Clause').

When the Consumer came out of the hotel, he was informed that his car had been stolen by three boys who had come to the Hotel and one of them picked up the keys of the Consumer's car from the Hotel desk. The Consumer had insured the car and subrogated its rights in respect of the theft of the car to the Insurer after his insurance claim was settled by the Insurer.

The Insurer and the Consumer filed a complaint before the State Commission against the Hotel under the 1986 Act, seeking payment of the value of the car and compensation for deficiency in service. The State Commission and National Commissioner held in favor of the Insurer and the Consumer. The Hotel filed an appeal before the Supreme Court challenging the decision of the National Commission.

III. THE SUPREME COURT'S RULING

The Hotel raised a preliminary objection with respect to the maintainability of the Complaint on the ground that the Insurer did not qualify as a 'consumer' and therefore, it had no right to file a complaint under the 1986 Act. The Supreme Court rejected this submission, relying on its decision in *Economic Transport Organisation* v *Charan Spg. Mills (P) Ltd.*,[2] where it had held that a complaint filed by an insurer acting as a subrogee is maintainable *inter alia* if it is filed by the insurer and the assured as co-complainants. In *Taj Mahal Hotel*, the Insurer and the Consumer were co-complainants. Therefore, the Court held that the pre-condition for filing a complaint by the Insurer as laid down in *Economic Transport Organisation* had been met and the Insurer had the *locus standi* to file the complaint.

On the substantive issue of liability of the Hotel for the stolen car, the Court examined it from a contract law perspective. This was the first time that the Supreme Court had been called upon to adjudicate upon this issue. The Court engaged in a detailed comparative analysis of the liability of 'innkeepers'[3] in

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[2] (2010) 4 SCC 114.

[3] As the Court notes, hotels owners were traditionally called 'innkeepers' (*See* ¶ 12).

various jurisdictions and noted that while the liability of a hotel owners or an innkeeper was strict in nature under common law, it has now been restricted in most common law jurisdictions to fault-based liability.

According to the fault-based liability approach (referred to by the Court as the 'prima facie liability rule'), 'the hotel owner is presumed to be liable for loss or damage to the vehicle of the guest upon his failure to return the same. However, he has an opportunity to exonerate himself by proving that the loss did not arise due to negligence or fault on his part or that of his servants'. The Court held that under Indian law as well, the prima facie liability rule must be applied as it balances the interests of hotel owners and guests and does not place undue burden on either party.

Crucially, however, the Court held that the prima facie liability rule was premised on the existence of a relationship of bailment between the hotel owner and the guest, and therefore, a contract of bailment must be found to subsist for the hotel owner to be liable. Such a contract would come into existence only if the custody or possession of the vehicle is 'purposefully handed over' to the hotel by the guest. On facts, the Court found that the relationship between the Consumer and the Hotel in *Taj Mahal Hotel* was one of bailor-baileeas per Section 148 of the Contract Act 1872.

Therefore, the standard of care required to be taken by the Hotel in respect of the Consumer's car is that prescribed in Section 151 of the Contract Act. Since the car had been stolen from the Hotel's premises, it was prima facie established that the Hotel had failed to take due care as required under Section 151 and the burden of proof lay on the Hotel to disprove this fact. The Court found that the Hotel had failed to discharge this burden and therefore, it was held to be negligent in its conduct.

Finally, the Court was required to determine the effect of the Exclusion of Liability Clause on the Hotel's liability for its negligence. This issue, too, had come for consideration before the Supreme Court for the first time. The Court affirmed the more-than-a-century old minority opinion (on this issue) of Sankaran Nair, J. in *Mahamad Ravuther* v *British India Steam Navigation Co. Ltd.*[4] and held that the Hotel could not contract out of its obligation under Section 151 of the Contract Act.[5] Thus, the Exclusion of Liability Clause did not absolve the Hotel of its liability for the loss of the car. Thus, the Court ruled in favor of the Insurer and the Consumer.

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4 (1908) 18 Mad LJ 497, MANU/TN/0073/1908.

5 This issue merits a separate analysis altogether which is outside the scope of this case comment.

IV. THE OVERLOOKING OF THE CONSUMER PROTECTION ACT 1986

The Supreme Court's analysis of the legal issues in *Taj Mahal Hotel* pertaining to the obligations of the Hotel is extremely detailed and coherent. However, it is not a flawless one, for it is centered on the Contract Act (in particular, the subsistence of a contract of bailment) and in this process, ignores the provisions of the 1986 Act. This is discussed below:

A. The Failure to Take Note of the Requirement of 'Deficiency' in Service

The complaint filed by the Insurer and the Consumer alleged deficiency in the service provided by the Hotel. According to Section 2(1)(c) of the 1986 Act, deficiency in service [defined in Section 2(1)(g)] is one of the six categories of allegations that can be made in a complaint filed under the Act. This assumes significance because for a consumer complaint to be successful, it is necessary that at least one of the six categories of allegations enlisted in Section 2(1)(c) is proved by the complainant.[6]

In the present case, since the only allegation under Section 2(1)(c) was deficiency in service, it was necessary for the Court in *Taj Mahal Hotel* to have concluded that this allegation was proved before it could grant any relief to the Insurer and the Consumer. In fact, the Supreme Court in *Ravneet Singh Bagga* v *KLM Royal Dutch Airlines*,[7] has categorically held that,

> '[i]*n the absence of deficiency in service the aggrieved person may have a remedy under the common law to file a suit for damages but cannot insist for grant of relief under the Act for the alleged acts of commission and omission attributable to the respondent which otherwise do not amount to deficiency in service*' (emphasis provided).

In other words, in a complaint filed before a consumer forum under the 1986 Act, the cause of action is distinct in nature (ie deficiency in service) from what may be urged before a civil court.

The Court's omission in *Taj Mahal Hotel* to take into account the provisions of the 1986 Act could perhaps be viewed as inconsequential to the outcome of the case, as the breach of the Hotel's obligation arising out of the contract of bailment would constitute 'deficiency in service', which would have entitled the Court to grant the same reliefs to the Insurer and the Consumer that

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[6] *Bhubaneshwar Development Authority* v *Susanta Kumar Mishra*, (2009) 4 SCC 684.

[7] (2000) 1 SCC 66.

it eventually did. However, the law laid down by the Supreme Court will have a bearing on cases where a contract of bailment is found to be non-existent, as the Court predicated the Hotel's obligation to take due care of the car on the subsistence of a contract of bailment.

According to the Court, where the guest merely parks her car in a parking space or facility, the relationship between the parking authorities and the guest is one of licensor-licensee and not bailor-bailee; consequently, the parking authorities would not have any liability in such a case. This binary approach - holding the parking authority liable where a contract of bailment subsists and absolving it from liability where no such contract is found to exist - is contrary to the provisions of the 1986 Act.

To elaborate, it is necessary to look into the meaning of 'deficiency' as defined in Section 2(1)(g) of the 1986 Act, which reads as follows:

> "'deficiency' means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service" (emphasis provided).

'Deficiency' is defined to mean any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance of an act in the prescribed manner. The prescription to carry out the act in a given manner may stem from: (a) any law; (b) a contract; (c)any source other than law or contract. The words 'or otherwise' in Section 2(1)(g) have been interpreted by the Supreme Court in *Punjab Urban Planning and Development Authority* v *Vidya Chetal*,[8] to subsume 'other modes of standard setting alternative instruments other than contracts such as laws, bye-laws, rules and customary practices, etc'. Therefore, it is settled that a deficiency in service is not premised solely on the existence of a contractual obligation.

One of the sources of an obligation to take due care of cars parked in one's premises is the doctrine of legitimate expectation. While this doctrine has its origins in administrative law; the Supreme Court has consciously extended its applicability to disputes under the 1986 Act. In *Malay Kumar Ganguly* v *Sukumar Mukherjee*,[9] the Court held that the position and stature of the doctors treating the patient and the hospital where the treatment was being carried out

[8] (2019) 9 SCC 83.
[9] (2009) 9 SCC 221.

raised a legitimate expectation as to the standard of care in medical service from the doctors and the hospital. Indeed, in *Taj Mahal Hotel* itself, the Court held that the responsibility of five-star hotels to take measures to ensure the safety of cars parked in their premises is '*higher*'. There is no contractual provision or statutory law which required the Court to impose a higher duty of care on five-star hotels *vis-à-vis* other hotels. It is simply the legitimate expectation of the consumer that given the premium price paid for services at a five-star hotel, the nature of services provided by such hotels would be superior.

Therefore, in a given scenario, the car owner may have a legitimate expectation that that the parking authorities would take due care of the car parked in their premises even if there is no contract of bailment. For instance, let us take a situation where a car owner parks the car herself in a shopping mall and does not hand over the keys of the car to the person in-charge of the parking area in the mall. The car owner pays Rs. 50 as parking fees and is issued a receipt for the same. All cars exit the parking area from a common exit only after showing the receipt issued to the driver.

In such a situation, there is no contract of bailment as the possession of the car has not been handed over by the car owner to the mall authorities. However, the car owner would be justified in assuming that the mall authorities would take due care of the car inside the parking area and prevent it from being stolen. This is a legitimate expectation of the car owner. Any loss or damage to the car would ordinarily constitute a deficiency in service on the part of the mall and would entitle the car owner to claim compensation under the 1986 Act. However, the Supreme Court's analysis in *Taj Mahal Hotel*, which focuses on the issue solely from a contract law perspective and ignores the provisions of the 1986 Act, would have the effect of absolving the mall authorities from liability.

The fallacy in the Court's approach in *Taj Mahal Hotel* is also evidenced by its reasons for distinguishing the National Commission's decisions in *Corpn. of Madras* v *S. Alagaraj,*[10] and *Rohini Group of Theatres* v *V. Gopalakrishnan*.[11] In *Alagaraj*, a complaint was filed under the 1986 Act against the Corporation of Madras for loss of the complainant's two-wheeler which was parked in the parking area designated by the Corporation. The National Commission held that the Corporation had provided the parking facility for a nominal fee of Re. 1/- and objective of the Corporation was to regulate traffic.

[10] 1995 SCC Online NCDRC 1.
[11] 1996 SCC Online NCDRC 1.

In such circumstances, the Corporation could not be assumed to have undertaken any liability for the loss of vehicles parked in the parking area. In *Rohini Group of Theatres*, the National Commission followed its decision in *Alagaraj* in the context of loss of a bicycle of the complainant who had gone to a theatre and parked his bicycle in the theatre premises for a fee. Neither of these decisions absolved the parking authority of liability on the ground that no contract of bailment was found to exist. Nonetheless, according to the Court in *Taj Mahal Hotel*, both *Alagaraj* and *Rohini Group of Theatres* were inapplicable to the facts of *Taj Mahal Hotel* because there was no contract of bailment in either of those two cases, as opposed to *Taj Mahal Hotel*.

The Court relied on decisions of the English Court of Appeal[12] and the Delhi High Court[13] to buttress its conclusion that in the absence of a contract of bailment, there exists merely a licensor-licensee relationship between the car owner and the parking authority, and therefore the parking authority has no obligation to the car owner in relation to the car parked in the former's premises.

However, both these decisions were rendered in the context of a claim instituted in a civil court for compensation for loss of the car. Neither of these decisions involved a determination of whether there was a 'deficiency' in the service rendered by the parking authority, which, as discussed above, constitutes a broader substantive obligation than the obligation arising out of a licensor-licensee relationship.

B. The Case of Gratuitous Bailment

One of the contentions raised by the Hotel in *Taj Mahal Hotel* was that the Consumer did not pay any charges for valet parking and therefore, the Hotel was not obligated to ensure the safety of the car. The Court rejected this contention on the ground that the Contract Act does not distinguish between the obligations of a bail or in case of a gratuitous bailment and a bailment for reward. The Court held that 'it is irrelevant as to how much parking fee was paid by the consumer, or whether any parking fee was paid at all, as the duty of care required to be taken by the hotel will be the same in all circumstances' (emphasis provided).

This reasoning and conclusion would be entirely correct if the Consumer had filed a civil suit seeking compensation for the loss of the car. However, it is erroneous in the context of a dispute arising under the 1986 Act.It is

[12] *Ashby* v *Tolhurst*, (1937) 2 KB 242.
[13] *New India Assurance Co. Ltd.* v *DDA*, 1991 SCC OnLine Del 8, AIR 1991 Del 298.

well-established that a complaint under the 1986 Act can only be filed by a 'consumer' as defined in Section 2(1)(d). A 'consumer' is a person who buys goods or avails of any service *for a consideration*. Moreover, the definition of 'service' in Section 2(1)(o) of the Act also excludes any service rendered free of charge and the Supreme Court has time and again recognized this exception.[14]

A reading of Sections 2(1)(d) and 2(1)(o) would make it unequivocally clear that in the absence of any consideration, an individual cannot be considered as availing of any 'service' and cannot qualify as a 'consumer'. Such an individual has no *locus standi* to file a complaint under the 1986 Act. For this reason, the Court's conclusion that it is irrelevant as to whether any parking fee was paid at all is erroneous and fails to take into account the provisions of the 1986 Act.

V. CONCLUSION

The Supreme Court's decision in *Taj Mahal Hotel* constitutes an important milestone in consumer protection law (as well as contract law), as it lays down important propositions of law. It is now settled that the liability of a hotel in its capacity as a bailor of its guests' belongings is not strict in nature, but the burden of proof lies on the hotel to establish that any loss or damage caused to the guests' goods was not on account of its negligence.

However, Court's analysis has failed to take into account the provisions of the Consumer Protection Act 1986. The Court has especially failed to note the requirement to prove deficiency in service in order to grant reliefs in proceedings under the 1986 Act and the meaning of 'deficiency' in service. This has resulted in the Court sourcing the obligation to take due care of vehicles parked in one's premises solely and exclusively on a contract of bailment even though the 1986 Act envisages other sources of such an obligation.

Prior to the decision in *Taj Mahal Hotel*, the existence of a legitimate expectation and the consequent obligation to ensure the safety of vehicles parked in one's premises would be determined on a case-to-case basis and the subsistence of a contract of bailment would merely be one of the elements to determine whether such an obligation exists. However, in light of the law laid down in *Taj Mahal Hotel*, it is only in situations where a contract of bailment is found to be in existence that the Persons in-charge of parking facilities can be held liable for loss or damage to vehicles parked in their premises.

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[14] *LDA* v *M.K. Gupta*, (1994) 1 SCC 243; *Indian Medical Assn.* v *V.P. Shantha*, (1995) 6 SCC 651; *Punjab Urban Planning and Development Authority* v *Vidya Chetal*, (2019) 9 SCC 83.

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