COLLECTIVE DOMINANCE AND INDIAN COMPETITION LAW

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INTRODUCTION

Articles 38 and 39 of the Indian Constitution directed, *inter alia*, that the state shall strive to endeavour towards promoting the welfare of the people by securing and protecting as effectively as it can a social order in which justice, social, economic and political, shall inform all the institutions of the national life,[1] and the State shall, in particular, direct its policy towards eliminating inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people.[2] Article 39 made it a Directive Principle of the State Policy to ensure that the ownership and control of the material resources of the community are so distributed so as best sub serve the common good.[3] These Articles are a part of the Directive Principles of State Policy of the Constitution of India. Based on these Directive Principles, the Monopolies and Restrictive Trade Practices Act was enacted in 1969. This was the first legislation pertaining to competition law in India.

The MRTP Act (which existed prior to the Competition Act, 2002) was an embodiment of the constitutional mandate; it exempted governmental companies from its purview and focused only upon the private entities.[4] Perhaps the philosophy underlying the MRTP Act was that government companies were the harbinger of public interest and private companies were the only entities in need of regulation to promote public interest.[5]

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[1]Constitution of India, Art 38(1).

[2]Constitution of India, Art 38(2).

[3]Constitution of India, Art 39(b).

[4]MRTP Act 1969, s 3 inter alia, states: "Unless the Central Government, by notification, otherwise directs, this Act shall not apply to – (a) any undertaking owned or controlled by a Government company, (b) any undertaking owned or controlled by the Government, (c) any undertaking owned or controlled by a corporation (not being a company) established by or under any Central Provincial or State Act..."

[5]Rahul Singh, 'The teeter totter of regulation and competition, competition authorities must trump sectoral regulators.' <http://www.cci.gov.in/images/media/completed/interface_sr_ca_20080508112129.pdf> accessed 27 August 2011.

Pursuant to liberalization of the economy in 1991, the MRTP Act was found to be inadequate to address the needs of the new, globalized economy.[6]

The MRTP Act had admirable aims but it failed to work as expected. This was partly because the Act was created at a time when all the process attributes of competition such as entry, price, scale, location, etc. were being regulated.[7] The MRTP Commission had no influence over these attributes of competition, as these were part of a separate set of policies. Another reason for its inadequacy in dealing with anti-competitive practices was the absence of proper definitions in the Act. A perusal of the MRTP Act shows that there are neither definitions nor even a mention of certain offending trade practices which are restrictive in character, for example cartels, predatory pricing, and bid-rigging. Further, the MRTP Commission was unable to take any action against any of the international cartels that attracted the attention of other competition authorities.[8]

It would have been a monumental task to amend the MRTP Act to address the needs of the economy.[9] Hence, India opted for a modern legislation on competition law that was mandated to enhance consumer welfare by sustaining competition in the market.[10]

Further, Indian competition law clearly lays down a private right of action by mandating the competition authority to act upon a complaint[11] by any person[12]. This is in contrast with the older competition law regime that conferred a right of complaint to a 'consumer'[13] only in cases of 'restrictive trade practice'. Further, the Competition Act, 2002 incorporates a provision for awarding compensation by the competition authority for any loss or damage suffered by any victim.[14] Thus, we can clearly deduce that the objective of the Competition Act, 2002 is to protect the rights of the consumer and to empower them so that they get the benefit of competition in the market and are protected by anti-competitive agreements. The Act also mandates the Competition Commission of India to regulate combinations, keep a check on anti-competitive agreements and also ensure that there has been no abuse of dominant position.

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[6]*Ibid.*

[7]Pradeep S. Mehta, 'Competition Law Regime in India: Evolution, Experiences and Challenges'. Concurrences Í° 1-2006 – pp. 150-156.

[8]ibid.

[9]Rahul Singh, 'Shifting Paradigms, Changing Contexts: Need for a New Competition Law in India'. Journal of Corporate Law Studies

[10]Competition Act 2002, Preamble.

[11]Competition Act 2002, s 19(1).

[12]Competition Act 2002, s 2 (l) defines a "person" to include an individual.

[13]MRTP Act 1969, s 10.

[14]Competition Act 2002.s 34.

Abuse of dominant position

Dominant position is a position of strength enjoyed by an enterprise in the relevant market which enables it to either operate independently of competitive forces prevailing in the relevant market,[15] or affect its competitors, consumers or the relevant market in its favour.[16]

The definition says that "an enterprise" will be in a dominant position when certain criteria are met. (Therefore *prima facie* it seems that an abuse of dominant position can only be performed by a single enterprise.) This interpretation of this section would render the objective of the Act useless as one or more enterprise may together, as happens sometimes in an oligopolistic market, collectively be in a dominant position and when they abuse that position it will directly affect the interest of the consumers. So, before moving on any further, it is important to understand this concept of 'collective dominance' which is also sometimes called 'joint dominance'.

Collective or Joint Dominance

Joint or collective dominance has been treated by the Competition Authorities as equivalent to oligopolistic dominance. As a general rule, joint market power exercised by a limited number of undertakings corresponds to the market of tight oligopoly. The concept of joint dominance has been developed under both Article 102 of the Treaty on the functioning of EU, named FEU in this paper, and the regulations on the control of concentrations between undertakings. Based on the economic links that competitors might share with each other, joint dominance can be defined as a relationship of mutual interdependence. The joint dominant competitors are dependent on each other, though able to act independently of the other competitors and the rest of market actors.

Oligopoly is a market structure in which two or more companies are in a position of dominance in the market (as differentiated from a one-company monopoly). Such a market structure is called an "oligopoly" ("oligo" is Greek for "a few"); a term that often refers to the market power these companies wield rather than to the given number of actors. In an oligopolistic situation, companies maintain their independence and do not directly partner with each other.[17] However, as a result of the characteristics of the limited marketplace, the same companies indirectly synchronize the pricing and policy

[15]Explanation I (i), Competition Act 2002, s 4(1).

[16]Explanation I (ii),Competition Act 2002, s 4(1).

[17]Patrick Ryan, European Competition law, joint dominance, and the wireless oligopoly problem, 11 Colum.J. Eur. L. 355 2004-2005, 358.

decisions they make, an action often labelled as "tacit coordination" or "conscious parallelism."[18]

Conscious parallelism is a situation where rival firms act similarly or "interdependently." Decisions about pricing structures and production levels, among other things, are made with an awareness of each other's conduct, though these competitors do not have express agreements to set prices.[19] Conscious parallelism also exists in the United States, where it has been described as the "process, not in itself unlawful, by which firms in a concentrated market might in effect share monopoly power, setting their prices at a profit-maximizing, supra-competitive level by recognizing their shared economic interests and their interdependence with respect to price and output decisions." [20]

The case law provides the following examples of connecting links to establish joint dominance:

1. Contractual links such as cooperation or license agreement, which might be a matter of explicit collusion.
2. Oligopolistic interdependence as a result of the market structure, which is an issue of tacit collusion.[21]

It is not necessary that the undertakings in question adopt identical conduct on the market in every respect.[22] It is to be seen whether they are able to adopt a common commercial strategy and act to a considerable extent independently of their competitors, their customers, and also of consumers.[23]

COLLECTIVE DOMINANCE UNDER OTHER JURISDICTIONS

European Union

The concept of joint dominance has emerged through various EC decisions and either EC or European Court. European Court judgments under Article 102 of the Treaty on

[18]*Brooke Group Ltd. v Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 227 (1993).

[19]*Sugar Cartel Case: SuikerUnie v Comission* (Case 40/73), [1975] ECR 1663.

[20]ibid.

[21]*Goyder & Albors-Llorens*, p 378 referring to Italian Flat Glass, para 45.

[22]*Irish Sugar*, T-228/97, ECR 1999 Page II-02969, para 66.

[23]*French Republic v Commission, supported by Federal Republic of Germany, C-68/94 and SociétéCommerciale des Potasses et del'Azote (SCPA) and EntrepriseMinière et Chimique* (EMC), C-30/95, para 221.

functioning of European Union (formerly article 82 EC) and the EC Merger Regulation. Article 102 EC applies to any abuse of a dominant position within the common market by one or more undertakings. It has been clear for some time that a dominant position in this sense can legally exist among one or more members of a group.[24] In other words, a company does not necessarily breach antitrust law when it possesses a dominant market share. However, a strict reading of the text does not tell us whether the reference to "one or more undertakings" in Article 82 EC also applies to legally or economically independent firms that hold a collective dominant position.

Earlier, the ECJ seemed to have rejected outright the idea that an oligopoly can hold a dominant position. In its 1979 *Hoffman La Roche* decision, the Court noted that a "dominant position must also be distinguished from parallel courses of conduct which are peculiar to oligopolies in that where in an oligopoly the courses of conduct interact, while in the case of an undertaking occupying a dominant position the conduct of the undertaking which derives profits from that position is to a great extent determined unilaterally."[25]

However, the court took a somewhat different stance in its 1992 *Italian FlatGlass*[26] judgment. Here, the lower CFI suggested for the first time that the concept of collective dominance may apply under Article 82 EC and that such dominance may constitute a breach of antitrust laws. This case, however, associated joint dominance with cases where joint agreements and licenses existed. This case along with the later case of *Compagnie Maritime Belge*[27], clearly laid down the concept of collective dominance, i.e. two or more undertakings linked in such a way that they form a collective entity in a particular market. The economic relationship between these undertakings does not have to be structural; instead, it can simply have emerged from connecting factors resulting from the oligopolistic structure of the concerned market. This however, does not establish that there has been an 'abuse of dominant position' by any of the parties.

It is also very important to now discuss the 'collective dominance' under EC merger law as it will help us understand the abuse of a dominant position. The EU Merger Regulation[28] prohibits mergers that "create or strengthen a dominant position as a result of which effective competition would be significantly impeded..." The Commission first applied the concept of 'collective dominance' in merger control in

[24]*Continental Can*, [1972] 57 C.M.L.R.

[25]*Hoffman La Roche & Co. AG v Commission*, Case 85/76, 1979 E.C.R. 461

[26]*SocietA Italiana Vetro SpA v Commission*, Joined Cases T-68/89, T-77/89 & T-78/89, 1992 E.C.R. 11-1403, at 11-1548.

[27]*Compagnie Maritime Beige*, 2000 E.C.R. at 1-1459 - 1-1460.

[28]Council Regulation 4064 of 1989.

1992 in *Nestle Perrier*[29], but it was not until *Kali & Salz*[30] in 1998 that the ECJ confirmed collective dominance as where

"...one or more undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers and also of consumers."

Further, according to the judgment in *French Republic*[31], creation or strengthening of joint dominance came within the scope of Article 2 of the first merger regulation[32], even if the dominant position in question was held by the parties to the concentration together with an entity not a party thereto.[33] Finally the *Airtours judgement*[34], in spelling out a three-part test, has established a clear standard based more precisely on the underlying economic theory of tacit collusion and collective dominance. This test was in relation to mergers. Confirming *Airtours*[35] criteria in *Laurent Piau*[36] case demonstrates that the definition of joint dominance under Article 102 FEU is coherent with the concept of joint dominance under the EUMR. Further, In *Impala*[37], the pre-existence of a joint dominant position has been disclosed by applying the test in the *Airtours* fact which may entitle the application of the Article 102 FEU on tacit collusion as well as collective dominance.

Thus, we can see that the concept of joint dominance has been recognised under the EUMR and it is also provided for under the Article 102 of the Treaty of Functioning of European Union.

Canadian law

Section 79(1) of the Competition Act[38] in Canada provides for prohibition of abuse of

[29]Case No. IV/M. 190.

[30]Case 30/95.1998 ECR I-1375.

[31]*French Republic and Sociétécommerciale des potasses et de l'azote (SCPA) and Entrepriseminière et chimique (EMC) v Commission*, joined cases C-68/94 and C-30/95, ECR1998 Page I-01375, paras 166-8.

[32]Council Regulation (EEC) No 4064/89 of 21st December 1989 on the control of concentrations between undertakings, OJ L395, 30.12.1989, p.1

[33]*French Republic* (n 64).

[34]*Airtoursplc v Commission*, T-342/99, ECR2002 Page II-02585.

[35]ibid.

[36]*Laurent Piau*, T-193/02, ECR 2005 Page II-00209.

[37]*Bertelsmann AG and Sony Corporation of America v Commission*, Impala, C-413/06 P, ECR [2008] Page I-04951.

[38]Competition Act (R.S.C., 1985, c. C-34).

dominant position. Subsection 79(1) sets out three essential elements, all of which must be found to exist by the Tribunal for it to grant an order. The Tribunal must find that: (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business; (b) that person or those persons have engaged or are engaging in a practice of anti-competitive acts; and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.[39]

The reference to "one or more persons" in section 79 contemplates a situation where a group of firms, none of which on its own is necessarily dominant, may collectively possess market power.[40] The Bureau establishes joint dominance similarly to single-firm dominance. In assessing cases where joint dominance is alleged, the Bureau will assess which firms in that market would need to engage in potentially anti-competitive behaviour such that together they have market power.[41] This market power analysis is based on the collective market share of the firms each alleged to be engaged in potentially anti-competitive behaviour, the market's barriers to entry or expansion, and any other relevant factors. Where the firms alleged to be engaging in potentially anti-competitive behaviour appear to collectively hold market power, the Bureau will consider these firms to hold a jointly dominant position.

Collective dominance: A case study

In the case of *Consumer Online Foundation v Tata Sky Limited & Ors*[42]., the CCI has ruled that the DTH service providers have not violated the provisions of the Competition Act 2002. One of the main issues before the commission for consideration was if the DTH service providers had abused their dominant position under Section 4 of the Act by denying nearly 20 million DTH subscribers the option to change service providers without a substantial switching cost. While deciding the case in the favour of the DTH operators, the CCI has ruled that the DTH service providers have not violated Section 4 of the Act.

[39]David McAllister, 'An Overview of the Abuse of Dominance Provisions of the Competition Act', <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01165.html> accessed on 2 September 2011.

[40]Competiton Bureau Canada, 'The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act)', <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf/$FILE/Draft-Abuse-of-Dominance-Guidelines-eng-16012009.pdf> accessed 2 September 2011.

[41]ibid.

[42]Case No 2 of 2009, decided on 24th March, 2011.

A consumer welfare organisation, Consumer Online Foundation had filed a case with CCI in 2009, on the basis that major DTH service providers were indulging in anti-competitive activities by requiring consumers to purchase new set-top boxes every time they would want to switch between service providers. It was stated that all the DTH operators have locked their consumers in and that switching from one DTH operator to another was not possible. The providers had deliberately made sure that there remained no interoperability in the DTH market. It was found by the Director General in his investigation that if case interoperability was insured, there would be a vigorous competition in the market and it would have resulted into churning of customers among the DTH service providers.

Under S. 4(1) of the Competition Act, 2002 abuse of dominant position has been prohibited. The same section of the act further provides the grounds under which there is an abuse of dominant position.[43] However, it is necessary in the first place to prove that the party accused of abusing dominant position is in a dominant position. In the absence of establishment of dominant position such conduct of the opposite party will not be covered under the provisions of Section 4 of the Act.[44] In this regard, dominant position has been defined in the Act.[45] As already discussed earlier, the definition says that "an enterprise" will be in a dominant position when certain criteria are met.

In the his report, the Director General (DG) has also discussed the issue of abuse of dominance by the opposite parties by restricting interoperability. It observed that Indian law does not recognize collective abuse of dominance as there is no concept of 'collective dominance' which has evolved in jurisdictions such as Europe. The word 'group' referred to in Section 4 of the Act does not refer to a group of different and completely independent corporate entities or enterprises. It refers to different enterprises belonging to the same group in terms of control of management or equity. Based on this report and similar contention of the DTH service operators, the CCI held that "the concept of dominance does centre on the fact of [sic] considerable market power that can be exercised only by a single enterprise or a small set of market players. Every single player in any relevant market cannot be said to possess such dominance, as seems to be the contention of the informant. All service providers of the entire DTH industry cannot be said to be individually dominant. Individually, none of the DTH operators has dominant position in terms of Explanation (a) to Section 4."[46]

[43]Competition Act 2002, s 4.

[44]*Pravahan Mohanty v HDFC Bank Limited, Chennai*, CCI Case No.17/2010.

[45]Competition Act 2002, s 4.

[46]Main Order of the CCI.

This view of the commission is based on the literal interpretation of the Competition Act. The reason why MTRP act was repealed and Competition Act, 2002 was enacted was because the market dynamics had changed. The threat was no more from only monopolies but from any entity that was capable enough to change the market dynamics in its favour. The view that only an enterprise can abuse its dominance is not the correct view. There are situations in which more than one enterprise can collectively abuse their dominance with a tacit understanding between them. If such practices cannot be curbed under the Competition Act, 2002, the objective of the Act, which is to protect the interests of the consumers, would be defeated. Hence, the provision regarding abuse of dominance must either be read as to include collective dominance or, the Competition Act, 2002 must be suitably amended so as to include collective dominance within the ambit of Section 4.

India indeed has a comprehensive competition law regime like other developed economies. All laws need to evolve and adapt to the changing times. Competition law in India too should constantly evolve with experience in order to fulfil the requirements of an ever changing market and conditions prevailing thereof. It would be wise to learn from the experiences of other developed market economies like the European Union, Canada etc. while handling similar situations.