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"Competition Policy towards Oligopolistic Behaviour of Multinational Corporations: An Indian Perspective"

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ABSTRACT

The very nature of competition policy is to enhance competition and forestall anti-competitive business practices. An increase in globalization, has made room for an economic vendetta between multinational corporations and the regulatory mechanism in place to promote competition. This has paved way for the oligopolistic behaviour of multinational corporations and the dearth in regulating this behaviour of transnationals and their economic activities, is having a negative impact on competition.This paper analyses the prevailing inadequacy in the regulatory framework in India, to curb the oligopolistic behaviour of multinational firms budding from their collusive nature thereby amounting to monopoly. This conundrum is overlooked due to the capital benefits twinned to transnationals, especially in developing countries thus deterring the fundamental of competition policy. Concurrently, this paper analyses the present stance of the regulatory mechanism as followed by the regulatory authority, the Competition Commission of India, under the shield of Competition Act, 2002 and proposes a modus to regulate the collusive behaviour of multinational corporations to pave way for the promotion of competition and restrict abuse of their monopolistic advantage in an effective manner.

KEYWORDS: Competition, Monopoly, Oligopolistic behaviour, Tacit co-ordination, Multinational Corporations, Regulatory mechanisms

1. INTRODUCTION

In light of the increasing trend of global investments, multinational corporations occupy a crucial position within the wheel of economy. The economic constitution in an ordoliberal sense, therefore, consists not solely of a regulatory half, that aims at protecting competition against state restrictions (fundamental freedoms) and private limitations (antitrust law) alike, but it conjointly entails a facilitative part, that aims at protecting individuals against the expedient behaviour of their transaction partners (through private rights and remedies).[1] This is consistent with institutional economist and Nobelist Douglass C. North, the latter is therefore essential that the economic problems of many developing and transition countries

[1] Stefan Grundmann et al., Party Autonomy and The Role of Information in the Internal Market 49 (2012).

can be explained by respective deficiencies in their domestic legal systems.[2] Multinational corporations worldwide, holds a robust position as they are viewed to be one among the distinct mediums in facilitating economic process. In this view point, their operations are likely to have an effect on competition in the respective markets.

After India commenced a mechanical phenomenon of economic alleviation in 1991, the wide unfold economic reforms initiated and pursued with consistence calibration over the last two decades have unleashed unprecedented growth momentum and pushed the development frontiers of the economy.[3] Competition Policy was brought about with an objective to push potency and maximise welfare.[4] Competition Policy is outlined as 'those Government measures that directly have an effect on the behaviour of enterprises and therefore the structure of industry'.[5] The fundamental is the enforcement of healthy trade practices thereby promoting competition and preventing anti-competitive behaviour of enterprises. This conundrum is dealing with both, the positive as well as negative impacts of competition with respect to transnational corporations.

Consequently, in this paper, the void in having effective regulations to promote competition and prevent anti-competitive behaviour of multinational corporations, taking into thought the monopolistic advantage of the multinational corporations is analysed in regard to the Competition Act, 2002. The shortage in regulatory governance of the oligopolistic behaviour of transnationals is additionally dealt in this paper.

2. OLIGOPOLISTIC BEHAVIOUR AMONGST MULTINATIONAL CORPORATIONS

2.1 Oligopoly: An Overview

The Webster's Dictionary defines an 'oligopoly' as 'a market situation in which each of a limited number of producers is strong enough to influence the market but not strong enough to disregard the reaction of his competitors'.[6] An oligopoly represents a market where market power is concentrated amongst a small cluster of firms or enterprises. The concern with respect to oligopoly is that these fewer firms produce most of the market's output thereby influencing the pricing of products. The barriers to entry for an oligopolistic market are high

[2] Douglass C. North, Institutions, Institutional Change and Economic Performance, 59 (1990); See Gralf-Peter Calliess and Jens Mertens, Transnational Corporations, Global Competition Policy, and the Shortcomings of Private International Law, 843 IJGLS, 844 (2011), https://www.jstor.org/stable/10.2979/indjglolegstu.18.2.843.
[3] National Competition Policy, (2011).
[4] Gautam Banerjee, Guide to the Competition Law 253 (2011).
[5] R. S. Khemani and Mark A. Dutz, The Instruments of Competition Policy and their Relevance for Economic Development, PSD Occasional Paper. 26 World Bank (1996).
[6] Philip Babcock Gove, Webster's Third New International Dictionary (3rd ed. 1993).

as a result of the size of the incumbent firms and the competitive advantages that are derived from that scale.[7]

Oligopolistic market occupies the middle ground in the market structure, i.e. between a market having perfect competition and that of a monopolistic market where power is concentrated with one single entity. However, the problem competition policy faces regarding oligopolistic markets, is that of mutual 'interdependence' i.e., the fact that each firm is able to affect other firms through its decisions and is affected by other firms' decisions.[8] The multinational corporations tend to exist in this market consequently imitating the market behaviour of the leading enterprise or the next response to surviving in this market is by having an understanding among the firms to follow a particular market conduct which results in the entire group of firms sharing equivalent capital profits rather than one less or the other more.

2.2 Tacit Coordination: A Resultant Problem

Markets characterized as oligopolistic are fertile ground for the existence of collusion.[9] Tacit coordination occurs when firms 'restrain trade by intentionally imitating their competitors' actions with reasonably high expectations of a responsive imitation that will lessen the rigors of competition'.[10] Tacit coordination, employed by the multinational corporations can be attributed as a way around competition law and policy to attain capital benefits and profits without entering into an agreement to that effect or any other means as followed under competition law. This implicit collusion between the firms undermine the very objective of competition policy that is to promote competition in the market. An insight on tacit coordination in oligopolistic behaviour is provided by different schools of thought.

2.2.1 Harvard School on Oligopolistic Behaviour

The Harvard school of thought, also known as the structuralist school, has based itself on the structure-conduct-performance (SCP) paradigm and located an instantaneous correlation between the structure of the market, conduct of the firms on the market and therefore the performance of the market. Thus, when the structure of the market is concentrated, the conduct of the firms become interdependent leading to a performance of decreased output and supra-competitive prices.[11] Hence, according to this school the problem of tacit

[7] Stuart Rosenberg and Patrick O'Halloran, Firm Behavior In Oligopolistic Markets: Evidence from A Business Simulation Game, 239 JBCS, (2014), https://doi.org/10.19030/jbcs.v10i3.8714.
[8] Richard Whish and David Bailey, Competition Law (9th ed. 2018).
[9] Jaime Eduardo Castro Maya, The Limitations on The Punishability of Tacit Collusion in EU Competition Law, 195 Rev. Derecho Competencia. Bogotá (Colombia), (2017), https://centrocedec.files.wordpress.com/2018/03/7-castro-195-2401.pdf.
[10] Reza Dibadj, Conscious Parallelism Revisited, 589 San Diego L. Rev., (2010), https://digital.sandiego.edu/sdlr/vol47/iss3/3.
[11] J. S. Bain, Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-1940, 293 Q. J. Econ., (1951), https://www.jstor.org/stable/1882217.

coordination occurs due to the concentrated structure of the market and it is for this reason that Turner proposed structural remedies like breaking up of oligopolistic industries to address this issue.[12]

2.2.2 Chicago School on Oligopolistic Behaviour

The Chicago school of thought is also known as the behaviouralist school which laid emphasis on the behavioural factors in the market than the market structure itself. According to them, irrespective of the concentration level in a market, a price needs to be agreed upon, adherence to that price level monitored and cheating detected and punished in order for supra-competitive pricing to occur.[13] However, even behaviouralists like Posner, agree that oligopolistic market structures with a few players on the market, homogenous products, static demand, high barriers to entry etc., are more conducive to tacit coordination.[14]

2.2.3 Game Theory on Oligopolistic Behaviour

Game theorists had an entirely different approach towards the oligopolistic behaviour wherein the assumption is that each competitor adopts their respective best strategy after taking into account their competitors' best strategies which ultimately would lead to an equilibrium i.e., a combination of strategies that represents the best strategy for every competitor.[15] The only conclusion that can be drawn from game theory is that tacit coordination may or may not occur in an oligopolistic market depending on the equilibrium reached which is not very helpful for competition policy aiming to frame definite rules to tackle this phenomenon.[16]

2.3 Prevalence of Oligopoly Among Multinational Corporations

Multinational enterprises are defined as 'a cluster of corporations of diverse nationality joined together by ties of common ownership and responsive to a common management strategy'.[17] Multinational enterprises appear mostly in industries dominated by comparatively large firms and characterized by high entry barriers.[18] The issues of competition policy associated with multinational enterprises, therefore, are mainly the familiar ones related to oligopoly

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[12] Donald Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 655 Har. L. Rev., (1962), https://www.jstor.org/stable/1338567.
[13] G. Stigler, A Theory of Oligopoly, 44 J. Political Econ., 72 (1964), http://home.uchicago.edu/~vlima/courses/econ201/Stigler.pdf.
[14] Richard Posner, Antitrust Law 70 (2nd ed. 2001).
[15] Sigrid Stroux, US and EC Oligopoly Control 14 (2004); See Dennis Yao and Susan DeSanti, Game Theory and the Legal Analysis of Tacit Collusion, 113 AB, (1993), https://heinonline.org.
[16] Avinash B. Amarnath, The Oligopoly Problem: Structural and Behavioural Solutions under Indian Competition Law, 283 JILI, (2013), www.jstor.org/stable/43953671.
[17] Raymond Vernon, Economic Sovereignty at Bay, 18 TIBR, (1969), https://doi.org/10.1002/tie.5060110114.
[18] Raymond Vernon, Competition Policy Toward Multinational Corporations, 276 Am Econ. Rev., (1974), https://www.jstor.org/stable/1816053.

behaviour.[19] The point of departure for the industry perspective on multinational corporation strategy is that the strategic decisions of individual firms, contrary to the case of perfect competition and monopoly, directly influence and are influenced by the decisions of other firms in the industry.[20] In the context of these enterprises, this implies that ‘a firm’s decision to engage in foreign direct investment hinges on the behaviour or expected behaviour of its rivals’.[21] Interdependence allows firms to achieve a monopolistic level of prices and profits which at the same time discourages competition and turns the market static as there is no incentive to innovate, change marketing models or even compete.[22]

Leaders in the oligopolistic industries have tried to promote cooperative behaviour by forming an industry cartel and dividing the existing markets among themselves. These tendencies have turned many national oligopolies into multinational oligopolies, especially in the mature industries, consequently broadening their geographic frontiers. The existing players share a common capacity for mutual destruction, a common concern over new entrants, and a common need to find some form of cooperative behaviour. As of today, an alternative is sought by these multinationals to join one another in joint ventures and follow one another into new locations, and establish bridgeheads in one another’s main markets.[23]

Continuing in this regard, it can be noted that multinational corporations in India also embrace collusive behaviour amongst its counterparts in order to sustain in the market. This tendency is not likely to devolve competition altogether but it is nevertheless likely to have an impact on competition. Nowadays, innovation-based industries, technological industries, pharmaceutical industries etc. are prone to parallel collusive behaviour to endure in the market. In actual fact, the combined market capitalization of four companies together, i.e., Facebook, Apple, Alphabet (Google) and Amazon is greater than the gross domestic product (GDP) of India alone. In the United States, China and of late, in India, corporations which have a disproportionately large share of their consumer markets are rising and the current regulatory architecture is woefully inadequate to grasp and determine whether this corporate concentration gives rise to monopoly power.[24]

[19] Id.
[20] Thomas Hutzschenreuter and Sascha Israel, A Review of Empirical Research on Dynamic Competitive Strategy, 421 Int. J. Manag. Rev., (2009), http://dx.doi.org/10.1111/j.1468-2370.2008.00246.x.
[21] J. F. Hennart and Y. R. Park, Location, Governance, and Strategic Determinants of Japanese Manufacturing Investment in the United States, 419 Strateg. Manag. J., (1994), http://www.jstor.org/stable/2486759.
[22] Eduardo Castro Maya, supra, 203.
[23] Vernon, supra, 277.
[24] Narayan Ramachandran, Opinion: India’s competition policy must keep up with emerging threats, Livemint Aug. 5, 2019, https://www.livemint.com/opinion/columns/opinion-india-s-competition-policy-must-keep-up-with-emerging-threats-1565025039611.html.

3. AN IMPERATIVE NEED TO REGULATE THE MONOPOLISTIC POWER OF TRANSNATIONALS

Time and again, the need to regulate the monopolistic power of multinational enterprises has been identified. Competition policy towards multinational companies has been liberal since the advent of liberalization, privatization and globalization in 1991. As a consequence, MNCs were able to establish a hold over a wide variety of goods and services ranging from consumer goods such as toothpaste, dry batteries, safety matches, cigarettes, etc, to producer goods including an entire range of engineering products, electrical as well as non- electrical and light as well as heavy electronics; chemicals; drugs; pesticides; plantations and rubber products; and core sector industries such as aluminium, automobiles etc.[25]

Since the very motive of the MNCs is global profit maximisation, these enterprises sometimes may not be compatible with the policy objectives of the host governments and may involve in restrictive trade practices. Thus, the regulation of their activities becomes necessary.[26]

3.1 Rationale for Effective Regulation

Primarily, multinationals are profit-motivated commercial entities with a number of monopolistic advantages[27] - such as innovative ability, technological skill and so on. These enterprises thereby utilize the deficiency in the market and exploit the market to their advantage. These monopolistic advantages give them market power in the areas in which they specialise, and enable them to indulge in monopolistic and/or restrictive trade practices including that of discouraging the local enterprise from entry into competition, restricting output and selling at higher than reasonable price.[28]

Secondly, operations of MNCs have certain implications in the host country in terms of the servicing burden and MNC affiliates in the host countries have a built-in tendency to import their requirements of capital goods, spare parts and raw materials, as much as possible, probably in order to provide a market to other affiliates of the same multinational chain.[29]

Thirdly, MNCs often leverage their own economic power with the power of their governments, to ensure even better terms. For instance, a United States pharmaceutical company will likely pressure the United States government to compel a foreign country to

[25] Nagesh Kumar, Regulating Multinational Monopolies in India, 909 Econ. Political Wkly., (1982), https://www.jstor.org/stable/4370975.
[26] Supra.
[27] N. Hood and S. Young, A Reassessment of the Growth, Performance and Strategy in 300 UK Holding Companies, 429 Manag. Decis., (1979), https://doi.org/10.1108/eb001203.
[28] Kumar, supra, 909.
[29] Id.

reconsider issuing a compulsory license, even when the issuance of that license is within the framework of the World Trade Organisation.[30]

Multinational corporations are specifically targeting developing countries like India, as market penetration here is easier due to insufficiency in meeting demands wherein domestic market weakness is used as an opportunity by multinationals enterprises as they provide with abundance of product options. In this way, these enterprises can manipulate the market to their advantage by colluding with other transnationals to make good their capital profits. Hence, there is a need to regulate the monopolistic power of multinational corporations.

3.2 Corporate Legislations on Regulating Multinational Corporations

In India, there are and have been laws and regulations governing multinational corporations. Development in these laws and regulations have been witnessed over a period of time. Some of the key corporate legislations that have made an effort in regulating the transnationals in the past and in the present. For one, The Industries (Development and Regulation) Act, 1951, makes it obligatory for a firm to obtain licence from the government before setting up an industrial unit or effecting expansion. Chapter III B of the Act deals with the control of supply, distribution, price, etc., of certain articles where a check by the Government is ensured as it provides for regulating the supply and distribution as well as trade and commerce entailing the commercial activities of corporations too.[31] The present Companies Act, 2013, defines 'foreign company'[32], as any company or body corporate incorporated outside India. The Act has also regulated the merger or amalgamation of company with a foreign company[33] consequently keeping an eye on the commercial activities of multinationals in India. Further, the Foreign Exchange Management Act, 1999, was to facilitate external trade and payments in India for promoting the orderly development and maintenance of foreign exchange market in India. It also lays down the procedures and formalities of all foreign exchange transactions in India.[34]

On the lines of competition regulations, the intention of the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP) was to ensure that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies and restrictive trade practices and for matters connected therewith.[35] The limitation of the Act was that it failed to regulate multinational monopolies and that it took into account the interconnections of companies operating in India, through non-resident undertakings where the collusive behaviour of these interconnected undertakings to maximise

[30] Thomas Fuller, Thailand takes on drug industry, and may be winning, New York Times, April 11, 2007, https://www.nytimes.com/2007/04/11/world/asia/11iht-pharma.4.5240049.html.
[31] The Industries (Development and Regulation) Act, § 18G (1951).
[32] Companies Act, § 2(42) (2013).
[33] Companies Act, § 234 (2013).
[34] Foreign Exchange Management Act, (1999).
[35] The Monopolies and Restrictive Trade Practices Act, (1969).

group profits hindered competition as they synchronised their activities and shared the market accordingly. It can be ascribed that the impact of the MRTPA on concentration of economic power was negligible and this was the major drawback of the Act.[36] This legislation was further revoked and replaced by the Competition Act, 2002 which focused on promoting competition than curbing monopolies. In all the stated legislations in picture, there lies an inadequacy in the effective enforcement of the provisions provided in consideration of multinational corporations.

4. RESTRAINT ON OLIGOPOLISTIC BEHAVIOUR OF MULTINATIONAL ENTERPRISES UNDER COMPETITION ACT, 2002

The Competition Act, 2002 has been described by many, as ushering in the second wave of economic reforms.[37] The provisions of Competition Act dealing with the prohibition on anti-competitive agreements and abuse of dominant position came into force in 2009[38] and the merger control provisions saw the light of the day much later in 2011.[39] This Act is enacted with an aim to prevent inequity, while sustaining the competition in the Indian market and to ensure free and ethical trade carried on by the participants in the market.[40] Thus, there has not been any final decisions made by the Competition Appellate Tribunal (COMPAT) or the Competition Commission of India (CCI) or the Supreme Court of India on the interpretation of the substantive provisions of the Competition Act in relation to tacit coordination till date.[41]

4.1 Section 32 of The Competition Act, 2002

Section 32 of the Act is empowered to take cognizance of an act happening in any place outside India but having an adverse effect on competition in India.[42] The Act by allowing CCI to exercise extra-territorial jurisdiction has made it possible for CCI to take action against anticompetitive conduct involving imports, and foreign cartels which may adversely affect the Indian market.[43] This provision encompasses the powers that is vested with the

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[36] United Nations Conference on Trade and Development, The History of UNCTAD 1964-1984, United Nations, New York, (1985), https://unctad.org/en/Docs/osg286_en.pdf.
[37] CUTS Centre for International Trade, Economics and Environment, The new Indian competition law in controversy, (2013), http://cuts-international.org/citee-advocacy- complaw.html.
[38] Notifications S.O 1241(E), The Gazette of India: Extraordinary, (2011), https://www.cci.gov.in/sites/default/files/notification/SO1231%28E%29%2CSO1231%28E%29240611.pdf.
[39] Notifications S.O 479-482(E), The Gazette of India: Extraordinary, (2011), https://www.cci.gov.in/sites/default/files/notification/SO479%28E%29%2C480%28E%29%2C481%28E%29%2C482%28E%29240611.pdf.
[40] Kartik Maheshwari and Simone Reis, Extraterritorial Application of the Competition Act and Its Impact, 144 CLR, (2012), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Extraterritorial%20Application%20of%20the%20Competition%20Act%20and%20Its%20Impact.pdf.
[41] Amarnath, supra, 297.
[42] Competition Act, § 32 (2002).
[43] Maheshwari and Reis, supra, 144.

Competition Commission of India to monitor the anticompetitive behaviour of the enterprises within the country and take cognisance of an act taking place outside India but having an adverse effect on competition within India.[44] Section 32 was formulated to fill in the gap under the MRTP Act which did not explicitly regulate extra-territorial jurisdiction.

4.1.1 Effects Doctrine

Section 32 of the Act of 2002, is based on the 'effects doctrine', which authorises regulators to extend jurisdiction beyond the 'principle of territoriality'. The effects doctrine was established in the case of United States v. Aluminium Company of America,[45] where the U.S. Court of Appeals for the Second Circuit held that, 'any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders'. The Court laid down a test of intended and actual effects on commerce which had to be satisfied by the firms in order to establish the United States jurisdiction over the foreign company.

4.1.1.1 Effects Doctrine: Indian Perspective

The concept of 'Effects Doctrine' was first observed in India in the case of Alkali Manufacturers Association of India v. American Natural Soda Ash Corporation (ANSAC),[46] where a complaint filed against American Natural Soda Ash Corporation (ANSAC), before the MRTP Commission, alleging collusion to form an export cartel by virtue of an agreement between the market players and this was reckoned to result in adverse effect on competition in the market. The MRTP Commission had held that ANSAC had not indulged in any practice of cartelisation by exporting soda ash to India in the form of cartel directly or indirectly. Simultaneously, another petition by the All India Float Glass Manufacturers' Association (AIFGMA) was filed against three Indonesian companies alleging collusion and aggrieved by the decision, both the parties in these cases approached the Supreme Court where the matters were clubbed to form one case, called the Haridas case.[47] The Court held that the MRTP Act had no extra-territorial operation, and the effects doctrine became applicable only with respect to a restrictive trade practice (RTP) after the goods were imported into India. Whereas, in the ANSAC case the Court ruled that the MRTP Commission's reach could not extend to the formation of a foreign cartel, unless a member of the cartel carries out business in India.[48] Thus, the Competition Act, 2002 incorporated Section 32 to address this lacuna under the MRTP Act.

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[44] Supra.
[45] United States v. Aluminium Company of America, 148 F.2d 416, (1945).
[46] Alkali Manufacturers Association of India v. American Natural Soda Ash Corporation (ANSAC), MRTPC 3 Comp LJ 152, (1998).
[47] M/S Haridas Exports v. All India Float Glass Manufacturers' Association, AIR 2728 SC, (2002).
[48] Maheshwari and Reis, supra, 146.

4.1.2 Authority of CCI[49]

CCI has the power to take action against a foreign entity and to inquire into any agreement or abuse of dominant position or combination if such agreement or dominant position or combination that has, or is probably going to possess, an appreciable adverse effect on competition within the relevant market in India and pass such orders because it may deem fit in accordance with the provisions of the Act. This power is coupled with the power to conduct enquiry as well the procedure for investigation under Sections 19, 20, 26, 29 and 30 of the Act.[50]

Even with an express provision in effect, no regulations or rules have been introduced to govern the manner or the time frame within which the regulator is required to act in matters beyond Indian territorial limits. On the other hand, CCI may pass an order against an anti-competitive agreement or prohibiting an action that may constitute an abuse of dominance, in terms of a combination taking place outside India as this would be imperative for CCI to raise an objection against or pass any decision at an appropriate stage, since it would be difficult for CCI to reverse a combination at a later stage after it has been effectuated in a foreign territory.[51]

4.1.3 A Resolution to The Challenge

With the growth in innovation and increasing globalised market place, CCI may find it difficult to tackle a competition problem which arises from action of firms located oversees at the expense of jeopardising diplomatic relations between countries as our country's economy is at stake. Additionally, corporate actions like acquisitions and mergers produce different synergies in different countries, thus attracting conflicting views between the competition regulators having jurisdiction. These challenges are faced by the European Union as well as the power player, United States of America.

The principles of extra-territorial jurisdiction can be bifurcated in two parts, firstly the subject-matter jurisdiction wherein the territorial and nationality principles are sufficient to undertake a great number of infringements of competition laws and enforcement jurisdiction which gives effect to the enforcement jurisdiction without entering into bilateral or multilateral agreements. Such issues have necessitated competition authorities to increasingly co-operate with each other to ensure a free and fair market.[52]

The United States and the European Union competition authorities are presently making a move towards a common peace ground by means of entering into bilateral as well as multi-

[49] Id.
[50] Competition Act, § 32 (2002).
[51] Maheshwari and Reis, supra, 147.
[52] Id.

lateral cooperation agreements such as the Agreement between the Government of the United States of America and thus the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws in 1991, the Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws in 1998, the Agreement on Mutual Legal Assistance between the European Union and the United States of America in 2003 to put an end to the bad blood in respect to competition in the market place.[53]

This modus can be mirrored by the CCI and thus, it must endeavour to enter into bilateral or multi-lateral agreements with other competition regulators under Section 18[54] of the Act.

4.2 Other Germane Provisions Under the Competition Act, 2002

The Competition Act also encompasses other relevant provisions which seek to regulate the monopolistic behaviour of multinational enterprises and promote competition in its place. The statement of the objects and reasons to the said Act substantiates the same. The very reason for the enactment is said to be a response from India, by way of opening up its economy, removing controls, and restoring to liberalization.[55]

The objective of the Act as gathered from its preamble, states that the Act, with the establishment of a Commission, is in place to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers, and not the least, to ensure freedom of trade carried on by other participants in the markets, in India.[56]

The Competition Act is drafted, without limiting its scope to the regulation of commercial acts of private parties. The Competition Act prohibits or regulates (A) Anticompetitive agreements under Section 3 of the Act, (B) Abuse of dominant position under Section 4 of the Act and (C) Combinations under Section 5 and 6 of the Act.[57]

4.2.1 Section 3 Of the Competition Act, 2002

Section 3 of the Act deals with Anti-competitive agreements wherein Section 3(1)[58] of the Act prohibits agreements that are likely to cause an appreciable adverse effect on

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[53] Maheshwari and Reis, supra, 148.
[54] Competition Act, § 18 (2002).
[55] Competition Act, (2002).
[56] Id.
[57] Shalaka Patil et al., Competition Law in India: A Report on Jurisprudential Trends and Way Forward, Nishith Desai Associates, (2013), http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/Competition%20Law%20in%20India.pdf.
[58] Competition Act, § 3(1) (2002).

competition. Agreement is provided for under Section 2(b) of the Act.[59] Thus, the recent stance of the CCI on tacit coordination was observed in the case of All India Tyre Dealers Federation v. Tyre Manufacturers,[60] wherein the case was concerned with an allegation as to the formation of a cartel among tyre manufacturers to fix prices and limit the output of tyres in India. Considering the oligopolistic structure of the tyre market, the CCI observed that:

> High concentration may provide a structural reasoning for collusive action leading to parallelism (price or output), yet it is vital to differentiate between 'rational' conscious parallelism arising out of the interdependence of the firms' strategic choices and parallelism stemming from purely concerted action.

In this case, CCI concluded that there was no substantive evidence of the existence of a cartel. In another important case, Builders Association of India v. Cement Manufacturers Association and Others *(Cement Cartel case)*,[61] CCI under Section 3 of the Act, found that the parallelism in prices among the parties through the Cement Manufacturer's Association (CMA) and the oligopolistic structure of the market was sufficient to infer an agreement to fix prices. In In re: Glass Manufacturers of India,[62] the CCI noted that, the price parallelism was justified by the cost structures and the absence of barriers to entry made collusion unlikely. In In re: Airlines,[63] the CCI held that a 'plain reading' of Section 3(3) makes it clear that the word 'practice' is limited only to an 'association of enterprises' or 'persons' and it was found that the parallel behaviour here, was a normal response to market conditions. In another case, In Re: Suo motu case *(LPG Cylinder case)*,[64] CCI laid down that in order to prove an 'agreement' through circumstantial evidence, the evidence must tend to 'exclude the possibility of independent action'.

Therefore, in accordance with the above-mentioned cases, it is quite clear that pure tacit coordination cannot be construed as an 'agreement' or 'arrangement or action in concert' as defined in Section 2(b) thus under Section 3. Secondly, the CCI seems to construe facilitating practices, as circumstantial evidence to fix prices unless, the exchange itself is through an agreement. Hence, CCI does not seem to be using the full breadth of the statute while addressing facilitating practices.[65]

4.2.2 Abuse of Dominance: Section 4 of The Act

Section 4 of the Act provides for the prohibition of the abuse of dominant position by an 'enterprise or group'.[66] The question as to whether Section 4 applies to situations of

[59] Competition Act, § 2(b) (2002).
[60] All India Tyre Dealers Federation v. Tyre Manufacturers, CCI Comp LR 92, (2013).
[61] Builders Association of India v. Cement Manufacturers Association and Others, CCI Comp LR 629, (2012).
[62] In re: Glass Manufacturers of India, MRTP Case No. 161 /2008 CCI, (2008).
[63] In re: Airlines, Case No. 01/2011 CCI, (2011).
[64] In Re: Suo motu case (LPG Cylinder case), Case No 03/ 2011 CCI, (2011).
[65] Amarnath, supra, 300.
[66] Competition Act, § 4 (2002).

'collective dominance' was in negative as CCI, explicitly rejected 'collective dominance' in the case of Royal Energy Ltd v. Indian Oil Corporation Ltd.,[67] where it noted that the 'concept of collective dominance is not envisaged under the provisions of Section 4'. Primarily, once an agreement is entered into by the transnationals in collusion with one and other, with an intention to monopolize, it would directly be dealt under anti-competitive agreements under Section of the Act itself and this would not befall under Section 4 of the Competition Act.

4.2.3 Section 5 And 6 Of the Competition Act

Under the Competition Act, Section 5 defines 'combinations'[68] where it stipulates that, a combination is a merger or acquisition (including an acquisition of control) where the parties to the transaction satisfy certain asset and turnover thresholds.[69] Adding on, Section 6 of the Act provides for the regulation of combinations as well as disclosures pertaining to the combination.[70] Section 31 of the Act gives CCI the power to approve, prohibit or propose modifications to combinations keeping in mind their effect on competition.[71]

This provision facilitates acquisitions and mergers, although taking place outside India resulting in an acquisition of an Indian entity or business over and above the financial thresholds prescribed under the Act.[72] Therefore, without seeking recourse under Section 32, it would appear that the Act already provides for contingencies that take place outside India but have an effect within India.[73] It is still unclear that, for permitting a merger or an amalgamation, a notification to the CCI is to be complied with under Sections 5 and 6 of the Act but no such requisite is bound to be followed by the foreign parties involved under the purview of the Act. Thus, it is not possible to say much about the substantive assessment of combinations by the CCI, as it is foreseeable that it is keeping in line with the accepted practice for merger control where the likelihood of a combination leading to a market structure conducive to tacit coordination or express collusion can be assessed.[74]

5. INTERNATIONAL COOPERATIVE MECHANISM: NEED OF THE HOUR

Growing internationalization of oligopoly in some industries might lead one to suppose that international markets in those industries are growing less competitive.[75] Geographical

[67] Royal Energy Ltd v. Indian Oil Corporation Ltd. (2012) Case No. 1/28 CCI, (2012).
[68] Competition Act, § 5 (2002).
[69] Rajat Sethi, Simran Dhir and Dhruv Agarwal, Defining Control: A Study of The Jet-Etihad Case, 185 Natl. Law Sch. India Rev., (2015), https://www.jstor.org/stable/44283657.
[70] Competition Act, § 6(1) (2002).
[71] Competition Act, § 31 (2002).
[72] Maheshwari and Reis, supra, 147.
[73] Id.
[74] ICN Merger Working Group: Investigation and Analysis Subgroup, ICN Merger Guidelines Workbook, (2006), http://old.internationalcompetitionnetwork.org/uploads/library/doc321.pdf.
[75] Vernon, supra, 278.

divisions of international markets among national oligopolists have become more difficult to sustain and problems of international competitiveness is still complex.[76] Bearing in mind the veracity in the Competition Act, 2002, upon regulating the monopolistic power position of multinational enterprises, a way out to adequately regulate the same is crucial.

Firstly, it is perceived that the concept of collusion as observed by the multinationals in the market is already in effect but is limited in scope. The competition policy in India can focus on facilitating practices of the transnationals as 'prevention is better than cure'. Two approaches that can be relied upon are, one the United States approach, where circumstantial evidence to corroborate facilitating practices such as price fixing agreements and market sharing agreements, should be penalised. This approach is in congruence with the Chicago School as it stressed that collusion (whether explicit or tacit) required some sort of conscious effort by firms on the market and by identifying markets most prone to collusion and indications of collusion through economic evidence, such 'efforts' deserved to be penalized due to the detriment caused to the consumers.[77] The other approach is the European Union approach which renders such facilitating practices as violations of competition law in themselves because they are 'concerted practices' which reduce uncertainty on the market.[78] The CCI seems to have followed the United States approach, but the risk in this approach lies in the fact that it leads to a narrow construction of the term 'agreement' which allows harmful facilitating practices to have an appreciable adverse effect on competition, thereby falling outside the net of competition law, eventually weakening the Act's armoury against tacit coordination and oligopolistic market as under Section 3 of Competition Act, 2002.[79]

Secondly, an effective merger control regime that looks into coordinated effects of multinationals will also help prevent market structures conducive to tacit coordination from arising in the first place.[80] The Raghavan Committee Report also recommended that in the substantive assessment of mergers, it is important to look into whether a merger will increase the possibility of collusive behaviour.[81] The report also notes that collusion is more likely in industries producing homogenous products with small and frequent transactions that are transparent.[82]

Thirdly, the concept of 'market investigations' which is a UK based system, where the regulator is vested with powers to impose structural and behavioural remedies to correct the identified competition problem after an in-depth market study.[83] In purview of the Indian

[76] Id.
[77] Amarnath, supra, 292.
[78] Id.
[79] Id.
[80] Id.
[81] Report of High-Level Committee on Competition Policy, (2000), https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf.
[82] Id.
[83] Amarnath, supra, 304.

context, such power in the hands of the CCI is bound to be controversial because of the various large state run entities in India and the so called 'turf war' between the CCI and other sector specific regulators.[84] If this concept is incorporated, one it provides flexibility to competition authorities as not every competition problem can be addressed by behavioural provisions like Section 3 and Section 4 and on the other hand, it helps address the competition problem more accurately as competition authorities are able to better understand why a market is not working well for consumers after an in-depth market investigation.[85]

Another form of recourse to the issue in hand would be to encourage the Competition Commission of India to enter into bilateral or multi-lateral agreements with other competition regulators regulating multinational enterprises surviving on the Indian soil, of their home country. By combining the common objective of the regulators, which in actuality would be to deter the anti-competitive behaviour of multinational enterprises in their respective national as well as international markets, these authorities can have a clear-cut picture as to the activities of the transnationals and rest at ease. The clauses and provisions of the agreements can be tailored down to the requirements of each of the countries in respect to their market structure, size and other variables in consonance with their respective domestic competition policy.

All aspects considered, with the competition policy prevalent world-wide, an international co-operative mechanism can be incorporated and adhered to by all nations as a conventional compendium on competition law taking into account all the relevant laws formulated to address the needs of the present as well as the future on competition law. The commercial activities of the multinationals can thereby be regulated adequately and a check on the oligopolistic behaviour of multinational corporations in consequence to their monopolistic power standpoint would also be tackled. The applicability of this mechanism on national grounds, say India, has to be in harmony with the domestic law governing competition i.e., the Competition Act, 2002 and other rules as well as regulations. The effect of this mechanism can be attributed to the governance mechanism of International Law and how it is incorporated by the States world-wide.

CONCLUSION

While the multinational players in the market structure hold powerful positions in manipulating the market, it deters the objective of competition law jurisprudence itself. When these transnationals explicitly or by way of implied conduct, control the market with an economic goal, it deviates from the principle of competition policy. Nonetheless, it is necessary to provide for a consensus on these issues of competition policy in the present-day

[84] Rahul Singh, The teeter-totter of regulation and competition: Balancing the Indian Competition Commission with Sectoral regulators, 71 Wash. U. Global Stud. L. Rev., (2009), https://openscholarship.wustl.edu/law_globalstudies/vol8/iss1/3.
[85] Amarnath, supra, 305.

scenario. Keeping in mind the oligopolistic market behaviour of multinational corporations, it is imperative to have an effective regulatory mechanism in hand to focus on the problem that is imminent**.**

In the Indian spectrum, the provisions of the Competition Act, 2002, addresses the hitch in the competition regime, by not only regulating Indian enterprises but also having an extra-territorial effect thus encompassing the multinational corporations under the garb of competition law. There ae other corporate legislations that are ancillary to this Act in dealing with foreign companies. Nonetheless, the regulatory authority i.e. the Competition Commission of India, has worked relentlessly to adhere and protect the very aim of competition policy but it takes a hit when it narrows down to regulating the oligopolistic behaviour of transnationals, where these cluster of firms, take the escape route by forming joint -ventures in case they are questioned.

Considering the entire perspective in regulating the monopolistic power position of multinational corporations, it is indispensable that there exists an inadequacy in countering the issue. Thus, it is crucial to have an international co-operative mechanism that is applicable to multinational enterprises carrying out commercial activities world-wide unexceptionally wherein this mechanism can be tailored in consensus with the domestic laws that prevails in their respective jurisdictions and that of the host state. An international commercial court can be set up to facilitate the disputes arising from the issue under consideration thereby curtailing the impediment and promoting competition.