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THE OLIGOPOLY PROBLEM: STRUCTURAL AND BEHAVIOURAL SOLUTIONS UNDER INDIAN COMPETITION LAW

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Abstract

The problem of 'tacit coordination' in oligopolistic markets has baffled competition authorities around the world and an effective remedy to this problem is yet to emerge. The Indian competition regime is in its infancy and must be able to deal with the problem of tacit coordination if it is to become a sophisticated competition regime particularly because many Indian industries tend to be oligopolistic in nature. This paper intends to assist in this endeavour by studying and critically analysing the economic literature on this phenomenon and the approach adopted to tackle tacit coordination in the European Union. The paper critically analyses the progress made so far by the Competition Commission of India (CCI) in dealing with tacit coordination and offers suggestions on how the Indian authorities and courts could deal with tacit coordination in a more effective manner.

I Introduction

THE PROBLEM of oligopolistic markets has been one of the most difficult problems for competition authorities and courts around the world ever since the inception of antitrust laws.[1] A particularly difficult problem has been that of 'tacit coordination' (alternatively called 'conscious parallelism', 'tacit collusion', *etc*) where firms are able to take advantage of certain features of a market and coordinate their behaviour on prices, output, *etc*., by taking into account their competitors' strategies and likely reactions without the direct or indirect contact that would amount to an infringement of anti-trust provisions.

The Competition Act, 2002 became operative in 2009 in India and has been described by many as ushering in the second wave of economic reforms.[2] In order

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1 Thomas A.Piraino, Jr, "Regulating Oligopoly Conduct under the Antitrust Laws" 89 *Minn L Rev* 9 (2004).

2 CUTS Centre for International Trade, Economics and Environment, "The new Indian competition law in controversy", *available at*: http://cuts-international.org/citee-advocacy-complaw.htm (last visited on Feb. 14, 2013).

to achieve an internationally acceptable competition regime, India will have to explore ways of tackling tacit coordination. This issue is vital because many major Indian industries like automobiles, brewing industry *etc.* are oligopolistic in nature[3] and the trend in recent years has been towards an increase in industrial concentration.[4] The purpose of this paper is to find what tools the Indian law has or ought to have to deal with tacit coordination. Part II briefly discusses the existing economic literature on oligopolies and tacit coordination. Part III discusses the legal approach to tackle tacit coordination adopted by the European Union (EU). The market investigations system adopted in the United Kingdom (UK) is also briefly discussed. Part IV discusses the position of the Indian law on the subject. It is argued that the CCI has rightly rejected the concept of 'collective dominance' under section 4 (although the concept is set to be introduced through statutory amendment[5]) and that it should not construe tacit coordination as an 'agreement' under section 3. In part V, the author concludes by suggesting that facilitating practices that reduce uncertainty among firms must be brought under section 3 as 'actions in concert'. The author has also offered further solutions to tackle tacit coordination including a market investigation system, merger control with a focus on coordinated effects and effective use of the CCI's advocacy powers including the proposed national competition policy (NCP).

II Economics of oligopoly

Most traditional economic models are structured around perfectly competitive markets and monopolies both of which rarely exist in reality.[6] In reality most markets tend to be somewhere between these two extremes and a lot of them tend to be oligopolies. However, it is first important to understand what an oligopoly means.

Oligopoly

The Websters 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."[7] Oligopoly is

3 Sampath Mukherjee, Mallinath Mukherjee, *et.al., Microeconomics* 151 (Prentice Hall-India, India, 2003).

4 Richard Whish and David Bailey, *Competition Law* 560 (Oxford University Press, UK, 2012).

5 The Competition (Amendment) Bill, 2012 (Bill 136 of 2012). *Available at*: http://164.100.24.219/BillsTexts/LSBillTexts/asintroduced/136_2012_ENG_LS.pdf (last visited on 6 Jan. 2013) introduced in the lower house of Parliament on 7 Dec. 2012 intends to add the words "jointly or singly" to s. 4. (last visited on Feb. 14, 2013)

6 *Supra* note 4.

7 *Webster's Third New International Dictionary* 1572 (3rd edn. 1993).

traditionally viewed as a market with few sellers. However, the problem competition policy faces with respect to oligopolistic markets is the firms ability to influence prices (output *etc.*) by recognizing their 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] Recent economic studies have shown that this strategic interdependence of firms is not necessarily related to the 'fewness' of firms in the market.[9] However, it is true that a fewer number of players on the market increases the interdependence and hence the market power.[10]

Theories of tacit coordination

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."[11] Thus under a situation of tacit coordination firms are able to achieve the same level of supra-competitive profits as a cartel or price fixing arrangement without entering into an agreement or any sort of communication normally proscribed by competition law by merely observing each other's reactions and mimicking their behaviour. The study of oligopolies and tacit coordination is highly intertwined as the basic question for economists (which still eludes a conclusive answer) has always been: What is the relationship between the structure of a market and the behaviour of the firms on the market? In other words, is tacit coordination linked to an oligopolistic market structure or is it merely attributable to firm behaviour?

Among modern theories of oligopolistic behaviour, there are primarily three schools of thought-the structuralist school (popularly called the 'Harvard school'), the behaviouralist school (popularly known as the 'Chicago School') and the game theorists.

Structuralist school

The structuralist school[12] based itself on the structure-conduct-performance (SCP) paradigm and found a direct correlation between the structure of the market, conduct of the firms on the market and the performance of the market. Thus when the structure of the market is concentrated, the conduct of the firms becomes

8 *Supra* note 4 at 561

9 See Carlton and Perloff, *Modern Industrial Organisation* (Longman, 4th edn. 2004); Bishop and Walker, *The Economics of EC Competition Law* (Sweet and Maxwell, 3rd edn. 2010).

10 *Supra* note 4.

11 "Conscious Parallelism-Fact or Fancy?" 3 *Stan L Rev* 680 (1951).

12 The school emerged out of Harvard University through the studies of researchers like Bain, Kaysen and Turner.

interdependent leading to a performance of decreased output and supra-competitive prices.[13] Thus according to the structuralists tacit coordination occurs due to the concentrated structure of the market. It is for this reason that Turner proposed structural remedies like breaking up of oligopolistic industries to address the problem of tacit coordination in his seminal article on this subject.[14]

Behaviouralist school

The excessive reliance on market structure by the Harvard School was challenged by the behaviouralists[15] who maintained that tacit coordination occurred because of behavioural factors. 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.[16] Further there must be an absence of new entrants in order for the coordination to be sustainable.[17] Thus according to the behaviouralists, tacit coordination occurs primarily due to the behaviour of firms and concentrated industrial structures do not always lead to tacit coordination. However, even behaviouralists 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.[18]

This emphasis on behaviour has led many proponents like Posner[19] and more recently Kaplow[20] to argue that tacit coordination can be caught by the prohibition on anti-competitive agreements as tacit coordination is also an 'agreement' in a sense.

Game theory

A completely different approach to studying oligopolistic interdependent behaviour was developed by the so-called game theorists. In a game theoretic

13 J.S.Bain, "Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-1940" *The Quarterly Journal of Economics* 323 (1951).

14 Donald Turner, "The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal" 75 *Harv Law Rev* 655 (1962).

15 The school emerged out of Chicago University through the writings of researchers like Stigler, Bork, Posner *etc.*

16 G.Stigler, "A Theory of Oligopoly" *Journal of Political Economy* 72 (1964).

17 *Ibid.*

18 Richard Posner *Antitrust Law* 70 (University of Chicago Press, 2nd edn. 2001).

19 Richard Posner "Oligopoly and the Antitrust Laws: A Suggested Approach" 21 *Stan L Rev* 1562 (1969).

20 Louis Kaplow "On the meaning of horizontal agreements in competition law" 99 *Cal L Rev* 683 (2011).

perspective, the assumption is that each competitor adopts his/her best strategy after taking into account his/her competitors' best strategies. This should ultimately lead to equilibrium *i.e.*, a combination of strategies that represents the best strategy for every competitor.[21] A major improvement in game theory has been the recognition of the so called 'repeated games' which recognize that oligopolists in reality 'play the game' (interact) with their competitors repeatedly due to which a plethora of different equilibria (some of which may be collusive) are possible.[22] The ultimate conclusion of game theory is that through the repeated games a plethora of 'equilibria' can be reached some of which may be collusive.[23] Whether such collusive equilibria may result again depends on whether firms are able to reach terms of coordination, monitor adherence and punish deviations. Thus the basic insights of the behaviouralist school remain important in game theory as well.[24]

Although game theory probably comes closest to describing market realities in an oligopoly setting, its biggest failing is that it is inconclusive.[25] The only conclusion that can be drawn from game theory is that tacit coordination may/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.

Criticisms and limitations of the theories of tacit coordination

The primary argument made against tacit coordination theories is that they fail to sufficiently explain their central proposition *i.e.*, how firms can coordinate their behaviour without explicit collusion or communication.[26]Both structuralists like Turner[27]and behaviouralists like Posner[28] believed that supra-competitive pricing could rarely be achieved without some form of agreement. Yet there seems to be very little stress in economic literature on the concept of 'communication' between firms and its importance in collusive behaviour.[29] Kaplow advocates that 'communication' does and should carry a wide meaning which would encompass

21 Sigrid Stroux, *US and EC Oligopoly Control* 13 (Kluwer, 2004); See also, Yao and DeSanti, "Game Theory and the Legal Analysis of Tacit Collusion" *The Antitrust Bulletin* 123 (1993).

22 Yao and DeSanti *ibid.*

23 Louis Kaplow, *supra* note 20 at 15.

24 *Id.* at 17.

25 Reza Dibadj, "Conscious Parallelism Revisited" 47 *San Diego L Rev* 610-611 (2010); John Lopatka, "Solving the Oligopoly Problem: Turner's Try" 41 *Antitrust Bulletin* 843 (1996).

26 *Supra* note 4 at 564.

27 *Supra* note 14 at 662.

28 Richard Posner, *Antitrust Law* 75 (University of Chicago Press, 2nd edn. 1976).

29 Michele Grillo, "Collusion and facilitating practices: a new perspective in antitrust analysis" 151 *Eur Jnl Law & Econ* 157-158 (2002).

much more than just words (thus wide enough to encompass tacit coordination)[30] but fails to identify a workable mechanism by which law can identify such harmful communications without compromising on the need for legal certainty. A second criticism of tacit coordination theory is that it presents too simplistic a picture of oligopoly markets and overstates the theory of interdependence. In real-life markets, firms rarely have similar cost structures, homogenous products, complete transparency of price information, no capacity constraints *etc.*[31]

Nobody denies the harmful effects for consumers arising from tacit coordination, as the effects are exactly the same as a cartel. The debate has always been about the causes of tacit coordination, how to identify it and accordingly what should be the best remedy there is certainly some sense in addressing tacit coordination through structural measures like merger control, market investigations *etc.* Regarding behavioural measures the biggest difficulty lies in identifying the 'conscious efforts to collude' by firms as these may very often just be normal market behaviour and one risks chilling the very competitive behaviour competition law seeks to promote. There is certainly a need for more economic study into the working of oligopolies but for now, the abovementioned are the only general conclusions that can be drawn.

III Legal approach to tacit coordination in the EU

Whish and Bailey group the legal approaches to tacit coordination under four heads:[32] a) structural approach; b) behavioural approach; c) regulatory approach; and d) investigatory approach. However, the paper focuses only on the structural and behavioural approaches.

Structural approach

As discussed above, one general conclusion that can be drawn from the economic literature on oligopoly is that tacit coordination is more likely to occur in an oligopolistic market structure. A structural approach would then entail preventing the structure of the market from becoming conducive to tacit coordination in the first place, this is where merger control comes in. Most modern competition regimes have some sort of merger control system in place with a focus on preventing market structures where 'coordinated effects' or 'tacit coordination' would be likely to arise.

30 *Supra* note 20 at 710-727

31 *Supra* note 4.

32 *Id.* at 565.

European Union

The European Commission's 'Guidelines on the assessment of horizontal mergers'[33] (hereinafter the Guidelines) provide guidance on how the commission assesses horizontal concentrations for competition concerns.[34] The Guidelines deal with 'coordinated effects' concerns in paragraphs 39-57. It is interesting to note that at paragraph 39 the Guidelines state that certain market structures may be such that firms would consider it "possible, economically rational, and hence preferable" to adopt a course of action aimed at selling at higher prices. The Guidelines go on to state that in assessing the likelihood of coordinated effects, the commission will look at:

i. Whether it is possible to reach terms of coordination: This depends on the structure of the market, artificial efforts by firms *etc.*
ii. Monitoring deviations: Detecting deviations from coordination depends on the transparency of the market.[35]
iii. Deterrent mechanisms: Deterrent mechanisms adopted to punish such deviations *e.g.*, price wars, boycotts *etc.* must be timely and sufficient.[36]
iv. Reactions of outsiders: Coordination can only be sustainable if there is no competitive constraint from actual or potential competitors not party to the coordination.

Coordinated effects concerns have arisen in a few cases before the commission. In *Gencor* v. *Commission*[37] the general court upheld the prohibition of a merger between Gencor and Lonrho as it would have led to a collectively dominant position (leading to coordinated effects) in the market making it clear that EU merger control covered situations of coordinated effects as well.

Merger control has been a reasonably effective tool in tackling tacit coordination in the EU. The strength of merger control as a tool to tackle tacit coordination lie in the fact that it is preventive *i.e.*, it aims at preventing situations conducive to tacit coordination. It is also a reasonably uncontroversial tool as it has a sound economic basis, that tacit coordination is more likely to occur in oligopolistic market structures although all oligopolistic market structures may not lead to tacit coordination.[38] Merger control is also quite flexible. Conditions can be imposed on the clearance of a merger and commitments and remedies can be fashioned to fit the facts of each peculiar case (this is particularly important for tacit coordination given the

33 OJ [2004] C 31/5.
34 *Id.*, para 5
35 *Id.*, paras 49-51.
36 *Id.*, para 53.
37 *Gencor* v. *Commssion* [1999] ECR II-753.
38 See discussion on "Economics of Oligopoly" in part II above.

unpredictability of the situations when it may arise). The weaknesses of merger control as a tool for controlling tacit coordination is that it is for the most part forward looking and predictive.[39] In merger control, authorities primarily rely on economic evidence, which can be very inconclusive and misleading at times leading to a risk of errors. This fear of false positives (*i.e.*, wrongly interfering in competitively harmless mergers) leads most competition authorities to be a little non-interventionist. Thus merger control, though necessary and useful, cannot be an exclusive tool.

Market investigations in the UK

The market investigations system of the UK is aimed at conducting in-depth analysis where a market is not working well and taking action to correct features of a market causing an adverse effect on competition.[40] The market investigation system is recognition of the fact that not all failures of the competitive process can be attributed to the behaviour of firms.[41]The office of fair trading (OFT) or the sectoral regulators may make a reference to the Competition Commission (CC) where there are reasonable grounds for suspecting that any feature(s) is distorting competition in a market.[42]The CC will then conduct an in-depth investigation into the market to determine if those features are causing an adverse effect on competition and decide on suitable remedies. The CC has a wide array of powers to remedy the adverse effect on competition and can impose structural remedies as well.[43] The CC's 'Market Investigation References: Competition Commission Guidelines'[44] (hereinafter MIR Guidelines) contain guidance on the substantive assessment of markets in a market investigation. Paragraphs 3.56 to 3.67 of the MIR Guidelines deal with coordinated effects. After noting the conditions where coordinated effects may be successful,[45] the MIR Guidelines state in paragraph 3.66 that the CC will particularly look at characteristics of the market that may facilitate coordinated effects like high market concentration, high product homogeneity, significant barriers to entry, institutions and practices that aid coordination *etc.*

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39 In certain jurisdictions with voluntary merger control systems (like the UK) completed mergers can also be reviewed.

40 Peter Freeman "Market Investigations and Oligopolistic Markets" in B.Hawk (ed.), *Fordham Competition Law Institute* (Juris Publishing 2008).

41 *Supra* note 4 at 467.

42 *Id.* at 452.

43 *Ibid.*

44 CC3, June 2003 *available at*: http://www.competitioncommission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/rules_and_guide/pdf/cc3 (last visited on 18 July 2012).

45 See ss. A.1

Oligopolistic market structures have been investigated by the CC in *Store Cards*,[46] *Domestic Bulk LPG*[47] and a few other investigations. So far, however the CC has not found the likelihood of coordinated effects in any of these markets. The competition problem has arisen due to information asymmetries and switching difficulties for consumers *etc.*

The strengths of a market investigation system being used to tackle tacit coordination lie primarily in the fact that it provides an alternative remedy to competition failures in the market that cannot be attributed to an anti-competitive agreement or an abuse of dominant position. This eliminates the need for expanding the provisions on anti-competitive agreements and abuse of dominant position beyond their natural meaning. The wide array of powers that the CC has also means that both structural and behavioural remedies can be fashioned to correct the occurrence of tacit coordination depending on the exact causes of such coordination. The in-depth study of the market done during market investigations ensures that a holistic view of markets is taken and the exact cause of the competition failure is more accurately identified. Of course there are some major criticisms levelled against the market investigation regime.[48] The first objection is that it is wrong in principle to interfere with the working of markets as this leads to a 'chilling effect' on competition. The second objection is that it imposes an unnecessary burden on businesses due to multiple investigations. The answer to these criticisms is that a highly transparent system with proper criteria for selecting only appropriate markets for investigation would minimize the 'chilling effect' and burden on businesses. Further as Freeman points out the 'phase I' scrutiny before a market is referred to the CC ensures that obviously competitive markets will not be interfered with.[49] It must also be kept in mind that the market investigation system is not punitive in nature and all its remedies are prospective. The risk of a 'chilling effect' would probably be more if tacit coordination was attacked with punitive measures like the prohibition on anti-competitive agreements as the investigation into the market would not be as 'in-depth' (as in a market investigation) leading to the risk of false

46 CC Report, Store Cards Market Investigation, 7 Mar. 2006, *available at*: http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2006/fulltext/final_report (last visited on 18 July 2012)

47 CC Report, Market Investigation into Supply of Bulk Liquefied Petroleum Gas for Domestic Use, 29 June 2006, *available at*: http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2006/fulltext/514.pdf> (last visited on18 July 2012).

48 *Supra* note 40 at 670; See also the discussion following Geroski's presentation on "The UK Market Inquiry Regime" in the Antitrust Perspectives Roundtable at the Fordham Conference in B.Hawk (ed), *Fordham Corporate Law Institute* 7 (Juris Publishing 2005).

49 *Id.* at 671.

positives. All in all, while the market investigation system may have certain weaknesses, it is certainly well within the "the tradition and philosophy of competition policy".[50]

Behavioural approach

The basic prohibitions of competition law are against anti-competitive agreements and abuse of market power (dominance). With the advent of the Chicago School, it came to be recognized that tacit coordination was not merely a 'rational response' by firms to the structure of the market. The Chicago School 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 consumers. These propositions are examined below.

European Union

The application of the behavioural provisions of the competition rules of the EU can be discussed under two heads:

i) 'Agreement/Concerted Practice' and Parallel Behaviour under article 101:

Article 101 of the Treaty of the Functioning of the European Union[51]prohibits 'agreements' or 'concerted practices' that have the object/effect of preventing, restricting or distorting competition. The application of article 101 to tacit coordination in the EU has primarily centred on the interpretation of the term 'concerted practice'. The Court of Justice (CJ) has defined a concerted practice as "a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition".[52]Any 'direct or indirect' contact that influences the market conduct of competitors including disclosing one's own course of conduct will be covered as a 'concerted practice'. [53]

In the *Woodpulp*[54] case the CJ clarified that parallel behaviour could constitute evidence of a concerted practice if concentration constitutes the only plausible explanation for such conduct.[55]Issues about parallel behaviour again arose recently in *CISAC*[56] where the European Commission condemned parallel adoption of certain

50 *Ibid.*

51 [2010] OJ C 83/01.

52 *ICI* v. *Commission* [1972] ECR 619, paras 64-65.

53 *Cooperatieve Vereniging Suiker Unie* v. *Commission* [1975] ECR 1663, 1942.

54 *Ahlström Oy* v. *Commission* [1993] ECR I-1307.

55 *Ibid.*

56 *Re CISAC Agreement* [2009] 4 CMLR 577.

territorial restrictions by 24 collecting societies as constituting evidence of a concerted practice because concentration was the only plausible explanation for such conduct.

Thus tacit coordination has always been outside the definition of a 'concerted practice' in the EU. In fact tacit coordination can actually be considered as a sort of 'defence' to an allegation under article 101 because if parties are able to show that their parallel behaviour can be explained by the oligopolistic structure of the market, then the courts cannot infer a concerted practice from such behaviour (this is precisely what happened in *Woodpulp*[57]). Thus while the concept of 'concerted practice' has been 'stretched' wider than the normal concept of an agreement in so far as conduct not constituting a 'meeting of the minds' can still constitute a concerted practice if it 'substitutes practical cooperation for the risks of competition', the courts still insist on evidence of some 'direct or indirect contact'. Some academics challenge this reliance on the concept of 'contact' or 'communication' to define a concerted practice because according to them communication is an extremely amorphous concept and stress should instead be laid on the economic effects of conduct.[58] It is true that communications in the real world can take varied forms, verbal, non-verbal, *etc*. However it must be kept in mind that the meaning given to a term in law can be very different from what a layman understands that term to be. Further even though competition law tends to be much more flexible than other fields of law due to its basis in economics there must be at least a basic degree of certainty and clarity to the meaning of terms so that firms can know what they are prohibited from doing. The stress on 'communication' provides that certainty to the meaning of a 'concerted practice'. Even if firms are indeed tacitly coordinating their behaviour to raise prices diluting the meaning of an 'agreement/concerted practice' beyond its natural meaning does not seem to be the correct solution.What practices, apart from agreements, can fall under the purview of article 101 as concerted practices? Article 101 has been deployed to attack practices which make it easier for firms to achieve tacit coordination popularly called 'facilitating practices'. There is an extensive amount of literature on the various types of facilitating practices caught under article 101[59] a full discussion of which is beyond the scope of this paper.

One obvious example of a facilitating practice that makes tacit coordination easier is the exchange of information among competitors that increases market transparency.[60] Building on case law of the CJ,[61] the European Commission has

57 *Supra* note 54.

58 *Supra* note 20.

59 *Supra* note 4, ch. 13 and 14; Stefano Grassani "Oligopolies and 'Pure' Information Exchanges in the EU: New Crops are growing on the soils plowed by UK Tractors" in B.Hawk (ed), *Fordham Competition Law Institute* (Juris Publishing 2008).

60 *Supra* note 4 at 569.

61 *Asnef-Equifax, Servicios de Información sobre Solvencia y Crédito, SL* v. *Asociación de Usuarios de Servicios Bancarios (Ausbanc)* [2006] ECR I-11125, [2007] 4 CMLR 224.

published guidelines on the applicability of article 101 to horizontal co-operation agreement[62] where it clarifies that exchange of information between competitors can constitute a concerted practice when it reduces 'strategic uncertainty' in the market thereby facilitating collusion.[63]It further goes on to state that exchange of future information on prices or output or in pursuance of a hardcore cartel will be considered to infringe article 101 by 'object'.[64] For other types of information exchange the horizontal cooperation guidelines mention that their anti-competitive effects may be assessed by taking into account characteristics of the market and of the information exchanged.[65] In general a more oligopolistic market increases the harm that information exchange may cause. Similarly individualised information about current or future prices and output is likely to cause greater competitive harm than historical, aggregated data. All information exchange can be justified if the parties are able to show efficiency gains under article 101(3).[66] In fact the European courts have gone as far as to hold that even unilateral disclosure of the future of course of action by a competitor to other competitors can constitute a concerted practice because there is a presumption that such information influences the behaviour of the other competitors.[67]

As can be seen from the above discussion, facilitating practices can be caught as concerted practices under article 101. It makes sense to catch facilitating practices, as there is some identifiable 'conduct' or 'effort' by parties towards coordination which can be proscribed by law. Most academics agree that cases of pure tacit coordination are bound to be rare and in reality most cases involve at least some voluntary effort by firms. Thus it is better to focus on these voluntary efforts or facilitating practices. Of course, caution must be observed in identifying only harmful facilitating practices because very often these practices can be neutral or actually pro-competitive.[68]

ii) Abuse of 'collective dominance' under article 102:

Article 102 dealing with abuse of a dominant position mentions that such abuse by may be by "one or more undertakings".[69] This raises the possibility that article 102 could be applied to firms indulging in tacit coordination as an abuse of a collectively dominant position. This reading of article 102 was initially rejected by

62 [2011] OJ C 11/1

63 *Id.,* para 61.

64 *Id.,* para 72-74.

65 *Id.,* paras 75-94.

66 *Id.,* paras 95-110.

67 *Hüls AG* v. *Commission* [1999] ECR I-4287, [1999] 5 CMLR 1016.

68 See *Asnéf-Equifax* [2006] ECR I-11125, [2007] 4 CMLR 224.

69 *Supra* note 51.

the CJ in *Hoffman-La Roche* v. *Commission*.[70] There, the court held that a dominant position must be distinguished from "parallel courses of conduct which are peculiar to oligopolies" because while in an oligopoly the "courses of conduct" interact, the conduct of a dominant undertaking is mostly unilateral. However, the general court in *Italian Flat Glass*[71] accepted that a principle of collective dominance existed under article 102 when two or more independent economic entities were united by such "economic links" that they held a dominant position on the same market. However, it must be noted that the conduct condemned under article 102 in this case had already been caught as a concerted practice under article 101. However the court in *Italian Flat Glass* left unanswered two critical questions: firstly what exactly is meant by "economic links" and secondly what can constitute an "abuse" of collective dominance?[72] Later case law has managed to answer at least the first of the above questions to a limited extent.[73] The most important among these cases is the CJ's judgment in *Compagnie Maritime Belge Transports* v. *Commission*.[74] In this case the CJ established that two or more independent entities could hold a collectively dominant position if they presented themselves or acted together on a market as a "collective entity" from an economic point of view. This could be achieved through 'links' consisting of 'agreements/concerted practices' within the meaning of article 101, structural links or even "other connecting factors" which would "depend on an economic assessment and, in particular, on an assessment of the structure of the market in question". Thus it is possible that firms in an oligopolistic market structure who behave in parallel may be held to be in a collectively dominant position as they appear as a collective entity. However, this case did not clarify whether mere oligopolistic interdependence would suffice for a finding of collective dominance or whether other links would also have to be proven.[75]

Another question that has been left unanswered by case law so far is what exactly constitutes the 'abuse' in a case of tacit coordination under article 102. Can mere price parallelism be an abuse?.[76] Surely mere parallelism of prices which is not the result of an agreement/concerted practice under article 101 cannot be an abuse under article 102. Perhaps the supra-competitive price level achieved by tacit coordination can be considered as excessive pricing. While this is legally possible[77] such actions are

70 [1979] ECR 461, [1979] 3 CMLR 211.

71 *Società Italiano Vetro SpA* v. *Commission* [1992] ECR II-1403.

72 *Supra* note 4 at 575.

73 See *France* v. *Commission Cases* [1998] ECR I-1375; *Impala* v. *Commission Case* [2008] ECR I-4951; *Laurent Piau* v. *Commission* [2005] ECR II-209.

74 [2000] ECR I-1365.

75 Craig Callery "Considering the Oligopoly Problem" 32(3) *ECLR* 151 (2011).

76 *Supra* note 4 at 579.

77 Art. 102 (a) lists as an abuse "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". *Supra* note 4 ch. 18 on exploitative pricing practices.

likely to be rare, as the European competition authorities do not want to be seen as price regulators. In *Compagnie Maritime Belge*[78] the abuses consisted of exclusionary practices like selective price cuts and loyalty rebates but the decision was taken by a liner conference consisting of various shipping companies and it is very unlikely that firms can tacitly coordinate on such practices without an agreement of some sort.

Despite the concept of 'collective dominance' being well established in EU jurisprudence its application to tacit coordination remains unclear. It firstly remains confusing whether mere oligopolistic interdependence can constitute a sufficient link for a finding of collective dominance. Secondly almost all of the cases brought under 'collective dominance' so far have involved some form of agreement (even in *Compagnie Maritime Belge*, the only reason article 101 was not applicable to the decision of the liner conference was a special block exemption). It seems to make little sense to then apply article 102 to conduct that can be caught by article 101 itself. Further as discussed above it seems extremely difficult to identify an 'abuse' in tacit coordination. It is said that articles 101 and 102 target collective and unilateral 'behaviour' that harms competition. But in tacit coordination it is extremely difficult to identify such 'behaviour'. Lastly the law needs to be clear at least at a basic level as to what constitutes permissible and impermissible behaviour. It seems strange to allow firms to claim oligopolistic interdependence as a 'defence' to an allegation of a concerted practice under article 101 and then penalise them for that very interdependence under article 102. For all these reasons, article 102 should not be applied to tacit coordination.

This concludes the discussion on the behavioural approach to tacit coordination in the EU. A few general conclusions that can be drawn are that while behavioural provisions can and should be used to attack practices facilitating tacit coordination, legal certainty and practicality demand that such provisions should not be stretched so wide that they lose all meaning. Stress on 'communication' in behavioural provisions provides this certainty because it at least identifies tangible conduct that can be proscribed. Another point to be made here is that if one were to apply behavioural provisions to tacit coordination, the evidence relied on is bound to be very hazy and unreliable leading to a risk of false positives. Certainty becomes all the more important because the economic literature on tacit coordination and oligopolistic behaviour is still inconclusive.

IV Legal approach to tacit coordination in India

As discussed above, the Competition Act's prohibition on anti-competitive agreements and abuse of a dominant position only came into force in 2009[79] with

78 *Supra* note 74.

79 Notifications S.O 1241(E) and 1242(E), *available at*: http://cci.gov.in/index.php?option=com_content&task=view&id=21 (last visited on 30 July 2012).

the merger control provisions coming into force much later in 2011.[80] Thus there have not been no final decisions of the Competition Appellate Tribunal (COMPAT) or the Supreme Court of India on the interpretation of the substantive provisions of the Competition Act in relation to tacit coordination till date. Therefore, the discussion that follows is primarily based on CCI decisions that are subject to appeal and hence could be overturned.

Section 3 tacit coordination, facilitating practices and the concept of 'agreement'.

Section 3(1) of the Competition Act prohibits any agreement which "causes or is likely to cause an appreciable adverse effect on competition within India". Section 3(3) then goes on to state that horizontal agreements among competitors, decisions or practices of associations of enterprises which fix prices, limit output, share markets or rig bids will be *presumed* to have an appreciable adverse effect on competition (AAEC). Section 3(3) is thus the Indian equivalent of 'object' restrictions under article 101 in the EU. 'Agreement' is defined under section 2(b) as including "any arrangement or understanding or action in concert" whether or not such agreement is formal, in writing or intended to be enforceable by legal proceedings. Without taking too technical a view, one can notice at first glance itself that a very wide and expansive definition of agreement is envisaged under section 2(b).

The Raghavan Committee, which was responsible for the policy behind the Act, is silent on the problem of tacit coordination.[81] However, what the report makes absolutely clear in paragraph 4.3.2 is that the term 'agreement' "should also apply to what in the UK law are known as concerted practices". The report goes on to state that while the distinction between "agreements" and "concerted practices" is often imprecise "concerted practices" consist of "informal cooperation without a formal agreement". Thus, it is quite clear that it was intended that section 3's prohibitions should be applicable to concerted practices falling short of proper agreements and thus facilitating practices like information exchanges, advance price announcements *etc.* should be covered under the definition of 'agreement'.

The issue of tacit coordination, price parallelism and its evidentiary value has come up before the CCI in a few cases so far. The clearest statement of the CCI's views on tacit coordination came out in the recently concluded case of *All India*

80 Notifications S.O 479-482(E), *available at*: http://cci.gov.in/index.php?option=com_content&task=view&id=21 (last visited on 30 July 2012).

81 Report of High Level Committee on Competition Policy, 2000 Vol I, *available at*: http://ebookbrowse.com/report-of-high-level-committee-on-competition-policy-law-svs-raghavan-committee29102007-pdf-d115899518 (last visited on 31 July 2012).

Tyre Dealers Federation v. *Tyre manufacturers.*[82] The case concerned an alleged cartel among tyre manufacturers to fix prices and limit output of tyres in India. While considering the oligopolistic structure of the tyre market the CCI observed, "Thus, high concentration may provide a structural reasoning for collusive action resulting in parallelism (price or output), yet it is very important to differentiate between "rational" conscious parallelism arising out of the interdependence of the firms' strategic choices and parallelism stemming from purely concerted action. Thus, inferring of cartels would require further evidences. Economic theory has demonstrated convincingly that "conscious parallelism", is not uncommon in homogeneous oligopolistic markets. Competing firms are bound to be conscious of one another's activities in all phases, including marketing and pricing. Aware of such outcomes especially where there is little real difference in product the CCI is of the opinion that it is quite probable that in many such instances, conscious parallelism may be dictated solely by economic necessity. Avoidance of price wars is a common instance where this takes place.[83] However, the CCI concluded that there was no substantive evidence of the existence of a cartel in this case. In another recently concluded case, *Builders' Association of India* v. *Cement Manufacturers' Association(Cement Cartel* case)[84] the CCI fined certain cement manufacturers for price fixing and other cartel activities. After noting that circumstantial evidence can be indicative of an 'agreement' under section 3, the CCI found that the parallelism in prices and dispatch along with communications among the parties through an association *i.e*, the Cement Manufacturer's Association(CMA) which also collected information on retail prices and the oligopolistic structure of the market was enough circumstantial evidence to infer an agreement to fix prices. In *In re: Glass Manufacturers of India*[85] the CCI noted while dismissing allegations of cartelisation against glass manufacturers that mere price parallelism "cannot be said to be an evidence of existence of any cartel agreement" and "in order to determine the existence of a cartel, price parallelism must be supported by an evidence of an agreement or collusion or action in concert." The CCI found that in this case, the price parallelism was justified by the cost structures and the absence of barriers to entry made collusion unlikely. In *In re: Airlines*[86] the director general of investigations alleged that 'conscious

82 MRTP Case RTPE No.20/2008, *available at*: http://cci.gov.in/May2011/OrderOf Commission/202008.pdf, (last visited on 6 Jan. 2013).

83 *Id.*, para 279.

84 *Available at*: http://cci.gov.in/May2011/OrderOfCommission/CaseNo29of2010 MainOrder.pdf (last visited on 31 July 2012).

85 Case No.161/2008, *available at*: http://cci.gov.in/May2011/OrderOfCommission/ Glass%20mfd24jan2012.pdf> (last visited on 3 Aug. 2012).

86 Case No. 01/2011, *available at*: http://cci.gov.in/May2011/OrderOfCommission/ Domesticairlinesorder11jan2012.pdf (last visited on 4 Aug. 2012).

parallelism' without an explicit /tacit agreement can violate section 3(3) as it amounts to a "practice" having an AAEC in the language of the statute. The DG found the airlines market in this case to be oligopolistic in nature. The CCI however held that a "plain reading" of the provisions of section 3(3) make it clear that the word "practice" is limited only to an "association of enterprises" or an "association of persons" and it further found that the parallel behaviour in this case was a normal response to market conditions.

A few bid rigging cases that have arisen before the CCI are also of relevance to understand the interpretation given to the term 'agreement' by the competition body so far. In *In Re: Suo motu* case(*LPG Cylinder* case) against LPG cylinder manufacturers[87] the CCI laid down that in order to prove an 'agreement' through circumstantial evidence, the evidence must tend to "exclude the possibility of independent action". This statement of the evidentiary standard for proving an 'agreement' through circumstantial evidence has been borrowed from the US Supreme Court judgment in *Matsushita*.[88]

Facilitating practices like the exchange of information among competitors have come up in a few cases and the CCI seems to regard such practices as 'circumstantial evidence' of an 'agreement' under section 3. In the *Cement Cartel* case,[89] one of the factors indicating the existence of an 'agreement' was the communications among the parties through the CMA which also collected information on retail prices. In the *LPG Cylinder* case[90] as well, a meeting of the bidders to discuss pre-bid issues was held to be a factor indicating the existence of an 'agreement' among the parties. In *In re:Sugar Mills*[91] the CCI found that there was no 'meeting of minds' among the sugar mills despite there being a meeting of the sugar producers where price issues were discussed. The reason given by the CCI was that none of the sugar producers acted on this meeting or adhered to the decisions taken therein.

A few general observations can be drawn from the abovementioned cases. Firstly the CCI has drawn a clear distinction between "rational" conscious parallelism arising from interdependence of firms (tacit coordination) and parallelism arising purely from concerted action in the *Tyres* case[92] and has recognised that "rational" conscious parallelism may arise solely from economic necessity in many instances. Secondly, the CCI seems to have made it quite clear that parallel behaviour by itself cannot

87 *Suo Motu* Case No 03/2011, *available at*: http://cci.gov.in/May2011/OrderOfCommission/LPGMainfeb2.pdf (last visited on 4 Aug. 2012)

88 *Matsushita Elec. Indus. Co Ltd v Zenith Radio Corp*. 475 U.S. 574 (1986).

89 *Supra* note 84.

90 *Supra* note 87.

91 *Available at*: http://cci.gov.in/May2011/OrderOfCommission/SUGAR%20CASE%20NO.%201-2010%2030.Nov%202011.pdf (last visited on 5 Aug. 2012).

92 *Supra* note 82.

constitute an 'agreement' under section 3 and 'something more' is needed. This is in line with the 'plus factors' approach of the US. But what exactly constitutes that 'something more' seems to be quite unclear. In the *Tyres* case the CCI observed: "among set of circumstantial evidences, evidences of communication among the participants to an anti-competitive agreement may give an important clue for establishing any contravention." In cases like *Cement Cartel*[93] and *LPG Cylinder*[94] meetings of the firms and price communications were held to constitute evidence of an 'agreement' but in *Sugar Mills*[95] similar meetings and discussions about price were held to be insufficient to establish an 'agreement'. The structure of the market has also been taken into account in proving an 'agreement'. Thus 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) under section 3 which is in line with most jurisdictions' practice on tacit coordination and is the correct approach to take. As already discussed above in the context of the EU, the need for a basic level of clarity and certainty in the meaning terms and the risk of false positives counsels against bringing tacit coordination under the definition of 'agreement'. Secondly, the CCI seems to construe facilitating practices, as circumstantial evidence of an 'agreement' to fix prices unless the exchange itself is through an agreement. The author is of the view that the CCI does not seem to be using the full breadth of the statute while addressing facilitating practices as the definition of 'agreement' is an inclusive one according to the statute. Further the Raghavan Committee Report clearly specified that the term 'agreement' was to cover what are known in the UK and EU as 'concerted practices'. Facilitating practices like exchange of information *etc.* if correctly identified and checked can go a long way in preventing situations of tacit coordination. Thus, the CCI must start looking into facilitating practices as 'actions in concert' (or concerted practices). For example, in the *Sugar Mills* case[96] discussed above, the meeting and discussion of prices should have itself been condemned under section 3(3) if such discussions were about future prices as such discussions reduce strategic uncertainty among firms.[97] This would also be in line with the legislative intent.

Section 4 and abuse of 'collective dominance'

Section 4 of the Act prohibits the abuse of a dominant position by an "enterprise or group". The question as to whether section 4 as it stands at present applies to

93 *Supra* note 84.

94 *Supra* note 87.

95 *Supra* note 91.

96 *Ibid.*

97 The decision is not clear as to whether the discussions in the meetings were about future prices or historical prices.

situations of 'collective dominance' has arisen in a few cases before the CCI so far.[98] The CCI was, however, explicit about its rejection of 'collective dominance' in *Royal Energy Ltd* v. *Indian Oil Corporation Ltd.*[99] where it noted that the "concept of collective dominance is not envisaged under the provisions of Section 4".

Thus, even if the concept of collective dominance were to be introduced through the proposed statutory amendments,[100] it seems to make little sense (as discussed above in the context of the EU) to punish tacit coordination as an abuse of dominance when the same is not illegal (in fact it is a 'defence') under the provisions on anti-competitive agreements.

Merger control, sectoral studies and other methods

The Act also grants the CCI powers of regulation of combinations ('mergers' in popular parlance) and general advocacy functions. Section 6 declares that combinations, which cause an appreciable adverse effect on competition within India, are void. Section 31 gives the CCI the power to approve, prohibit or propose modifications to combinations depending on their effect on competition. The provisions on the regulation of combinations came into effect only in June 2011[101] and so far there have not been any combinations, which have raised serious competition concerns warranting an in-depth investigation. Thus, it is not possible to say too much about the substantive assessment of combinations by the CCI at this point of time but it is foreseeable that keeping in line with accepted practice for merger control[102] the CCI will also look for 'coordinated effects' *i.e.*, the likelihood of a combination leading to a market structure conducive to tacit coordination or express collusion in its substantive assessment of combinations.

The CCI also commissions various research organisations to conduct in depth studies into various sectors ('market studies') to understand the competition problems faced in different markets. This power is derived from the CCI's general advocacy powers under section 49(3) of the Act. The final reports on the different sectors are

98 *Consumer Online Foundation* v. *Tata Sky Ltd.* Case No. 2/2009, *available at:* <http://cci.gov.in/menu/main order consumer 250411 (last visited on 12 Aug. 2012) *Mrs. Manju Tharad* v. *Eastern India Motion Picture Association (EIMPA), Kolkata*, Case No. 17/2011, *available at:* <http://cci.gov in/May 2011/Order of Commission/172011 (last visited on 12 Aug. 2012).

99 MRTP Case no 1/28, *available at*: http://cci.gov.in/May2011/OrderOfCommission/MRTP1-28main.pdf (last visited on 12 Aug. 2012).

100 The Competition (Amendment) Bill, *supra* note 5.

101 Notification S.O 479 (E), *available at*: http://cci.gov.in/images/media/notifications/SO479(E),480(E),481(E),482(E)240611.pdf (last visited on 13 Aug. 2012).

102 'ICN Recommended Practices for Merger Analysis', available *at*: http://internationalcompetitionnetwork.org/uploads/library/doc316.pdf (last visited on 13 Aug. 2012).

available in the 'Market Research' section of the CCI's website.[103] The CCI, however, has no remedial powers to rectify the problems identified in these study reports. The Central Government is also in the process of finalising a National Competition Policy (NCP) aimed at ensuring that state policies themselves do not hinder competition.[104] This is a very important tool in tackling tacit coordination as very often, oligopolistic market structures arise due to state rules and regulations on the market.

V Conclusion and suggestions

It is appropriate to now try and answer the basic question posed at the beginning of this paper: What should be the best remedy to tackle 'tacit coordination'? The conclusion that can be drawn from the above discussion is that there does not seem to be one single remedy to this problem and what is needed is a combination of different strategies:

Facilitating practices under section 3

Firstly the reasons discussed above, it does not seem to be appropriate to construe pure 'tacit coordination' as an 'agreement'/'concerted practice'. Instead of chasing a concept of 'tacit coordination' that nobody can see, it would be better for Indian law to focus on identifiable facilitating practices. It is a better approach to prevent a situation conducive to tacit coordination from arising in the first place. Here there are two approaches that can be followed: one is the US approach of regarding facilitating practices as circumstantial evidence of a price fixing agreement and penalising such practices only if they are also through an agreement. The other approach is the EU approach of regarding such facilitating practices as violations of competition law in themselves because they are 'concerted practices' which reduce uncertainty on the market (though they fall short of a proper 'agreement'). So far the CCI seems to have followed the US approach, but the risk in this approach lies in the fact that it leads to too narrow a construction of the term 'agreement' which means that many harmful facilitating practices fall outside the net of competition law. This would weaken the Act's armoury against tacit coordination and oligopoistically structured markets. Further as discussed above, it was the intent of

103 *Available at*: http://cci.gov.in/index.php?option=com_content&task=view&id=140 (Visited on 13 Aug. 2012).

104 Press Release 84220 'National Competition Policy in the final stages of adoption- CCI celebrates 3 years of enforcement of competition laws', *available at*: http://pib.nic.in/newsite/erelease.aspx?relid=84220 (last visited on 13 Aug. 2012); Draft NCP, *available at*; http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf (last visited on 13 Aug. 2012).

the drafters of the statute that concerted practices falling short of a proper agreement (or meeting of minds) should also be covered under section 3.

Thus it is suggested that the term 'agreement' used in section 3 be extended to practices and direct/indirect contact that "substitute practical cooperation… for the risks of competition"[105] or reduce "strategic uncertainty"[106] in the market even if they fall short of a proper 'agreement' (or 'meeting of the minds'). Such practices can be considered to be 'action(s) in concert' as used in the definition of 'agreement' (or any other term for that matter as even the terms 'arrangement' or 'understanding' are wide enough to encompass such concerted practices). A related question that comes up if one is to bring facilitating practices under the ambit of section 3, is whether such practices are to be subject to the 'presumption' of section 3(3) applicable to horizontal price-fixing and market sharing agreements. This would of course depend on the type of facilitating practice being examined. As a general suggestion the question of whether a facilitating practice should be presumed to have an AAEC under section 3(3) should be based on sound economic analysis. Taking the example of exchange of information as a facilitating practice, it seems that exchanges of sensitive price information pursuant to a hardcore price fixing cartel would obviously be presumed to have an AAEC under section 3(3) as part of the price fixing agreement. However, the problem arises when there is a so-called 'pure' exchange of information (*i.e.*, merely an exchange of information without any accompanying price fixing agreement) like the situation that arose in *Bananas*[107] and *Sugar Mills*[108] above. In such situations, the CCI could follow the EU practice of treating exchanges of individualised future information on price or output as particularly likely to be an 'object' restriction[109] (in the Indian context this would be the presumption of AAEC under section 3(3)). This would seem at first glance to jar with the list provided in section 3(3), which only talks about 'agreements' which directly or indirectly determine purchase or sale prices.[110] However if the drafters of the statute intended to encompass concerted practices within section 3(3)[111] then they must have surely intended that concerted practices like the exchange of individualised future price information which make determination of sale prices particularly likely should also be covered by the presumption. Of course, parties are always free to claim efficiency

105 Case 48-57/69 *ICI* v. *Commission* [1972] ECR 619, paras 64-65.

106 Guidelines on the applicability of art. 101 to horizontal co-operation agreements [2011] OJ C 11/1 para 61.

107 Case COMP/39.188 Commission decision of 15 Oct. 2008, on appeal case T-587/08 *Fresh Del Monte Produce* v. *Commission*, not yet decided

108 *Supra* note 91.

109 *Supra* note 106 para 73.

110 The other agreements in the list include agreements that 'limit or control production', 'share the market' or result in 'bid rigging'.

111 *Supra* note 81, para 4.3.2.

defences under section 19(3) even for agreements/concerted practices that are presumed to have an AAEC under section 3(3). For all other types of information exchange (*i.e.*, exchange of information other than future individualised information on price and output) the author suggests that a 'rule of reason' analysis be conducted under the general prohibition of section 3(1) particularly keeping in mind the characteristics of the market and the information being exchanged. As discussed above[112] the more oligopolistic the market structure and the more individualised and recent the information, the greater the harm to competition and consumers is likely to be.[113]

Thus, one prong of the strategy to tackle tacit coordination must be a strict approach to practices that facilitate tacit coordination by bringing them under section 3 as concerted practices. Of course, it is very important to keep in mind here that many of these 'facilitating practices' are also likely to be pro-competitive and thus their identification and prohibition must be based on sound economic analysis.

Merger control

A merger control regime that looks into coordinated effects will help prevent market structures conducive to tacit coordination from arising in the first place. 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.[114] The report also notes that collusion is more likely in industries producing homogenous products with small and frequent transactions that are transparent.[115]

Merger control is relatively new in India and is only in its first year of enforcement. It is foreseeable in the future that the CCI will come out with guidelines on how it conducts its substantive assessment of mergers as and when it has gained enough experience and it will not be any surprise to see a section on the assessment of coordinated effects as this is a basic and necessary aspect of merger control. It is also a crucial step in tackling tacit coordination as it helps in preventing collusive market structures.

Market investigations (MIR)

What is meant by the term 'market investigations' is a UK style system with the power to impose structural and behavioural remedies to correct the identified competition problem after an in-depth market study. Such power in the hands of

112 See part III discussing the treatment of information exchanges in the EU.

113 *Supra* note 106.

114 *Supra* note 81, para 4.6.4.

115 *Ibid.*

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.[116] It must also be noted here that no other country has adopted a market investigation regime with as wide ranging powers as the UK.[117]

On the merits, the arguments in favour of a market investigation regime include: a) it provides flexibility to competition authorities as not every competition problem can be addressed by behavioural provisions like section 3 and section 4 (equivalent of article 101 and 102 TFEU) and b) 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. For example, in *Charging of differential rates of interest by banks (suo motu)*[118] the harm to consumers was said to arise from the practice of banks charging differential rates of interest for existing and new customers. However, the CCI had no option but to dismiss the case since there was no evidence of either an 'agreement' under section 3 or any bank holding a 'dominant position' under section 4. A market investigation regime would have helped the CCI to remedy this situation perhaps by mandating the passing on of more information about interest rates to consumers *etc.*

It has been claimed that market investigations give too much power to the CCI. However, if we adopt a two phase process, a) it is not likely that harmless markets will be scrutinised (or penalised) after phase one. Also, parties should have a right to apply for a review of the proposed remedies, b) in the Indian context, the argument could be that introducing a market investigation system would involve too much burden on the workload and resources of the CCI. However, *i.e.*, strictly speaking, an administrative question rather than a legal one. c) Finally some would argue that an MIR mechanism should be the domain of sector specific regulators rather than the CCI. However, in India, this discussion is moot as the CCI has been granted exclusive authority to deal with competition issues.[119] Also, no sectoral regulator has the necessary expertise to deal with such matters.

Perhaps the remedial powers need not be as wide ranging as in the UK with structural remedies being imposed only in the most serious cases, but the author suggests that a market investigation system with remedial powers to the CCI is an effective measure in tackling tacit coordination.

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116 Rahul Singh "The teeter-totter of regulation and competition: Balancing the Indian Competition Commission with Sectoral regulators" 8 *Wash U Global Stud L Rev* 71 (2009).

117 Oxera Economics, 'Market Investigations: a commentary on the first five years', *available at*: http://www.oxera.com/Oxera/media/Oxera/downloads/Agenda/Market-investigations.pdf?ext=.pdf (last visited on 16 Aug. 2012).

118 Case No 33/2007, *available at*: http://cci.gov.in/May2011/OrderOfCommission/SuoMotoBankMainOrder130711.pdf (last visited on 16 Aug. 2012).

119 See ss.18 and 60 of the Competition Act, 2002.

Competition advocacy and the national competition policy

As noted above oligopolistic market structures are very often the result of state regulations and policies that are not mindful of the need for free competition in the market *e.g.*, regulations restricting the number of firms on the market or mandating publishing of price information *etc.* The CCI should use its advocacy powers to ensure that such regulations are eliminated. The Central Government has already taken a right step in this direction by announcing the adoption of a NCP. One of the primary features of this policy is going to be a competition impact assessment of existing and future state policies to ensure that these policies foster rather than hinder competition in the market.[120]

Dealing with tacit coordination and oligopolistic industries has not been an easy task for competition authorities around the world. The fact that economic study on this subject is still unsettled adds to the difficulty of finding a clear cut solution. The best approach at present seems to be to work on whatever conclusions economic literature offers us at present on this subject and devise the most reasonable solutions.

120 Draft NCP, *available at*: http://www.mca.gov.in/Ministry/pdf/Draft_National_Competition_Policy.pdf (last visited on 13 Aug. 2012) para 6.1.