Indian sectoral regulators were vested with competition-related powers on account of an economic wisdom which has dimmed with time. In an attempt to address this, the Indian courts have even excluded the CCI from the dispute-settlement jurisdiction of sectoral regulators. Despite this ostensible overlapping of jurisdictions, the Competition Act is ill-designed to resolve situations of jurisdictional duplicity. However, the Competition Commission of India (CCI) has been vested with an exceptionally broad mandate under section 18 of the Competition Act, 2002 (‘competition Act’). Some sectoral statutes delegate exclusive jurisdiction over competition-related matters to sectoral regulators. The CCI lacks the jurisdiction to investigate anti-competitive conduct in such instances. This post proposes that the Indian competition authorities could be harmonised, and their expertise and specialised knowledge must be harnessed by bringing them under a single umbrella, with sectoral regulators only being liable for devising sector-specific competition-related regulatory interventions. Most sectoral laws also do not provide any guidelines for the enforcement of these laws. This implies that while sectoral regulators are vested with competition-related powers, they do not have the tools to enforce these powers properly. This can also result in unnecessary duplication and resource wastage, which can become problematic in a developing country like India where regulatory bodies face serious budgetary and manpower constraints.

II. OVERLAP BETWEEN SECTORAL REGULATION AND ANTI-TRUST: WHY PROBLEMATIC?

Sectoral regulators and competition authorities pursue the common goal of safeguarding consumer welfare. However, they have different regulatory mandates and perspectives, which may lead them to act at odds with each other. For instance, the Indian competition law is based on the ‘rule of reason’ and is supplemented with a parens patriae mandate. On the other hand, some sectoral laws provide for an ex-ante perspective. Sectoral regulators are required to ascertain that there is no abuse of market power and that firms are not engaging in anti-competitive behaviour. The CCI, however, must prove that there is a significant degree of anti-competitive harm before it can intervene to achieve specific statutory outcomes. This implies that while sectoral regulators employ ex-ante regulation in a pro-active manner, the CCI must employ ex-post competition assessment, allowing many sectoral regulators to assume competition enforcement powers even in the absence of concrete provisions within their governing statutes.

Broadly put, there are three different models which can be used to address the problem of jurisdictional duplicity. The first is the exclusivity model, under which either of the bodies is granted the exclusive competency to deal with competition issues. The second is the concurrency model, under which both the authorities enjoy competency and must act in concert to resolve any conflicts. The third is the complementarity model, under which the two bodies have to work in tandem to resolve any conflicts.

B. Position in India

In the Indian context, the CCI has exclusive jurisdiction over matters falling under the Competition Act, while the TRAI only has a generic competition mandate under the TRAI Act. However, the TRAI Act only makes a broad declaration of competition goals with no provisions for the enforcement of these laws. The CCI, on the other hand, is empowered to investigate allegations of anti-competitive conduct pursuant to the Competition Act, 2002. The CCI can even issue directions to firms and direct them to take concrete steps to rectify any anti-competitive conduct.

Different states have different legislative mandates and perspectives, which may lead them to act at odds with each other. For instance, the Telecom Regulatory Authority of India Act, 1997 (‘TRAI Act’) mandates the TRAI to ‘issue directions’ to a licensee if it causes or causes an adverse effect on competition. On the other hand, some sectoral laws outline this jurisdiction with far greater specificity and by using stronger language. For instance, the Electricity Regulatory Commission Act, 2006 requires the Central Electricity Regulatory Commission to ‘issue directions’ to a licensee if it causes or causes an adverse effect on competition.

Despite this ostensible overlapping of jurisdictions, the Competition Act is ill-designed to resolve situations of jurisdictional duplicity. Most sectoral laws also do not provide any guidelines for the enforcement of these laws. This implies that while sectoral regulators are vested with competition-related powers, they do not have the tools to enforce these powers properly. This can also result in unnecessary duplication and resource wastage, which can become problematic in a developing country like India where regulatory bodies face serious budgetary and manpower constraints.

IV. THE MOST Viable APPROACH IN THE INDIAN CONTEXT

A. Problems with the exclusion of the CCI

The Indian courts have even excluded the CCI from the dispute-settlement jurisdiction of sectoral regulators. Despite this ostensible overlapping of jurisdictions, the CCI lacks the jurisdiction to investigate anti-competitive conduct in such instances. This post proposes that the Indian competition authorities could be harmonised, and their expertise and specialised knowledge must be harnessed by bringing them under a single umbrella, with sectoral regulators only being liable for devising sector-specific competition-related regulatory interventions. Most sectoral laws also do not provide any guidelines for the enforcement of these laws. This implies that while sectoral regulators are vested with competition-related powers, they do not have the tools to enforce these powers properly. This can also result in unnecessary duplication and resource wastage, which can become problematic in a developing country like India where regulatory bodies face serious budgetary and manpower constraints.

B. Suitability of the Concurrency model

Mixed with jurisdictional overlap, one possible policy change could be the adoption of the concurrency model. This implies that while the CCI will continue to operate through its investigative and regulatory functions, it will not act in developing a country that is already burdened with increased regulatory mandates and perspectives. Sectoral regulators and competition authorities can act in concert to resolve any conflicts. The CCI will have the authority to investigate allegations of anti-competitive conduct in such instances. The CCI can even issue directions to firms and direct them to take concrete steps to rectify any anti-competitive conduct.

C. Need for grant of primacy and exclusivity to the CCI

Given the limitations of sectoral regulations, the enforcement of competition laws exclusively by the CCI would prove to be the most viable framework for India. Competition authorities have an economy-wide perspective, possess the necessary expertise to evaluate anti-competitive conduct, secure accountability in the application of laws across sectors, and reduce the risk of regulatory capture and helping to bring about industrial efficiency. Sectoral regulators are more likely to be influenced by vested interests of firms in the sector.

Moreover, acquisition of primary and the CCI will not mean losing sectoral regulators’ duties from the competition law paradigm. Instead, their enforcement and sectoral mandates will be harmonised in a viable legislative environment mandating the sectoral regulators to provide the CCI with assistance in the enforcement process in the face of sector-specific information and analysis.
V. THE CASE OF NETWORK INDUSTRIES

While this paper proposes that competition law should be accorded priority in regulated sectors in India, the relative priority of competition law may not be decided in this case of network industries, such as telecommunications, electricity and petroleum and gas, which are at the heart of economic activities. In these sectors, there is an inherent tension between competition law, which relies on behavioural tools, and sectoral regulation, which relies on structural tools. The CCI, as a competition regulator, would be required to consider the balance between these two regulatory mechanisms, which are often in conflict.

In order to encourage the use of competition law remedies, sectoral laws should regulate the market to refer such matters to the CCI for an ex-ante analysis, whenever possible, instead of resorting to regulation. In this regard, section 8(2) of the Competition Act allows the CCI to conduct an inquiry into any matter referred to it by a statutory authority or the Competition Commission of India, subject to the conditions of limitation set out in section 8(3) of the Competition Act. This would enable sectoral regulators to refer matters to the CCI for an ex-ante analysis. In this manner, sectoral regulators would not have the power to block the enforcement of the Competition Act by enacting new regulations. This would also extend the scope of competition law enforcement, as sectoral authorities may not otherwise be able to clearly enforce the conduct of large number of enterprises with whom they have jurisdiction. Thus, these industries should be subject to the formal competition laws, while at the same time, ensuring that the market conduct is in an antitrust law sense should be seen to create a functional demarcation between these two regimes.

With technological developments and due to the impact of regulation, network industries would often stipulate provisions in the agreements that give preference to some competitors. This would make it difficult to ensure that competition between competitors is not distorted by subsidies or adverse terms. In such cases, the Competition Commission of India should be empowered to investigate the matter. This would also enable competition enforcement, as without authorities may not otherwise be able to clearly enforce the conduct of large number of enterprises with whom they have jurisdiction. Thus, these industries should be subject to the formal competition laws, while at the same time, ensuring that the market conduct is in an antitrust law sense should be seen to create a functional demarcation between these two regimes.

In order to effect this transition, the CCI should be vested with the powers to relax and subsequently lift economic regulations in those network industries where workable competition has emerged. Subsequently, the competition jurisdiction of these regulatory institutions should be dismantled by bringing about legislative amendments, and these industries should be made subject to pure competition law regimes.

The results put forth in this post would help the Indian policy-makers in achieving the best balanced interplay between regulation and competition law. By bringing in the regulatory changes suggested above, the law would enhance market certainty, which would go a long way in creating a more enabling business environment in India.


[5] The model put forth in this post would help the Indian policy-makers in achieving the best balanced interplay between regulation and competition law. By bringing in the regulatory changes suggested above, the law would enhance market certainty, which would go a long way in creating a more enabling business environment in India.


[16] ibid.


[18] ibid.


[23] The parties would provide a more enabling business environment in India.

[24] Despite the need for sectoral regulation in such industries, the CCI should neither be excluded nor be rendered residual. Instead, suitable legislative amendments should be enacted to require all such sectoral regulators to conduct an inquiry into any matter referred to it by a statutory authority or the Competition Commission of India, subject to the conditions of limitation set out in section 8(3) of the Competition Act. This would also enable competition enforcement, as without authorities may not otherwise be able to clearly enforce the conduct of large number of enterprises with whom they have jurisdiction. Thus, these industries should be subject to the formal competition laws, while at the same time, ensuring that the market conduct is in an antitrust law sense should be seen to create a functional demarcation between these two regimes.

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[27] Ian S Forrester, 'Sector-Specific Price Regulation or Antitrust Regulation—A Plague on Both Your Houses?' (2011) 1(2) CUTS Commentaries 1.

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