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Article

# Whither evidence (Act) based reasoning?: towards an effects-based approach in Indian competition jurisprudence

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**ABSTRACT**

India has a nascent competition enactment. But it has an old evidence law—the Indian Evidence Act—of 1872 vintage. The competition commission has shown scepticism towards the applicability of the evidence law to competition proceedings. This article argues that such scepticism is mistaken. Based upon an *intrinsic* reasoning (ie arguments from the autonomous discipline of law) and two 'instrumental' reasonings (ie arguments emphasizing the consequences of the counterfactual), this article underscores that the competition commission ought to develop fidelity towards the Indian Evidence Act. Such fidelity (rather than scepticism) would move the needle of competition jurisprudence towards an effects-based approach in decision-making.

**KEYWORDS:** competition law, antitrust, competition policy, jurisprudence
**JEL CLASSIFICATIONS:** K20, K21, K23, L40, L44

## I. INTRODUCTION

An apocryphal story about the Indian police goes something like this: in a joint exercise meant to build confidence, police from three countries—India, the USA and the Great Britain are tasked with catching a lion from the jungle. While the US police catches it within an hour, and the British turning trumps within a couple of hours, there are no signs of the Indian police after several hours. Finally, giving up on waiting, the trainers set out to find the Indian police—they stumble upon a bear tied to a tree with Indian police surrounding it and torturing it to 'confess' that it is a lion!

In spite of the obvious element of humour involved, is there something serious for the competition commission to learn from the above? Even in general enforcement of law, the Indian police routinely demands exemption from the rigours of

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evidence law treatment of confession made in person to the police. Such demands may have contributed to the above story gaining currency.

In the context of competition law, the story certainly holds at least a grain of truth for the competition commission as it finds its feet in its nascent years. This article will explore the treatment that the commission has given to the one of the oldest legislations in India—the Evidence Act of the 1872 vintage. As explored in the course of this article, just like the Indian police, the competition commission seems to be working towards seeking concessions from the rigours of the extant evidence legislation.

It may be germane to note that recently a member of the (federal) law commission—the Law Commission of India—has suggested that the Indian Evidence Act, 1872 ought to be repealed hook line and sinker.[1] While the suggestion is quite drastic, there is little to replace the law of proof for both civil and criminal trials in India, which the Indian Evidence Act encompasses.

In any event, it is beyond the scope of this article to explore this suggestion which is as drastic in its scope as it would be unrealistic in its implementation. Instead, the article has a modest aim to defend the usage of the Indian Evidence Act in the context of competition law. Of course, much of the argument that this article offers could be extended to the usage of evidence law by sector-specific regulatory authorities (eg the petroleum and natural gas regulatory board) as well. But the focus of the article remains in the field of competition law.

The article argues that at this stage of development, the competition commission ought to adopt an evidence law based reasoning. A starting point of such a reasoning will be to utilize the existing evidence law—the Indian Evidence Act—by showing fidelity to it rather than jettisoning it.

This article is divided into three core sections. Section II deals the text and the context of defending the Indian Evidence Act. It deals with the competition commission's general approach to the evidence law, its usage of literal rule of interpretation, the dichotomy between the Competition Act and the Indian Evidence Act and context-based, purposive approach to interpretation. Section III highlights the counterfactual in terms of the 'legal' implications for making the evidence law inapplicable to competition proceedings. It deals with the impact on burden of proof, the legislative tool of presumption and 'sponge'-like effects. Section IV highlights the counterfactual related to 'economic' implications of making the evidence law inapplicable to competition proceedings. It also deals with the possible impact on the effects-based approach to competition enforcement. Section V concludes.

## II. THE TEXT AND THE CONTEXT OF DEFENDING THE INDIAN EVIDENCE ACT

The Indian Evidence Act of the 1872 vintage is one of the oldest legislations in India. While India wrested her independence from the British in 1947, it continued to repose faith in three of the bulwarks of British era legislations—the Indian Penal

1 Debayan Roy, 'Reform Evidence Act as Per Shastras, Vedas: New Law Commission Member' (*News18*, 14 October 2016) <http://www.news18.com/news/india/reform-evidence-act-as-per-vedas-shastras-says-new-law-commission-member-1301737.html> accessed 16 March 2017.

Code, 1860 (criminal law), the Indian Contracts Act, 1872 (commercial transactions), and the Indian Evidence Act, 1872 (the law of proof).

Indeed, the Constitution of India provides for a legislative protection for such British-era legislation. The default rule contained in the Constitution stipulates that 'all the law in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority'.[2] This constitutional protection extends to the Indian Evidence Act. It has not been repealed.

Interestingly, in spite of its age, there have been very few amendments to the enactment. This is probably the best testimony to its utility and durability.[3] This section will offer an 'intrinsic' reasoning (ie arguments from the autonomous[4] discipline of law) to defend the usage of the Indian Evidence Act in competition proceedings. Towards this, the section will deal with (i) the manner in which the competition commission understands the applicability of the Indian Evidence Act, 1872; (ii) the competition commission's adoption of literal rule of interpretation; (iii) understanding the nuances of the Competition Act as juxtaposed with the Indian Evidence Act; and (iv) context-based, purposive interpretation.

## The competition commission's approach to evidence law

The Competition Act, 2002—the legislation governing the field of competition law in India—is quite nascent vis-a-vis the evidence law. Regardless, the competition commission—the agency responsible for enforcement of the legislation has taken a peculiar approach in a recent decision. The commission has suggested that the evidence law does not apply to its proceedings, through the holding set out below.[5]

> 'It is important to note that the Indian Evidence Act, 1872 (the Act of 1872) has not been made applicable to the proceedings conducted before the [Competition] Commission. It is only certain provisions of the Act of 1872, *i.e.,* Sections 123 and 124 that have been made applicable for the purpose of summoning any public record or document'.

It is obvious from the above extract that the competition commission has not offered any detailed analysis for its understanding that all the livelong evidence law does not apply to the proceedings conducted by it. It appears that the commission has applied the doctrine of *expressio unis est exclusio alterius*—the express mention of one thing means the implied exclusion of others. In other words, this interpretation by the commission is possibly a rare instance of usage of literal interpretation in the real world.

2 The Constitution of India art 372(1).

3 cf The Constitution of India (1950 document with 100 amendments carried out until 2015).

4 Brian Bix, 'Law as an Autonomous Discipline' in Mark Tushnet and Peter Cane (eds), *The Oxford Handbook of Legal Studies* (OUP 2005) 975.

5 Case 03/2014 *Re cartelization in respect of tenders by Indian Railways for supply of brushless DC fans and other electrical items* decided on 14 August 2015, para 18.

## The competition commission's literal interpretation

To be sure, it is not unusual for the competition commission to use literal interpretation rule. In the context of merger control, it has been noted that the commission 'has taken refuge under the letter (as opposed to spirit) of law and has adopted a literal (rather than purposive) interpretation of competition law'.[6] However, this was understood in a very specific context of pushback against corporate lobbies.[7]

Such usage of literal interpretation is not a norm generally in legal context. For, the application of literal rule appears to be rule against using common sense.[8] In general, we understand the meaning of words from the context in which it occurs.[9] An example would illustrate this: when parents asked a child-minder to keep the children amused by teaching them a card game, the child-minder teaches 'strip poker'.[10] If one strictly follows literal rule, strip poker falls within 'card game'.[11] However, as per context rule, it was not the sort of game intended by the parents.[12] This follows from the customary ideas as to the proper behaviour and upbringing of children and reasonableness of actions.[13]

In spite of such enduring explanation against the usage of literal rule of interpretation, what explains the competition commission's penchant for the same? In the context of the applicability of the Indian Evidence Act, does the commission believe it will tend to hobble its analysis? This requires a closer scrutiny of the competition commission's remarks extracted above.

The commission seems to have relied upon the explicit mentioning of sections 123 and 124 of the Indian Evidence Act, 1872, in the Competition Act, 2002 to conclude that other provisions of the Indian Evidence Act do not apply.[14] This is a mistake: for, even if read literally, as the commission seems to have done, the provision being relied upon merely deals with the request for public record or copy of such public record. Furthermore, the express mention is merely of sections 123[15] and 124[16] of the Indian Evidence Act, 1872. The two sections relate to 'evidence from

6 Rahul Singh, 'India's Tryst with the Clayton Act Moment and Emerging Merger Control Jurisprudence: Intersection of Law, Economics, and Politics' in D Daniel Sokol, Thomas K Cheng and Ioannis Lianos (eds), *Competition Law and Development* (Stanford Law Books 2013) 266.

7 ibid.

8 Glanville Williams, *Learning the Law,* (11th edn, Universal Book Traders 1993) 105.

9 ibid 104.

10 ibid 104.

11 ibid 104.

12 ibid 104.

13 ibid 104.

14 The Competition Act 2002, s 36(2)(e) states: 'The [Competition] Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908, while trying a suit, in respect of the following matters, namely :- . . .requisitioning, subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), and public record or document or copy of such record or document from any office'.

15 The Indian Evidence Act 1872, s 123 states: 'No one shall be permitted to give *any evidence derived from unpublished official record* relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withheld such permission as he thinks fit.' (emphasis added).

16 The Indian Evidence Act 1872, s 124 states: 'No public officer shall be *compelled to disclose communications made to him in official confidence,* when he considers that the public interests would suffer by the disclosure.' (emphasis supplied).

unpublished official records' and disclosure of 'communications made . . . in official confidence'. The sections do not relate to the general applicability of the evidence law—the law of proof—that governs all trials in India.

To be sure, it was possible for the competition commission, in this context, to rely upon the following observations of the apex court—the Supreme Court of India—which were made in a different precedent way back in 1957:[17]

> Now, it is no doubt true that the evidence of the respondent and his witnesses was not taken in the mode prescribed in the Evidence Act; *but that Act has no application to enquiries conducted by tribunals*, even though they may be judicial in character. The law requires that such tribunals should observe rules of natural justice in the conduct of the enquiry and if they do so, their decision is not liable to be impeached on the ground that the procedure followed was not in accordance with that, which obtains in a court of law. (emphasis added).

It is noteworthy that in spite of being a seeming strong voice in favour of the competition commission's general, sweeping remarks extracted above in subsection 'The competition commission's approach to evidence law', the commission has not cited this Supreme Court precedent. This may possibly be because the Supreme Court has used the term 'tribunal' in a very loose sense.

The material facts of the case relate to administrative proceedings (regarding abetment of bribery) conducted through an officer of the Ministry of Commerce and Industry. Clearly, the Supreme Court precedent does not deal with proceedings in the nature of what the Competition Act entails. Therefore, the observations of the Supreme Court are *obiter dicta* making them non-binding in future cases.

Furthermore, while the Supreme Court does not specifically clarify this point, it appears that it interpreted the administrative proceedings conducted through an officer to not being eligible to qualify as 'court' (ie a person legally authorized to take evidence) within the framework of the Indian Evidence Act. This aspect related to the definition of 'court' within the framework of the Indian Evidence Act to mean 'person legally authorized to take evidence' becomes relevant for the purposes of competition proceedings and has been extensively dealt with in subsection 'Context-based, purposive interpretation in the Indian Evidence Act' below.

In any event, as explained in following sections, it is doubtful that the Supreme Court precedent would have utility for a competition agency which has specifically been constituted within the four corners of a legislation. Accordingly, a deeper analysis of the apparent dichotomy between the Competition Act and the Indian Evidence Act, 1872 is necessary.

## The competition-evidence dichotomy

In terms of its applicability, the Indian Evidence Act categorically states that it applies to all 'judicial proceedings in or before any court' but does not apply to affidavits.[18]

17 *Union of India v T R Varma* AIR 1957 SC 1957 [10].

18 The Indian Evidence Act 1872, s 1 states: 'This Act may be called the Indian Evidence Act, 1872. It extends to the whole of India (except the State of Jammu and Kashmir) and applies to all *judicial proceedings* in or before any Court, including Court Martial (other than Courts-martial convened under the Army

Both the aspect of non-applicability to 'affidavits' and applicability to 'judicial proceedings' are interesting from the perspective of the applicability of evidence law to the Competition Act.

### *Affidavits*

The non-applicability of the Indian Evidence Act to evidence obtained through affidavits is due to such evidence not being subject to the usual rigour of cross-examination (or, observance of demeanour) that other evidence undergo. Courts, usually are chary of admitting evidence received solely upon affidavits.[19]

Even so, in the exact same section that the competition commission interpreted to exclude the applicability of the evidence law, the Competition Act provides that the commission could receive 'evidence on affidavit'.[20] It would, nevertheless, be a huge leap in logic for the competition commission to conclude from this that the whole of evidence law becomes inapplicable. Therefore, it is important to note the implications of the applicability to 'judicial proceedings in or before any court' mentioned in the Indian Evidence Act. Are the competition commission's proceedings 'judicial' in terms of the evidence law?

### *Judicial proceedings in or before any court*

It is noteworthy that the original, unamended 2002 version of the Competition Act suggested (albeit indirectly) that the proceedings, at least in certain contexts, before the competition commission could be considered to be 'judicial proceedings'.[21] Possibly, this provision was a legacy of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 which has been repealed by the Competition Act.[22]

The provision, in the unamended 2002 version of the Competition Act (which has been deleted through the 2007 amendments) had two parts (i) the legal fiction of deeming of commission's proceedings to be 'judicial proceedings' for the purposes of certain provisions of Indian Penal Code; and (ii) the legal fiction of deeming of the commission to be a civil court for the purposes of certain provisions of the Code of Criminal Procedure, 1973. Both of these have implications for the purposes of

Act, the Naval Discipline Act r the Indian Navy (Discipline) Act, 1934 or the Air Force Act), but *not to affidavits* presented to any Court or Officer, nor to proceedings before an arbitrator . . . ' (emphasis added).

19 Note, however, that the Code of Civil Procedure 1908 and the Code of Criminal Procedure 1973 allow evidence to be received on affidavit.

20 The Competition Act 2002, s 36(2) states: 'The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :- . . .(c) receiving evidence on affidavit.'

21 The Competition Act 2002 (original, unamended version), s 36(3) stated: 'Every proceeding before the [Competition] Commission shall be deemed to be judicial proceeding within the meaning of sections 193 and 228 and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the [Competition] Commission shall be deemed to be a civil court for the purposes of section 95 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973'.

22 The Monopolies and Restrictive Trade Practices Act 1969, s 12(2) stated: 'Any proceeding before the [MRTP] Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228 of the Indian Penal Code, 1860 (45 of 1890), and the [MRTP] Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).'

understanding the phrase 'judicial proceedings in or before any court' that occurs in the Indian Evidence Act.

In terms of the Indian Penal Code, the legal fiction of deeming of commission's proceedings to be 'judicial proceedings', it is instructive to note that it was in the original, unamended 2002 version of the Competition Act, and meant for limited purposes such as (i) perjury;[23] (ii) usage of false evidence,[24] and (iii) obstruction of justice.[25] Even in the context of the original, unamended 2002 version of the Competition Act, the usage of the phrase 'judicial proceedings' was not intended to impact the applicability (or otherwise) of the Indian Evidence Act, 1872.

Furthermore, in terms of the Code of Criminal Procedure, the legal fiction of deeming of the commission to be a civil court, in the original, unamended 2002 version of the Competition Act was intended to serve the purpose of clarifying the *locus standi* of the authority whose complaint could begin the process of trial related to perjury, usage of false evidence and obstruction of justice mentioned in the preceding paragraph.[26] In terms of the original, unamended 2002 version of the Competition Act, such trials could be initiated only upon complaint in writing of the competition commission.[27] This means that the usage of the phrase 'civil court' was not intended to impact the applicability (or otherwise) of the Indian Evidence Act, 1872.

Interestingly, the notes on clauses accompanying the 2007 amendments to the Competition Act (that deleted the original, unamended 2002 version of the provision related to 'judicial proceedings' delineated above) did not venture into the purpose behind the removal of the provision. Curiously, in a cavalier fashion the 2007 amendments merely noted that:

> the existing section 36 ... provides that every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning

23 The Indian penal Code 1860, s 193 states: 'Whoever intentionally gives false evidence in any of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine.'

24 The Indian Penal Code 1860, s 196 states: 'Whoever corruptly uses or attempts to use as true or genuine evidence any evidence which he knows to be false or fabricated, shall be punished in the same manner as if he gave or fabricated false evidence.'

25 The Indian Penal Code 1860, s 228 states: 'Whoever intentionally offers any insult, or causes any interruption to any public servant, while such public servant is sitting in any stage of judicial proceeding, shall be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both'.

26 The Code of Criminal Procedure 1973, s 195 , in relevant parts, states: '(1) No Court shall take cognizance - . . .(b)(i) of any offence punishable under any of the following sections of the Indian Penal Code (namely, sections 193 to 196 (both inclusive), 199, 200, 205 to 211 (both inclusive) and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or (ii) of any offence described in section 463, or punishable under section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence in a proceeding in any Curt, or (iii) of any criminal conspiracy to commit, or attempt to commit, or the abetment of, any offence specified in sub-clause (i) or sub-clause (ii), *except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.*' (emphasis supplied).

27 ibid.

> of sections 193 and 228 and for the purpose of section 196 of the Indian Penal Code and the Commission shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.[28]

There is mere repetition of the deleted provision, devoid of any explanation or rationale.

Strikingly, the same set of amendments in 2007 found it worthwhile to introduce the exact same clause related to 'judicial proceedings' with respect to the appellate tribunal, which was newly being set up. Accordingly, this (new) provision related to the appellate tribunal in section 53O(3) of the Competition Act, states that:

> every proceeding before the appellate tribunal shall be deemed to be judicial proceedings within the meaning of sections 193 and 228, and for the purposes section 196, of the Indian Penal Code (45 of 1860) and the appellate tribunal shall be deemed to be a civil court for the purposes of section 195 (2 of 1974) and Chapter XXVI of the Code of Criminal Procedure, 1973.

Worse, the notes on clauses accompanying this introduction of the new provision do not even attempt at any explanation or rationale. The notes on clauses, insouciantly state that 'this clause seeks to insert a new Chapter VIIIA to the Competition Act, 2002 relating to establishment of Competition Appellate Tribunal'.[29]

While there is no official explanation, one aspect is certain. The removal of the provision related to 'judicial proceedings' with respect to the competition commission through the 2007 amendments had no logical or rational nexus with the applicability (or otherwise) of the Indian Evidence Act to the competition commission. For, it would make little sense to make evidence law inapplicable to the commission proceedings but applicable to the appellate tribunal which has the mandate to hear appeals from competition proceedings. If the methodological rigour at the competition commission is not maintained, how would the appellate tribunal be expected to review its decisions?

Did government's nonchalance in offering any purpose behind drafting provisions in the competition enactment, later, spur the competition commission to make general remarks about the applicability of the Indian Evidence Act? Indeed, the competition commission's approach is indefensible for yet another reason.

On the one hand, as noted above, it has stated that the Indian Evidence Act is generally not applicable to the commission's proceedings. On the other hand, a set of delegated legislation—which in accordance with the provisions of the parent legislation the competition commission is entitled to formulate—themselves make certain provisions of the evidence law applicable to the commission's proceedings. For instance, a provision of its general regulations state that it may 'take notice of facts of which notice can be taken by a court of law under section 57 of the Indian Evidence Act, 1872'.[30] Another provision in the same regulations state that the commission, at

28 The Competition Amendment Bill 2007, cl 29 Notes on clauses.

29 The Competition Amendment Bill 2007, cl 43 Notes on clauses.

30 The Competition Commission of India (General) Regulations 2009, reg 41(2)(f).

its discretion, could make other sections of the Indian Evidence Act (eg section 22A related to oral admission as to the contents of electronic records) applicable.[31]

A potential pick-and-choose that the above approach of the commission instantiates does not portend well for the certainty and predictability of the competition regime. To be sure, the text of the decision from which the statement related to the Indian Evidence Act has been taken, does not indicate that the parties were able to make many of the arguments that have been discussed in this article. But it does suggest that a crucial soft infrastructure for development of the competition regime—a critical mass of competition lawyers and commission officials with relevant expertise—is still a work-in-progress in the Indian context.

This is significant to underscore due to two inter-related reasons.

Firstly, the general, sweeping remarks about the applicability of the Indian Evidence Act were made by the competition commission in the context of a procedural legislative entitlement to cross-examine a witness. Such an entitlement is not merely useful for the parties who seek to rebut assertions of the opponent but also for the trier of fact (ie the competition commission in this context) who would get an opportunity to observe the demeanor of the witness and draw its own conclusions about the credibility of the witness. The commission, in spite of the general, sweeping remarks about the non-applicability of the Indian Evidence Act conceded the parties' entitlement to cross-examine. This concession of the commission was interesting in the light of the regulations (formulated by the commission itself) that provides for such a right and were cited by the commission.[32] Although couched in discretionary language, the general regulations drafted by the commission, within the framework of the parent legislation stipulate that 'if the commission or the director general, as the case may be, directs evidence by a party to be led by way of oral submission, the commission or the director general, as the case may be, if considered necessary or expedient, grant an opportunity to the other party or parties, as the case may be, to cross-examine the person giving the evidence'.[33] This means that even if the commission has a penchant for literal interpretation, much of the general, sweeping remarks about the applicability of the Indian Evidence Act were nonetheless avoidable.

Secondly, as explained below, an application of a context-based, purposive interpretation (as juxtaposed with the literal rule of interpretation) allows for a larger wiggle-room for the applicability of the Indian Evidence Act than the commission is willing to concede.

## Context-based purposive interpretation

A context-based, purposive interpretation is central to law. In general, we understand the meaning of words from the context in which it occurs.[34] As the child-minder example cited in subsection 'The competition commission's literal interpretation' above

31 The Competition Commission of India (General) Regulations 2009, reg 41(3).

32 Case 03/2014 *Re cartelization in respect of tenders by Indian Railways for supply of brushless DC fans and other electrical items* (Order of 25 August 2015) para 16.

33 The Competition Commission of India (General) Regulations 2009, reg 41(5).

34 Williams (n 8) 104.

indicated, 'no text is plain until it is interpreted, every text is plain - for the purposes of the interpretative problem in question - at the conclusion of the interpretative process'.[35]

Given that mere old age of the Indian Evidence Act could possibly be used as an argument against its suitability in modern-era, it is important to emphasize the inter-generational equity in terms of the present generation's right of a context-based, purposive interpretation. In the words of Thomas Paine, which have immense bearing upon the suitability of context-based purposive interpretation:[36]

> 'The rights of men in society, are neither devisable, nor transferable, nor annihilable, but are descendable only; and, it is not in the power of any generation to intercept finally, and cut off the descent. If the present generation, or any other, are disposed to be slaves, it does not lessen the right of the succeeding generation to be free: wrongs cannot have a legal descent.'

If a context-based, purposive interpretation is indispensable for the (old) Indian Evidence Act, it is equally important for the (relatively new) Competition Act. In pursuit of defending the applicability of the evidence law for the purposes of competition proceedings, what follows is an application of context-based, purposive interpretation in terms of (i) the Competition Act; and (ii) the Evidence Act.

*Context-based, purposive interpretation in the Competition Act*

An (unarticulated) argument related to the competition commission's general remarks about the non-applicability of the Indian Evidence could be in certain provisions of the Competition Act itself. These provisions, while not part of either arguments of the parties or reasoning of the commission in its decision, could possibly be related to (i) *non obstante* clause; and (ii) the duty to aid clause contained in the Competition Act.

In terms of the *non obstante* clause, the Competition Act states that 'the provisions of the [Competition] Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force'.[37] This may give the impression that the Competition Act is supreme and overrides all other legislations. In any event, the Competition Act being a later legislation would, in theory, in accordance with well-settled precedent trump the older legislation—the Indian Evidence Act.

It is noteworthy, however, that the *non obstante* clause effectively has a significant *sine qua non*: inconsistency between the legislations. There is little that is inconsistent between the Competition Act and the Indian Evidence Act. On the contrary, fidelity to the rules contained in the Indian Evidence Act has the potential to ensure that the decisions of the competition commission are sustained by the higher authorities—the appellate tribunal and ultimately the Supreme Court of India. In the absence of

35 Aharon Barak, *Purposive Interpretation in Law* (Universal Law Publishing Pvt Ltd 2005) xii.

36 Thomas Paine, *Rights of Man Part I* (Everyman's Library 1969) 94.

37 The Competition Act 2002, s 60.

any inconsistency between the two legislations there is little that the *non obstante* clause offers.

This lack of inconsistency between the Competition Act and the Indian Evidence Act is further underscored by the provision related to the duty to aid. In spite of a *non obstante* provision that ostensibly indicates as if the Competition Act is supreme, it is noteworthy that the duty to aid clause clarifies that 'the provisions of this Act are in addition to, and not in derogation of any other law for the time being in force'.[38] This means that the Competition Act has been legislatively envisaged to work together with the Indian Evidence Act.

The context, purpose-based interpretation of the interface between the Indian Evidence Act and the Competition Act indicates that there is little potential for any conflict. The law of proof that governs both civil and criminal trials in India—the Indian Evidence Act—would aid the endeavour of the Competition Act in its quest for proving anti-competitive infringements of the law. In the context of its general, sweeping tirade against the Indian Evidence Act, the competition commission has not explained any potential conflict between the two enactments.

In any event, a context-based, purposive approach is not confined to the interpretation of provisions in the Competition Act. They extend to the interpretation of the Indian Evidence Act as well.

*Context-based, purposive interpretation in the Indian Evidence Act*

In subsection 'Judicial proceedings in or before any court' above, the legislative vicissitudes of the treatment of 'judicial proceedings in or before any court' in terms of the Competition Act has been dealt with. Interestingly, a context-based, purposive interpretation of the phrase from the framework of the Indian Evidence Act provides for remarkable clarity.

It has been noted above that the Indian Evidence Act categorically asserts that it does not apply to affidavits. But, the evidence law expansively defines 'courts' to include 'persons . . . legally authorized to take evidence'.[39] This expansive definition of 'courts' is important from two perspectives.

Firstly, there could be little doubt that the competition commission is a 'person'. Interestingly, while the Indian Evidence Act does not define the term 'person', the Competition Act contains a very expansive definition of the term 'person' to include 'every artificial juridical person'.[40] Furthermore, regardless of the general, sweeping remarks of the competition commission it is clear that it has been authorized by law to take evidence.

Secondly, it is noteworthy that the definition of 'courts' in the Indian Evidence Act uses an illustrative phrase ('includes') rather than the exhaustive word ('means'). This means that the intent of the definition of 'courts' in the evidence law is not to exhaust all forums that could be considered 'courts' for the purposes of the Indian

38 The Competition Act 2002, s 62.

39 The Indian Evidence Act 1872, s 3 states: 'In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context :- 'Court' includes all Judges and magistrates and all persons, except arbitrators, legally authorized to take evidence.'

40 The Competition Act 2002, s 2(l).

Evidence Act but merely to provide a legal standard. In any event, the Competition Act envisages the competition commission to be a 'civil court' for the purposes of rules of discovery.[41] This status in the nature of 'civil court' for the competition commission is buttressed through a related provision in the Competition Act that stipulates that 'no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the [competition] commission or the appellate tribunal is empowered by or under this Act to determine . . .'.[42]

Accordingly, a context-based, purposive interpretation suggests that the competition commission is a 'court' in terms of the Indian Evidence Act—the commission being a person legally authorized to take evidence. Furthermore, the commission has been envisaged to be in the nature of 'civil court' in terms of the Competition Act. Such nuances could possibly be missed in application a literal rule. A context-based, purposive interpretation is certainly illuminating.

Such application of a context-based, purposive interpretation clearly indicates a case for the applicability of the Indian Evidence Act to competition commission's proceedings. This is contrary to the assertions of the commission that has been noted above. The application of a context-based, purposive interpretation provides for an 'intrinsic' and undoubtedly compelling justification behind the applicability of the Indian Evidence Act to competition proceedings. Even so, there are 'instrumental' justifications behind the applicability of the Indian Evidence Act as well. The following sections will deal with two such 'instrumental' justifications—(i) 'legal' implications; and (ii) 'economic' implications.

## III. THE 'LEGAL' IMPLICATIONS

Besides the 'intrinsic' compelling justification that has been argued above for the application of the Indian Evidence Act to competition proceedings, there is a significant 'instrumental' justification. This justification relates to the usage of the legislative tool of 'presumptions' impacting upon the burden of proof that needs to be discharged in terms of competition proceedings.

### Burden of proof and usage of 'presumption'

While the Competition Act is a relatively recent legislation, it is not intended by the parliament to operate in vacuum. As discussed in subsection 'Context-based, purposive interpretation in the Competition Act' above, the Competition Act itself envisages concurrency with other legislations. In the context of burden of proof, in common law jurisdictions, it is axiomatically understood that the 'petitioner' or the claimant has the initial burden of proof before that burden shifts to the 'respondent'.

A close scrutiny of the scheme of the Indian Evidence Act is instructive. It stipulates that the 'petitioner' who approaches the court to give judgment is supposed to discharge the initial evidentiary burden of proof. It is useful to extract the provision that states: 'Whoever desires any Court to give judgment as to any legal right or

41 The Competition Act 2002, s 36(2) states: 'The Commission shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908) . . . .'

42 The Competition Act 2002, s 61.

liability dependent on the existence of facts which he asserts, must prove that those facts exist.'[43] Clarifying its impact on the burden of proof, the provision, continues to state that 'when a person is bound to prove the existence of any fact, if it is said that the burden of proof lies on that person'.[44] Yet another provision which has a bearing upon the scheme of the burden of proof in terms of the Indian Evidence Act goes on to stipulate that 'the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side'.[45]

In terms of its bearing of the above scheme on competition commission's proceedings, this means that if the commission allege violation, the burden of proof would usually be on the commission as the claimant to prove. It is interesting to note however, that at least in the context of horizontal restraints such as cartels, the Competition Act has introduced a different scheme. In terms of this alternate scheme, with a *sine qua non* of the existence of an 'agreement', the competition commission could draw 'presumption' of an adverse effect on competition. Contrary to the general scheme of burden of proof outlined above, this 'presumption' drawn in terms of the Indian Evidence Act effectively shifts the burden of proof to the 'respondent'. Such a shifting of burden of proof certainly acts as a significant legislative tool in the armour of the competition commission.

To be sure, while the legislative tool of 'presumption' in the Competition Act is borrowed from the Indian Evidence Act, its usage is not entirely novel. With respect to horizontal restraints such as cartels, the Indian Evidence Act's concept of 'presumption' plays a similar role as that of 'per se' in the context of the USA and 'violation by object' in the EU. In the context of the EU, however, it should be noted that the burden of proving an infringement rests on the 'party or authority alleging the infringement'.[46]

Regardless of its similarity to the US 'per se' doctrine or the EU concept of 'violation by object', the usage of 'presumption' undoubtedly makes the job of the competition commission relatively easier in so far as horizontal restraints such as cartels are concerned. Its significance is accentuated considering the usual lack of evidence that the competition agencies face in these contexts as much of cartel activity takes place behind closed doors.

Interestingly, the introduction of the concept of 'presumption' in terms of the Competition Act indicates an intelligent design by the parliament. The ingenuity of the parliament lies in its reliance upon the pre-existing jurisprudence of evidence law of the 1872 vintage rather than grapple with inevitable problems of legal transplantation that concepts borrowed from other jurisdictions usually entail.

Instead of relying upon such predominant xenophile instincts in competition law, there is yet another reason why it is noteworthy that the scheme of the Competition Act has relied upon the concept of 'presumption' borrowed from the Indian Evidence Act. In radical scenario (albeit purely theoretical as it was not in contemplation at the stage of drafting of competition legislation), it was possible (due to its

43 The Indian Evidence Act 1872, s 101.

44 ibid.

45 The Indian Evidence Act 1872, s 102.

46 The Council regulation (EC) No 1/2003 of December 2002, art 2.

availability as an option in evidence law) for the Competition Act to suggest that the existence of 'agreement' with respect to horizontal restraints such as cartels would be 'conclusive proof' of adverse effect on competition.

The usage of the concept of 'conclusive proof' could have (purely in theory) made the task of the competition commission even easier. For, the evidence law suggests that 'when one fact is declared by this Act to be conclusive proof of another, the court, shall on proof of one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it'.[47]

For instance, the Indian Evidence Act has used such 'conclusive proof' approach in the context of proof of paternity. The evidence law provides that 'the fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man'.[48] While there is an obvious social advantage to such conclusive proof-based approach to questions of paternity, even in this context the evidence law has provided for a crucial exception of 'unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten'.[49]

In any event, a conclusive proof-based approach in competition law would not be desirable as it would lead to concerns related to fairness—a concept which is otherwise well-entrenched in Indian jurisprudence. Furthermore, a drastic step such as that of conclusive proof based approach would engender a chilling effect on (desirable) competition.

As an instance of intelligent design of the Competition Act, instead of using conclusive-proof based approach, the competition law relies upon the evidence law concept of 'shall presume'. The Indian Evidence Act states that 'whenever it is directed by this Act that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved'.[50] This 'shall presume' approach as juxtaposed with the 'conclusive proof' approach has benefits both for the competition commission and the parties.

The 'shall presume' approach ensures that the competition commission's evidentiary burden of proof is eased. The decisional practice related to horizontal restraints have shown a high level of success of this approach.[51] Furthermore, for the parties, the 'shall presume' based approach ensures that the 'respondent' retains a 'fair' opportunity to disprove any adverse effect on competition.

It is noteworthy that if one were to use the literal rule of interpretation, which has been described in section II above, the competition commission will not be able to seek the benefits of 'shall presume' approach of the Indian Evidence Act. For, the provision related to 'shall presume' states that it will apply only when 'it is directed by this Act', the phrase 'this Act' obviously referring to the Indian Evidence Act.

As delineated in subsection 'The competition commission's literal interpretation' above, based upon its usage of literal rule of interpretation, the competition

47 The Indian Evidence Act 1872, s 4.
48 ibid s 112.
49 ibid.
50 ibid s 4.
51 John Handoll, 'India: Bid Rigging and Competition Law' (2016) Concurrences 93.

commission's general, sweeping remarks indicate that it is chary of an application of the Indian Evidence Act. If one were to apply a similar interpretation to the 'shall presume' provision in the Indian Evidence Act, it would not be *ipso facto* applicable to the Competition Act.

However, based upon the purposive rule of interpretation described in subsection 'Context-based purposive interpretation' above, given that the Indian Evidence Act states that 'the court shall presume a fact' and the competition commission is certainly a court for the purposes of the Indian Evidence Act, the meaning of the phrase 'shall presume' will be applicable in the context of competition proceedings as well.

This indicates that the application of the Indian Evidence Act in the context of the Competition Act seems to have sponge-like characteristics, implications of which have been dealt with below.

### 'Sponge'-like effect of evidence law

In an article succinctly titled '*Sponge',* Ariel Ezrachi has drawn attention to the 'inherent characteristics of the law and the effect that these have on its susceptibility to a multitude of considerations'.[52] The main argument of this article has been extracted below.[53]

> The thesis put forward in this article is more nuanced. It concerns the inherent characteristics of the law and the effect that these have on its susceptibility to a multitude of considerations. It argues that the sponge-like characteristics of competition law make it inherently pre-disposed to a wide range of values and considerations. Its true scope and nature are not 'pure' nor a 'given' of a consistent objective reality, but rather a complex and, at times, inconsistent expression of many values. (footnotes omitted)

This extract is redolent of the ongoing international harmonization and assimilation in the field of competition law. Internationally, it is useful to note that the US antitrust law relies upon the federal rules of evidentiary procedure for enforcement with little problem. Analytically, however, besides being open to the international best practices in the field of competition law, India's competition commission ought to be open to the domestic rule of law requirements stemming from the Indian Evidence Act as well.

Such openness is bound to enrich the enforcement mechanism of the competition commission. Indeed, as subsection 'Burden of proof and usage of 'presumption'' above indicates, the competition commission's approach of ignoring the applicability of the Indian Evidence Act is full of disastrous consequences. For, if the commission interprets that the Indian Evidence Act is not applicable to the competition proceedings, it has ramifications for the legal landscape related to horizontal restraints such as cartels.

Furthermore, competition commission has displayed open-mindedness towards other jurisdictions—both developed and developing. The canvass of jurisdictions

52 Ariel Ezrachi 'Sponge' (2017) 5 Journal of Antitrust Enforcement 49, 50.
53 ibid.

that have influenced decision-making in a range of judgments cover the USA, the EU, the UK, South Africa, Brazil, and Australia. Besides being influenced by the decisions emanating from these jurisdictions, the competition commission actively participates in discussions at the International Competition Network, United Nations Conference on Trade and Development, The Organisation for Economic Co-operation and Development and the World Bank. Within the framework of Brazil, Russia, India, China and South Africa (BRICS), there has been attempts to ensure that the 'emerging economies' are able to exchange notes with each other without the overbearing presence of the representatives of the advanced economies.

Unsurprisingly, the Competition Act provides for a legislative mandate to the competition commission to 'enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country'.[54] Interestingly, this mandate suggests that these arrangements ought to be for 'the purpose of discharging [commission's] duties or performing its functions under [the Competition] Act'.[55] The competition commission has used this provision to enter into a memorandum with the advanced jurisdictions such as the USA, the EU and the UK.

This openness displayed by the competition commission should not be limited to international context. The commission ought to shed its reticence towards domestic legislation such as the Indian Evidence Act and utilize it to augment competition enforcement. Indeed, given the legal milieu in which the competition commission exists it is surprising that it feels that the evidence law would in any manner hobble its enforcement activities.

This is particularly relevant because of the stage of development of the competition commission. Being a relatively nascent agency, it requires a certain and predictable development of competition jurisprudence. The certainty and predictability that surrounds an old enactment such as the Indian Evidence Act is immense. Such certainty and predictability will ensure that all stakeholders are in a better position to arrange their affairs in life.

The legal implication of making the Indian Evidence Act non-applicable has been discussed above. While the 'legal' implication does provide an *instrumental* justification for ensuring that the Indian Evidence Act is applicable to competition proceedings, there are potential 'economic' implications as well.

## IV. THE 'ECONOMIC' IMPLICATIONS

Besides 'legal' implications which provide for *instrumental* justification behind the applicability of the Indian Evidence Act to competition proceedings, there are 'economic' justifications. The 'economic' implications could be appreciated from the perspective of (i) legal architecture within the frameworks of competition and evidence laws; and (ii) the potential impact upon the desirability of effects-based approach.

54 The Competition Act 2002, s 18 proviso.
55 ibid.

## Legal architecture

It is noteworthy that the Competition Act provides that professionals other than 'legal practitioners' ie trained lawyers can appear in its proceedings. Indeed, it provides that 'a person or an enterprise or the director general may either appear in person or authorize one or more chartered accountants or company secretaries or cost accountants or legal practitioners or any of his or its officers to present his or its case before the Commission'.[56] This open-minded approach towards other professionals should be noted in the backdrop of the general reluctance of regulator of the Indian legal profession to open legal practice to foreign law firms and lawyers.[57]

In spite of the open-ended wording of the statute to permit assistance from other professionals, the competition commission's decisional practice shows scepticism about the role of economists in competition proceedings. For instance, in one of the early cases decided vis-a-vis alleged abuse of dominance against a stock exchange—the National Stock Exchange—the commission was quick to (implicitly) note that the economic reports prepared by economists were 'paid for' reports.[58] Presumably, the fact that an entity had hired the economist to represent their case seems to have led to adverse inferences. This aspect comes across relatively more clearly in an abuse of dominance case against a realty entity, *DLF*, where, the competition commission, noted:[59]

> There is nothing to indicate why DLF [data] should be given more weightage over the *objective* and *unbiased* data used by DG [i.e. the director general]. DLF primarily relies on JLLM report that *it commissioned* while DG relies on CMIE data (and others) that are *objective* and *taken from public domain* (emphasis added).

To be sure, this phenomena is not wholly unknown internationally and it has been noted that 'it is often the case that each economic expert would display a tendency to become an advocate for the party by which he was instructed'.[60] Unfortunately, in the Indian context, the phenomena of allegations related to passage of consideration does not seem to have turned up as a spectator sport for the competition commission. Writing contemporaneously as the stock exchange case cited above was drawing to a close, a newspaper pointed out the following:[61]

56 ibid s 35.

57 Rahul Singh, '*Festina Lente* or disguised protectionism?: Monopoly and Competition in the Indian Legal Profession' (2014) Harvard Law School Program on the Legal Profession Research Paper No. 2014-8. <https://ssrn.com/abstract=2384599> accessed 15 March 2017.

58 Case 13/2009 *MCX Stock Exchange v National Stock Exchange* para 6.4. (noting that 'In their submission and arguments, the opposite parties prominently relied on reports submitted by *their* economic consultants . . .') (emphasis added). But, in similar vein, the commission noted that 'the informant also relied upon reports of *their* economic consultants. . .'. (emphasis added)

59 Case 19/2010 *Belaire Owner's Association v DLF Limited* para 12.53.

60 Ezrachi (n 52) 62 citing *Streetmap v Google* [2016] EWHC 253 (England and Wales High Court (Chancery Division)), para 47.

61 Srivatsa Krishna, 'Four vital steps to fight corruption' *The Times of India* (New Delhi, 19 June 2011) <https://www.pressreader.com/india/the-times-of-india-new-delhi-edition/20110619/282144992966890> accessed 17 March 2017.

> 'One of India's premier regulators, in a recent case involving two of the most prominent stock exchanges in the country, extorted money from both sides, before awarding a mutilated decision to one of them. The brokers in the deal were some of the most prominent law firms in India'.

To be sure, the newspaper account indicts a 'premier' regulator (without making it clear if it was referring to the competition commission) and certain (unnamed) 'prominent law firms'. Curiously, there is no account of any threatened or real defamation suit against the author.

Be that as it may, why hasn't the competition commission painted lawyers' opinion with the same brush as it does for the economists. Aren't lawyers paid for their expertise too? If being 'paid for' their expertise is possibly being held against economists, wouldn't the same be true of lawyers as well?

Until now, the competition commission has not explicitly discounted lawyer's arguments on the basis of being 'paid for'. Nevertheless, there could be a plausible connection between the competition commission's scepticism for economists and its sceptical approach to the applicability of the Indian Evidence Act described in section II.

The Indian Evidence Act suggests open-mindedness towards opinion of experts and considers them relevant for arriving at a decision. In spite of the 1872 vintage, it is remarkable that the evidence law states that 'when the court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or the questions as to identity of handwriting or finger impressions are relevant facts'.[62] If the competition commission were to insist upon its sceptical approach towards the applicability of the Indian Evidence Act to competition proceedings, such flexibility regarding the opinion of experts accorded by the Indian Evidence Act would possibly be lost.

This should not be understood to mean that *de hors* the Indian Evidence Act, the competition commission does not have the authority to take into account the opinion of the expert economists. On the contrary, the Competition Act stipulates that the commission 'may call upon such experts, from the field of economics, commerce, accountancy, international trade or from any other discipline as it deems necessary to assist the commission in the conduct of any inquiry by it'.[63] Indeed, the regulations formulated by the competition commission in terms of its delegated legislation mandate goes even further than the Competition Act; it states that 'the commission may invite experts of eminence to assist the commission in discharging its functions under the [Competition] Act on such terms and conditions and at such times as may be decided by the commission'.[64]

The difference between the approach of the Competition Act and the Indian Evidence Act should be noted. The former merely gives a discretion to the commission to use an expert economist. This discretionary approach is clear from the

62 The Indian Evidence Act 1872, s 45.

63 The Competition Act 2002, s 36(3).

64 The Competition Commission of India (General) Regulations 2009, reg 52.

proviso to the regulations formulated by the competition commission that has been cited in the preceding paragraph—the proviso states that 'the commission shall have absolute discretion as regards the evaluation of expertise or eminence of those invited to assist the commission'.[65] *Au contraire,* the Indian Evidence Act indicates that the parties are free to take the opinion of expert economists and the commission would be obligated to take into account relevant facts suggested by such expert economists.

To be sure, in practice, the case in favour of the usage of expert economists is not merely a straightforward application of the Indian Evidence Act. The non-usage of economists face another hurdle, a definitional one—who is an economist? Such definitional challenges are easy to meet for regulated professions such as law. But in the context of the discipline of economics, what is the essential criteria—would a masters degree suffice or must one have a doctorate in economics? Assuming one decides on doctoral degree to be basis, should the economist necessarily have pursued competition policy or, at the very least industrial relations or organization theory?

This question related to relevant expertise in economics is not merely theoretical. In a short span of eight years of enforcement of conduct-related cases, the competition commission seems to have already hit an ethical wall. In a case related to 'point of sale' terminals, the competition commission (indirectly) alluded to the defendant's attempt to submit market data (indicating absence of 'dominant position') prepared by an accounting firm, which was presumably acting in the capacity of an expert economist.[66] While market data available in public domain are usually non-controversial, the problematic defendant behaviour, in this case, appears to be that the market data were presumably prepared with a retrospective date.

It is perhaps due to such instances that the competition commission remains very sceptical of expert economists' opinion in cases. This kind of instances fuel the commission's belief that expert opinion could be 'manufactured' opinion based upon payment made by parties. Faced with such realities it is hard to argue against the competition commission's reluctance of the usage of economists.

Nevertheless, an unintended consequence of the commission's continuing scepticism of economists in spite of a clear legislative mandate of the Indian Evidence Act would be the desirability to move towards an effects-based approach in the competition milieu.

## Towards an effects-based approach

In the context of the EU, the effect-based approach has been understood as the following:[67]

> 'An effects-based approach requires a careful examination of how competition works in each particular market. By focusing on the effects of company actions

65 ibid.

66 Case 13/2013 *Three D Integrated Solutions v VeriFone* , para 6.6 (noting the allegation of the informant that '[the economic] report is not an independent report and has been prepared at the instance of the opposite party's counsel'.)

67 Lars-Hendrik Roeller and Oliver Stehmann 'The Year 2005 at DG Competition: The Trend toward a More Effects-Based Approach' (2006) Review of Industrial Organization 281, 282.

> rather than on the form that these actions may take, an effects-based approach makes the circumvention of competition policy constraints more difficult for companies.'

While it is evident from the above that the usage of economics does not have a monopoly over ensuring an effects-based approach for the competition commission, a combination of the lack of fidelity towards Indian Evidence Act and sceptical approach towards economists is heady mix.

Surprisingly, the competition commission seems to be oblivious of the need for an approach based on the Indian Evidence Act and the need to move towards an effects-based approach. In a written text of the speech delivered by the chairperson of the competition commission at a conference organized by an industry association, there is no mention of the fidelity towards the Indian Evidence Act or an effects-based approach.[68] A video of the same speech which is available online, however, contains reference to both but seems to conflate the usage of evidence with an effects-based approach.[69]

It can hardly be overemphasized that any legal assessment requires solid support of proof. The legal assessment cannot be based upon conjectures. A framework established by the age-old evidence law provides a precise legal methodology to ensure that the competition commission's decisions are credible. Such decisions of the commission are likely to provide the much needed soft infrastructure of certainty and predictability in decision-making.

Interestingly, in a recent newspaper piece, the first chairperson of India's competition commission (who retired from his position way back 2011) found the commission to be 'one of the youngest in the world and highly respected for what it has achieved within its relatively short existence'.[70] While puffery is not unknown to the world of competition law, there remains a compelling justification behind engendering a fidelity towards the Indian Evidence Act, which would in turn, act as an edifice for a robust movement towards an effects-based approach.

## V. CONCLUSION

The aim of the article was to defend the applicability and usage of the Indian Evidence Act in competition proceedings. This defence became necessary due to the sceptical approach taken by the competition' commission towards the evidence law which is of 1872 vintage. The defence was based on 'intrinsic' and 'instrumental' prongs.

Intrinsically, the text and the context of the Competition Act and the Indian Evidence Act indicate that the evidence law cannot be wished away in competition proceedings. This is especially evident from a context-based, purposive approach to statutory construction.

68 Assocham's 4th International Conference on Competition Law - Opportunities and Challenges in India, 9 September 2016.

69 Speech of Devendra K Sikri, Chairperson, Competition Commission of India <https://www.youtube.com/watch?v=aZODCXPhBbI> accessed 17 March 2017.

70 Dhanendra Kumar 'Regulating Lightly' *Indian Express* (New Delhi, 3 December 2016) 15.

Instrumentally, there are two significant insights from counterfactuals. In terms of the 'legal' implication of making the evidence law inapplicable to competition proceedings, it will have lasting impact upon competition commission's mandate of regulating horizontal restraints such as cartels. Such an approach of the commission would also ignore the 'sponge'-like effects. In terms of the 'economic' implication of making the evidence law inapplicable to competition proceedings, the danger is that the competition jurisprudence may lose out on an effects-based approach which, in turn, is needed to ensure robust compliance.

In sum, the competition commission may afford to ignore fidelity to the Indian Evidence Act at its own peril.