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Analysis of Conflict Between CCI and Sectoral Regulators: Challenges and Solution

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ABSTRACT

The competition Commission of India (CCI) is vested with an extraordinarily power or duty under the legislative framework of Section 18 to eliminate practices having adverse effects on competition, to promote and sustain competition and to ensure freedom of trade. The mandate given to the CCI by the law overlaps with the jurisdiction of the sector-specific regulators such as Telecomm Regulatory Authority of India(TRAI), Insurance Regulatory and Development Authority(IRDA)etc. This research paper focuses to analyse this overlapping and provide solutions thereof.

Keywords: *CCI, TRAI.*

I. INTRODUCTION

The competition Commission of India (CCI) is vested with an extraordinarily power or duty under the legislative framework of Section 18[2] to eliminate practices having adverse effects on competition, to promote and sustain competition and to ensure freedom of trade, The wide scope that is contained in s. 18 reverberates in the preamble[3] of the enactment as well, where similar language has been instituted. This mandate overlaps with the jurisdiction of the sector-specific regulators such as the electricity regulator, petroleum regulator, insurance regulator, telecomm regulator and securities regulator. These sectoral regulators are vested with competition related powers which is favoring each of their sectoral regulation like Telecomm Regulatory Authority of India(TRAI), Insurance Regulatory and Development Authority(IRDA), Central Electricity Regulatory Commission(CERC), Petroleum and Natural Gas Regulatory Board(PNGRB), Securities Exchange Board of India(SEBI) constituted both before and after the enactment of

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[2] Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

[3] The preamble of the Competition Act, 2002 lays down that the Act is meant to "prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto".

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Competition legislation. They started to lose their importance since the development of Competition law in India, however the issue of issue of jurisdictional duplicity in Indian courts has been resolved by excluding the competition commission instead of sectoral regulators.

Some sectoral laws do make a broad declaration of competition goals but with the absence of any specification. For example, the TRAI Act mandates TRAI to take measures to 'facilitate competition' and 'promote efficiency in the operation of telecommunications services'. The common anti-competitive practice in the developing area of telecommunication services is for the operators already in the field to deny access to the new participants to their infrastructure which is called 'unbundling the local loop'. In the field of satellites, telecommunication operators could enter into agreements providing for pooling of their space segment capacity, the effect of which may be such as to limit their own ability to compete among themselves. They may also enter into agreement among themselves to limit their supplies in quality or quantity to third parties. Direct or indirect imposition of any kind of agreement by a telecommunication operator for instance, by making the uplink subject to the conclusion of an agreement with a third party would constitute an abuse of dominant position. All such anti-competitive practices should be brought under the purview of Competition Act 2002, and should be decided only by one authority so that the unintended conflicts of the exercise of jurisdiction are avoided. The primary negative concerns of exclusive dealing are foreclosure of existing competitors it happens when for example an exclusive dealing contract mandates the supplier to deal only with one manufacturer's products and not of the competitors. Due to this, the competitors of such manufacturer are foreclosed from the demand represented by the contracting suppliers for the term of the contract. Antitrust is not concerned with this minimal foreclosure. Second, erection of entry barriers to deter potential competitors, an entry barrier is created by increasing the costs of entry and reducing the opportunity for potential competitors to gain access to a needed supply. As a result, exclusive dealing contracts may preserve or augment the market power of incumbent firms and create an anti-competitive business environment. The final results of foreclosure and entry barriers are higher costs to the consumer and, in extreme cases, a lack of any real freedom to chose which products to purchase. The importance of this freedom of buyers to make un-coerced choices in an unrestricted market was expressly recognized by the US Supreme Court in F.T.C. v. Brown Shoe Co.

The Petroleum and Natural Gas Regulatory Board Act, 2006 demands the Petroleum and Natural Gas Regulatory Board to 'foster fair trade and competition'. The Electricity Act, 2003 ('EC Act') 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

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combination which is likely to cause or causes an adverse effect on competition'. Such legislations have blurred the distinction between ex-ante regulation and ex-post competition assessment, allowing for potential conflicts between these regulators and the CCI.

Thus, there is a serious overlap of the jurisdiction between Competition Commission of India and sectoral regulators in India, which necessitates legislative intervention. The interface between sector specific regulation and competition law in India is extraordinary. In the immediate past, India has witnessed a massive burst in its rate of growth. While the fast-paced development has uplifted people from poverty levels, it has also led to concomitant challenges.

Having regards to that both sectoral regulators and Competition authorities pursue a common goal of consumer welfare through different perspectives and legislative framework which may lead them to reach different outcomes. Broadly there are three different models which can be addressed to solve the jurisdictional duplicity. First is the exclusivity model, second is the concurrent model and third is cooperation model. Under the exclusive or supremacy model in which either of the bodies shall have the competency to deal with the competition issues. Under the concurrent model both the bodies shall have the competency and reach a decision through a consultation process and under the cooperation model as the name suggest competition law enforcement is allocated between the two authorities and consultations mechanisms are devised to resolve any conflicts.

The role of Competition Commission and sectoral regulators can be complimentary however at times the interface between the two can be a source of great tension, where identification of the issue in sector specific regulation is ex-ante and administration of behavioural issues happens before a problem arises whereas competition law regime addresses the problem ex-post in the background of market conditions.

The crux of the interface between competition authority and sectoral specific regulators stands on the four pillars viz. Section 18, 21, 60 and 62 of the Competition Act 2002. Section 60[4] of the Competition Act 2002 is a non-obstante section which explicitly states that competition legislation is supreme within Competition enforcement, on the contrary Section 62[5] of Competition Act 2002 states that Competition law is to work along in consonance with other enactments, now the possible tension arises where both the sections are intended to be phrased in a mandatory language and if the trio of bombarding Sections 18, 60 and 62 weren't adequate

[4] Section 60 of the Competition Act, 2002 reads: "The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force."
[5] Section 62 of the Competition Act, 2002 reads: "The provisions of this Act shall be in addition to, not in derogation of, the provisions of any other law for the time being in force".

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to cause sufficient conundrum, Section 21[6] of the same act explicitly states in any proceedings before the statutory authority, the statutory authority[7] may make a reference to the competition if the need arises and Section 21A, incorporates a mechanism for consultations between the Competition Commission of India and other sectoral authorities. However, these consultations are neither mandatory nor binding. Thus, this voluntary mechanism did not worked in practice because of the prevailing tug of war between these governmental authorities.

II. DIFFERENCE BETWEEN COMPETITION AND SECTORAL REGULATORS

	Competition authority	**Sectoral regulators**
1.	Competition law is ex-post	Sectoral regulation is mostly ex-ante
2.	Competition law consists of negative commands	industrial specific regulation requires positive commands.
3.	Competition law deals in an indirect manner and more concerned with conduct and behavior.	Sectoral sectors are more direct and structural concerned sectors.
4.	Insufficiencies in regulation can be overcomed by competition law enforcement eg. Predatory pricing.	A sectoral regulator can do what competition authorities cannot. Examples situations warranting price fixation in public interests, setting standards, etc.
5.	Competition authorities have strength in economic/competition matters; principles set by them apply across all sectors.	Sectoral regulators have strength in technical areas.
6.	Emphasizes upon consumer welfare and unfair transfer of wealth from consumers to firms with market power or dominance	Emphasizes upon orderly development of a sector that would presumably trickle down in a sector ensuring consumer welfare

[6] Section 21(1) states: "Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such authority has taken or proposes to take, is or would be, contrary to any of the provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission."

[7] Section 2(w) of the Competition Act, 2002 defines statutory authority as: "any authority, board, corporation, council, institute, university or any other body corporate, established by or under any Central, State or Provincial Act for the purposes of regulating production or supply of goods or provision of any services or markets therefor or any matter connected therewith or incidental thereto"

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III. JURISDICTIONAL DUPLICITY BETWEEN SECTORAL REGULATORS AND COMPETITION

The Act empowers the CCI to enforce provisions relating to anti-competitive agreements[8], abuse of dominance[9] and combinations[10]. While exercising its powers, the jurisdiction of the CCI has been challenged in various cases, wherein the CCI emphasized its exclusive jurisdiction over competition related matters. In ***Consumer Online Foundation v. Tata Sky Ltd. & Other Parties***[11], the jurisdiction of the CCI was challenged by Dish TV operators on the basis that TRAI had exclusive jurisdiction over issues arising in the telecommunication industry being the telecomm sector. The CCI, clarifying its stand on unequivocal terms, held that competition-related matters shall squarely fall within the purview of the Act. Subsequently, in *Shri **Neeraj Malhotra, Advocate vs. North Delhi Power Ltd. &Ors***,[12] which alleged anti-competitive conduct of the electricity distribution companies, the Discoms alleged exclusive jurisdiction of the DERC on issues relating to anti-competitive behaviour of electricity distribution companies. However, the DERC, in this case, categorically stated in its communication to the CCI that although all matters pertaining to electricity tariff have to be decided under the provisions of the Electricity Act and DERC Regulations, allegations of anti-competitive behaviour, including abuse of dominant position by the Discoms fell within the jurisdiction of the CCI, thus upholding the jurisdiction of the CCI on competition-related issues, therefore CCI was having the exclusive jurisdiction.

Recently, the CCI in *M/s HT Media Limited v. M/s Super Cassettes Industries Limited*[13], while deciding on its jurisdiction, held that the powers of the CCI and the Copyright Board are different and the Copyright Board cannot serve as an effective instrument for promotion of competition and its objectives. The CCI while recognising the role and importance of sector-specific regulators, held that the CCI being the market regulator, had jurisdiction to look at all issues affecting, reducing or hindering the competition in the market.

Although competition law is sector-agnostic and is applicable across sectors, the CCI has not secured supremacy in all the proceedings. The High Court in certain cases has stayed the

[8] Section 3, *Competition Act*, 2002
[9] Section 4, *Competition Act*, 2002
[10] Section 5 and 6, *Competition Act*, 2002
[11] *Case No. 2/2009*, Available at: < http://www.cci.gov.in/sites/default/files/MainOrderConsumer250411_0.pdf >, Last accessed on October 1, 2021
[12] *Case No. 6/2009*, Available at: <http://www.cci.gov.in/sites/default/files/R.DissentingOrder300511_0.pdf>, Last accessed on October 2, 2021
[13] *Case No. 40/2011*, Available at: <http://www.cci.gov.in/sites/default/files/C-2011-40_0.pdf>, Last accessed on October 2, 2021

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proceedings before the CCI. For instance, the proceedings before the CCI against public sector undertakings in the oil sector alleging cartelisation in the supply of aviation turbine fuel to Air India, was stayed by the Delhi High Court,[14] since the PNGRB had already passed an order in respect to restrictive and unfair trade and marketing practices and cartelisation in respect of marketing and sale of petroleum and petroleum products by public sector undertakings.[15]

In another case, Ericsson had initiated legal action against Micromax for enforcing its intellectual property rights before the Delhi High Court.[16]Micromax, during the pendency of the proceedings before the Delhi High Court, filed a complaint before the CCI, accusing Ericsson of abusing its dominant position by imposing exorbitant royalty rates for standard essential patents(SIP's) and not licensing it on fair and non-discriminatory terms. The CCI passed a prima facie order of directing investigation. Ericsson filed a separate writ petition before the Delhi High Court challenging the CCI's jurisdiction, since the Patent Act itself provides adequate mechanism to balance the rights of the patentee and other stakeholders and there is a specific patent act to govern on this particular issue. At the interim stage, the Delhi High Court directed Ericsson to provide information to the Director General of investigation ("DG"), however, restricted the ability of the CCI to pass any final order and took away jurisdiction.

Such notion of over-lap of jurisdiction may occasionally result in situations where both CCI and respective sector regulators may feel that they have jurisdiction to deal with an anti-competitive conduct in the sector. Recognising the expertise of the CCI in dealing with broad competition issues in various sectors of the economy and the expertise of different sector regulators in matters of details such as setting of tariffs and the operating conditions, the legislature has wisely inserted Sections 21 and 21A in the Competition Act 2002 (the Act). The expectation was to clearly demarcate or separate the jurisdiction of the CCI and various sector regulators. The CCI is expected to deal with overall competition issues and any matter needing competition analysis irrespective of the sector involved and refer the technical issues involved, if any, to the respective sector regulators under Section 21 A of the Act. Similarly, the sector regulators are expected to refer competition issues before them to CCI under Section 21 of the Act if the

[14]*Delhi HC stays CCI proceedings against IOCL, HPCL and BPCL*, Available at: < http://www.businesstoday.in/current/corporate/delhi-hc-stays-cci-proceedings-against-iocl-hpcl-and bpcl/story/200813.html>, Last Accessed on October 5, 2021

[15]*Reliance Industries Limited & Ors. v. Indian Oil Corporation Ltd. &Ors*., Complaint No. 4 of 2008, order dated 12 July 2012, Available at: <http://www.pngrb.gov.in/pdf/orders/order02july.pdf >, Last accessed on October 5, 2021

[16]*Elefonaktiebolaget Lm Ericsson (Publ) V. Mercury Electronics AndAnr*. CS(OS) 442/2013, Available at: < http://delhihighcourt.nic.in/dhcqrydisp_o.asp?pn=46519&yr=2013>, Last accessed on October 7, 2021

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competition issues are involved.[17]

IV. DIFFERENT SECTOR REGULATORS AND THE CONFLICT

- **The Petroleum and Natural Gas Regulatory Board Act**

The Petroleum and Natural Gas Regulatory Board Act, 2006 established the Petroleum and Natural Gas Regulatory Board to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum products and natural gas.[18]The functions of the Board include regulating access to common carriers[19] or access to common gas distribution networks[20] while supporting fair trade and competition among the entities.

The PGNRB Act provides for civil penalties in cases of violations of the directions of the Board not exceeding one crore rupees.[21] However, if the complaint is on restrictive trade practices[22], the amount of the civil penalties is multiplied by five times of the unfair gains made by the entity or rupees ten crores, whichever is higher in that case. It is interesting to note that the PNGRB Act, 2006 has used the same definition of "restrictive trade practices" as given in the Monopolies and Restrictive Trade Practices Act.[23] The Competition Act, 2002 has repealed the Monopolies and Restrictive Trade Practices Act and created a special legislation for dealing with competition issues, from curbing monopolies to promoting competition However, in spite there being a gap of four years between passing of the Competition Act in 2002 and the PNGRB Act in 2006, it is quite astonishing to notice the legislature's failure in reconciling of both the acts.

As this Board has been entrusted with the responsibility to promote competition policies, there have been increasing jurisdictional conflicts with the Competition Commission in the cases where the complaints are anti-competitive practices based in the petroleum, oil and natural gas sector. The Competition Commission's decisions, though inconsistent, do lean towards giving up the jurisdiction power to the regulatory authority.

In ***Shri Awadh Singh v. Petroleum and Natural Gas Regulatory Board***[24] it was alleged that

[17] K.K. Sharma, *'Necessary and Sufficient' Test: Healthy Inter Regulatory Relationship – Part I*, Competition Law Reports, June 2014
[18] Petroleum and Natural Gas Regulatory Board Act, 2006, Section 1(4).
[19] See Petroleum and Natural Gas Regulatory Board Act, 2006, Sections 2(j), 11(e)(i).
[20] Petroleum and Natural Gas Regulatory Board Act, 2006, Section 11(e)(iii).
[21] Petroleum and Natural Gas Regulatory Board Act, 2006, Section 28.
[22] Petroleum and Natural Gas Regulatory Board Act, 2006, section 2(zi) (This section defined restrictive trade practice. It means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular).
[23] See the Monopolies and Restrictive Trade Practices Act, 1969, Section 2(o).
[24]Shri Awadh Bihari Singh vs. Petroleum and Natural Gas Regulatory Board, Case No. 75 of 2013,MANU/CO/0002/2014, Competition Commission of India (January 2, 2014) .

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the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Amendment Regulations, 2013 issued by the PNGRB encouraged anti-competitive practices. The CCI noted that the PNGRB Act gave powers to the Board to issue the said regulations as a form of subordinate legislation and thus, the commission did not have the jurisdiction to hear the matter.[25]

In ***Faridabad Industries Association v. Adani Gas***,[26] the CCI held that that the issue of compliance with the regulations framed by the PNGRB was beyond its scope.[27] However, the Commission investigated into the allegation whether the gas prices were being fixed arbitrarily under the Gas Supply Agreement albeit holding against the complainant. Through this case, the CCI has carefully tried to demarcate or limit competition issues from other issues concerning the oil and gas sector, although a strict demarcation is not feasible because of the duplicity. In cases where Fuel Supply Agreement is called into question for anti-competitive practices and abuse of dominance. In the Gujarat Textile Processing v. Gujarat Gas Company,[28] the allegation was that the opposing party was abusing their dominant position by imposing unilateral, unreasonable and arbitrary conditions in the supply of gas under the Gas Supply Agreements. The Commission sought an opinion of the PNGRB but the latter threw the ball back in the CCI's hands by stating that it can adjudicate on the matter after considering relevant regulations.[29]

The CCI, while acknowledging its powers to punish for abuse of dominance noted that the Agreements in question are in the purview of the PNGRB Act and since the latter is a specific provision and empowered the regulator to constantly monitor the price and take corrective measures.[30] Thus, the CCI exempted itself from giving any remedy in this case by asking the complainant to pursue remedy which is available before PNGRB. However in Notice for ***Acquisition of Equity & Tata Power Distribution v. GAIL***,[31]the CCI discussed the PNGRB regulations and on that basis adjudicated the absence of abusive conduct of the respondent due to their compliance with the regulations and allowed the losing party to approach the regulator for remedy.[32]

[25] Id. at 4
[26] Faridabad Industries Association v. Adani Gas Limited, Case No. 71 of 2012, MANU/CO/0063/2014, Competition Commission of India (July 3, 2014).
[27] Id.at102
[28] Gujarat Textile Processors Association, Surat, Gujarat v. Gujarat Gas Company Ltd., Ahmedabad, Gujarat, Case No. 50 of 2011, MANU/CO/0114/2011, Competition Commission of India (December 12, 2011).
[29] Id. at 15
[30] Id. at 22
[31]TATA Power Delhi Distribution Limited v. M/s. GAIL (India) Limited, Case No. 94 of 2013, MANU/CO/0038/2014, Competition Commission of India (March 11, 2014).66
[32] Id. at 12-14.

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Few years ago, three public sector enterprises had approached the Delhi High Court challenging the jurisdiction of the CCI[33] with regard to cases pertaining to the oil and petroleum sector.[34] Reliance had filed a complaint before the CCI alleging that the State Public Sector Enterprises had formed a cartel in the market for supply of aviation fuel to Air India.[35]The High Court, interestingly, disallowed the CCI from hearing the issue in the present case as an order on this issue had already been passed by the PNGRB. It is important to note that the PNGRB does not have exclusive jurisdiction on the matter and any dispute involving competition concerns is also under the jurisdiction of CCI. This order begs the question that if a complaint is filed before both the Sectoral regulator and the CCI, whether the passing of an order on the issue by one of them bars the other body from exercising its special jurisdiction.

The above cases show that that the CCI has never taken a consistent approach to cases where overlap of jurisdiction can occur, sometimes seeking reference, in others refusing to step into domain of PNGRB. Further, another complicated issue that arises is whether the jurisdiction of one body is precluded if another parallel authority passes an order on the same matter. The confused approach of CCI with respect to PNGRB is in contrast to its activist stand taken with respect to overlap with TRAI.

The case study of CCI's overlapping cases with TRAI and PNGRB illustrate the different approaches that CCI has taken towards overlap in different sectors. Thus, there is an increasing need to clarify this confusion and outline the structural relationship between the regulatory bodies such as TRAI, PNGRB and Competition Commission. With a view to clarify this confusion the next section shall seek to map out the different approaches taken internationally to highlight the key takeaway points that could be used in the Indian Context.

- **Telecomm regulatory authority of India**

Co-operation is important among telecom sector operators due to the need for different network providers to use each other's cables and tower networks through imposition of interconnectivity charges. Interestingly, it has been observed that in a free market private players do not co-operate with each other, charge competitors exorbitant interconnectivity charges and engage in predatory pricing to discourage new entrants in the market.[36] It is against this background that

[33] Nikhil Kanekal, Sangeeta Singh &UtpalBhaskar, Competition watchdog faces fresh challenge to jurisdiction, MINT HT MEDIA, January 23, 2011.
[34] M/s Royal Energy Ltd. v.M/s Indian Oil Corporation Ltd., M/s Bharat Petroleum Corporation Ltd. and M/s Hindustan Petroleum Corporation Ltd (2012) CompLR 563 (CCI).
[35] See RIL moves CCI against public companies Aviation Turbine Fuel Cartel, THE ECONOMIC TIMES, July 15, 2010.
[36] Ashok V. Desai, INDIA'S TELECOMMUNICATIONS INDUSTRY: HISTORY, ANALYSIS, DIAGNOSIS 51 (2006).

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co-operation and competition was sought to be enforced externally through creating of a regulator i.e. TRAI.

The TRAI Act, 1997 empowers the regulator to make suggestions to the Department of Telecom regarding the quality of the service, interest of the new entrants, licensing policy, spectrum allocation and measures to facilitate competition and efficiency in the sector.[37] It also has the power to call for information and conduct investigation and issue directions to any service provider.[38] Further, as per the TRAI Act, the members and head of the authority are to be experts in telecommunication, finance, management but are not expected to be knowledgeable in competition law.[39]

Overlap between the goals and means of TRAI and CCI have been observed in numerous cases. For Example, under Section 11, of the TRAI Act, the regulator is empowered to make recommendations regarding the need for new service providers, spectrum allocation terms and condition of licenses to service providers, which has a direct impact on the intensity of competition. Recently, the CCI has criticized the TRAI's unilateral recommendations to the Department of Telecom regarding review of license terms and capping of number of access providers and has requested discussion on the issue as it has competition implications.[40] Further, the issue of monopoly pricing and fixation of tariff by TRAI is problematic.

Keeping the consumer in mind, TRAI may fix extremely low tariffs. Although it will benefit the consumers in the short run, in the long run it will create a barrier on new entrants and hamper better competition in the market.[41] Finally, in cases of merger control, TRAI recommends that at any point of time the total number of service providers should not be less than four or the merged entity's market share exceeds 40%.[42] However, the CCI while reviewing a merger does not have any such bar and will disallow a merger only if it feels that the merged company will cause an appreciable adverse effect on competition.[43]

Interestingly, the proviso defining the jurisdiction of Telecom Dispute Settlement Appellate

[37] Telecom Regulatory Authority of India Act, 1997, Section 11
[38] Id. Section 12
[39] Telecom Regulatory Authority of India Act, 1997, Section 4.
[40]Harsimran Singh, TRAI and CCI fighting the turf war, THE ECONOMIC TIMES, 18 July 2007, http://articles.economictimes.indiatimes.com/2007-07-18/news/28461865_1_consultation-papernumber-portability-trai-chairman (last seen on October 7, 2021)
[41] Hemant Singh & Radha Naruka, Telecom Regulatory Authority of India & Competition Commission of India: Jurisdictional Conflict, SOCIAL SCIENCE RESEARCH NETWORK 1, 35 (2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2252530(last visited May 18, 2015).
[42] See Samir R. Gandhi & Rahul Rai, CCI and TRAI- Regulating in Harmony, BUSINESS LINE, April 24, 2009 http://www.thehindubusinessline.com/todays-paper/tp-opinion/cci-and-trai-regulating-inharmony/article1049961.ece (last visited June 7, 2015).
[43] Id

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Tribunal (the adjudicatory arm of TRAI) ('TDSAT') states that "nothing in this provision will apply to any dispute subject to jurisdiction of Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP")."[44] The MRTP Act was repealed and the Competition Commission was put in its place through the Competition Act, 2002, but the related amendment was not made in the TRAI Act to replace the words 'MRTP' with 'The Competition Act'. This lack of corresponding amendments in the TRAI

Act has created a grey area or lacuna regarding the jurisdictional limitations between TDSAT and CCI during overlapping disputes. This legislative ambiguity has given room for interpretation and the CCI and TDSAT have answered these questions differently in numerous cases.

In Sea T.V Ltd. v. Star India Ltd. the petitioner in TDSAT challenged the actions of Star Network as being in violation of TRAI Act and Interconnectivity Regulations issued by TRAI.[45]The Respondent contented the jurisdiction of the commission relying on the proviso to Section 14 of TRAI Act arguing that the matter was about monopolistic practices. This led to a conflict of jurisdiction between the TRAI and the now defunct MRTP Commission. The court took a very simplistic view that the present claim was about violation of regulation and not any anti-competitive practice, thus it was held that the MRTP Commission cannot adjudicate a dispute based on the rights and liabilities arising out of TRAI Act or Regulations even if it incidentally involves the subject of monopoly and restrictive practices.[46] Such a broad view of the TDSAT's jurisdiction would exclude practically every case from the ambit of MRTP Act because it would be always connected to some Guideline or Regulation issues by TRAI that's the important hip up now.

This decision could be justified because TRAI is a special legislation it should always be prioritized over general legislations like the Competition Act, 2002 by virtue of the legal maxim generalius specialibus Moreover, TRAI consists of experts in the field of telecom and markets and it should be entitled to decide even when disputes have certain competition angle to it, considering that the proviso to Section 14 has not been amended yet to include CCI.[47] Contrarily, the CCI has expressed an opposite view in Consumer Online Foundation v. Tata

[44] Telecom Regulatory Authority of India Act, 1997, § 14- Provided that nothing in this clause shall apply in respect of matters relating to - "The monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969."
[45] Sea T.V Network Ltd. v. Star India Pvt. Ltd., (2006) 2 CompLJ (Telecom DSAT) 487, ¶ 10 (Telecom Dispute Settlement & Appellate Tribunal).
[46] Id. at 14
[47] See Hemant Singh & RadhaNaruka, supra note 16, 6.

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Sky Ltd. where the Dish TV operators were alleged to have intentionally agreed to prevent interoperability of set top boxes with other DTH operators.[48] This created hardship for the customerto switch from one service provider to another. On a challenge to its jurisdiction, the Commission held that even though TRAI is the special regulator, competition in the market is within the exclusive jurisdiction of CCI.[49] TRAI had recommended an up gradation of technology in set top boxes as well as adopting the regulations for interoperability.[50]The Commission in fact referred to these regulations on inter-operability of set top box and found that these guidelines were not enforced by service providers.[51] This view of the Commission would indicate that even if there is a trace of competition issues in the telecom sector on the basis of non-compliance of TRAI regulations the Commission has the exclusive jurisdiction over competition issues wholly.

In the same case, the Commission was put in a precarious position when it was asked to decide two technical based issues. The first issue was that whether providing for interoperability among set top boxes among different DTH providers was technologically and commercially feasible.[52] The second issue was that whether the agreement between DTH operators to mutually abstain from providing such interoperability signaled towards anticompetitive practices.[53] The Commission dismissed the complainant's case and avoided any comment on telecom technology. It held that even if interoperability was possible, the complainant could not show that there was an agreement between the DTH operators to mutually avoid providing interoperability demonstrating an anti-competitive practice.[54] The helpless commission distanced itself from taking any decision on feasibility of the interoperability on the ground that those recommendations of TRAI were yet to be adopted. This case could have been better decided if both bodies were on board sharing their expertise on these issues.

V. SOLUTION FOR RESOLVING THE CONFLICT IN THE INDIAN BACKGROUNDS

In India, as discussed above, the reference mechanism is toothless and rarely used, thereby diluting the atmosphere of co-operation that was intended by the framers. This loophole has

[48] Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, MANU/CO/0011/2011, ¶2, Competition Commission of India (March 24, 2011).
[49] Id. at 27
[50] Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, MANU/CO/0011/2011, ¶12, Competition Commission of India (March 24, 2011).
[51] Id.
[52] https://nslr.in/wp-content/uploads/2019/04/NSLR-Vol-11-No-6.pdf
[53] Consumer Online Ltd. v. Tata Sky Ltd., Dish TV, Reliance Big TV and Sun Direct TV Pvt. Ltd., Case No. 2 of 2009, at 75, Competition Commission of India (March 24, 2011), available at http://www.cci.gov.in/menu/MainOrderConsumer250411.pdf (last visited October 9, 2021).
[54] Id. at 109.

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been exploited by both the competition commission and the regulators to unilaterally take action thereby diluting the atmosphere of cooperation intended by the legislatures. Apart from duplication of work it also gives scope to parties for forum shopping and the resulting confusion creates a bad environment for investment in India. Therefore, to address these concerns it is imperative that a structured and well-defined model of cooperation is laid down through law. Further, to ensure successful implementation of this model it is essential to take measures that garner a culture of institutional co-operation between both bodies which is visibly absent in India as discussed.

In the context of exclusive model, the authors feel that it should be shunned as the disadvantages of the model outweigh the advantages. If the competition commission is designated as the sole body to take charge of enforcement of competition issues in regulated sectors, the issue of lack of knowledge of the technicalities of a particular sector emerges.[55]Further, it is not practically feasible to reduce the enforcement power, staff strength and authority of multiple sectoral regulators abruptly.

Similarly, if the competition commission's role is reduced in regulated markets, there will be an apprehension regarding the correct application of the competition policy by the regulators whose members do not have expertise in the field of antitrust law. Moreover, there will be a risk of a non-uniform standard of application of competition law in the country if different sectors are entrusted with the task of enforcing competition law. This will make the situation worse. Therefore, in order to extract the advantages, expertise and knowledge of the sector specific regulator and the competition commission, the author's view is that, a concurrent model will be the most appropriate for India. Finally, the legislative intent in passing Sections 21 and 21A of the Competition Act, 2002 prescribing a reference mechanism signals the intention of the framers to adopt a concurrent model as compared to the exclusive jurisdiction model.[56]

The author proposes a concurrent model based on two foundations which will be rooted in the international best practices discussed above and the Financial Sector Law Reforms Commission Report of 2013 ('FSLRC Report'). [57]Firstly, there should be a well-defined procedure of cooperation between the regulators and the commission which will settle cases of overlap, forum shopping and the disputes between the two bodies. Secondly, there should be an

[55] See Maher M. Dabbah, The Relationship between competition authorities and sector regulators, 70(1) THE CAMBRIDGE LAW JOURNAL 113, 119 (March 2011).
[56] Competition Act, 2002, Section 21-21A
[57]GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION VOLUME I 53 (March 22, 2013).

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apparatus or working party group to harvest institutional collaboration at the time of drafting regulations and policies as well as at the stage of adjudication. This will ensure a harmonious and symbiotic relationship between the two regulators.

VI. The Structure of Co-operation between CCI and Sectoral Regulators

This model will focus on the need to have a detailed working relationship to be developed between the regulators and the competition commission. The quantity of conflicts between the two bodies is directly proportional to the extent of non- clarity of the wording of the legislature. Therefore, the authors suggest the following mechanism to overcome the problem of overlap. If a matter comes before the competition commission and if one of the parties is a player in any of the sectors regulated by sectoral regulator, then the commission must inform the concerned sector regulator.[58] For example, if Vodafone is one of the parties before the Commission, the latter must inform TRAI that it is hearing the dispute regarding a player regulated by it or which comes under its ambit. Similarly, if there is a case before the regulator which has competition implications then the competition commission should take the lead and issue a notice to the regulator to resolve the issue of overlapping of the jurisdiction. This procedure of notice will help to address the confusion in the present reference mechanism which depends on the referrer's opinion of overlap.

After the issue of notice, there should be an internal meeting between the two bodies to decide jurisdictional aspect of the case and who is better suited to adjudicate the dispute.[59] If an agreement cannot be reached, the Competition Appellate Tribunal should have the mandate to decide which body should hear the case or if a joint bench with representatives from both

Institutions would be a necessity. This suggestion is based on the success of the United Kingdom Concurrency Regulations discussed above.[60] Further, there would be no question of forum shopping because once it is decided which body is to exercise jurisdiction, the other body will lost the chance to adjudicate upon the matter. This would avoid a situation where CCI would refuse to comment on TRAI Regulations alleging them to be an issue of technicality .FSLRC Report deals with reforms in the financial sector, but it comments on the interaction between financial sector regulators and competition commission.[61] Thus, the model proposed by this

[58] Id. at 5.9
[59] See The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 4(2).
[60] The Competition Act 1998 (Concurrency) Regulations 2014, Regulation 5(1)
[61]GOVERNMENT OF INDIA, REPORT OF THE FINANCIAL SECTOR LEGISLATIVE REFORMS COMMISSION VOLUME I 53 (March 22, 2013).

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report is equally relevant in the context of conflict between CCI and any specific regulator. This report suggests that CCI should submit a report reviewing the draft regulations of industry specific regulators highlighting the potential competition implications.[62] The regulator must consider the recommendation and it must give valid reasons when it decides to deviate from the recommendation.[63]

Further, if the commission feels that the regulator through its policy actions has caused a 'negative effect' for competition in the industry, the Commission can submit a report in this regard and the regulator should consider it and respond to it.[64] If it fails to respond within a reasonable time the commission can issue binding directions to neutralise the negative effect caused in the regulated market.[65] Even, though this model is not directly relevant to jurisdictional conflict, the author feel that it would create a much needed balance between the two bodies by involving them to come together right from the stage of formulating the policy.

VII. Institutional Collaboration between CCI and Sectoral Regulators

The second foundation of our model will be based on an institutional collaboration between the regulators and the Commission. To promote an exchange of information and technical expertise on a regular basis, it is required that there should be a working party group or group of individuals to work on that issue similar to the one adopted in the United Kingdom, where the regulators and the commission have periodic meetings to discuss overlapping issues so that both sides can benefit from a thorough discussion on overlapping issues.

This interaction could be an important aspect of the competition advocacy function of CCI which includes training professionals on competition issues.[66] Similarly, the commission will gain valuable technical knowledge about the particular sector from the regulators. Such a working party group can also organise workshops together to better understand the interlinking or interconnected issues between the sector regulation and competition law. Such efforts have worked well in countries like UK, Canada, USA because both sides have tried to maintain cordial relationships through regular periodic meetings and staff transfers.[67]

The author also feels that the Act should be amended to include a provision which mandates

[62] Id. at 5.9
[63] Id.
[64] Id.
[65] Draft Law on Indian Financial Code, 2013, Section 134.
[66] The Competition Act, 2002, Section 49.
[67] Competition Authorities and Sector Regulators: What is the best operational framework, VIEWPOINT (CUTS Centre for Competition, Investment & Economic Regulation, Jaipur), October 2008.

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that the CCI has MOUs with the sector regulators which will promote a harmonious relationship among them. This is evident in many countries like UK, Finland, Ireland and South Africa. MOU's have the advantage that both bodies can freely tailor the ambit of co-operation policy regarding investigation, adjudication and institutional collaboration. Even the FSLRC report has a provision which emphasises on the need for such MOUs.[68]

Further, even the planning commission in its Working Group on Competition Policy made pertinent suggestions to promote this institutional culture by coordinated staff transfers on deputation basis as well as sharing of experts by both bodies.[69] Similar policy of staff transfers is followed in United States, Australia and Zambia amongst others and has garnered a co-operative culture between both regulators. This suggestion is important in the context of Indian background where we have witnessed turf war between regulators and CCI regarding policy formulation and adjudication of overlapping disputes. Thus, a clear delineation of co-operation and collaborative culture may usher a sea change from the current turf war to a collaborative environment where competition law is enforced by both bodies in India.

VIII. CONCLUSION

Worldwide policy makers have been faced with questions regarding enforcement of competition law in regulated sectors. While regulators and competition agencies share their own strengths and weaknesses or pro and cons, legislative ambiguity has rendered the reference mechanism under the Act dormant. The confusion has given way to various responses by CCI while handling overlapping cases in between different sectors. With regard to PNGRB, the CCI has mostly passed the buck, while with respect to TRAI it has sought to retain or reserve jurisdiction. This disturbing trend ought to be replaced by more certainty and collaborative environment.

Global experience reveals two main elements of a successful policy to resolve jurisdictional conflict. First is defining the contours or boundaries of cooperation between bodies. In this vein, India must adopt the model of issuing notice by the interested regulator in overlapping instances to resolve among themselves or in cases of failure by the COMPAT, regarding who is better suited to have jurisdiction. Second defining feature is the institutional collaboration that can minimize the potential of a turf war between regulators and CCI. This could be done through different mechanisms including regular staff transfers, entering into Memorandum of

[68] Draft Law on Indian Financial Code, 2013, Section 138.
[69] Chapter VII, Report of the Working Group on Competition Policy, Planning Commission, Government of India, February 2007, 43.

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Understanding, and having regular Working Party group Meeting between both sides etc.

For inculcating the full benefit of this co-operation, India must adopt a combination of these measures and ensure they are implemented effectively. The author believe that these two measures would usher not only better administration of competition law in regulated sectors, but also eventually extend co-operation in framing regulatory policies, like to the model envisaged by the FSLRC Report. An example would be TRAI as discussed above cooperating with CCI while deciding the spectrum allocation or the number of players suitable for the market. Co-operation at policy level can have a great impact of reducing the number of jurisdictional challenges and regulatory showdowns by ensuring co-operation at the very nascent stage of policy making between the concerned regulatory.

However, it is important to note that such a cooperation framework will not likely to work if CCI and the sector regulators still prefer exclusive jurisdiction. Whilst memoranda of understanding and other cooperation agreements between the regulators would be in good faith, problems could also arise in the implementation if the regulators do not fully subscribe or owe it's allegiance to such a framework.

A concurrent jurisdiction approach is what is likely to sustain in India. Such an approach would call for amendments to the current Competition Act, 2002, in India as well as the respective sectoral regulation, to ensure that the need for cooperation becomes binding. The amendment would give some powers to sector regulators to enforce the provisions of the Competition Act, 2002, in their respective sectors, but in collaboration with CCI, hand in hand. In addition, a platform for referring disagreements on the best-placed regulator to deal with the case would also have to be created, such disagreements are bound to happen, and therefore this is best suitable.

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