

COLLECTIVE DOMINANCE: NEED FOR LAWS RELATING TO COLLECTIVE DOMINANCE AND DIFFERENCE BETWEEN CARTELS

Author: PRAJWAL VISHWANATH (9TH SEM, BBA LLB)

Co-Author 1: SOUKYA R D (9TH SEM, BBA LLB)

Co-Author 2: HARSHITH N (9TH SEM, BBA LLB)

DEPARTMENT: SCHOOL OF LAW

PRESIDENCY UNIVERSITY, BENGALURU, INDIA.

Abstract

This paper makes an attempt to study the need to amend the Competition Act, 2002 and include prohibition of 'Collective Dominance' by enterprises in the market with special reference to oligopolistic market. Collective Dominance is a concept which originated in the European Union (EU). The manner of conduct of the market players adopting Collective Dominance is a unique approach and the laws have been tuned accordingly to address the menacing issue of Collective Dominance. The paper also attempts to study the existing Indian laws to address the issue of 'Dominance' and the reason for the inclusion of Collective Dominance within its sphere.

The issue of Collective Dominance has often been equated with Cartels by many jurists and lawmakers. The paper also attempts to draw a differentiation between Cartels and Collective Dominance to come to a conclusion that though the intention of both Cartels and Collective Dominance is the same, the manner of approach are entirely different and both have the ability to cause harm to the competition in a significant manner thereby affecting the competitors, new entrants to the market and the final consumers.

Introduction

The decision taken by the Government of India to open its market through liberalization, privatization and globalization in the year 1991 and also after becoming a member of the WTO in 1995, realized that the laws existing then were insufficient to tackle the increase in competition from its foreign counterparts. The Competition Act, 2002 replaced the Monopolies Restrictive Trade Practices Act, 1969 (MRTP Act) upon the recommendations made in the Raghavan Committee Report¹.

The Competition Commission of India (CCI) is a statutory watchdog established through the Competition Act, 2002 to regulate unfair trade practices in the market and promote healthy competition. The CCI has slapped a penalty of Rs 6,700 crores on cement companies for cartelization as anti-competitive practices under section 3 of

¹ S.V.S. Raghavan Committee Report on Competition Policy and Law, 2000

the Competition Act, 2002 and imposed a penalty of Rs 590 crores on Coal India Ltd where it was found that there was an abuse of dominant position under section 4 of the Act.

The CCI has been efficient in discharging its duties within the sphere of Competition Act, 2002. However, due to certain deficiencies in the Competition Law i.e. due to the absence of the concept of 'collective dominance', CCI has not been able to exercise its powers to the fullest. In the case of *Sanjeev Rao vs. Andhra Pradesh Hire Purchase Association*², the CCI was constrained from levying penalty on the implicated parties due to the absence of 'Collective Dominance'. There have been many instances where the hands of CCI were tied on the prima facie cases like *Sonam Sharma vs. Apple, Vodafone, Airtel*³, etc. among others⁴.

The genesis of 'collective dominance' can be traced back to Treaty on the Functioning of European Union (TFEU). Article 102 of TFEU discusses the concept of 'collective dominance' where one or more independent or unrelated entities are economically connected cumulatively hold a dominant position and abuse the same⁵.

In India, the abuse of dominant position has been defined under section 4 of the Competition Act, 2002. The Act forbids an 'enterprise' or 'group' from abusing its dominance. The term 'group' in this context has been defined as enterprises under the same management. The term 'group' excludes independent enterprises from its ambit. The non-inclusion of independent enterprises in the definition of 'group' excludes the scope of 'collective dominance' of independent enterprises in the market.

The non-inclusion of abuse of collective dominance in the Indian Competition Law has been substantiated with the inclusion of anti-competitive practices i.e. Cartels under section 3(1) of the Competition Act, 2002⁶. The jurists believe that Collective Dominance is not different from Cartels in its functioning. It is argued that there needs no separate provision for 'Collective Dominance'.

The jurists and lawmakers have failed to take into consideration the fact that the scope of cartels is restricted to horizontal agreements within the relevant market and does not include within its ambit the scope of dominance by market players without any agreement which possibly could lead to abuse of collective dominance.

²N Sanjeev Rao v. Andhra Pradesh Hire Purchase Association Case No. 49 of 2012

³Shri Sonam Sharma v. Apple Inc. USA & Ors Case No. 24 of 2011

⁴'Collective Dominance': The Need To Hasten Up Inclusion In Indian Competition Regime

<https://nujssitc.wordpress.com/2013/12/10/collective-dominance-the-need-to-hasten-up-inclusion-in-indian-competition-regime/>

⁵Rational Approach To Abuse of Collective Dominance in Antitrust Law

<https://www.lexology.com/library/detail.aspx?g=b2228827-a180-4fe7-8f7f-c86bca778ff1>

⁶No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

Position of 'Abuse of Dominance' under Competition Act, 2002

The concept of prohibiting 'abuse of dominant position' was adopted from Article 104 of Treaty on the Function of the European Union (TFEU). The term 'dominant position' or 'abuse' has not been defined in the Treaty. The interpretation of both the terminologies has been left to the judiciary⁷.

The dictionary meaning of the term 'dominant' is 'commanding', 'authoritative' or 'controlling'⁸. It can be construed from the dictionary meaning that the term 'dominant position' means a position where an enterprise has authority or control over the market.

The dictionary meaning of the term 'abuse' is 'misuse' or 'exploit'⁹. It can be understood from the meaning that an enterprise having a dominant position may misuse its control or power and may directly or indirectly impose discriminatory conditions in the purchase or sale of goods and services, predatory pricing of goods and services and creating barriers to the new entrants in the market¹⁰.

The Competition Act, 2002 (herein after referred to as the 'Act') under section 4 prohibits the 'abuse of dominant position' by 'enterprise'¹¹ or 'group'. Section 4(1) reads as follows: '*No enterprise or group shall abuse its dominant position*'. The term 'group'¹² has been defined as associated enterprises or subsidiaries of an enterprise. It does not include a combination of two or more independent enterprises.

It is pertinent to note that the Act per se does not prohibit any market player from holding a dominant position in the relevant market but the legislation lays down prohibition on the abuse of the dominant position held by an enterprise in the market which may cause appreciable adverse effect on the competition.

Abuse of dominance becomes a unilateral conduct of an enterprise or its associates which holds an adequate market share in the relevant market and therefore can operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers in the relevant market in its favor¹³.

⁷Prashanti Upadhyay, *A Comparative Study of Dominant Position*; Published in Articles section of www.manupatra.com

⁸<http://english-learners.com/wp-content/uploads/The-Oxford-Thesaurus-An-A-Z-Dictionary-Of-Synonyms.pdf>

⁹<http://english-learners.com/wp-content/uploads/The-Oxford-Thesaurus-An-A-Z-Dictionary-Of-Synonyms.pdf>

¹⁰ Section 4 of the Competition Act, 2002; https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

¹¹ enterprise is defined under section 2(h) of the Act as "enterprise" means a person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relating to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space.

¹² "group" means two or more enterprises which, directly or indirectly, are in a position to —

- (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or
- (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or
- (iii) control the management or affairs of the other enterprise;

¹³ Section 4(2) of Competition Act, 2002

To establish the abuse of dominant position by any enterprise, three essential factors must be taken into consideration by the courts namely:

- a. The Relevant Market
- b. The market strength to carry out its business independently
- c. Determining the abusive conduct by that enterprise in the relevant market¹⁴

The intriguing question before us is what is a relevant market? Determining ‘relevant market’¹⁵ is essential to find out whether an enterprise is in a dominant position or not and whether it is abusing the dominant position. Relevant market has been sub-classified into ‘Relevant Geographic Market’¹⁶ and ‘Relevant Product Market’¹⁷.

In the case of *GKB Hi Tech Pvt Ltd vs. Transitions Optical India Ltd*¹⁸, the abuse of dominant position by the Opposite Party was premised on the fact that the Opposite Party had a giant market share of 85% and it was abusing its dominant position in the relevant product market by indulging in exclusive supply of their products with few downstream entities¹⁹.

In the case of *Belaire Owners’ Association vs. DLF Ltd*²⁰, the CCI restricted the scope of relevant market as ‘high-end residential apartments in the suburban areas of Gurgaon’ which implicates both the relevant product market and relevant geographic market and was imposed with a penalty of Rs 630 crores for abusing its dominant position²¹. The relevant market is decided by the CCI on a case to case basis and does not prescribe a uniform pattern of ‘relevant market’²².

Analyzing Cartel under the Indian Competition Law

Section 2(c) of the Act, Cartel is defined as “*cartel*” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.

Section 3(3) of the Act states that: *Any agreement entered into between enterprises or association of enterprises, including cartels, engaged in identical or similar trade of goods or services which directly or indirectly*

¹⁴<http://www.legalservicesindia.com/article/729/Abuse-o-Dominant-Position.html>

¹⁵ Section 2(r):” “relevant market” means the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets”

¹⁶ Section 2(s): “relevant geographic market” means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas”

¹⁷ Section 2(t): “relevant product market” means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use”

¹⁸GKB Hittech Lens Pvt Ltd v. Transitions Optical India Case No. 93 of 2018

¹⁹ Case No.1/2010- GKB Hi Tech Lenses Private Limited vs. Transitions Optical India Private Limited available at http://www.cci.gov.in/index.php?option=com_content&task=view&id=150

²⁰ Belaire Owners' Association v. DLF Ltd Case No. 19 of 2010

²¹ Case no. 19/2010 Belaire Owners’ Association vs. DLF Limited

²²Rini Violet Tiga, *THE CRITICAL ANALYSIS OF THE COMPETITION LAW IN INDIA: WITH SPECIAL REFERENCE TO THE ABUSE OF DOMINANT POSITION*; IJLLJS, Volume 4, Issue 2

determines the prices, limits or controls production or supply of goods, shares the market by way of allocation of geographic area or types of goods or customers or directly or indirectly results in bid rigging is presumed to have an appreciable adverse effect on competition.

The provision relating to cartel is adopted from Article 101 of Treaty on the Functioning of the European Union (TFEU)²³. The objective of this provision is to prohibit any unfair trade practices in the market. Any horizontal agreement either express or implied, entered into by enterprises engaged in the similar business to reduce the competitiveness amongst the rival enterprises within the internal market and to control the supply, fix prices, share the market or entered into bid rigging are said to have entered into a Cartel²⁴.

Cartels are generally found in oligopolistic markets where there are few players in the market like the cement industry, telecom sector, and oil industry among others. The most common agreements amongst enterprises are to regulate the price in the market. It can be in the form of tie-in agreements, exclusive supply agreements, refusal to deal and resale price maintenance²⁵. Cartels are independently existent enterprises collaborated with each other through common policies and with the objective of attaining monopoly in the market²⁶.

The negative effects of Cartel are detrimental to the society. The higher prices fixed by the enterprises leads to inelastic demand for the product, the availability of the products will be restricted as a result of control in supply of goods and the competitiveness is reduced to nil in the market²⁷.

Nevertheless, the CCI has never failed to nab cartels and have imposed huge penalties on those enterprises engaged in the anti-competitive practices. In the case of *Builders Association of India vs. Cement Manufacturers Association*²⁸, it was found that the cement companies which formed a cartel had limited, controlled the production and fixed cement price in India. The court held that an existence of written material is not necessary to prove a common understanding or agreement²⁹.



²³ The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development, or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

²⁴ Vishaka Singh Deshwal, *Combating Cartels in India*

²⁵ Section 3 of the Competition Act, 2002; https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf

²⁶ <https://www.cliffsnotes.com/study-guides/economics/monopolistic-competition-and-oligopoly/cartel-theory-of-oligopoly>

²⁷ https://www.economicsonline.co.uk/Business_economics/Cartels.html

²⁸ 2012 Comp LR 629 (CCI)

²⁹ Id.

In the case of *Express Industry Council of India vs. Jet Airways (India) Ltd and Others*³⁰, it was held that the Opposite Parties had colluded in the fixing of Fuel Surcharge rates for cargo transportation by the domestic airlines and also the freight charges have been uniformly increased in collusion.

Analyzing Collective Dominance under the European Union (EU) Law

Article 102 of TFEU defines ‘collective dominance’ as abuse of a dominant position by “one or more” legally independent enterprises within the domestic market which orchestrate in a collective manner³¹.

The definition laid down by the TFEU with respect to ‘collective dominance’ is deficient as it does not prescribe the conditions when an enterprise/s are said to be in a dominant position. There have been no determinant factors laid down by the law which leaves the judiciary with the responsibility of interpreting the circumstances under which Article 102 can be made applicable³².

The term ‘one or more’ connotes a wide interpretation. In the case of *Societa Italiana Vetro Spa vs. Commission*³³, the General Court held that the phrase ‘one or more’ has to be construed as economically independent enterprises.

The view with respect to the terminology “one or more” was established by the General Court. There was, however, lucidity on the fact as to the link which needs to be in existence between the two economically independent enterprises. The European Commission, through its decisions has clarified that these enterprises must be “economically linked”³⁴.

The term ‘economically linked’ could mean that the enterprises collectively were capable of regulating the market implicitly or also mean that the enterprises collaborated through an agreement to dominate the market and cause adverse effect. The latter expression would be similar to that of a ‘Cartel’³⁵. In light of the latter expression having characteristics of a Cartel, the view was rejected³⁶.

The Commission was burdened with the responsibility of determining the circumstances leading to “Collective Dominance”. In the case of *Gencor*³⁷, the General Court held that the enterprises in an oligopoly market are in a

³⁰ 2018 (1) CompLR 376

³¹ Consolidated Version of Treaty on the Functioning of the European Union

³² Silija Snall, *Legal Test for Finding of a Collective Dominant Position under Article 102 TFEU*

³³ [1992] ECR II-1403 [357]-[358]; Liza Lovdahl Gormsen, *Collective dominance: An overview of national case law*; National Competition Laws Bulletin

³⁴ Liza Lovdahl Gormsen, *Collective dominance: An overview of national case law*; National Competition Laws Bulletin

³⁵ Alison Jones and Brenda Sufrin, *EU Competition Law* (2014, OUP, 5th edn) 718. See also Liza Lovdahl Gormsen, *Collective dominance: An overview of national case law*; National Competition Laws Bulletin

³⁶ French-West African Shipowners’ Committees [1992] OJ L134/1; CEWAL [1993] OJ L34/20

³⁷ *Gencor v Commission* [1999] ECR II-753

position to anticipate each other's behavior and their interdependence align their conduct in the market so as to abuse their dominant position by indulging in restricted trade practices.

The General Court in the *Airtour*³⁸ merger case laid down three tests to determine the complicity of enterprises in the abuse of "Collective Dominance" which includes the following:

- a. Each enterprise is informed about the behavior of its competitors
- b. Tacit collusion between the players has no reason to exit from the common policies
- c. Reactions of the consumers and competitors did or would not jeopardize the repercussion of the intended common policy

The Court of First Instance (General Court) reaffirmed the tests laid down by the General Court in the case of *Independent Music Publishers and Labels Association (Impala) v Commission*³⁹ and further elaborated by stating that the market conditions must provide evidence to prove joint dominance.

It can be understood that the concept of "Collective Dominance" developed by the European Union is interpreted to include economically independent enterprises to mutually abuse the dominant position attained by them without any sort of an agreement.

Difference between Cartel and Collective Dominance

There is a very thin strand of difference between a Cartel and Collective Dominance. The differences can be inferred from the above analysis of Cartel and Collective Dominance. Cartel is an agreement either explicit or implied between enterprises dealing with homogenous products which results in appreciable adverse effect on the market.

In a Cartel, an agreement is imperative. The enterprises enter into an agreement with the intention of determining prices of the products, limiting control, sharing of the market or bid rigging. Cartels are generally found in an oligopolistic market. Cartels are considered as anti-competitive by the *per se* rule.

In Collective Dominance, there exists no agreement between the enterprises. In this arrangement, the enterprises in the relevant market are well informed about the behavior of their competitors and collude with them tacitly so as to abuse their joint power and exercise control over the market. It's hard to prove collective dominance and it is predominantly existent in the oligopolistic market.

The intention of the entities involved in cartel and collective dominance is the same. However, the manner of approach differs. Cartels are covered under section 3 of the Competition Act, 2002 as anti-competitive practices whereas; Collective Dominance has not been covered under Indian laws.

³⁸Airtours v Commission [2002] ECR II-2585

³⁹ [2006] ECR II-2289

Why does India need to implement laws against Collective Dominance with the help of a case study?

Collective Dominance can prove fatal to the society as oligopoly market consists of essential commodities such as oil, steel, telecom, etc. The incorporation of laws preventing Collective Dominance in India is the need of the hour.

Case Study

*In Re: Mr. Ashok Kumar Vallabhaneji vs. Geetha SP Entertainment LLP and others*⁴⁰, The Informant is a Telugu film producer and distributor of dubbed movies in Telugu language and the Opposite Parties are engaged in the business of production and distribution of movies in the state of Telengana and Andhra Pradesh.

The Informant entered into an agreement Sun Picture Ltd wherein he had purchased the distribution rights of the movie 'Petta' i.e. the Telugu dubbed version for exhibition. It is stated that the Opposite Parties have a collective dominant market share of over 80% on the local movie theatres.

The Informant approached the OPs to provide a minimum of 400 screens to exhibit the dubbed version of the movie *Petta*. The OPs refused to provide the required number of screens as other Telugu movies were scheduled to release during the same time.

The Informant approached the CCI alleging cartelization of the OPs in restricting the screen allocation to the movie of the Informant. It was also stated that the conduct of the OPs amounted to violation of Section 3(3)(b) of the Act. Further, it was also alleged that the act of the OPs amounted to violation of Section 4 of the Act.

The CCI after examining the records stated that the provision relating to Section 4 of the Act contemplates the abuse of the dominant position by an enterprise or group of enterprises which includes associated and subsidiary enterprises.

In the present matter, there is no abuse of dominance by an enterprise or a group of enterprises as no single entity enjoys dominant strength in the market and the Informant has implicated 68 enterprises in the present petition which indicates that no single entity enjoys a dominant position.

Since the concept of collective dominance is not recognized by the Competition Act, 2002 it is outside the scope of the Commission to rule in favor of the Informant and hence, the petition was dismissed.

The absence of the concept of Collective Dominance proved fatal to the Informant wherein the OPs jointly are enjoying over 80% of the market share and are dictating the terms of the market but still are evading the consequences.

⁴⁰ Competition Commission of India, Case No. 17 of 2019

This concept must be incorporated by the Legislature to keep a check on such enterprises that enter into such tacit collaboration thereby evading the repercussions of cartelization and jointly enjoying dominance in the market causing adverse effect on the market within the legal permissible limits i.e. without facing any legal consequences as the concept is not recognized by the Competition Act, 2002.

Conclusion

As many jurists are of the opinion that Collective Dominance are nothing but Cartels, must understand the most important distinction between the two and that they are not the same.

The European Union recognized the concept of Collective Dominance way back in the 1980s and has interpreted the meaning of the term over the years. In the existing competition, the absence of the provision relating to Collective Dominance is providing the entities an opportunity to abuse their dominance in a manner which has no legal sanction and is well within the permissible limits of law.

Since this type of collusion is mainly found in the oligopoly market which serves essential commodities, the detrimental effects are unimaginable. The Government must understand the repercussions of Collective Dominance on the economy before it's too late. If the Government fails to act upon Collective Dominance now, the competitors, new entrants and the consumers at large will be at stake due to abnormal fixation of prices and inelastic demand.

