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CHALKING OUT A SKELETON FOR STATE AID REGULATIONS UNDER THE INDIAN COMPETITION LAW FRAMEWORK

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ABSTRACT

The concept of State Aid in Indian competition law jurisprudence has remained absent, thereby arising the need to incorporate certain substantive provisions in regard thereof. This paper undertakes an interdisciplinary approach to identify the rationale behind the grant of “specific” aids by the State and their deleterious impacts on the market.

Accordingly, the paper indicates some conceivable effects of such aids on both domestic and international competition, also triggering the international trade and investment law regime. Subsequently, the paper references some contemporary industry practices and evaluates the (ab) use of such aids by corporations to initiate monopolistic trends.

Thereafter, the paper explores the scheme of existing laws on such state actions in countries such as Brazil and Australia, and those including constitutional and trade law provisions in India, that presumably take cognizance of such situations. It then argues how the current legal apparatus stands insufficient for the provision of requisite reliefs to parties challenging such actionable grants.

Subsequently, it substantiates the need for a separate mechanism to tackle such aids under the Indian Competition law to render both ex-post and ex-ante remedies, with specific reference to the European Competition law which comprehensively accommodates state aid regulations under its anti-trust provisions.

Conclusively, the paper endeavours to engineer a characteristic model for a legal-regulatory framework in India, inspired by but distinct from European law. The proposed template aims to embody the particularities of the Indian landscape in fulfilling the paired objectives of preventing distortive state measures as well as protecting a single integrated market.

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A PREMIER ON STATE AID

State aid refers to the benefits transferred to a particular entity, or a group of entities, by the government, using public resources.³ This includes direct benefits, in terms of grants, cash transfers, etc., as well as indirect benefits such as subsidies, tax benefits, and the sale/purchase of assets by the government at a favourable rate.⁴ “State aid” may be granted in favour of a whole sector of the economy and the players falling therein, for instance, the aid rendered by the Indian government to the agricultural sector.⁵ It also includes benefits transferred to certain specific entities/corporations or a group of corporations, like the government subsidies provided to TATA Motors.⁶ This type of aid offered in favour of certain specified players is called “selective aid”, and is often considered to be distortive of the competition in the market.⁷ This section thus focuses on the concept of state aid in general, the motive underlying the same, and its consequential effects on the market dynamics.

Erstwhile colonies, such as India, were faced with the challenge of developing secondary and tertiary sectors in order to survive the economic crisis faced in the initial years of independence.⁸ Consequently, a protectionist regime was constructed with the extension of aid by the government to local industries, to help them rise against their foreign counterparts.⁹ However, as the world metamorphosed towards globalisation, these state aids were derided by international players, like organisations such as the World Trade Organisation (“WTO”) which aimed to eliminate these state measures to ensure equitable international competition.¹⁰ However, even presently, states are nonetheless inclined to grant aid, specific as well as sectoral.¹¹ This can be explained by political incentives or even purely economic reasons.

Although, national governments are encouraged to abide by international agreements acting against “state aid”, they are often faced with what may be regarded as the “prisoners dilemma”. In weighing the reciprocal benefits of all member states to such agreements *vis-a-vis* the competitive advantage bestowed on national

³ Péter Staviczky, ‘Cumulation of State Aid’ (2015) 14(1) European State Aid Law Quarterly 117.

⁴ Vincent Verouden, ‘EU State Aid Control: The Quest for Effectiveness’ (2015) 14(4) European State Aid Law Quarterly 459.

⁵ Ministry of Agriculture & Farmers Welfare, Government of India, ‘Assistance to Farmers affected by Floods and Covid-19 Pandemic’ (2021) <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1697514>> accessed 8 March 2023.

⁶ Romita Datta, ‘West Bengal’s costs to retain Tata Nano beginning to mount’ (*Mint*, 16 September 2008) <<https://www.livemint.com/Politics/XEPNHMHIDW0KLEFXcmSjeK/West-Bengal8217s-costs-to-retain-Tata-Nano-beginning-to-m.html>> accessed 8 March 2023.

⁷ Alison Jones, Brenda Sufrin and Niamh Dunne, *EU Competition Law* (7th edn, Oxford University Press 2019).

⁸ Ramachandra Guha, *India after Gandhi: The History of the World’s Largest Democracy* (Macmillan, 2007).

⁹ John Toye, ‘Political Economy and the Analysis of Indian Development’ (1988) 22(1) Modern Asian Studies 97.

¹⁰ WTO, ‘History of the Multilateral Trading System’ (*World Trade Organisation*) <https://www.wto.org/english/thewto_e/history_e/history_e.htm> accessed 8 March 2023.

¹¹ Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

firms as a result of such aids,¹² the governments often end up choosing the latter, for instance in the European subsidies granted to Airbus.¹³

With regards to their influence on the market, “State aid” often has positive impacts on the market, such as the grants provided to bail out certain high-potential corporations undergoing financial crunches that can actually prevent a market crisis.¹⁴ However, at times, these aids may result in deleterious ramifications not just on competition, but on the market structure in general. Providing grants to low-performing firms can disincentivize efficient firms from rendering their best.¹⁵ It can also lead to capital misallocation, subsequently causing reduced total production.¹⁶

SELECTIVE AID: A CONCUSSION IN THE MARKET

“Selective aids” refer to the specific aids granted by the government in favour of certain entities which, in most cases, are corporations.¹⁷ Such aids, given only to certain specific players, place them in an advantageous stance as compared to their counterparts. Governments across nations are motivated by several factors for providing such aid.

In some cases, there exist political considerations behind such state actions; Directors and CEOs of certain corporations/entities might have personal associations among political leaders with vested interests, who issue state grants in favour thereof.¹⁸ Furthermore, state governments in federal nations often tend to compete with each for attracting better investments and thus, attempt to provide exorbitant subsidies and grants to certain corporations as incentivizes to set up plans in their respective states. Such instances have become common, including in India, where for instance the West Bengal government granted inordinate subsidies to TATA Motors.¹⁹

In certain cases, the government also grants such aids in favour of state-owned enterprises, rendering them at an advantage relative to their private counterparts, which was evident from the inordinate direct and indirect

¹² James A. Brander, Barbara J. Spencer, ‘Export subsidies and international market share rivalry’ (1985) 18 *Journal of International Economics* <<https://www.sciencedirect.com/science/article/abs/pii/0022199685900066>> accessed 9 March 2023.

¹³ Loren Thompson, ‘European Aircraft Subsidies: A Study of Unfair Trade Practices’ (Lexington Institute 2010) <<https://www.lexingtoninstitute.org/wp-content/uploads/EuropeanSubsidiesBrochureFinal.pdf>> accessed 8 March 2023.

¹⁴ Timothy Besley and Paul Seabright, ‘The Effects and Policy Implications of State Aids to Industry: An Economic Analysis’ (1999) 14(28) *Economic Policy* 14.

¹⁵ Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

¹⁶ *Ibid*

¹⁷ Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

¹⁸ Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

¹⁹ Romita Datta, ‘West Bengal’s costs to retain Tata Nano beginning to mount’ (*Mint*, 16 September 2008) <<https://www.livemint.com/Politics/XEPNHMHIDW0KLEFXcmSjeK/West-Bengal8217s-costs-to-retain-Tata-Nano-beginning-to-m.html>> accessed 8 March 2023.

benefits provided to state-owned entities, such as Indian Airlines in the earlier years of Indian independence.²⁰ An additional incentive behind providing selective aid, specifically with the governments of developing nations, might also lie in rendering corporations capable of making investments in foreign nations.²¹

Such steps often lead to complications which can be analysed from an interplay of different legal provisions, including those of international trade and investment law. The competitive gain is apparent from certain instances wherein corporations have utilised such state aids to develop technologies and obtain intellectual property rights there over, consequently establishing a monopoly in the market.²² Further, subsidies, at times, are also effected through liberalising the labour codes, which helps corporations in cutting down on input costs,²³ in grave violations of the labour laws.

A DIVE INTO THE EXISTING JURISPRUDENCE CONCERNING “STATE AID”

The following section enumerates the various “laws” that govern the grant of selective state aid and further analyses their violation along with the remedies present therein. It then assesses the insufficiency of these laws in comprehensively addressing the situations arising out of such aids.

1. International Trade Law

International trade law takes cognizance of specific state actions affecting international trade. The World Trade Organisation (hereinafter the “WTO”) is the central authority responsible for ensuring the existence of free trade among its members and guaranteeing fair international competition.²⁴ The Agreement on Subsidies and Countervailing Measures (hereinafter the “SCM”),²⁵ entered into by the member states, came into force in 1996 and has been governing “specific” state subsidies and aids ever since.²⁶ The said agreement recognizes direct as well as indirect benefits given to specific industries or sectors of the economy as “subsidies”, and classifies these subsidies into “prohibited” and “actionable.”²⁷ It takes cognizance of aids that are specifically likely to affect the trade between nations by either providing grants and subsidies to domestic entities engaged in exports or by favouring

²⁰ Romita Datta, ‘West Bengal’s costs to retain Tata Nano beginning to mount’ (*Mint*, 16 September 2008) <<https://www.livemint.com/Politics/XEPNHMHIDW0KLEFXcmSjeK/West-Bengal8217s-costs-to-retain-Tata-Nano-beginning-to-m.html>> accessed 8 March 2023.

²¹ Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

²² Pierre Mathejsin, ‘State aids, state monopolies, and public enterprises in common market’ (1972) 5 Duke Law Journal <<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3372&context=lcp>> accessed 9 March 2023.

²³ PJ Secki, ‘Seismic Shifts in Indian Labour Laws’ (2015) 50(40) Economic and Political Weekly 19.

²⁴ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021).

²⁵ Subsidies and Countervailing Measures 1996 (WTO).

²⁶ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021).

²⁷ Subsidies and Countervailing Measures 1996, Art. 3 (WTO).

domestic entities competing against foreign goods and services.²⁸ Cognizance is either taken by the WTO on *suo motu* basis, or on complaints filed by member states.²⁹

There have been instances in contemporary times of the involvement of developing countries like India in matters concerning state aid, allegedly violative of the SCM provisions.³⁰ However, such provisions only concern aids and grants as and when they are deemed to be violative of inter-state trade and international competition, while aids that are merely detrimental to domestic competition are not taken cognizance of. Additionally, filing a complaint under the WTO regime concerns international diplomacy and bilateral relations between concerned states and, consequently, incidents of filing an actual “complaint” are rare.³¹ Moreover, in light of the developments in American politics, some commentators are of the opinion that the WTO SCM has lately been latent.³² Hence, the SCM and its provisions prove to be insufficient, especially when it comes to governing state aid specifically affecting the domestic competition of a nation.

2. International Investment Law

International investment law concerns bilateral and multilateral investment treaties between nations and the settling of disputes arising therein.³³ In such investment treaties, it is a practice, as common as a custom, to include provisions of “minimum standard treatment”. These provisions call for “fair and equitable treatment” of foreign corporations and entities setting up their plants in the signatory state’s territory. Such provisions have been widely incorporated in bilateral and multilateral treaties, for instance, in the India-America Bilateral Investment Treaty.³⁴

Selective aids and subsidies granted in favour of domestic players are deemed to be violative of such “fair and equitable treatment” clauses, as the same render the foreign corporations at a comparative disadvantage. Such actions violating the minimum standard requirements have, time and again, been taken cognizance of by arbitral tribunals settling investment disputes, such as in the matter of *ADF Group Inc. v. United States of America*.³⁵ Hence, even the investment laws and provisions arising from treaties agreed upon thereunder consider specific state aids as violative. However, these restrictions are

²⁸ Ilze Jozepa, ‘EU State Aid Rules and WTO Subsidies Agreement’ (House of Commons Library 2021) <<https://researchbriefings.files.parliament.uk/documents/SN06775/SN06775.pdf>> accessed 8 March 2023.

²⁹ Peter Van den Bossche and Werner Zdouc, *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* (5th edn, Cambridge University Press 2021).

³⁰ WTO, ‘India appeals panel reports in disputes targeting Indian sugar subsidies’ <https://www.wto.org/english/news_e/news22_e/ds579_580_581apl_11jan22_e.htm> accessed on 9 March 2023.

³¹ Barry H. Steiner, ‘Diplomacy and International Theory’ (2004) 30(4) *Review of International Studies* 493.

³² Rachel Brewster, ‘The Trump Administration and the Future of the WTO’ (2018) *Yale Journal of International Law Online* <<https://ssrn.com/abstract=3328929>> accessed 8 March 2023.

³³ Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022).

³⁴ India-America Bilateral Investment Treaty, 2015.

³⁵ *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1 (2013).

limited to alleged violations of treaty provisions and do not concern either the distortion of national competition or the integrated market concerns arising out of selective aids.

3. Labour Laws

Domestic labour laws are responsible for ensuring minimum wages and a minimum standard of working conditions for employees. These laws add to the input costs involved in the production of goods and services and are hence, at times, looked down upon by corporations and potential investors.³⁶ Consequently, in order to attract better investments, governments tend to dilute these labour law provisions, which serve as an aid/subsidy for corporations, providing indirect benefits to the same.³⁷ Such dilutions are often challenged in courts, for instance, the challenge to dilution of Indian labour codes in the Pankaj Kumar Yadav case.³⁸

Consequently, it can be concluded that existing labour laws, at times, do act as a bar against indirect state aid, however, even these provisions are restrictive in their approach as the same concern only matters involving labour code violations.

4. Anti-trust Provisions

It is evident, that there do exist legal provisions which, in part, act against selective aids, however, none comprehensively addresses the concern regarding the distortion of domestic competition in the market arising from such aids. In this context, anti-trust provisions aimed at regulating such state aids gain significance. The International Competition Network, which serves as a system of competition authorities worldwide, among other recommended practices, has proposed measures and provisions against “state-created” and “state-facilitated” monopolies.³⁹

Certain states have incorporated these provisions regulating aids and subsidies in their respective anti-trust frameworks. However, the European Union has comprehensive anti-trust provisions regulating “selective state aids” which this paper in the following section would make a thorough analysis of. Moreover, other nations, including Brazil, Peru, Hungary and Australia have also, in part, enacted similar provisions.⁴⁰

³⁶ PJ Secki, ‘Seismic Shifts in Indian Labour Laws’ (2015) 50(40) Economic and Political Weekly 19.

³⁷ Ibid.

³⁸ Murali Krishnan, ‘Plea in SC against Labour Law Dilution’ (Hindustan Times, 15 May 2020) <<https://www.hindustantimes.com/india-news/plea-in-sc-against-labour-law-dilution/story-DwyPdSZ8COi7VFBIO3k5MM.html>> accessed 8 March 2023.

³⁹ ‘State-created monopolies, Analysis pursuant to unilateral conduct laws’ (2006) ICN Unilateral Conduct Working Group <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_SCMonopolies.pdf> accessed on 9 March 2023.

⁴⁰ Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

Nations such as Brazil and Australia have enacted provisions to ensure “competitive neutrality”. The said principle ensures that government-owned business activities do not enjoy a competitive advantage over their private counterparts. As discussed earlier, governments may be incentivised to provide selective aid in favour of state-owned business corporations, however, the competitive neutrality principle restricts the same by establishing grounds for neutrality in state actions, for instance, taxation neutrality, debt neutrality, etc.⁴¹ In cases of violation of these neutrality principles, the said states provide for a complaint mechanism to private players, wherein they can get register their grievances with competition authorities.⁴²

EXPLORING THE EU ANTI-TRUST PROVISIONS ON “STATE AID”

The European Competition Law Provisions, as enshrined under the founding treaty,⁴³ provide for a comprehensive state-aid regulation framework.⁴⁴ The said provisions ensure a twin benefit, *firstly*, ensuring fair competition in the market, and *secondly*, protecting the view of a single integrated market, wherein businesses are subjected to similar conditions in all member states of the Union.⁴⁵

The EU law classifies “selective” state aids which benefit certain corporations/groups of corporations and prohibits the same.⁴⁶ It provides for an *ex-ante* as well as an *ex-post* regulation of aids; there is a requirement to notify any aid, apart from the exempted ones, being provided by a member state to the Commission.⁴⁷ The Commission, after the receipt of information with regard to such aids, engages in an analysis as to whether such aid is likely to distort competition in the market, and accordingly, approves or disapproves the said aid.⁴⁸ Additionally, even after approving certain aid, if it finds reasons to believe that the said aid is being “misused” in a manner as to distort competition, it can abolish the same.⁴⁹ However, certain specific kinds of aid, aimed at promoting public welfare, such as the aids to compensate for damages caused by a natural disaster, or aid to promote economic development in selected areas are excused.⁵⁰

In order to ascertain whether any state action concerning a certain corporation/group of corporations constitutes “state aid” or not, the European law applies the “private investor test.”⁵¹ The state actions which are found akin to that of a private investor are exempted. A counterfactual test is applied to test whether the

⁴¹ ‘Commonwealth Competitive Neutrality Statement’ (1995) <<https://treasury.gov.au/sites/default/files/2019-03/cnps.pdf>> accessed on 9 March 2023.

⁴² Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

⁴³ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47.

⁴⁴ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 107-109.

⁴⁵ Jonathan Faull and Ali Nikpay, *Faull and Nikpay: The EU Law of Competition* (3rd edn, Oxford University Press 2014).

⁴⁶ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 107.

⁴⁷ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 108.

⁴⁸ Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

⁴⁹ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 108.

⁵⁰ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 107.

⁵¹ Case T-196/04, *Ryanair Ltd v Commission of the European Communities*, ECLI:EU:T:2008:585.

state is acting as a private investor in the normal market situation.⁵² If it is found that a private person would have acted similarly in the said situation, it is concluded that the alleged action does not constitute “state aid”.⁵³ Hence, investments and disinvestments made by the state as a “private investor” are exempted from the application of the said state aid provisions.

However, it is pertinent to note that the said provisions of “state aid” are not restricted to the direct grants and subsidies provided by the government, and have been interpreted liberally by the European Court of Justice.⁵⁴ It has been observed that any benefit in cash or kind can comprise a “state aid”.⁵⁵ It can include tax benefits,⁵⁶ subsidised services,⁵⁷ and even debt write-offs, and direct grants of loans.⁵⁸ “Aids” can also include holding in the capital of an undertaking⁵⁹ or specifying rules on insolvency procedure.⁶⁰ Even public statements from the government on market situations which are beneficial for a particular undertaking have been interpreted as “State aid”.⁶¹

These provisions provide for extensive regulation of state aid and subsidies, and the paper in the coming sections would propose incorporating a similar model in the Indian competition law framework. However, certain distinctions from the European provisions would also be drawn, looking at the peculiar needs of the Indian market.

ADDRESSING THE DEFICIENCIES IN THE EXISTING REGIME IN INDIA

This section of the paper would lay emphasis on the specific conditions and instances in India that necessitate anti-trust state aid provisions. A reference to case laws would be made wherein specific aids have been challenged under other domestic laws which would be analysed and their insufficiency highlighted.

In India, there have been numerous instances of direct and indirect benefits being granted to specific entities and corporations. Such aids have been motivated by various incentives highlighted earlier in the paper, including the desire of different states to compete with each other for attracting better investments.⁶² Such specific aids lead to deleterious impacts, including distortion of competition in the market, however, in a

⁵² Ibid

⁵³ Case C-142/87 *Belgium v Commission* (‘Tubemeuse’) [1990] ECR I-959, ¶ 29; Case T-16/96 *Cityflyer Express v Commission* [1998] ECR II-757, ¶ 51.

⁵⁴ Case C-39/94, *Syndicat français de l'Express international (SFEI)*, [1996] ECR I-3547.

⁵⁵ Case 30-59, *De Gezamenlijke Steenkolenmijnen in Limburg v High Authority of the European Coal and Steel Community*, ECLI:EU:C:1961:2.

⁵⁶ Case T-198/12, *Germany v. Commission*, ECLI:EU:T:2014:251.

⁵⁷ Jonathan Faull and Ali Nikpay, Faull and Nikpay: *The EU Law of Competition* (3rd edn, Oxford University Press 2014).

⁵⁸ Ibid

⁵⁹ Case C-39/94, *Syndicat français de l'Express international (SFEI)*, [1996] ECR I-3547.

⁶⁰ Case C-200/97, *Ecotrade v Altiforni e Ferriere di Servola (AFS)*, [1998] ECR I-7907, para 41; Case C-295/97 *Piaggio*, [1999] ECR I-3735, ¶ 36.

⁶¹ Joined Cases T-425/04, *France and Others v Commission*, [2010] ECR II-2099, ¶ 234; Joined Cases C-399/10 P and C-401/10 P, *Bouygues and Bouygues Télécom v Commission and Others*, ECLI:EU:C:2013:175, ¶ 89.

⁶² Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

developing country like India, such aids also ought to be analysed from the perspective of the “opportunity cost principle”. Government funds, being limited, can only be allocated to certain limited uses at a time.⁶³ Hence, the fund which is allotted to provide aid to selective corporations could be used elsewhere in the counterfactual, like for provision of direct benefit transfers in the sectors of health and education. Therefore, the opportunity cost of using government funds for selective state aid is huge and leads to a compromise between social benefits and public goods.

In this light, it becomes even more pertinent to regulate and restrict specific state aids. As discussed earlier, international trade and investment law, like other countries, govern India as well. However, the said laws are narrow in their approach and do not address the domestic concern of the nation. Apart from the said laws, there are two major domestic law provisions that, in part, cover state aid. The first is the Comptroller and Auditor General (hereinafter the “CAG”) Report, and the second is the constitutional provisions enshrined under Article 14.⁶⁴

The CAG Report is issued at the end of every financial year.⁶⁵ It provides an analysis of government spending, including the spending on state aid and subsidies, however, the said report is a soft document and cannot act as a basis of action in a court of law.⁶⁶ Hence, the said report, although addressing selective aids, cannot provide a recourse for the same.

Another potential provision addressing the selective aid concern in Indian domestic law is Article 14 of the Indian Constitution.⁶⁷ It provides for recourses against “differential treatment” by the state.⁶⁸ Hence, in cases of selective aid being provided to certain corporations/entities, others can challenge the same on the ground of inequality in state action. Such challenges have been made, and selective state aids, indeed, have been arraigned for violation of Article 14,⁶⁹ for instance, in the matter of *Union of India vs Government Of Tamil Nadu*.⁷⁰ However, there are certain limitations pertaining to the said constitutional remedy, which render it insufficient for comprehensively addressing the state aid concerns.

Firstly, Article 14 violation provides for a writ remedy and the burden of proof therein is high. Additionally, the only recourse in such cases is to approach the Supreme Court or a High court, and given the burden on and

⁶³ Stelios H. Zanakis, Tomislav Mandakovic, Sushil K. Gupta, Sundeep Sahay and Sungwan Hong, ‘A review of program evaluation and fund allocation methods within the service and government sectors’ (1995) 29(1) Socio-Economic Planning Sciences 59.

⁶⁴ The Constitution of India, 1950 art 14.

⁶⁵ The Constitution of India, 1950 art 148.

⁶⁶ *Manish Kumar Aggarwal v. Union of India*, 2017 SCC OnLine HP 1972.

⁶⁷ The Constitution of India, 1950 art 14.

⁶⁸ MP Jain, *Indian Constitutional Law* (8th edn, LexisNexis 2018).

⁶⁹ The Constitution of India, 1950 art 14.

⁷⁰ *Union of India v Government of Tamil Nadu*, 2013 MAD LJ 4 721.

pendency of cases in these courts,⁷¹ the said remedy, in effect, is mostly rendered redundant. *Secondly*, the said remedy only provides for an *ex-post* remedy and does not touch upon the *ex-ante* regulation of aids.

Thus, the existing laws in India stand inadequate to regulate state aid, however, this does not mean that instances and industrial practices of state aid do not exist. There have been numerous cases of selective aid and the same has been challenged time and again in different courts. For instance, specific aid provided to certain industries during the COVID-19 pandemic was challenged in the Supreme Court.⁷² Specifically, in the Electric Vehicle sector, it was believed, that the government has provided aid in favour of certain selected entities.⁷³ Another example, as earlier touched upon, can be of exorbitant aid granted to TATA Motors. Pursuant to the said aid, it was alleged in the court that the said corporation has attained “dominance” in the market.⁷⁴

Instances of beneficial treatment in favour of state-owned entities are also not unprecedented in India. Exceptional efforts have been made for development as well as the bailout of government aviation players like Air India;⁷⁵ there have also been similar instances in the transport sector, wherein license applications of private players have been turned down, to reserve certain routes for state corporations.⁷⁶

Therefore, it can be concluded that there are instances of selective state aid in India, which lead to pernicious impacts, including but not limited to distortion of competition. However, legal provisions governing the same have their own limitations. Consequently, there is a requirement for a comprehensive model, addressing the said concern, which shall be introduced in the next section.

A BID FOR A NEW REGULATORY TEMPLATE

It is evident that there is an absence of comprehensive provisions governing selective state aid in India. This section would thus propose a model for the inclusion of such a provision under the competition law regime. It is inspired by European law but is characteristic of the particularities and the market dynamics distinctive to India.

India should incorporate a provision for regulation and restriction of state aid under its Competition Act.⁷⁷ This provision can take inspiration from the European model and can mandate an *ex-ante* notification for all

⁷¹ K.G. Balakrishnan, ‘Judiciary in India: Problems and Prospects’ (2008) 50(4) Journal of the Indian Law Institute 461.

⁷² *Small Scale Industrial Manufactures Association v Union of India* 2021 SCC OnLine SC 246.

⁷³ Shally Seth Mohile and Nitin Kumar, ‘Start-up EV makers allege partial treatment, halt of FAME subsidies’ (Business Standard, 11 October 2022) <https://www.business-standard.com/article/companies/start-ups-allege-partial-treatment-halt-of-fame-ii-scheme-subsidies-122101100894_1.html> accessed 8 March 2023.

⁷⁴ *Neha Gupta v. Tata Motors Ltd.*, 2021 SCC OnLine CCI 25.

⁷⁵ Arijit Mazumdar, ‘Deregulation of the Airline Industry in India: Issues, Causes and Rationale’ (2009) 70(2) The Indian Journal of Political Science 451.

⁷⁶ Organisation for Economic Co-operation and Development, ‘Competition, State Aids and Subsidies’ (OECD 2010) <<https://www.oecd.org/competition/sectors/48070736.pdf>> accessed 8 March 2023.

⁷⁷ The Competition Act, 2002 (12 of 2003).

the state aids to the Competition Commission. The said aids could only be brought into effect after the same has been approved by the Commission. Additionally, it could also provide for an *ex-post* regulation, wherein, certain aids initially approved, could still be declared restricted due to the impact it creates on the market, once affected. Certain specific aids, either falling under a minimum threshold (*de-minimis*) or aimed at social welfare could be exempted and such exemptions can be included in the act as well.

However, it must be noted that the requirements of the market of a developing country like India differ from that of its European counterpart. Consequently, a distinction must be drawn from the European provisions, at least on two grounds.

Firstly, unlike the European state-aid regulation provision, state actions taken by the government to bail out specific corporations in times of financial crunches and insolvency must be exempted from the purview of competition law. The European model takes cognizance of state actions assisting certain corporations even during insolvency procedures, given that these are specifically benefitting certain players.⁷⁸ However, it must be noted that the Indian market is at a nascent stage as compared to its European or American counterparts. Consequently, corporations and entities therein do require the support of the government, specifically in times of market crisis. Hence, the state-aid regulation in India can be restricted to grants, subsidies, and other similar benefits, and assistance provided under insolvency procedure or other similar assistance during financial crunches can be exempted.

Secondly, it must be noted that although, the European provision does provide for an *ex-post* restriction provision,⁷⁹ however, the same is not taken recourse to actively.⁸⁰ The European Competition Commission has evolved comprehensive tests over time to analyse the likelihood of distortion of competition and such tests are applied at the stage of *ex-ante* notifications. Consequently, instances are rare wherein a requirement might arise to restrict a particular aid after the same has been approved, and such *ex-post* recourses are largely limited to situations wherein, some member state does not notify the commission timely about certain aid.⁸¹

It is noteworthy that the nascency of Indian competition regime warrants more novel and extensive tests in the state aid provisions to undertake comprehensive analyses of their likely effects on the market. Therefore, there might arise such situations wherein the Commission initially approves a particular state aid, but later finds it to be creating a deleterious impact on the market. Hence, *ex-post* restrictions should be equally given heed to and there should exist comprehensive statutory provisions for the same.

⁷⁸ Case C-200/97, *Ecotrade v Altiforni e Ferriere di Servola (AFS)*, [1998] ECR I-7907, para 41; Case C-295/97, *Piaggio*, [1999] ECR I-3735, para 36.

⁷⁹ Consolidated Version of the Treaty on the Functioning of the European Union, [2012] OJ C 326/47, Art. 108.

⁸⁰ Alison Jones, Brenda Sufrin, and Niamh Dunne, *EU Competition Law* (7th edn, Oxford University Press 2019).

⁸¹ *Ibid.*

CONCLUSION

As discussed earlier, the European state-aid regulations serve a twin purpose- preventing distortion of the market and safeguarding the principle of a single integrated market.⁸² The inclusion of a similar yet distinctive provision in the Indian competition law framework would benefit the Indian market, not just with respect to the first objective, but also the second one. Enabling state aid regulation would restrict the state governments' actions of providing selective subsidies in order to compete with one another. Hence, it would lead to integration of the Indian market.

It has rightly been stated that "*competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.*"⁸³ Monopolies created resultant of state actions have been widely recognized as one of the leading causes of distortion of competition in the market.⁸⁴ Introducing a state-aid control mechanism in the Indian competition law framework, as proposed in the paper, would restrict such monopolies, leading to a libertarian market, conducive to the Indian competition law regime.

⁸² Richard Whish and David Bailey, *Competition Law* (10th edn, Oxford University Press 2021).

⁸³ Joseph Stiglitz, 'Competing over Competition Policy, Project Syndicate' (2001) < <https://www.project-syndicate.org/commentary/competing-over-competition-policy>> accessed on 9 March 2023.

⁸⁴ State-created monopolies, Analysis pursuant to unilateral conduct laws' (2006) ICN Unilateral Conduct Working Group <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/07/UCWG_RP_SCMonopolies.pdf> accessed on 9 March 2023.