

## A study of its implementation over the past two decades

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### Abstract

This paper aims to examine the relation between the subject of Economics, and the recently developed Competition Law, and how there is an interplay between both fields in order to attain market participation. Competition law is a nascent field, and understanding the dynamic state of the market requires regular improvements and changes to be made within its provisions. The latest developments in the telecom market and the e-markets have inspired a change in market functioning and market practices. This was analyzed by a review of previously written papers on the same, and aligned topics to establish the effectiveness of the implementation of competition law. An analysis was undertaken related to the concept of collective dominance, which is a part of European and USA competition law jurisprudence. The same requires further market analysis to be included in the Indian legal jurisprudence; an explanation of the concepts' current legal standing was also done. To analyze the effectiveness of the field, indices released by a number of organizations were used. The study aims to establish the interrelation between the two fields and their relevance in the market.

**Keywords:** collective dominance, economic, competition law

### Introduction

The method adopted to write this paper consisted of secondary sources of data such as Government publications, websites, books, journal articles, internal records, etc. A systematic literature review of the annotated bibliography was generated through the search of several digital databases including Economic journals, and other published papers in order to locate peer-reviewed literature, as well as various publications to locate related literature. Key words describing or related to competition law concepts, as well as their impact were identified via various books and research papers (e.g. vertical agreements, dominance, collective dominance, etc.) which guided the literature search. All this data was analyzed to find a linking chain between the subjects of macroeconomics and competition law. Further, a case study analysis of the concept of collective dominance and its inclusion in the Indian legal jurisprudence has also been done.

### Competition Law

Competition Law is a nascent field in India with the latest act of 2002. It plays a major role in policy making and competition regulation in the country. The main purpose of it is to restrain the concentration of market power with a limited number of entities, and therefore has placed provisions prohibiting anti-competitive agreements, abuse of dominance by entities, and also sets procedures to be followed by the commission. Economics plays a major role in the formation of such policies, and the commission involves a number of economists for advice and decision making. The fields are closely related to one another. Market forces and the legal interventions required to ensure efficient competition in the market form the primary jurisprudential understanding of the subject. The subject plays a major role with its implications at both, a micro and a macro level. The same will be understood with an analysis of 'collective dominance' as a concept and its inclusion in

the Indian legal jurisprudence and a study to understand that in the two decades of the act's existence, whether or not it has had a positive impact on the Indian market and participation.

### 1. Interrelation between Competition and Macroeconomics

Studies indicate that the level of economic development, the size of an economy, transition and economic reforms, foreign direct investment, sectoral structure, economic activity of the state, openness to trade, international organizations, membership in regional trade agreements, and corruption might have an impact on effective enforcement of competition law<sup>[1]</sup>. Within a normal competitive environment, companies seek increasingly efficient ways of producing and distributing goods, they are motivated to adopt new technologies and, not least, to innovate. These sources of productivity growth stimulate the economic development<sup>[2]</sup>.

Further, those countries for which foreign direct investment is of great importance for capital accumulation might enforce competition law more effectively in order to provide a market-oriented and transparent framework<sup>[3]</sup>. This would increase the investors' reliance in the economy and reduce the transaction costs. To examine empirically which factors influence effective implementation of competition law fixed effects panel estimation method is employed<sup>[4]</sup>.

In certain contexts, it has been understood that trade

<sup>1</sup> Kronthaler, F., 2007. *Effectiveness of competition law: a panel data analysis* (No. 7/2007). IWH Discussion Papers.

<sup>2</sup> *Id.*

<sup>3</sup> WTO, 1998. *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, Working Group on the Interaction between Trade and Competition Policy. World Trade Organization, WT/WGTCP/W/80.

<sup>4</sup> Greene, W.H., 2003. *Econometric Analysis*, 5th edn Prentice-Hall. *Upper Saddle River, NJ*; Baltagi, B.H., 2005. *Econometric analysis of panel data* 3rd Edition England JW & Sons.

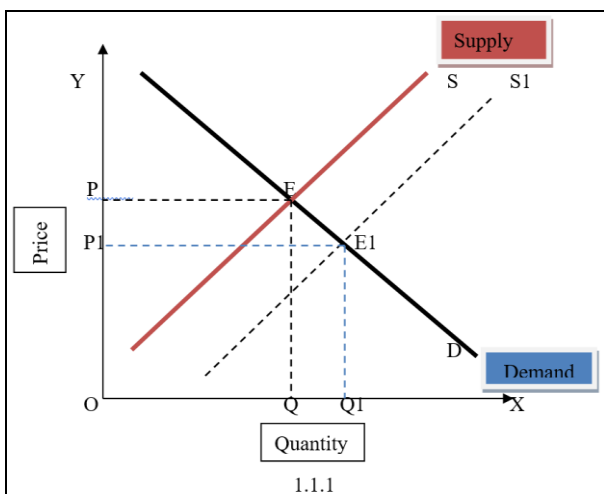
liberalization should be enough a factor to stimulate efficient competition in an economy [5]. However, it is to be understood that trade liberalization and competition law complement one another. Trade liberalisation advocates for the objectives of efficient market stimulation by reducing government provided restrictions on trade and market interaction, whereas competition law addresses anti-competitive practices of enterprises that impede access to markets or distort their efficient functioning [6]. In fact, the subject holds much relevance, as it has been insisted upon by the IMF to be introduced in a number of countries.

General economic understanding has shown that competition policy can lead to increased productivity through three main channels:

1. The selection effect – which reduces the market share of less efficient competitors;
2. The restructuring effect – which increases companies’ motivation to reduce costs;
3. The entry effect – which stimulates entry of more efficient competitors [7].

With respect to Indian legal jurisprudence, the selection effect can be maintained through Section-4 [8], read with section 19(4) [9] of the competition act, the restructuring effect can be attained and the entry effect that can be ensured by section 3 [10], and 4 [11].

**1.1. Microeconomic diagrammatic explanation**



The allowance of effective competition and regulation of entities misusing their position of dominance, or indulging into anti-competitive activities, there is a possibility for

<sup>5</sup> Dixit, A., 1984. International trade policy for oligopolistic industries. *The Economic Journal*, 94, pp.1-16.

<sup>6</sup> WTO, 1998. *Synthesis Paper on the Relationship of Trade and Competition Policy to Development and Economic Growth*, Working Group on the Interaction between Trade and Competition Policy. World Trade Organization, WT/WGTCP/W/80.

<sup>7</sup> Aghion, P. and Schankerman, M., 2004. On the welfare effects and political economy of competition-enhancing policies. *The Economic Journal*, 114(498), pp.800-824.

<sup>8</sup> Competition Act, 2002, §4, No. 12, Acts of Parliament, 2003 (India)[hereinafter Competition Act 2002].

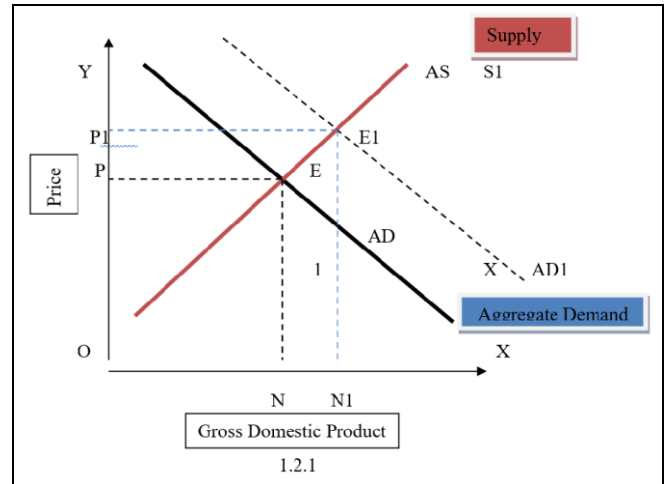
<sup>9</sup> Competition Act, 2002, §19(4), No. 12, Acts of Parliament, 2003 (India)[hereinafter Competition Act 2002].

<sup>10</sup> Competition Act, 2002, §3, No. 12, Acts of Parliament, 2003 (India)[hereinafter Competition Act 2002].

<sup>11</sup> Competition Act, 2002, §4, No. 12, Acts of Parliament, 2003 (India)[hereinafter Competition Act 2002].

entry of new firms in the market. This leads to an increase in supply, from ‘S’ to ‘S1’, this leads to a shift in equilibrium from ‘E’ to ‘E1’ showing an increase in quantity supplied in the market, at a reduced price, ‘P1’ which is responsive to consumer needs. This would lead to a direct benefit for the customers, and further stimulate market activity

**1.2 Macroeconomic diagrammatic explanation**



An effective implementation of Competition law would allow for an increase in Foreign Direct Investment which can be accorded in an increase in investment. Aggregate Demand resultantly would increase from AD to AD1, which would shift the point of equilibrium from E to E1. This would lead to an increase in price from P to P1. Additionally, there would be an increase in the GDP from Q to Q1.

**2. Case study analysis- Collective dominance**

**2.1 Legal Standing**

The concept of Collective dominance in context of Competition law implies the dominant position held by more than one firm in a market [12]. The same has been practiced in the competition law jurisprudence of the EU. However, it had been aimed to be introduced in accordance with the 2012 Amendment, the same did not receive legislative assent. In the light of the same, it is necessary to analyze whether such a concept would hold significance and maintain the objectives of competition law with respect to a developing country and a primary sector-based economy, as India.

**2.1.1 2012 Amendment bill and section 4 of Competition Act**

The bill mentioned, ‘In section 4 of the principal Act, in sub-section (1), after the words "or group", the words "jointly or singly" shall be inserted.’ implying the inclusion of the concept of collective dominance. Section 4 [13] explains single entity dominance. The same bill was not passed and therefore said concept was not introduced,

**2.1.2 Raghavan Committee report**

The report [14] released prior to the competition act, and had

<sup>12</sup> Treaty on the Functioning of the European Union, No. 102, 2009.

<sup>13</sup> Competition Act, 2002, §4, No. 12, Acts of Parliament, 2003 (India)[hereinafter Competition Act 2002].

<sup>14</sup> 2, ABIR ROY JAYANT KUMAR, COMPETITION LAW IN INDIA 14 (2018).

vehemently opposed the inclusion of collective dominance in the Indian jurisprudence, as it would adversely affect the competition, and market stability in a developing country.

**2.1.3 Case laws**

The courts have also rejected the existence of such concepts. In the case of *Ashok Kumar Vallabhaneni v. Geetha SP Entertainment* <sup>[15]</sup>, *DLF Park Place Residents vs. DLF Limited* <sup>[16]</sup>, *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd* <sup>[17]</sup>, there has been a constant requirement to introduce the concept of collective dominance. The same is substantiated by undertaking the study of the functioning of oil companies and their dominance in the market in the form of cartels.

**2.1.4 Treaty on the functioning of the European Union**

Article 102 <sup>[18]</sup> prohibits the abuse of a dominant position by one or more undertakings in the relevant market on the grounds that abusive conduct deprives consumers of the benefits of competition <sup>[19]</sup>. Therefore, it is necessary to establish a relevant market, and an abusive conduct through a situation of tacit coordination <sup>[20]</sup>. However, said principle has not been included in Indian Jurisprudence.

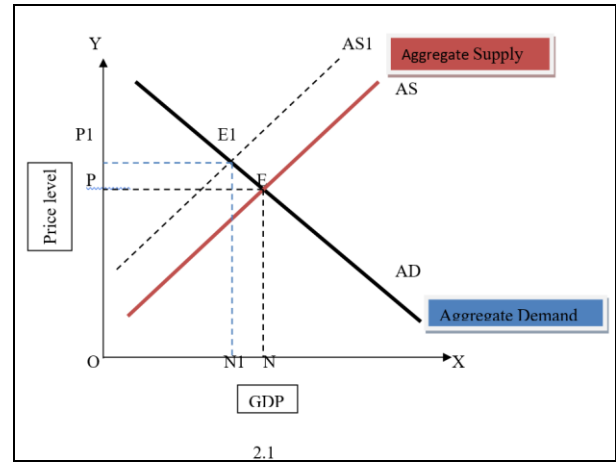
With respect to the same there is a requirement to analyze the overall sustainability of said concept across all sectors for its efficient performance and whether it should be included.

**2.2 Tacit coordination and market**

Tacit coordination is an important criterion determined in the *Airtours case*<sup>21</sup> and implies a parallel behavior between firms without any explicit interaction between them. Further, there is no necessary requirement for an agreement between firms for the same <sup>[22]</sup>. It particularly creates a problem in the circumstances of oligopolistic markets where parallel behaviour may need to be addressed if the policy objective is to be achieved.<sup>23</sup> Oligopolistic markets involve a high level of inter-relatedness implying coordination between them. A policy adopted by one firm may lead to a chain adoption of the same by other firms in competition. The same can be understood through the game theory where each firm, undertaking actions in coordination rather than in conflict will lead to optimization of its own value. The inclusion of such concepts as prohibiting the existence of collective dominance would therefore hinder competition, economic efficiency, and economies of scale. Competition law has long sought to establish a calculus enabling some certainty in determining the circumstances under which mere oligopolistic interdependence of decision-making and

action crosses the line and becomes cooperative or collusive. Another way of framing the issue is to ask at what point collusion may be inferred or deemed. This has proved to be a difficult challenge for the courts.<sup>24</sup>

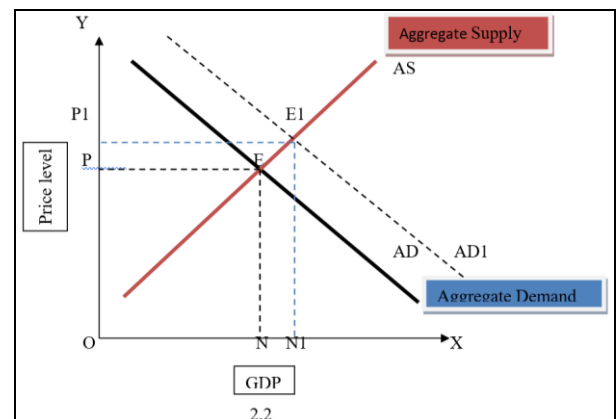
An abrupt inclusion of said restriction on collective dominance, would amount to be a government regulation. A higher number of regulations placed on market functioning makes it more expensive to produce overall output, affecting the aggregate supply in the market.



A fall in the Aggregate supply will lead to a leftward shift in the aggregate supply curve, which in turn shifts the equilibrium to E1, leading to a fall in the GDP of the nation from N to N1, and a rise in price level from P to P1.

However, the restriction on collective dominance would also allow newer firms to freely and easily enter the market. This would lead to higher investment expenditure by the newer firms entering. Consequently, there would be an increase in the Aggregate Demand. This would imply a forward shift in the Aggregate Demand curve as described in Fig. 2.2. The same would have a positive effect on the GDP of the country.

A true analysis of the application of such laws in any country requires a market analysis of each sector and resultant expansion and decrease in the aggregate demand, and aggregate supply curves. There is an analysis required of how the new measure would affect at a microeconomic, and a macroeconomic level. The application would require to be applied in all sectors and therefore the impact of such laws in each sector should be analyzed before implementation.



<sup>15</sup> *Ashok Kumar Vallabhaneni v. Geetha SP Entertainment*, Case no. 17 of 2019.

<sup>16</sup> *DLF Park Place Residents vs. DLF Limited*, Case no. 18 of 2010.

<sup>17</sup> *Neeraj Malhotra v. Deutsche Post Bank Home Finance Ltd*, Case no. 5 of 2009.

<sup>18</sup> Treaty on the Functioning of the European Union, No. 102, 2009.

<sup>19</sup> Mezzanotte, Felix. (2010). Interpreting the Boundaries of Collective Dominance in Article 102 TFEU. *European Business Law Review*. 21. 519-537.

<sup>20</sup> *Id*

<sup>21</sup> *Airtours plc v. The Commission of European Communities*, ECLI:EU:T:2002:146.

<sup>22</sup> *Joined Cases T-68, 77-78/89, Societ ItalianoVetroSpA v. Commission*, 1992 E.C.R. II-1403.

<sup>23</sup> HOLMES, J.R., 2017. *Collective dominance and oligopoly control in European competition law: Dealing with persistent oligopoly in markets such as telecommunications* (Doctoral dissertation, Monash University).

<sup>24</sup> *Id*.

Due to an increase in Investment expenditure, Aggregate Demand would increase and shift from AD to AD1 leading to a resultant increase in the price rate from OP to OP1, and an increase in the Gross Domestic Product from ON to ON1. There would be an increase in the National Income of the country, which shows a positive and beneficial impact of implementation of the concept of collective dominance.

### 3. Is Competition law really effective

CUTS, who reviewed the competition regimes of India, mentioned the implementation and working to be ineffective.<sup>25</sup> Further the Ease of doing business index ranked India at 63. Further, it has ranked 58<sup>th</sup> in the Global Competitiveness Index released by the World Economic Forum. Cartels exist in markets as Oil manufacturing companies and hinder healthy competition in the market.

Competition law is still at a nascent stage in India, with the recent act being implemented only in 2002. The same will require an observation over a period of time to determine the effectiveness of its implementation. There needs to be a clearer identification of the CCI's nature and an increase in the effective performance of the commission. There also needs to be an establishment of transparency in the functioning of the commission and the companies for an effective implementation. Further, there are a large number of discrepancies and problems faced in relation to the e-commerce sector.<sup>26</sup> A large number of problems have risen with respect to sports federations, and organisations. Newer concepts as 'collective dominance' seek inclusion owing to the current requirements for the protection of minority companies, and to avoid the creation barriers to entrants. Further developments in the field will constantly be made to ensure market participation and activity in the form of amendments made to the act.

In a dynamic market setting as India's the field of Competition law requires constant amendments and changes to be made within the provisions of the laws. Our country's economy and employment structure heavily depends on the primary sector. Further research, study, and market analysis is required in all sectors for the implementation of new laws. As there is a uniform application of laws and the same should not have an adverse effect on any particular sector. Though, the MRTTP act existed before 2002, the policy decisions under taken in the 90's required a reformation owing to globalisation, privatisation, and liberalisation of the domestic economy. Pursuant to the new market atmosphere, the Competition act 2002, in reference to the Sherman act of the USA, and the Treaty of the Functioning of the European Union. It has allowed for a participative market, and interventions are made by the commission in cases of extreme inequality for the minority market share holders. Especially with the entrance of an era of e-marketing, prominent players as Google, Amazon, etc. are in a dominant position and it is necessary for provisions to be instated which check the use of the dominant entities' power so they don't abuse it. Though at a nascent stage, further research and study into the field of interrelation between economics and competition law can allow for more

effective provisions and their implementation to attain the desired of the subject.

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<sup>25</sup> CUTS (2003b): *The Role of International Cooperation in Building an Effective Competition Regime*, CUTS Centre for Competition. *Investment and Economic Regulation Briefing Paper No. 6/2003*.

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