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Sectoral Regulation, Competition Law, and Jurisdictional Overlaps: Tracing the Most Viable Solution in the Indian Context

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Indian sectoral regulators were vested with competition-related powers on account of an economic wisdom which favoured regulation, which has started to lose its relevance since the development of the competition law regime. Despite this, the Indian courts have resolved the issue of jurisdictional duplicity by excluding the competition authority, instead of the sectoral regulators. This post proposes that the Indian competition authority should be given the exclusive competency for competition enforcement with sectoral competition regulation playing a role only in network industries until these markets attain sustainable competition.

I. INTRODUCTION

The Competition Commission of India ('CCI') has been vested with an extraordinarily broad mandate under section 18 of the Competition Act, 2002 ('Competition Act') to 'eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade (…) in markets in India'. This mandate of the CCI, however, overlaps with the competition-related powers that have been conferred on some sectoral regulators in India, constituted both before and after the enactment of the Competition Act.[1]

On the one hand, some sectoral laws only make a broad declaration of competition goals with no specifications. For instance, the Telecom Regulatory Authority of India Act, 1997 ('TRAI Act') mandates the Telecom Regulatory Authority of India ('TRAI') to take measures to 'facilitate competition' and 'promote efficiency in the operation of telecommunications services'.[2] Similarly, the Petroleum and Natural Gas Regulatory Board Act, 2006 requires the Petroleum and Natural Gas Regulatory Board to 'foster fair trade and competition'. On the other hand, some sectoral laws outline this jurisdiction with far greater specificity and by using legislative language identical to that contained in the Competition Act.[3] For instance, the Electricity Act, 2003 empowers the Central Electricity Regulatory Commission to 'issue directions' to a licensee if it 'enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition'.[4] Such laws have blurred the distinction between ex-ante regulation and ex-post competition assessment, allowing many sectoral regulators to assume competition enforcement powers even in the absence of concrete provisions within their governing statutes.[5]

Despite this ostensible overlapping of jurisdictions, the Competition Act is ill-designed to resolve

situations of conflict. While section 60 of the Act contains a non-obstante clause giving an overriding effect to the Act, section 62 declares that the Act should be read in harmony with other statutes. The Act, however, makes an attempt to address this issue partially through sections 21 and 21A, which incorporate a mechanism for consultations between the CCI and other sectoral authorities. However, consultations under these sections are neither mandatory nor binding.[6] This voluntary mechanism has, however, not worked in practice on account of the turf wars that prevail between these governmental authorities.[7] There is, thus, a serious overlap between the jurisdiction of the CCI and that of some sectoral regulators in India, which necessitates legislative intervention.

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

Sectoral regulators and competition authorities pursue the common goal of safeguarding consumer welfare.[8] Nonetheless, they have different legislative mandates and perspectives, which may lead them to reach different outcomes. While sectoral regulators employ ex-ante regulation in a pro-active manner, competition authorities largely use ex-post assessment in a reactive manner.[9] This implies that while competition authorities intervene in the market mechanism in case of a market failure, sectoral regulators intervene to achieve specific statutory outcomes.[10] In other words, competition law aims at protecting competition by checking anti-competitive practices but sectoral regulation aims at promoting competition by ushering in structural changes.[11]

Such a difference in approach can result in divergences between regulations and competition law standards, even when the sectoral regulator takes into account the established jurisprudence while framing competition regulations.[12] The existence of such divergences can imply that compliance with regulation may not necessarily save firms from competition scrutiny, thus resulting in market uncertainty and increasing their exposure to potential liability.[13] This can also lead to duplication of efforts, inefficient use of resources and an increased risk of forum shopping.[14]

III. ADDRESSING JURISDICTIONAL OVERLAPS: POSSIBLE SOLUTIONS AND THE STANCE TAKEN BY THE INDIAN COURTS

A. Approaches used in other countries

Broadly put, there are three different models which can be used to address the problem of jurisdictional duplicity.[15] The first is the exclusivity model, under which either of the bodies is granted the exclusive competency to deal with competition issues.[16] The second is the concurrency model, under which both the authorities enjoy competency and reach a decision on the exercise of the same through a consultative process.[17] Under the third model of cooperation, competition law enforcement is allocated between the two authorities and consultations mechanisms are devised to resolve any conflicts.[18] Different states have adopted different models, depending upon their legal traditions, political climate, institutional culture, competition goals etc.[19]

B. Position in India

In the Indian context, the courts and the CCI have adopted contrasting stances on this issue. Interpreting the scope of its own jurisdiction, the CCI has held that despite the existence of competition mandate within sectoral laws, the power to investigate allegations of anti-competitive

conduct continues to rest with the CCI.[20] However, the Indian High Courts have quashed the jurisdiction of the CCI to investigate anti-competitive practices in sectors subjected to competition regulation.[21] For instance, in a recent 2017 matter,[22] the Delhi High Court quashed the CCI's probe into cartelisation by incumbent telecom companies on the ground that the issue fell within the exclusive jurisdiction of the telecom regulator, TRAI. This was so held even when the TRAI only has a generic competition mandate under the TRAI Act,[23] which itself excludes matters falling under the Monopolies and Restrictive Trade Policies Act, 1970 (the act preceding the Competition Act) from the dispute-settlement jurisdiction of the TRAI.[24]

IV. THE MOST VIABLE APPROACH IN THE INDIAN CONTEXT

A. Problems with the exclusion of the CCI

The Indian courts have conferred an exclusive competition competency on the sectoral regulators having a competition mandate. However, the exclusion of the CCI from such sectors can become problematic for at least three main reasons.

First, functional separation between sectoral regulators and the competition authority requires an efficient allocation of institutional responsibilities through the use of unambiguous legislative language.[25] This has, however, not been achieved in the Indian context. Most sectoral laws in India do not outline competition objectives in a concrete fashion[26] and do not contain any parameters for analysis of market failure to justify competition-related regulatory interventions. Most sectoral laws also do not provide any guidelines for the resolution of possible conflicts between competition objectives and other regulatory goals.[27]

Second, the conferment of an exclusive jurisdiction on the sectoral regulators may result in the perpetuation of regulation contrary to the needs of the market in question. Regulators, due to their bias towards regulation, may take the latitude of imposing burdensome, intrusive obligations, instead of allowing the competitive trends in the market to flourish organically.[28] Such unwarranted regulatory interference can result in misallocation of resources, market distortions, and economic inefficiencies.[29] In addition, despite the emergence of sustainable competition, regulators may often be reluctant to lift regulatory obligations to serve their own vested interests.[30]

Third, the Competition Act is based on the twin principles of private enforcement[31] and imposition of damages,[32] which together equip the CCI to achieve higher standards of consumer welfare.[33] This protection, however, is absent from most sectoral laws in India, which generally rely on the regulator as the parens patriae for the enforcement of regulations.[34]

In light of these limitations of sectoral regulation, there is clearly a need to re-evaluate the Indian position on this issue.

B. Suitability of the Concurrency model

Faced with jurisdictional overlaps, one possible policy choice could be the adoption of the concurrency model, as followed in countries such as the United Kingdom.[35] The concurrency model, though successful in the UK,[36] may not work in a developing country like India where a hierarchical institutional culture and power battles prevent governmental bodies from meaningfully cooperating with each other.[37] Concurrency 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.[38]

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

Given the limitations of sectoral regulation, the enforcement of competition law exclusively by the CCI would prove to be the most suitable framework for India. Competition authorities take an economy-wide perspective, possess the necessary expertise to evaluate anti-competitive conduct, ensure consistency in the application of rules across sectors, and reduce the risk of regulatory capture and lobbying to which industry regulators are susceptible, besides minimising the market distortions that can arise from direct regulatory interference.[39] Therefore, legislative amendments must be brought to designate the CCI as the sole body empowered to undertake competition law enforcement, with sectoral regulators only being liable for devising technical, economic and access regulation.

However, accordance of primacy to the CCI does not mean ousting sectoral regulators altogether from the competition law paradigm. Instead, their expertise and specialised knowledge must be harnessed by bringing in suitable legislative amendments mandating the sectoral regulators to provide the CCI with assistance in the enforcement process in the form of sector-specific information and advice.

V. THE CASE OF NETWORK INDUSTRIES

While this paper proposes that competition law should be accorded primacy in regulated sectors in India, eradication of competition regulation may not be possible in the case of network industries, such as telecommunications, which tend to be natural monopolies due to heavy entry barriers.[40] In such industries, competition law, which relies on behavioural tools, is considered to be inadequate as structural changes, such as opening up of access to essential facilities, are needed to facilitate the establishment of competitive conditions.[41] On account of this, ex-ante competition regulation would continue to remain relevant in the case of those network industries in India which have yet not attained sustainable competition.

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 confer with and defer to the CCI on competition-related matters and deal with them only in conformity with the Competition Act. The involvement of the CCI in the drafting of ex-ante regulation would prevent conceptual divergences between the two regimes.[42] The CCI can also be tasked with supervising the conduct of competition impact assessments to ensure maximum efficiency in the enactment of such regulations.[43]

In order to encourage the use of competition law remedies, sectoral laws should mandate the regulators to refer matters to the CCI for ex-post evaluation wherever possible, instead of resorting to regulation.[44] In this regard, section 19(1)(b) of the Competition Act allows the CCI to conduct an inquiry into any alleged anti-competitive conduct upon reference being made by a statutory authority. In this manner, sectoral regulators would not have the scope to tread upon the enforcement jurisdiction of the CCI by enacting new regulations. This would also enhance competition enforcement, as antitrust authorities may not otherwise be able to closely monitor the conduct of a large number of enterprises which fall within their jurisdiction. Thus, those sectoral laws in India which seemingly empower the regulators to take action against anti-competitive conduct in an ex-post fashion[45] should be amended to create a clear functional demarcation

between these two authorities.

With technological developments and due to the impact of regulation, network industries would attain sophistication with the emergence of new players.[46] On account of this, the focus would shift from regulation of the conduct of the dominant incumbents to that of independent firms.[47] Competition law would thus become a more effective tool for ensuring the proper functioning of such markets than regulation.[48] 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.[49] Subsequently, the competition jurisdiction of these regulatory institutions should be dismantled by bringing in suitable legislative amendments and these industries should be rendered subject to pure competition law rules.

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

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[1] Banking Regulation Act 1949, s 44A; Telecom Regulatory Authority of India Act 1997 (TRAI 1997), s 11(1)(a)(iv); Electricity Act 2003 (EA 2003), s 60; Petroleum and Natural Gas Regulatory Board Act 2006 (PNGRB 2006), s 11(a); Insurance Regulatory and Development Authority (Scheme of Amalgamation and Transfer of General Insurance Business) Regulations 2011, F. NO.IRDA/REG/1/55/2011.

[2] TRAI 1997, s 11(1)(a)(iv).

[3] Competition Act 2002 (CA 2002), ss 3, 4, 5 and 19.

[4] EA 2003, s 60.

[5] Telecom Regulatory Authority of India, 'Regulatory Principles of Tariff Assessment' (Consultation Paper 3, 2017) <http://www.trai.gov.in/sites/default/files/Consultation_paper_03_17_feb_17_0.pdf> accessed 19 December 2017.

[6] CA 2002, ss 21 and 21A.

[7] Pradeep S. Mehta, 'Competition vs Regulation: The Best Way Forward' *The Hindu Business Line* (Chennai, 16 September 2005) <http://www.thehindubusinessline.com/todays-paper/tp-opinion/competition-vs-regulation-the-best-way-forward/article2189381.ece> accessed 19 December 2017; Tanya Thomas, 'Turf War Rages between CCI and TRAI over Telecom Tariffs' *The Hindu Business Line* (Chennai, 27 July 2017) <http://www.thehindubusinessline.com/info-tech/turf-war-rages-between-cci-and-trai-over-telecom-tariffs/article9791247.ece> accessed 19 December 2017.

[8] Maher M. Dabbah, 'The Relationship between Competition Authorities and Sector Regulators' (2011) 70 CLJ 113, 116.

[9] ibid 115.

[10] ibid.

[11] ibid.

[12] ibid.

[13] Margherita Colangelo, 'The Interface between Competition Rules and Sector-Specific Regulation in the Telecommunications Sector: Evidence from Recent EU Margin Squeeze Cases' (2013) 14 CRNI 214, 237.

[14] Paloma Szerman, 'Telecommunications Regulators and Competition Agencies: Their Institutional Setting in Spain, the UK and France' (2015) ENLR 243, 244.

[15] United Nations Conference on Trade and Development, 'Best Practices for Defining Respective Competences and Settling of Cases Which Involve Joint Action by Competition Authorities and Regulatory Bodies' (United Nations, 17 August 2006) <http://unctad.org/en/Docs/tdrbpconf6d13rev1_en.pdf> accessed 19 December 2017.

[16] ibid 8.

[17] ibid.

[18] ibid 9.

[19] Dabbah (n 8) 115.

[20] *Consumer Online Foundation v Tata Sky Ltd* (CCI, 24 March 2011); *Shri Neeraj Malhotra, Advocate v North Delhi Power Ltd* (CCI, 11 May 2011); *M/s HT Media Ltd v M/s Super Cassettes Industries Ltd* (CCI, 1 October 2014).

[21] Press Trust of India, 'Delhi HC Stays CCI Proceedings against Indian Oil, Hindustan Petroleum and Bharat Petroleum' *Indian Express* (Chennai, 22 November 2013) <http://indianexpress.com/article/business/business-others/delhi-hc-stays-cci-proceedings-against-indian-oil-hindustan-petroleum-and-bharat-petroleum/> accessed 19 December 2017.

[22] *Vodafone India Ltd v Competition Commission of India* (Bombay High Court, 21 September 2017).

[23] TRAI 1997, s 11(1)(a)(iv).

[24] ibid s 14.

[25] Szerman (n 14) 245.

[26] TRAI 1997, s 11(1)(a)(iv); EA 2003, s 60; PNGRB 2006, s 11(a).

[27] Szerman (n 14) 248.

[28] Ian S Forrester, 'Sector-Specific Price Regulation or Antitrust Regulation—A Plague on Both Your Houses?' in Claus-Dieter Ehlermann and Mel Marquis (eds), *European Competition Law Annual 2007: A Reformed Approach to Article 82 EC* (Hart Publishing 2008) 555.

[29] CUTS International, 'Harmonising Regulatory Conflicts: Evolving a Cooperative Regime to Address Conflicts Arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities' (Indian Institute of Corporate Affairs 2012) 7 < http://oldwebsite.iica.in/images/Harmonising%20Regulatory%20Conflicts.pdf> accessed 19 December 2017.

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[31] CA 2002, s 19(1)(a).

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[34] ibid.

[35] Competition Act 1998; Competition Act 1998 (Concurrency) Regulations 2014, SI 2014/536.

[36] Dabbah (n 8) 132.

[37] Mehta (n 7).

[38] Vijay Vir Singh and Siddhartha Mitra, 'Regulatory Management and Reform in India' (CUTS International 2010) <https://www.oecd.org/gov/regulatory-policy/44925979.pdf> accessed 19 December 2017.

[39] Dabbah (n 8) 118.

[40] Carlos Lapuerta and Boaz Moselle, 'Network Industries, Third Party Access and Competition Law in the European Union' (1998-1999) 19 Nw J Intl L & Bus 454, 455.

[41] ibid.

[42] Katarina Fodorova, Erika Lovasova and Zuzana Sabova, 'Interplay between Competition Law and Sector-Specific Regulation – What is the Role of the Ne Bis in Idem Principle?' (2014) 13 Common L Rev 46, 51.

[43] ibid.

[44] Lage and Brokelmann (n 30) 659.

[45] EA 2003, s 60.

[46] Gail Hillebrand, 'The Application of Antitrust Law to Telecommunications' (1981) 69 Cal L Rev 497.

[47] Pierre Larouche, *Competition Law and Regulation in European Telecommunications* (Hart

Publishing 2000) 332.

[48] ibid 333.

[49] Lage and Brokelmann (n 30).

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