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"COLLECTIVE DOMINANCE: A DILEMMA IN THE INDIAN SCENARIO."

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I. ABSTRACT:

The Competition Laws in India are at an emerging stage and currently under-developed. In the year 2002, the Competition Act was enacted with the purpose of fostering competition in the blooming Indian Market and safeguarding it against anti-competitive practices by the enterprises. The Act aims at promoting healthy competition in the market, prohibiting anti-competitive agreements, restraining abuse of dominance by undertakings and regulating combinations in order to ensure that there is no adverse effect on competition in India. The paper focuses on Section 4 of the Competition Act, 2002 which deals with abuse of dominance by undertakings. According to the Act, dominance is holding a position of strength in the market.

The paper includes parameters for assessment of relevant market and abuse of dominance along with the judicial interpretation and international approach to collective dominance. It is pertinent to note that dominance per se is not held to be bad but its abuse is. The question of abuse by dominant enterprises or undertakings is decided as per the facts of the case in hand, however, there is no explicit mention of the number of undertakings which can be presumed to be dominant in the same relevant market. The situations in which there are more than one dominant undertaking in the same relevant market is a situation of collective

dominance. The Indian judiciary in a plethora of cases has held that the concept of collective dominance is outside the purview of the Competition Act, 2002 which has led to encouraging anti-competitive activities in India. Therefore, the authors through the present paper enunciate the current situation of collective dominance in India drawing a need for recognition of the concept in India reducing ambiguities in law.

Keywords: Abuse of Dominance, Anti-Competitive Activities, Collective Dominance.

"Free Competition exists inside shelters of law, custom, insurance, political approval, and carefully protected status".

-Mason Cooley[1]

II. INTRODUCTION:

"The primary purpose of competition law is to improve some of those cases where the activities of one enterprise or two lead to the breakdown of the free market system".[2] "Economic model" is the model for ideal competition and the very purpose of the Competition Act, 2002 is to promote economic efficiency and prevent anti-competitive practices "keeping in view the economic development of the country".[3] The main objective defined under the preamble of the Competition Act of 2002 is "keeping in view of the economic development of the country to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade".[4]

Indian Law does not allow more than one dominant undertaking or enterprise in the same market. If in the market, two or more undertaking or enterprise are present, it presumes a dominant position in the market thereby creating a collective dominance. The ***Competition (Amendment) Bill, 2012***, proposed amendment in Section 4 of the Competition Act, 2002 to

[1] Mason Cooley, AZ QUOTES, (March 04, 2019, 10:00 AM), https://www.azquotes.com/quote/1253583.
[2] Competition Commission of India v. Steel Authority of India Ltd. and Anr., (2010) 10 S.C.C. 744 (India).
[3] *Id.*
[4] The Competition Act, 2002 (Act No. 12 of 2003).
http://www.cci.gov.in/sites/default/files/ cci_pdf/competitionact2012.pdf.

provide for the recognition of the potential existence and the resulting scope of regulating collective dominance and thus further suggested the amendment of Section 4(1) with the addition of the words —" joint" or "singly". Accordingly, the suggested changes in the wordage of Section 4(1) would be *"No enterprise or group, jointly or singly, shall abuse its dominant position".*

Section 4 of the Act prohibits an undertaking or an enterprise from abuse of its dominant position and thereby defines dominance and abuse of dominance. A firm is considered to be dominant, if it is in a position of "such economic strength that it can behave, to an appreciable extent, independently of its competitors and customers, Therefore, to assess dominance it is important to consider the constraints that an enterprise faces on its ability to act independently".[5]

The Act defines 'dominant position' as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour".[6]

Abuse of dominance or one-sided regulation refers to the behaviour of an enterprise holding adequate market power in a specific relevant market, such that it can control independently of market forces and the competitive restrictions inflicted by its competitors. The market share is of considerable importance when evaluating the market power of the undertakings, consequently examining the existence, creation or strengthening of a dominant position.[7] When two undertakings or enterprise come together and share a substantial share in the market, it stipulates a fierce competition in the market. To put it other words, it would be unusual if competition law mandates firms to behave not rationally by not acting in parallel so as to infringe the law.[8]

[5] ARIJIIT PASAYAT KUMAR, SM DUGAR GUIDE TO COMPETTITION LAW, 400-433 (Lexis Nexis 6th ed. 2016).
[6] The Competition Act, 2002 (Act No. 12 of 2003) explanation (a) to Sec. 4.
[7] United Brands Co. v. Commission of the European Communities, 1978 E.C.R. 207.
[8] RICHARD WHISH & DAVID BAILEY, COMPETITION LAW 566 (2011).

III. LEGAL ANALYSIS OF ISSUES AND CHALLENGES WITH RESPECT TO COLLECTIVE DOMINANCE:

A. *What Constitutes Abuse of Dominance:*

According to Sec. 4(1) of the Act, "no enterprise or group shall abuse its dominant position".[9] Section 4 (2) (a) (i) of the Competition Act, 2002, states that "there shall be an abuse of dominant position if, an enterprise inter alia, imposes unfair condition in purchase or sale of goods or services". The Competition Law provides an enterprise or an undertaking to be in a dominant position[10] since dominance per-se is not illicit, but bars it from abusing it.[11] This is explained with regard to the fact that "if a firm with a low market share of just 20% and the remaining 80% diffusely held by a large number of competitors may be in a position to abuse its dominance, while a firm with say 60% market share with remaining 40% held by a competitor may not be in a position to abuse its dominance because of the key rivalry in the market".[12] In order to prove the abuse of dominant position by an enterprise or an undertaking, it is essential to ascertain[13] the 'relevant market'[14] in which the enterprise or undertaking holds a position.

i. To determine the Relevant Market:

The Competition Act of 2002 defines the relevant market[15] as "the market that 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". In simple terms, relevant market classifies the product or the service in a specific geographical area by the particular enterprise or undertaking. To establish abuse of dominant position, it is essential to determine 'the

[9] The Competition Act, 2002 (Act No. 12 of 2003), § 4.
[10] The Competition Act, 2002 (Act No. 12 of 2003) ,§ 4.
[11] M/s Jupiter Gaming Solutions Private Ltd. v. Secretary, Finance, Government of Goa, (2012) Comp. L.R. 56 (C.C.I).
[12] ARIJIT PASAYAT & SUDHANSHU KUMAR, SM DUGAR GUIDE TO COMPETITION LAW,1 (6th ed. 2016) p. 415.
[13] The Competition Act, 2002 (Act No. 12 of 2003), § 4 (2).
[14] Shri M. M. Mittal v. M/s Paliwal Developers Ltd., 2016 S.C.C. Online CCI 61.
[15] The Competition Act, 2002 (Act No. 12 of 2003), § 2 (r).

relevant market' and in order to determine the relevant market,[16] it is essential to consider the two fundamental dimensions, the "relevant geographic market"[17] and the "relevant product market".

a. Relevant Geographic Market:

Under Section 2(s) of the Act, relevant geographic market is "a market comprising of the area in which the conditions of competition, for supply of goods or provision of services or demand of goods or services, are distinctly homogeneous and distinguishable from the conditions prevailing in the neighbouring areas".[18] In simpler terms, the 'relevant geographic market' refers to that area of the market within which competition takes place.

In the case of ***Sunil Bansal v. Jaiprakash Associates Ltd.,***[19] it was held that only Noida and Greater Noida will be considered as a geographic market and not the entire NCR. The CCI gave the following reasons, "(a) the conditions for supply of real estate development services in Noida and Greater Noida were different from that of the other NCR regions like Faridabad, Anwar, Bhiwandi, etc.; (b) other NCR regions were suggested not as substitutable as they differ on the basis of rules and regulations, regulatory authorities, price difference in properties, infrastructure, transport services, etc. which might prevent consumers from switching their purchases to other regions".

The two major elements involved under Section 2(s) of the Act in a relevant market are the "homogenous state of competition" and "a well-defined state of the competition". The Act does not anywhere define the expression 'homogenous', but as per Law Lexicon, it means "of the same description" which means the market conditions for the supply of goods and services in a specific geographic area must be uniform.[20] On the other hand, with reference to

[16] Prints India v. Springer India Pvt. Ltd. Case No. 16/2010.
[17] Meru Travel Solutions Pvt. Ltd. v. Uber India Systems Pvt. Ltd. & Ors., (2016) Comp. L.R. 209, (C.C.I.); United States v. Marine Bancorporation, 418 U.S. 602 (1974).
[18] Mr. Gajinder Singh Kohli v. Genius Propbuild Private Limited Case No. 15/2016.
[19] Sunil Bansal v. Jaiprakash Associates Ltd., Case Nos. 72 of 2011, 16, 34, 53 of 2012 and 45 of 2013, 2015 CompLR 1009 (CCI).
[20] SM DUGGAR, GUIDE TO COMPETITION LAW, CONTAINING COMMENTARY ON THE COMPETITION ACT, 2002; MRTP Act, 1969; Consumer Protection Act, 1986 (6th Ed.) Volume 1, p134, Lexis Nexis.

a clearly defined state of competition in the market, it is to be seen that the surroundings of the competition are adequately homogeneous in order to evaluate the economic power of the undertaking concerned.[21] In the ***Coal field cases,***[22] it was held that "the market conditions for the entire country was uniform and homogenous, and thus held the relevant geographic market to be India". Similarly, in the case of ***Odisha Steel Federation v. Odisha Mining Corporation Limited,***[23] it was held that "since 99.5% of the total production of friable chrome ore in the country was available in Odisha, the Commission was in agreement with DG/lower Authority's findings and held the State of Odisha to be the relevant geographical market".[24]

b. Relevant Product Market:

Under Section 2(t) of the Act, the relevant product market is defined in as "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.[25] For the purposes of relevant product market, interchangeable products or the substitutes will also be taken into account. Different factors like the 'physical characteristics or end use of goods; price of goods or service; consumer preferences; exclusion of in-house production; existence of specialised producers and classification of industrial goods are some factors for determining 'relevant product market'."[26]

ii. Assessment of dominance of such enterprise or group:

Section 19 (5) of the Act says that "to establish a firm's abuse of dominance in the market, it is necessary to determine the dominant position acquired by that the enterprise or the undertaking in the relevant market".

[21] United Brands v. Commission, (1978) ECR 207: (1978) 1 CMLR 429.
[22] M/s. Maharashtra State Power Generation Company Ltd. v. M/s. Mahanadi Coalfields Ltd. and M/s. Coal India Ltd. and M/s. Gujarat State Electricity Corporation Limited v. M/s. South Eastern Coalfields Ltd. and M/s. Coal India Ltd., 2013 CompLR 910 (CCI).
[23] All Odisha Steel Federation v. Odisha Mining Corporation Limited, 2013 CompLR 746 (CCI).
[24] *Id.*
[25] The Competition Act, 2002 (Act No. 12 of 2003), § 2 (r) explanation (a).
[26] *Id.*

The European Court of Justice in the case of *United Brands Co. v. EC Commission*[27] defines the term 'dominant position' as "a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to— (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour."

However, several factors have been laid down to establish the dominance of an enterprise (or an undertaking) or its influence in the relevant market under Section 19(4) of the Act.

iii. Establishing the abuse of dominance:

Abuse of Dominance is stated to occur "when an enterprise/undertaking or a group of enterprises/undertakings uses its dominant position in the relevant market in an exclusionary or/ and an exploitative manner".[28] The Competition Act 2002 gives an exhaustive list of practices that shall constitute abuse of dominant position and, hence, are prohibited. Such practices when adopted by an enterprise enjoying dominant position in the same relevant market in India result in abuse of their position. Abuse of dominance is assessed in terms of the acts specified and thus committed by a dominant enterprise. Competition Law prohibits such types of acts. Such specified type of abuse if committed by a dominant firm shall stand prohibited.[29]

A series of activities adopted by an enterprise or an undertaking has been laid down by the Competition Act that shall establish abuse of dominant position of that enterprise or undertaking.[30] These are "(i) anti-competitive practices of imposing unfair or discriminatory trading conditions or prices or predatory prices; (ii) limiting the supply of goods or services, or a market or technical or scientific development, denying market access; (iii) imposing

[27] United Brands Co. v. EC Commission (1978) ECR 207; Hoffmann La Roche v. Commission, 85/76, [1979] ECR 461.
[28] Abuse of Dominance Cover, Provisions relating to Abuse of Dominance, COMPETITION COMMISSION OF INDIA (Feb. 10, 2019, 10 PM), http://www.cci.gov.in/sites/default/files/advocacy_booklet_document/AOD.pdf.
[29] *Id.*
[30] Nishith Desai and Associates Competition Law in India, Jurisprudential Trends on the way forward, April 2013, p24.

supplementary obligations having no connection with the subject of the contract, or (iv) using dominance in one market to enter into or protect another relevant market". This list of abuses as specified by the Competition Act is meant to be exhaustive, and not merely illustrative.[31]

B. *Is collective Dominance included in Competition Act, 2002?*

The concept of collective dominance envisages expanding abuse of dominance provisions to envelop those situations where autonomous companies, when coming together create situations of dominance. Collective abuse of dominance is nowhere recognized under Indian law.[32]

i. *The intention of the Legislature:*

Collective Dominance has been denied not just by the judiciary but also by the legislature whose intention was to possibly not to take into account more than one single dominant player in the market, despite having the opportunity to include the same under the *Competition (Amendment) Bill, 2012*.[33] The bill looked for the incorporation of ―collective dominance‖ aspect under Section 4(1). It had been proposed that "Section 4(1) was to be amended with the inclusion of the words ―joint or singly‖". Accordingly, the proposed revision of the wordage of Section 4(1) would be―"*No enterprise or group, jointly or singly, shall abuse its dominant position".*

The proposition given for collective dominance under the ***Competition (Amendment) Bill, 2012***, was not enacted into a law as the legislature clearly wanted to retain the recognition only a single dominant enterprise or undertaking in a definite market. The Act nowhere recognises the concept of collective dominance by enterprises or undertakings that unrelated, different and completely independent entities. Under Section 4 of the Act, the word *'group'* refers to "different enterprises belonging to the same group in terms of control of

[31] *Supra 28.*
[32] Competition Amendment Bill, 2012 (now lapsed): proposed to bring in "Collective Dominance" within Sec. 4, The Competition Act 2002 (Act No. 12 of 2003).
[33] The Competition (Amendment) Bill, 2012.

management or equity".[34] Considering there are two separate enterprises having different control of management or equity then they both cannot be considered to be holding a dominant position in the market.

According to the Act,[35] 'group' means "two or more enterprises which, directly or indirectly, are in a position to:

i. Exercise twenty-six percent or more of the voting rights in the other enterprise; or
ii. Appoint more than fifty percent of the members of directors in the other enterprise; or
iii. Control the management or affairs of the other enterprise."

In the case of ***Manappuram Jewellers Pvt. Ltd.,[36]*** information was filed against Kerala Gold & Silver Dealers Association for abusing its dominant position for imposing directly or indirectly unfair or discriminatory conditions in purchase or sale of gold ornaments in the relevant market which affected the business of the complainant. The commission noted that from the DG's report that there were approximately 650 jewellers in the Thrissur district out of which only 242 jewellers were the members of KGSDA constituting only 37% of the total jewellers in the district.[37] The market share of the members of KGSDA was only 10-12%. The Commission held that "since none of the individual members of KGSDA was in a dominant position in the relevant market of "purchase and sale of gold and silver jewellery in the state of Kerala", the question of abuse of dominance did not arise". Also, the argument around collective dominance under Section 4 of the Act was held to be not tenable.

ii. Tenable arguments for and against the Concept of Collective Dominance:

a. *There are perceptible dangers that arise from rejecting the existence of more than one dominant enterprise or undertaking in the market:*

The presence of only one dominant undertaking as lawfully identified is favourable in numerous ways, both to the consumers as well as other market players. The rise of a sole

[34] SM DUGGAR, ,GUIDE TO COMPETITION LAW, CONTAINING COMMENTARY ON THE COMPETITION ACT, 2002.
[35] The Competition Act, 2002 (Act No. 12 of 2003), § 4 (2) (c).
[36] Manappuram Jewellers Pvt. Ltd. V Kerala Gold & Silver Dealers Association, 2012 CompLR 548 (CCI).
[37] *Id.*

dominant player protects the welfare of the consumer through the practices of the dominant enterprise or undertaking in the attainment of the incentive to continue its dominance. In maintaining its dominance and to avoid being overpowered by the other market players, it will result in constant innovation on the part of the enterprise or undertaking who is at a dominant position. It will also be a motivation for all other enterprises or undertakings to enhance and brainstorm with the expectation of attaining dominance one day in the market. This safeguards in all respects the uniformity and preservation of standard in the goods and services of not only the dominant enterprise or undertaking but also the other undertakings in the market in the quest to attain a dominant position by ousting the subsisting dominant enterprise or undertaking. In this way the subsisting dominant enterprise or undertaking in order to achieve that standard and quality of goods and services act as the benchmark in the quality of the market structure thereby stimulates the ethos of a healthy competition.

Accountability too is an important benefit when there are multiple entities capable of impacting the market and thereby making the single dominant entity liable towards any anti-competitive practice associated with the relevant market considering its unrestricted impact over the market. The single dominant player in this regard helps the market examine and regulate by providing sufficient opportunity. Hence the implementation of laws in relation to the market surroundings and competition becomes much more feasible and systematic when the number of dominant undertakings is restricted to one.

b. Recognition of only a single dominant entity serves to benefit the market:

Considerable dangers are associated with the existence of a single dominant entity in the relevant market. These dangers include the incapacity to manage and direct various anti-competitive practices undertaken by the dominant enterprises who in obtaining gains in isolation, would now want to combine their dominant positions in the pursuit for substantial power in market exploitation thereby resulting in causing problems to the most basic occupiers of competition in the market. Such practices discharge into much considerable dangers such as entering into anti-competitive agreements develop in predatory pricing or the formation of cartels, situations which could have been nipped in the bud had it been

accepted that multiple undertaking could assume dominance and the same could have been monitored closely.[38] Enterprises possessing remarkable power in the market thereby have the capacity to be engaged in cartelization thereby curbing and restraining production and supply and collusive price fixing through price parallelism. These activities have activated a considerable unfavourable effect on the competition in the market and influenced consumer interests at large of not being managed and observed closely. The Indian law is a system where it refuses to acknowledge the existence of more than one dominant enterprise or undertaking in a market comprising of various players where no one firm or group is in a dominant position thereby giving rise to ousting of the existing conditions of a fruitful competition, which shall eventually result to gross harms to the consumers.

IV. CASE ANALYSIS ON COLLECTIVE DOMINANCE:

A. *International Approach:*

As per the EU Guidelines, "the assessment of whether an undertaking is in a dominant position and of the degree of market power it holds is a first step in the application of Article 102. While the dominant position has not been defined in EU law", the definition emerges from the *United Brand's Case*[39] and subsequently affirmed in *Hoffman La Roche Case*[40]:

"The dominant position referred to in this Article relates to a position of economic strength enjoyed by undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to and appreciable extent independently of its competitors, customers and ultimately of its consumers."

Section 4(2) of the Act talking about the definition of 'dominant position' and is in parlance to Art 102 of the Treaty of the European Union (TFEU). 'Dominant Position' as defined above by the EU courts as "a position to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent

[38] Ripal Gupta, Need Of Collective Dominance Under Indian Competition Act 2002, Journal of Legal Studies and Research (Vol 2 Issue 3, ISSN 2455-2437, 2014).
[39] United Brands Company and United Brands Continental v Commission [1978] ECR 207.
[40] Hoffman-La Roche & Co. v. Commission, [1979] ECR 461.

independently of its competitors, its customers and ultimately of the consumers".[41]Article 102 of TFEU considers European Community as a whole and is different from national markets of its member nations.

An enforcement action was brought by the United States Department of Justice against the two payment card networks and against the licensor of one payment card brand, alleging that "governance duality between networks and network's exclusivity rules were agreements in restraint of trade in violation Sherman Antitrust Act". The Court held that "Visa U.S.A. and MasterCard violated the Sherman Antitrust Act by enforcing their respective versions of the exclusionary rule, barring their member banks from issuing Amex or Discover cards". The Canadian Competition Tribunal in the *Visa MasterCard Case*[42] noted that "both MasterCard and Visa can individually possess market power in the same relevant market".

The United States laws on Competition Law do not provide adequate recognition to Collective Dominance. ***The Federal Trade Commission Act,*** under Section 5 prohibits 'unfair methods of competition', and is dubious on prohibition of conscious parallelism. Conventional to the careful access of United States competition regulators, cases such as *Boise Cascade*[43] and *Ethyl Corp*[44], while not ruling out such a prohibition, have greatly limited its applicability. The US Antitrust Legislation in Section 2 of the Sherman Act[45] was enacted over 100 years and provides that: "Every person, who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons to monopolize any part of trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony", therein signifying its acquiescence of the presence of potentially dangerous dominant players in the same relevant market. The Competition Commission of India (CCI) in *In* ***Re: Mr. Mohit Manglani and Flipkart & Ors.***[46] held that since none of the

[41] *Id.*
[42]Sudipto Sircar, Fast Track Call Cab Pvt. Ltd. and Anr. v. ANI Technologies Pvt. Ltd., Case No. 6 and 74 of 2015, INDIAN COMPETITION AND ANTI-TRUST BLOG, (March 01, 2019, 10 PM), https://indiancompetitionantitrust.wordpress.com/2017/09/11/fast-track-call-cab-pvt-ltd-and-anr-v-ani-technologies-pvt-ltd-case-no-6-and-74-of-2015/ .
[43] Boise Cascade Corp. v. Federal Commission of Trade, 637 F.2d 573 (9th Cir. 1980).
[44] Ethyl Corp. v. Federal Commission of Trade, 729 F.2d 128 (2d Cir. 1984).
[45] The Sherman Antitrust Act, § 2 (1890).
[46] Mr. Mohit Manglani and Flipkart & Ors. CCI Case No. 80 of 2014.

concerned parties was "dominant", it was not necessary to enquire into the allegations of "abuse of dominance" against them. In this backdrop, it is worthy to examine Section 2 of the Sherman Act, one of the pillars of antitrust law in the United States (US), which apart from outright "monopolisation", also penalises an "attempt to monopolise" markets.

The Competition laws i.e. the Competition Act 2002, is mostly modelled on the EU Law and draws a parallel connection with the US law. The Treaty on the functioning of the EU has been cognizant of the existence of more than one dominant undertaking/enterprise in the same market and has made explicit reference to the same in Article 102 which "prohibits the abuse of dominant position *"by one or more undertakings"* in the market". The opening words of Article 82 of EC Treaty (Now Article 102 of the TFEU) and Section 4 of the Competition Act 2002, as it presently stands, are divergent, so far as, Article 82 begins with this phrase "any abuse by one or more undertakings of a dominant position" and it was this phrase "one or more undertakings" which was used by Court of First Instance in the *Italian Flat Glass Case*[47] to hold that "there is nothing in principle to prevent two or more independent economic entities from being, on specific market, united by such economic links that, by virtue of that fact, together they hold a dominant position vis-à-vis the other operators on the same market". This pronounced the beginning of the concept of "collective dominance" in Europe.

The General Court of the European Union confirmed that "a relationship of interdependence existing between parties to a tight oligopoly which created a likelihood of coordination was sufficient to establish collective dominance".[48] Moreover, that a joint dominant position is "the coming together of numerous undertakings to adopt a common policy owing to a connection between them and act to a considerable extent independently of their competitors, their customers, and ultimately consumers".[49] In the *Airtours*[50] judgment, the Court had set

[47] Judgment of the Court of First Instance (First Chamber) of 10 March 1992. – Società Italiana VetroSpA, Fabbrica PisanaSpA and PPG Vernante PennitaliaSpA v Commission of the European Communities – EURLex-61989A0068.
[48] Gencor v. Commission, 1999 E.C.R. II-753.
[49] Irish Sugar plc v. Commission, 1997 O.J. (L 258) 1; France & Ors. v. Commission, 1998 E.C.R. I-1375.
[50] Airtours v. Commission, 2002 E.C.R. II-2585.

out "a three limbed test establishing that *first*, each firm knew how other members were behaving; *second*, tacit co-ordination was sustainable over time; and *third*, the foreseeable reactions of competitors and customers would not jeopardize the results expected from the common policy". Henceforth, the establishment of tacit co-ordination or an economic link[51] is a requirement for proving collective dominance.

B. Judicial Interpretation in India:

The Section 4 of the Indian Competition Act 2002 defines "dominant position" as *"a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour."* A group or an enterprise will be considered dominant if any of the factors as mentioned under section 19(4) of the Act are identified. Under Section 4(2) of the Act, a "dominant enterprise" is considered to be an abuse of dominance if it "(a) imposes unfair or discriminatory conditions or prices (including predatory prices) in purchase or sale of goods or services; (b) limits or restricts production and supply of goods and services or market or technical or scientific development to the prejudice of consumers; (c) undertakes practice(s) denying market access; (d) makes contracts conditional on supplementary obligations unrelated with the subject of the contracts; or (e) uses its position of dominance in one relevant market to enter into or protect another relevant market".

The Indian judiciary has interpreted the 'concept of collective dominance' in a plethora of cases, mostly, affirming the absence of the concept in India. In the famous case of ***Fast Track Call Cab Pvt. Ltd. and Anr. V. ANI Technologies Pvt. Ltd.***[52], it was alleged that "Ola was misusing its dominant position in the market by offering substantial discounts to its customers and incentives to the cab drivers associated with them which result in predatory pricing under Section 4 (2) (a) (ii) of the Act". It was concluded in this case that Ola was not dominant in the relevant market and hence was not abusing its position. It was said that "the

[51] SocietaItalianaVetroSpA v. Commission, 1992 E.C.R. II-1403, at 357-358.
[52] Fast Track Call Cab Pvt. Ltd. and Anr. V. ANI Technologies Pvt. Ltd. 2016 Indlaw COMPAT 2; 2016 (3) CPJ(Comp.AT) 1.

relevant market is yet to evolve fully and any intervention at this stage would lead to disturbing the market dynamics". The commission in this case observed "that there are various provisions in the Act that signify the intent of the legislature that there cannot be more than one dominant enterprise in the relevant market simultaneously".

The Competition Commission of India in the case of ***Arjun Jawahar Ganj vs. Viacom 18 Zion Bizworld***[53] in relation to the allegation of collective abuse of dominant position by the OPs, the commission observed that "Section 4 of the Act currently excludes the scenario of more than one dominant undertaking in the same relevant market". Hence, the commission was of prima-facie opinion that "there was no contravention of the provisions embedded in Section 4 of the Act". The purview of Collective dominance was also discussed upon in the case of ***Flyash Based Bricks Manufacturers and Promoters Association, Uttar Pradesh v Chief Secretary, Government of Uttar Pradesh and others***[54] wherein the Competition Commission of India held that "there was no abuse of dominance by the alleged two parties collectively".

In the case of ***Royal Energy v. IOCL, BPCL and HPCL***[55], while ruling whether the operations of the three oil marketing companies cause a violation of the Act, the CCI explicitly held that "the concept of collective dominance was not envisaged under the provisions of Section 4 of the Act. Since each company was an independent legal entity and no one company exercised control over another enterprise". Thus the CCI also found that "the three companies could not collectively form a group".

In ***Consumer Online Foundation v. Tata Sky & Ors.***[56], the CCI observed that: "Indian law does not recognize collective abuse of dominance as there is no concept of 'collective dominance' in the Act, unlike in other jurisdictions such as Europe. The Act recognizes abuse of dominance by a 'group', which does not refer to a group of completely independent

[53] Arjun Jawahar Ganj vs. Vaicom 18 Zion Bizworld, CCI Case No. 57/2017.
[54] Flyash Based Bricks Manufacturers and Promoters Association, Uttar Pradesh v Chief Secretary, Government of Uttar Pradesh and others 2017 Indlaw CCI 53.
[55] M/s Royal Energy Ltd. v. M/s Indian Oil Corporation Ltd., M/s Bharat Petroleum Corporation Ltd. and M/s Hindustan Petroleum Corporation Ltd., 2012 Comp LR 563(CCI).
[56] Consumer Online Foundation v. Tata Sky Ltd &Ors, CCI Case No. 2/2009.

corporate entities or enterprises, it refers to different enterprises belonging to the same group in terms of control or equity". The Indian Judiciary in the case of ***Indian Sugar Mills Association v. Indian Jute Mills Association***[57] **and** ***K.Sera Sera Digital Cinema Pvt. Ltd. v. Digital Cinema Initiatives, LLC and Ors.***[58]**,** further reiterated the absence of any provision relating to collective dominance and that "enterprises cannot be said to be dominant jointly as the concept of collective dominance is not envisaged under the provisions of Section 4 thereby denying recognition of more than one dominant enterprise/ undertaking in the same market".

In the case of ***Sanjeev Rao v. Andhra Pradesh Hire Purchase Association***[59]**,** the Competition Commission of India (CCI) expressed its inability to penalise the parties due to the absence of an expressed provision of "Collective Dominance" under Section 4 of the Competition Act, 2002. The Court held similar view in the case of ***Shri Sonam Sharma vs. Apple, Vodafone, Airtel & Ors.***[60] where they stated that Collective Dominance is outside the purview of the Competition Act, 2002.

V. CONCLUSION & RECOMMENDATIONS:

The laws relating to Competition have been relatively under-developed in India. The introduction of the Competition Act, 2002 was due to the insufficiency of the already existing MRTP Act and its inadequacy to deal with situations of cartels, abuse of dominance and collusive agreements. Indian markets are relatively fast growing and there was a need to have a more concrete law in existence. Abuse of Dominance has been interpreted differently in different cases. Although the ambit of collective dominance is outside the purview of competition law in India but there are case laws in which it has been held that a group can be considered dominant in a market. There are some guidelines regarding the scenarios wherein a *"group"* can be considered dominant in the same market. Those guidelines enshrined under

[57] Indian Sugar Mills Association v. Indian Jute Mills Association, 2014 Comp LR 225 (CCI).
[58] K.Sera Sera Digital Cinema Pvt. Ltd. v. Digital Cinema Initiatives, LLC and Ors., 2016 Comp LR 1098 (CCI).
[59] Sanjeev Rao v. Andhra Pradesh Hire Purchase Association, CCI Case No. 49/2012.
[60] Shri Sonam Sharma vs. Apple, Vodafone, Airtel & Ors. 2013CompLR0346 (CCI).

The Competition Act, 2002, § 4 (2) (c) includes the following situations in which a group can be considered dominant (i) Exercise twenty-six percent or more of the voting rights in the other enterprise; or (ii) Appoint more than fifty percent of the members of directors in the other enterprise; or (iii) Control the management or affairs of the other enterprise. However, where a group creates dominance in the market not falling in any of the above categories then the dominance is outside the purview of the Competition Act 2002. Such an exclusion leads to ambiguity in law and narrows down the scope of the Act.

Through this research paper, an attempt has been made to highlight the grounds on which abuse of dominance in the relevant market is assessed and the need to recognize collective dominance in India as there are situations where the small enterprises and firms face losses and obstacles due to the abuse of dominant position by two parties collectively. These situations and issues need to be addressed and the inclusion of ***"Collective Dominance"*** in the Competition Act, 2002 is the need of hour in a fast-growing country like India. Even though the relevant amendments have been proposed but it received mixed opinions from the jurists and legal practitioners.

The ones in favour of the inclusion of "collective dominance" believe in strict actions to be taken to punish parties involved in instances of abuse of dominance in a group and sometimes even when unrelated to each other. While the opponents argue that "collective dominance, which owes its origin to Europe, cannot be extrapolated to India owing to the developing economy of the country and the nascent regime of competition law". However, the authors through this paper propound the first view as the recognition of "collective dominance" in the Indian laws would pave the path for fair and healthy competition in the Indian Markets and therefore, flourish the economy of the entire country.