SOFT LAWS: NATURE AND EMPLOYABILITY IN COMPETITION LAW

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Abstract

The Competition (Amendment) Act, 2023 brought in several changes to the Indian competition law regime with special emphasis on the need to restructure the Competition Commission of India's enforcement strategies. With rapid technological advancement and evolving business dynamics, there seems a renewed emphasis on the adoption of soft law instruments to complement the existing hard law and act as, what is opined as a 'stop-gap measure' used by the agencies. An analysis of the soft law enforcement tools existing in prominent jurisdictions such as the European Union and the United States reveals the role of soft law tools in fostering stakeholders' collaborations, self-regulation, and information-sharing. However, the questions pertaining to its placement within the legal framework and interaction with the hard law still persist. The present research aims at dissecting the role of different soft law instruments within the competition law toolkit while studying their ability across nations. With the Amendment granting the Commission the powers to issue guidelines and undertake enhanced advocacy measures, it would be crucial to assess how soft law measures can be better incorporated within the legal system while yielding flexibility and legal certainty.

Keywords: *Soft Law, Competition Law, Regulatory Toolkit, Self-Regulation, Guidelines, Advocacy*

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I. DECODING 'SOFT LAW' INSTRUMENTS

Markets have been rapidly evolving warranting the existing legal framework to be carefully evaluated and updated at regular intervals. In this direction, the development of soft laws has picked pace acquiring a distinct role within the regulatory toolkits across sectors in many prominent jurisdictions. However, the debate around the inclusion of soft laws and the value accorded to such instruments is not novel. Scholars have been deliberating upon the nature and use of soft laws and the extent to which they can be utilised for necessary legal compliance.

Soft law, simply put, can be defined as *a set of non-binding rules/instruments assisting in the interpretation and understanding of legally binding laws, enlisting standards for future conduct and expected/appropriate behaviour*.[1] Another view suggests that such laws can be understood as *'rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects and also legal effects'*.[2]

The views are divided in terms of decoding its placement within the broader legal landscape. Is it merely a guidance/recommendation which is non-binding or a legally binding commitment/agreement complementing the hard law? Rational institutionalists opine that to be able to construe the applicability/ binding nature of soft laws, the language of the commitments should be the focus. Contrary to this, the view of constructive scholars points to the enactment stage of such instruments, thus bridging the gap between the theory and law-in-action.[3] Soft law was also understood to have been enacted to cater to the weakening of hard law along its three dimensions namely obligation, precision, and delegation.[4] In addition, it also assists in situations where the existing hard law is vague and its implementation is at the discretion of the parties.[5]

Amidst questions surrounding its actual placement, the present research aims to analyse the role of different soft law instruments within competition law, through a comparative study and suggest a plausible way forward.

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1 Andrew T Guzman and Timothy L Meyer, 'International Soft Law' (2010) 2(1) Journal of Legal Analysis 171.

2 Francis Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques' (1993) 56(1) The Modern Law Review 19.

3 Gregory C Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706 <https://ssrn.com/abstract=1426123>.

4 Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421 <https://ssrn.com/abstract=1402966>.

5. *Guzman and Meyer* (n 1) 204.

Authorities across jurisdictions have stressed upon the need to incorporate soft laws, complementing the hard law, as competition enforcement lags behind the rapid changes to the economic landscape. The adoption of soft law is of particular relevance at a time when rapidly evolving markets call for swift action from the regulators. The legal scholarship suggests that soft laws cannot be employed through a straight-jacketed formula and reasoning might differ from case to case. This further adds to the existing challenge of not only its formulation but also its applicability and implementation.

II. THE GRADUAL SHIFT TO THE SOFT LAW APPROACHES

The Competition Act, 2002 was recently amended introducing several substantive modifications while strengthening the existing regulatory framework.[6] The amendment builds on the need to provide a trust-based business environment, ensuring regulatory certainty and faster market correction.[7] The new amendment aligns with the global acknowledgement of the need to reconsider the enforcement tools in the backdrop of the revamping of business structures. With the need to revise the substantive provisions, the resort to soft law has also been one of the considerations and indeed a peculiar one.

Soft law in the form of informal guidance, reports, guidelines, recommendations, etc., serves as an integral part of the enforcement toolkit. Initiating any legislative change in the hard law is a long-drawn process and it is, hence, crucial to devise instruments that timely respond in such situations. It is primarily to ensure that damage has not been ensued, till a concrete action is initiated and enforced. Such hybrid models have been existing within several sectors in India such as the securities market, banking, and telecom to mention a few. The United Kingdom (UK), the United States of America (USA), and the European Union (EU) competition regime also incorporate a hybrid system. The EU regime has a legal system where soft laws provide the required precision to the rules, as envisaged by the Treaty, specifying and concretising the hard law.[8] This further helps in seeking cogent feedback from the stakeholders. In building a prompt and adaptive regulatory model, keeping pace with the market development in technology push and preventing a negative impact on innovation, a revamp of the regulatory policies is a must.[9]

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6 The Competition (Amendment) Act 2023 (Competition Amendment Act).

7 Competition Commission of India, 'Competition (Amendment) Act, 2023: Salient Features' (2023) 3 <https://www.cci.gov.in/images/publications_booklet/en/competition-amendment-act-2023-salient-features1684831868.pdf>.

8 Oana Andreea Stefan, 'Hybridity Before the Court: A Hard Look at Soft Law in the EU Competition and State Aid Case Law' (2012) 37 European Law Review 51.

9 International Telecommunication Union and World Bank, 'Transformative Technologies (AI) Challenges and Principles of Regulation' (Digital Platform Regulation, 8 May 2024) <https://digitalregulation.org/3004297-2/>.

The gradual absorption of the soft law instrument was referred to as *'Sunshine Regulation'* which at first emerged in the US, where the prices were regulated by the railway regulator, resorting to the release of informal statements, reports, and studies. The term refers to an enforcement strategy which disseminates information about the potential anti-competitive behaviour and entities in any industry.[10] Although one of its kind, scholars have referred to it as a double-edged sword, citing it as a measure adopted to define the future conduct of the authorities. Thus, it is understood as a limitation placed on the enforcement discretion enjoyed by the regulators, creating an anomaly surrounding its binding nature.[11]

While the importance of soft laws has been recognised, its adoption differs with few authorities still preferring hard law over soft law. For instance, the EU took a primarily hard law approach towards platform regulation by issuing the P2B Regulations, 2019 and the Digital Market Act (DMA), 2022, targeting 'gatekeepers'. It also resorted to the adoption of guidelines and directives from time to time. China, on the other hand, has resorted to soft laws with Anti-Monopoly Guidelines for the Platform Economy (Platform Guidelines), 2021 aimed at regulating the big techs.

The distinct nature and pervasiveness of digital markets have made it inevitable for the authorities to reconsider the approaches in order to better detect and analyse the actions resulting in potential harm to the existing/future competition. Moreover, the need for a timely intervention of authorities while ensuring that it does not result in over-enforcement, makes it imperative to consider soft laws. The competition law and policy are not only responsible for eliminating anti-competitive practices but also for fostering innovation, consumer welfare and overall economic growth. Thus, the use of soft law provides a safe harbour for the enforcers to respond to urgent matters and propose measures in the form of guidance and recommendations.

III. SOFT LAWS OR HARD LAWS: NEED FOR A BALANCED REGULATORY APPROACH

The authorities have been looking into the avenues of refining its approaches by working in collaboration with the industry players and other stakeholders considering the long-term economic goals. In India, this is evident in the Competition Commission of India's (CCI) recent deliberations on its role in fostering sustainability initiatives or the introduction of a lesser penalties regime.[12] Though the adoption of soft law has been

10 Frank Wijckmans, Filip Tuytschaever and Alain Vanderelst, *Vertical Agreements in EC Competition Law* (OUP 2006) 36.

11 Nicolas Petit and Miguel Rato, 'From Hard to Soft Enforcement of EC Competition Law- A Bestiary of "Sunshine" Enforcement Instruments' (2008) SSRN <https://ssrn.com/abstract=1270109>.

12 Competition Amendment Act, s 46.

encouraged, it is important to consider the following pros and cons of such adoption. Some of the advantages of soft laws are underlined below:

(i) Soft law, being flexible and accommodative, can help the transposition of new tools into competition law enforcement by drawing inferences from other prominent jurisdictions. At the same time, it ensures to adjust itself to the socio, political and economic parameters of the nation. Its flexibility makes it ideal to be adopted for building solutions and tools which can be implemented in a timely manner.

(ii) It is less formal, saves time, is inexpensive and thus, fits well per the needs of sectoral regulators and their governance. Soft law obeys the logic of *'flexible governance'*, assisting in regulating the sensitive sectors in which agreements are often very hard to reach.[13] The temporary measures undertaken across different sectors during the period of COVID-19 are a primary example of the importance of soft law especially in cases of exigencies.

(iii) Soft law facilitates cooperation and negotiation amongst the participants in the industry including both the state and non-state actors while maintaining transparency, knowledge-sharing, and participation of interested parties. It can also reduce the degree of obligations, delegation and precision as compared to the hard law. It can further improve the chances of its compliance, facilitating self-assessments/regulation. With our growing focus on the adoption of self-regulation, soft laws will play a crucial role in realising the goal.

Some of the important disadvantages of the adoption of soft law are discussed below:

(i) Enforcement of soft law is very complex in view of its flexibility and non-binding nature. Contrary to hard law, which is based on resulting sanctions for contraventions of the rules, soft law relies on self-regulated behaviour and social coercion which further adds to the complexity of its implementation.

(ii) Excessive use of soft laws may lead to over-expansion of administrative power by passing the normal law-making process through parliament involvement. Such administrative power's limits shall have to be carefully demarcated to avoid abuse of the unfettered power of the executive negatively impacting legal certainty and uniformity.

(iii) Although soft law is non-binding, it could also be understood as an additional layer of enforcement in addition to the hard law and creating what researchers have called a 'quasi-obligation' over the market players and the regulators.

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13 Competition Amendment Act, s 46.

IV. THE EXISTING FRAMEWORK: THE COMPETITION (AMENDMENT) ACT, 2023

The use of soft laws has not been mentioned expressly within the scheme of the Competition Act, 2002. However, the Competition Advocacy provision (Section 49) provides for the scope to include soft laws.[14] The advocacy practices could take the form of guidelines, guidance notes, advisories, non-binding codes of conduct, sets of recommendations, initiating MoUs, issuing notices, etc. Furthermore, sub-section (3) of Section 49 of the Amendment Act provides as under:

> *(3) The Commission shall take suitable measures for the promotion of competition [or culture]*[15] *advocacy, creating awareness and imparting training about competition issues.*

The recent amendment added the words *'or culture'* to the sub-section prescribing the commission with the responsibility of instilling a free and fair competitive culture amongst the entities. It is an acknowledgement of the need to incorporate measures that help realise the goals and objectives of the law i.e., promote economic efficiency and consumer welfare.

In addition to the existing provision, the newly inserted Section 64B in the Competition Act, 2002 is of relevance when it comes to the discussion over adopting a soft law approach to competition law enforcement. The section reads as under:[16]

> *64B. (1) The Commission may publish guidelines on the provisions of this Act, or the rules and regulations made thereunder either on a request made by a person or on its own motion.*
>
> *(2) Guidelines issued under sub-section (1) shall not be construed as determination of any question of fact or law by the Commission, its Members or officers and shall not be binding on the Commission, its Members or officers.*
>
> *(3) Without prejudice to anything contained in sub-section (1), the Commission shall publish guidelines as to the appropriate amount of any penalty for any contravention of provision of this Act.*
>
> *(4) While imposing penalty under clause (b) of section 27 or under section 43A or section 48 for any contravention of provision of this Act, the Commission shall consider the guidelines under sub-section (3) and provide reasons in case of any divergence from such guidelines.*

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14 Under its advocacy initiatives, CCI has issued compliance manual, procurement toolkit, diagnostic tools, etc. However, such power of 'competition advocacy' was not available with the erstwhile Monopolies and Restrictive Trade Commission under the repealed MRTP Act 1969.

15 Competition Amendment Act, s 49.

16 Competition Amendment Act, s 64B.

(5) The guidelines under sub-sections (1) and (3) shall be published in such form as may be prescribed.

Under the new arrangement, CCI is empowered to issue guidelines with respect to the provisions of the Act including the rules/regulations. Such guidelines can be issued either on its own accord or upon a specific request. One of the peculiar aspects of the provision is the enforceability of such guidelines as and when issued by the Commission. Sub-section (2) provides that neither such guidelines be binding on the Commission, nor should they be used to determine any question of fact or law. Thus, any such guidelines would be mere directory in nature. Further, specific guidelines can be issued over the penalty amount upon contravention of any of the provisions of the Act.[17]

Even though it is non-binding in nature, the Commission, by virtue of Section 64B(4), has been entrusted that due consideration be given to the guidelines while imposing penalties. In case of any deviations from the guidelines, it must be well-reasoned by the Commission. Thus, it can be understood as an attempt to provide legal certainty to both the Commission and the market players.

The amendment has brought in several changes primarily aimed at strengthening the enforcement strategies of the Commission. The inclusion of settlement and commitment mechanisms and the leniency plus regime shows the renewed focus of the Commission to divert from the traditional and lengthy legal processes and tools.

A. Settlement and Commitments

As stated above, although a comparatively young regulator, CCI has already initiated steps in the direction of incorporating soft law tools. The Competition (Amendment) Act, 2023 inserted Sections 48A and 48B introducing settlement and commitment mechanisms respectively. Under the new provisions, the benefit of reduced penalties can be availed by the parties. Settlement mechanisms are used as tools to settle cases, upon payment of a settlement amount, with the party against whom an inquiry has been initiated. The commitments, on the other hand, allow parties, after the inquiry has been conducted, to offer commitments addressing the concerns arising from its anti-competitive practices. While accepting settlement and commitments from the parties, the Commission is required to consider the nature, gravity, and impact of the contravention. This mechanism will certainly be of assistance in ensuring speedy resolution of the cases. However, the implications would be more apparent once the provisions are applied by the Commission.

17 The Competition Commission of India (Determination of Monetary Penalty) Guidelines, 2024 were notified by the Commission on March 6, 2024 while the submission of the paper was in process.

B. Leniency Regime (2018 – 2023): Evaluating the Success Ratio and Recent Measures

Since its enactment in 2009 until 2020 only around 11 orders were passed by the CCI imposing a lesser penalty.[18] The number seems much less when compared to the mature jurisdictions for instance in the US where an automatic immunity applies to the first-in party. The numbers witnessed a slight increase in the last five years from 2018 to 2023. A total of 15 applications were passed with lesser penalties while comparatively only 7 applications were passed during the period from 2009 to 2017. It can be inferred that the CCI is still evolving in its enforcement approaches keeping in consideration simultaneously evolving market structures.

The reasons for an under-utilised leniency mechanism can be multi-fold. Scholars argue that the overall less turnout could be due to the excessive discretionary powers of the Commission in granting the applications. In addition, imposition of conditions of continued cooperation and withdrawal of the immunity upon cessation to cooperate or furnishing false information/disclosures for instance may also be the reason.[19] Previously, a lack of advocacy initiatives also has been argued to contribute significantly to the enforcement hurdles. However, the recent Annual Reports of the CCI published its initiatives and how it has been actively engaging with the stakeholders including government departments, PSUs, other undertakings, and associations under its advocacy mandate. The Commission conducted over 110-115 advocacy programs each year from 2018 to 2021 which grew to a total of 340 during 2021-22.

The discrepancy in CCI orders could also be one of the contributors to a lesser number of applications over the years. There have been instances wherein the first applicant was granted 100 percent immunity, but the second applicant was granted only 30 percent immunity, without any definite and clear reasoning. Uncertainty and the absence of a reasoned order could be major contributors discouraging the parties from approaching the Commission. It would imply that the gains from providing information to the Commission are less than the gains from the cartel activity. Against this backdrop, the restructuring of the regime coupled with specific guidelines appears a *sine-qua-non*.

Last year, the Draft Lesser Penalty Guidelines, 2023 were issued by the Commission for public consultation. The guidelines introduced the 'Leniency Plus' regime. It is a strategy that offers a further reduction in penalty, in addition to the first

18 The Competition Commission of India (Lesser Penalty) Regulations 2009.

19 Angela Dua, '10 Years of the Indian Leniency Programme: Lessons to be Learned from the US and EU Experience' (KSLR Blog, 8 June 2020) <https://blogs.kcl.ac.uk/kslrcommerciallawblog/2020/06/08/10-years-of-the-indian-leniency-programme-lessons-to-be-learned-from-the-us-and-eu-experience-angela-dua/>.

leniency, to the parties assisting the Commission and making full, true, and vital disclosures pertaining to a second cartel. In 2021, the pre-filing consultation guidelines were also revised, extending their scope to include consultation and assisting the parties in determining their eligibility for the Green Channel Route.

V. SOFT LAWS AND REGULATORY BODIES IN INDIA

The adoption of soft laws already finds a place as a well-established practice within the regulatory toolkits of market regulators in India. All prominent regulators including the Securities and Exchange Board of India (SEBI), Reserve Bank of India (RBI), Telecom Regulatory Authority of India (TRAI) and Insolvency and Bankruptcy Board of India (IBBI) have resorted to soft laws in pursuing their respective statutory objectives. The tools exist in the form of guidelines, consultation papers, recommendations, sandboxes, codes of conduct, etc.

The observations of the former Chairperson of SEBI highlighted the significance of soft laws.[20] The suggestions received from consultants provided that too many hard enforcement actions could lead to a substantial delay in adjudications. Moreover, it was opined that a soft law-centric approach would help enhance regulatory supervision, thus filling the gaps, and instilling certainty and transparency.

VI. EMPLOYING SOFT LAW APPROACHES: INFERENCES FROM PRACTICES ACROSS JURISDICTION

The European Union has resorted to the use of such instruments to infuse cooperation and consistency amongst the Union and National Competition Authorities (NCAs). For competition law enforcement, the system works in a decentralised manner in accordance with the Council Regulation 1/2003 on the implementation of the rules on competition laid down in Articles 101 and 102 of the TFEU. The competition provisions under the Treaty are implementable at the Union and the National level, necessitating a level of close collaboration. Moreover, Article 11 para 6 prescribes that in cases of conflicts, the Commission's decision be given priority, by providing— *'The initiation by the Commission of proceedings for the adoption of a decision under Chapter III shall relieve the competition authorities of the Member States of their competence to apply Articles 101 and 102 of the Treaty'.*

The use of soft law has been a contentious issue at the Union level. The European Parliament's background note on the use of soft law discussed the existing

20 Menaka Doshi, 'Under UK Sinha, SEBI Adopted A New "Soft Enforcement" Approach' *NDTV* (5 March 2017) <https://www.ndtvprofit.com/law-and-policy/under-uk-sinha-sebi-adopted-a-new-soft-enforcement-approach>.

tensions related to the inclusion and the resulting effects of soft laws.[21] Based on the binding force, it is argued that soft laws, without any legal effects, cannot be equated to a 'law'. The other view suggests that soft laws, based on the treaty and the opinion of the courts, can assist in guiding the member states about the applicability of laws and in devising a response to urgent situations. It is well established that soft laws produce legal effects, primarily by influencing the acts of the market participants and regulating their behaviour. At times of crisis, enacting soft laws allows smooth transition during exigencies, by offering flexible and simpler procedures. This was evident in the challenges that ensued during COVID-19. It called for an urgent coordinated action between the EU and the member states. These instruments, hence, help maintain uniformity and synchronised collective actions, particularly at the Union level.[22]

In practice, it was suggested that *'the Court is more confident to apply Commission's non-binding instruments, in conjunction with the hard competition law, and never exclusively as a ratio decidendi'*.[23] While fixing the fines in a cartel case involving producers of sodium gluconate, reliance was placed on the Leniency notice on the non-imposition or reduction of fines[24] and the guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No. 17.[25]

Soft laws have been adopted by the Commission, clarifying the substantive and procedural aspects of Article 101. It was employed to ease the difficulty in maintaining consistency and uniform application of laws that were previously highlighted in many NCA cases.[26] Moreover, soft laws have significantly contributed to the development of legal concepts and measures. For instance, the Guidelines on the Application of Article 101(3) led to the evolution of what is understood and widely accepted today as the 'more economic approach' with the central aim of consumers' welfare.[27]

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21 The European Parliament's Committee on Legal Affairs, 'Institutional and Legal Implications of the Use of "Soft Law" Instruments' (March 2007) <https://www.europarl.europa.eu /RegData/etudes/note/join/2007/378290/IPOL-JURI_NT(2007)378290_EN.pdf>.

22 Corina Andone and Florin Coman-Kund, 'Persuasive rather than "Binding" EU Soft Law? An Argumentative Perspective on the European Commission's Soft Law Instruments in Times of Crisis' (2022) 10(1) The Theory and Practice of Legislation 22.

23 Case C-510/06 P *Archer Daniels Midland Co. v Commission of the European Communities* [2009] ECR I-01843.

24 *Archer Daniels Midland Case*- EC OJ 1996 C 207.

25 The commission, referring to the guidelines, levied fines considering the following factors: gravity and duration of the infringement, nature, its actual impact on the sodium gluconate market in the European Economic Area and the geographical extent of the market concerned, the actual economic capacity to cause damage to competition.

26 Or Brook and Kati Cseres, 'Member States' Interest in the Enforcement of EU Competition Law: A Case Study of Article 101 TFEU' in M Varju (ed), *Between Compliance and Particularism: Member State Interests and European Union Law* (Springer 2018) 150.

27 EU (2004/C 101/08) Guidelines on the application of Article 101(3) TFEU [2004] *OJ C 101/97.*

Although not binding they provide helpful guidance on exchanges of information and clarity over the thinking of the European Commission. Article 101 of the Treaty applied to horizontal co-operation agreements, sets out the principles for the information exchange agreements through the guidelines.[28] In addition, the Guidelines pertaining to the determination of fines, leniency, and de-minimis exemptions, were frequently referred before the courts. Thus, offering an analytical framework to the parties to self-assess and regulate their actions.

With the focus on integration of the Union, greater emphasis was laid on the interplay of hard law combined with soft laws, to deliver an effective regulatory setup. Soft laws particularly helped in breaking down and simplifying the legal procedure, ensuring greater responsibility and accountability. The introduction of more soft laws gave a boost to the parties to refer to such laws in cases, enhancing the reasoning and arguments. It infused the required flexibility and incorporation of relevant factors beyond the hard laws.

The discussion on soft laws and their relevance was highlighted by the European Court of Justice (ECJ) in *Grimaldi's case*. It was held that soft law instruments such as relevant notices/ recommendations must be taken into consideration by the courts deciding upon any dispute.[29] However, to the contrary and to some extent, courts opine that notices/recommendations cannot affect the opinion of the court and should only be a point of reference.[30] The use of soft laws hence has garnered criticism as it adds to the already existing precariousness about its applicability as a competition law enforcement tool. The justification rendered for the various types of soft laws has been quite distinct across the various member states.

The study refers to soft law practices in the EU member states (primarily, the Netherlands, Germany, and France), the UK, China, Brazil, Australia, and the US to develop an understanding of their placement and rationale.

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28 EU (2023/C 259/01) Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2023] OJ C11.

29 In *Salvatore Grimaldi v Fonds des maladies professionnelles (Case C-322/88) [1989] ECJ 646, the Fonds des maladies professionnelles* (Occupational Diseases Fund), Brussels had refused to recognize that Dupuytren's contracture, from which Mr Grimaldi suffered, was an occupational disease.

30 In *Societe de Vente de Ciments et Betons de l'Est v Kerpen & Kerpen GmbH & Co. KG* (Case 319/82) [1983] ECJ, it was held that the automatic nullity decreed by Article 85 (2) of the EEC Treaty applies only to those contractual provisions which are incompatible with Article 85 (1). The consequences of such nullity for other parts of the agreement, and for any orders and deliveries made on the basis of the agreement, and the resulting financial obligations are not a matter for Community law.

A. Voluntary Commitments

Between 2004 and 2021, the Netherlands Competition Authority (ACM) concluded the cases with an infringement finding in only around 40 percent of inquiries. A considerable number of cases resulted in negotiation, settlements, and voluntary commitments.[31] The ACM adopted a formal commitments mechanism specifically to handle highly regulated sectors, involving contentious cases. One of the prominent instances is the settlement and commitments undertaken during the COVID-19 pandemic. ACM opined that *'The open and constructive dialogue with companies, consumers, and other authorities, could be an efficient approach for other issues in the future as well'*.[32] Corresponding to the practices adopted by the ACM, Germany's Bundeskartellamt has been swift in adopting the soft law from its previously followed hard law enforcement. About 58 percent of German decisions involved hard enforcement strategies including the imposition of fines, resorting to voluntary settlement, and commitment measures. Voluntary commitments were particularly allowed in cases involving a need to strike a balance amongst competition considerations and larger public interest, including but not limited to COVID-19, sustainability initiatives, digital markets, professional associations, etc. The Authority, during COVID-19, in addition to its regulatory powers, affirmed itself as a partner with businesses. A striking feature of the commitment and settlement mechanism can be noted in the approach of the Competition and Markets Authority (CMA) of the UK. The CMA resorted to a more case-by-case assessment, considering the peculiar circumstances of each case brought forth, ensuring that the problematic conduct in question is discontinued or rather modified.

B. Informal Opinions and Warning Letters

The ACM, with its guidance-led compliance mechanism frequently resorts to informal opinions and warning letters at regular intervals. The authority issues warnings, enlisting the parties and the potential infringement market players may be involved in, highlighting the concerns and plausible ways to counter them. The informal opinions issued by the authorities are used as provisional and informal assessments. Such opinions provide information/guidance based on the factual and legal aspects

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31 Or Brook, 'Do EU and U.K. Antitrust "Bite"?: A Hard Look at "Soft" Enforcement and Negotiated Penalty Settlements' (2023) 68(3) The Antitrust Bulletin 477 <https://doi.org/ 10.1177 /0003603X231180245>.

32 Martijn Snoep, 'Competition Enforcement in Times of Crisis: A Perspective from the ACM' (2020) 8(2) Journal of Antitrust Enforcement 267.

pertaining to the cases.[33] Germany's Bundeskartellamt's approach now corresponds to the Dutch authority, with the adoption of informal opinions. In the UK, warnings and advisories also constitute an essential tool of the commitments and guidance mechanism within CMA's strategies. The authority stresses the need to notify the market participant to self-regulate before a plausible breach ensues.

C. Guidelines

The ACM relies heavily on a thoroughly deliberated process and consultation, engaging the stakeholders and arriving at a suitable conclusion. ACM's enforcement strategy includes the use of instruments based on consultations with the representatives of market parties and frequently invoking the guidelines.[34] Reliance has been placed on the Guidance paper to establish the Commission's effect-based and economic approaches. However, it has been simultaneously noticed that neither the NCAs nor the courts are obliged to follow such guidance.[35] The French Competition Authority (FCA) has, in its decisions, based its findings on guidelines and discussion papers, while providing reasoning as well.[36] In cases where the arguments over the legal placement of soft law were called into question, FCA clarified that guidelines carry weightage serving as an 'analytical guide' to the hard law. Using the guidelines and guidance papers, the authority clarified the established practices of the ECJ.[37] Hence, guidelines have been a useful and swift referencing framework for the authorities.

In the UK, as already discussed, soft laws have been frequently invoked to provide the necessary assistance. Most of the recent cases have been found to be resolved through soft enforcement tools with a minimalistic infringement decision. However, the tools have also been called into question before the authorities. The Horizontal Guidelines, 2011[38] were invoked in a case with an applicant submitting that guidelines should be taken into consideration as prescribed under Section 60(3) of the

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33 The Netherlands Authority for Consumers and Markets (ACM), 'ACM Procedure Regarding Informal Opinions' (Dutch Government Gazette No. 11177, 2019) <https://www.acm.nl/sites/default/files/documents/2019-07/acm-procedure-regarding-informal-opinions.pdf>.

34 Netherlands Competition Authority, 'Annual Report NMa' (NMa, 2005) <https://www.acm.nl/sites/default/files/old_publication/publicaties/6115_nma-annual-report-2005.pdf>.

35 *CRV Holding BV v ACM* [2010] ECLI.

36 Commission Regulation (EC) 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] OJ L336/21.

37 Soft law approach was recognised in *La Société SNCF v Autorité de la Concurrence* [2014] C.A. Paris RG No. 2013/01128 and *Société Royer Sport SAS/Societe Converse Inc v Société Auchan France SA and others* [2014] C.A. Rennes RG No. 12/05938.

38 *Tesco Stores Ltd, Tesco Holdings Ltd, Tesco Plc v Office of Fair Trading* [2012] CAT 31.

UK Competition Act, 1998. The court, however, reserved its decision with respect to the guidelines by not expressly engaging and relying on the soft laws. This is not to suggest that the courts have disregarded the softer instruments. The courts have engaged with guidelines in its decisions in several other cases. For instance, in a patent infringement case involving Fair, Reasonable and Non-Discriminatory (FRAND) commitments, both the Horizontal Guidelines and the Technology Transfer Guidelines were considered by the court. [39]

In the US, the adoption and the subsequent withdrawal of the merger guidelines give insight into the need for a well-structured soft law approach in any economy. The withdrawal highlights that soft laws must align with the legal framework and policy objectives as envisioned by the hard law. The Federal Trade Commission (FTC) and the Department of Justice (Antitrust Division) have jointly been working on the new merger guidelines and released the Draft Merger Guidelines in 2023. The previous version of the Vertical Merger Guidelines 2020 was subsequently withdrawn, citing the use of unsound theories and the guideline being inherently contrary to the law and market realities. It was pointed out that the guidelines did not only contravene the Clayton Act but were based on a flawed economic theory. It impacted the analysis of the efficiencies/pro-competitive benefits and weighing them against the concerns, for any proposed mergers. The new guidelines aim to provide required clarity regarding the characteristics of transactions that are likely unlawful, without diminishing the positive effects of the resultant entity. It caters to remedies that are based on a thorough evaluation of the remedies previously adopted, and its impact, including the features of new-age markets, digital economy, and labour markets.

The Draft Guidelines have been re-structured to address the gaps including -

(i) ensuring consistency with the existing law drawing upon the precedents from Supreme Court and Appellate cases.

(ii) provide enhanced understanding to the public about the assessment process and rationale of agencies' decisions.

(iii) increase transparency and awareness by undertaking a merger review.

(iv) assessments based on market realities, and expertise reflecting significant advancement in the law and economy.

(v) evaluating the impact of proposed mergers on the labour market.

(vi) evaluating the concerns arising from mergers involving platforms leading to high entry barriers.

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39 *Unwired Planet International Limited v Huawei Technologies Co. Limited* [2015] EWHC 2097 (Pat).

(vii) ensuring inclusiveness through public comments, inputs from attorneys and economists, and feedback from the agencies.[40]

Discussion on guidelines warrants us to peruse the soft law practices adopted in Brazil by the Administrative Council for Economic Defence (CADE). The CADE's practices were recognised as the Best Soft Law– Concerted Practices on the Antitrust Writing Awards organised by the French magazine Concurrences. Since 2015, CADE has been actively releasing soft instruments in the form of detailed guidelines for Gun Jumping (2015), Leniency (2016), and Dawn raids (2017) to mention a few. The development of soft laws has been a result of CADE's close collaboration with other agencies including sectoral regulatory authorities and the judiciary. The Brazil National Council of Justice, in its recommendations, stressed that CADE's opinion be demanded before adjudicating upon any matter. Thus, highlighting the need to strengthen its competition advocacy initiatives and culture.[41] While building its enforcement strategy to combat the challenges of the digital markets, China has been resorting to a hybrid regulatory structure. China adopted Anti-Monopoly Guidelines for the Platform Economy (Platform Guidelines), 2021. The explanation to the guidelines states: 'The aims of the Guideline are to promote innovation, highlight problem-orientation and respond to public concerns'. The authority has also made a considerable number of decisions using these guidelines. In addition to soft laws, China enacted the Provisions on the Administration of Algorithm Recommendations for Internet Information Services.[42]

The Australian Competition and Consumer Commission (ACCC) also placed reliance on the new regulatory arrangements for digital platforms. It places special emphasis on the guidance materials citing how they can assist businesses helping to secure compliance with the law. The authority opines that guidelines contribute to the promotion of investment and innovation.[43] In its submissions to the Privacy Act Review

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40 U.S. Department of Justice, Office of Public Affairs, 'Justice Department Issues Statement on the Vertical Merger Guidelines' (15 September, 2021) <https://www.justice.gov/opa/pr/justice-department-issues-statement-vertical-merger-guidelines>.

41 'Cade Study for Market Definition Nominated for International Award' (*BRICS Competition Law and Policy Centre*, 6 February 2023) <https://www.bricscompetition.org/news/cade-study-on-market-definition-nominated-for-international-award>.

42 Nishan-E-Hyder Soomro and Wang Yuhui, 'Appraisal of Existing Evidences of Competition Law and Policy: Bilateral Legislative Developments of Sino-Pak' (2023) 9(8) Heliyon <https://www.sciencedirect.com/science/article/pii/S2405844023061431>.

43 Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry Interim Report No. 5' (September 2022) <https://www.accc.gov.au system/files/Digital%20platform%20services%20inquiry%20-%20September%202022% 20interim%20report.pdf>.

Discussion Paper, the authority recommended the Office of the Australian Information Commissioner (OAIC) to formulate guidance material. Serving as a reference for the industry players, it would elaborate upon any additional obligations on digital platforms, in relation to the collection of children's personal information.[44] The authority called for well-defined and targeted guidance as it deliberated regulating unfair trade practices.[45]

Thus, the study of jurisdictions points to soft laws being considered a useful tool within competition law enforcement. At the same time, it also reveals the reluctance to rely on such laws, especially in the absence of any legal instrument. Additionally, soft law instruments must be aligned to the larger economic objectives ensuring that they do not act as an impediment to market regulation.

An analysis of the soft law practices in different jurisdictions shows that the adoption of such tools depends on the primarily two determining factors– a) the nature of the market and the competitive concerns existing in the country, and b) the different power designs of competition institutions with respect to the administrative and legislative powers. Moreover, it is crucial to carefully adopt the instruments that would be better suited to balance the need for enforcement, circumventing the plausibility of over-enforcement.

VII. CONCLUSION

The use of soft laws certainly has a peculiar role within competition law enforcement frameworks. There are certainly questions and contrary opinions surrounding the utility of soft laws and their binding nature. A perusal of instances from across jurisdictions revealed that while resorting to soft law, it is important that such law is in conjunction with hard law. It is also relevant that the adoption of soft laws stresses upon curation of tools, specific to the characteristics of each market. This makes it inevitable for the authorities to continuously engage with the stakeholders to be able to arrive at constructive conclusions.

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44 Australian Competition and Consumer Commission, 'Digital Platform Services Inquiry Interim Report No. 7' (September 2023) <https://www.accc.gov.au/system/files/DPB%20-%20DPSI%20-%20September%202023%20Report%20-%20Interim%20Report%207%20-%20Final%2815835612.1%29.pdf>.

45 Australian Competition and Consumer Commission, Consumer Affairs Forum Communiques (Meeting- 12 of Ministers for Consumer Affairs).

As evident, the soft law approach does contribute to reducing uncertainty and infuses flexibility around the hard laws. It also serves as a resort in crisis or exigencies, for instance, COVID-19. The use of soft law has facilitated self-assessing and self-regulating practices on behalf of the market players. It contributes to significantly reducing legal compliance costs and encouraging swifter corrections. It can also be inferred that competition soft laws largely depend on the structure of the domestic legal system and the market conditions prevalent in the nation. It is particularly true for a booming market like India to have soft laws within its competition law regulation, encouraging the market players to expand their operations in the nation. In addition, the strengthening of international working groups and engagements like that of the International Competition Network (ICN) and the Organisation for Economic Co-operation and Development (OECD) facilitates an inclusive and global convergence. It ensures the information flow and assists in cementing the interplay of hard law and soft law instruments.