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TITLE OF THE PROJECT: COMPETITION ACT, 2002 AND THE ISSUE OF SECTORIAL OVERLAPPING

Siddharth Tripathi[1]

INTRODUCTION

India, as a country used to believe only in the socialistic form of economy so much so that it ended up adding the word "socialist" by virtue of 41st amendment in the preamble before the steep economic crisis which forced India to adopt Liberalization, Privatization and Globalization (LPG) Policy of 1991.[2] Under this policy, India paved the way for private entities to enter in to the public sectors, allowed free entry to foreign investment and technology, reduced taxes and import tariffs, etc. With the adoption of LPG, 1991, it was presumed that this market-based economy will ensure the growth of economy by the virtue of optimum allocation of sources.[3] With the change in the era, few laws that were enacted before the adoption of LPG went futile, one of them is Monopolies and Restrictive Trade Practices Act, 1969. This act was there to regulate the trade practices going in the country and also to prohibit the monopoly in its totality. This particular statute failed to meet with the changing economic trends of the company and hence, a high-level meeting was set up to evaluate the MRTP Act, 1969 under the chairmanship of Shri S.V.S. Raghavan.

This concept of open market is through a boon to economy but is also more susceptible to market failures.[4] This issue of market failures come into picture when free market failed to perform due to lack of technological know – how, public goods etc. In order to systemize the losses occurred due to failure of free market, government intervention becomes essential.[5] The legislation comes up with Rules and Regulations which can regulate the market and can prevent such failures to happen in future. For instance, on great market crisis took place in India in the year 1991 when a massive securities fraud took place, popularly known as Harshad Mehta Scam, 1991.[6] This leads to the establishment of Securities Exchange Board of India (SEBI) which has power to regulate the securities and impose penalties in case of

[1] The author is a law graduate of Symbiosis Law School, Hyderabad.
[2] Montek S. Ahluwala, *Economic Reforms in India Since 1991: Has Gradualism worked?,* 16(3) JEP 67 (2002).
[3] Kritika Sethi &Akshita Amit, *Overlapping Jurisdiction of Regulators in India: Never Ending Battle?,* 1(2) ICLR 2 (2019).
[4] Francis M Bator, *The Anatomy of Market Failure,* 72(3) QJE 351, 352 (1958).
[5] Janusz R. Mrozek, *Markey Failures and Efficiency in Principles Course,* 30(4) JEE 411 (1999).
[6] *Securities Scam: The Systematic Origins,* 27(36) EPW 1891, 1892 (1992).

market failures. Other examples can be the establishment of TRAI, CERC etc. All the establishments are governed by their respective statutes with the common aim to promote fair competition and consumer interest.

Hence, failure of MRTP Act leads to the formation of CCI in 2002 *"to promote and sustain competition in the market and to protect interest of consumers and competitors"*[7]. This leads to the establishment of a common body along with varied specific regulators with the common aim. Apart from common goals, certain decision of the regulators related to tariff, competitors etc. also started overlapping. This also paved way for the possibility of jurisdictional overlap between CCI and other specific operators and hence one can witness the issue of sectorial overlapping when it comes to free and fair competition in the Indian market.[8]

This paper seeks to explain the instances of overlapping in its first part, followed by the effects of overlapping and how the Competition Act, 2002 is losing its intrinsic value. Lastly, the authors will also come up with the solutions for the issue as mentioned.

INSTANCES OF OVERLAPPING

Post-1991 liberalisation move, many sectors specific regulators were introduced to regulate their respective markets. For instance, the Securities and Exchange Board of India, which was introduced in 1992 and other regulators by the likes of the Telecom Regulatory Authority of India (TRAI), and so on.

Around the same time, the Competition Commission of India was introduced by virtue of the Competition Act, 2002, to maintain healthy competition in every sector. But right from its introduction, there had been various instances of tug of war where the Competition Act, an antitrust regulator, had overlapped with the jurisdiction of other sector-specific regulators, which shall be discussed below.

[7]Brahm Dutt vs. Union of India, AIR 2005 SC 730, *see also,* The Competition Act, 2002, Preamble.
[8]Security Printers of India Pvt Ltd v. Deputy Secretary to theGoI, (1980) 50 Comp. Case 690.

CCI and SEBI

SEBI was established as a non-statutory body in 1988 through a resolution of the Government of India[9] to regulate the securities market. Back then, it had minimal powers.

Only after some well-known scams like the Harshad Mehta scam came into the limelight, which showed the lacunae existing in the law, SEBI was bestowed with more powers to take cognisance against such happenings. Therefore in 1992, SEBI was constituted as a statutory body[10]to *"protect the interests of investors in securities and to regulate and promote the development of the securities market."*[11]

As far as SEBI Act, 1992 is concerned, section 32 of the Act states that this act *"shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force."*[12]This provision makes it apparent that the powers of SEBI cannot override any other regulator in the market; instead, it is supposed to co-exist with it. Moreover, several regulations are framed under the SEBI Act, 1992, for regulating various other fronts of the securities market.

SEBI is also bestowed with powers to prevent unfair trade practices and fraudulent activities.[13] In this regard, SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (Takeover Code) was formed by SEBI, which provides for procedures to which exchange-listed firms are supposed to adhere when merging. As a result, SEBI approved these mergers, raising the possibility of overlap with CCI because both bodies have a common objective, ensuring fair market competition.

Because of such commonality, as mentioned above, there had been instances where both these regulators had overlapped each other's jurisdiction. For instance, in Advocate Jitesh Maheshwari vs. National Stock Exchange of India (NSE) Ltd[14], CCI declined to deal with the issue regarding abuse of dominance by the NSE and permitted SEBI to continue with its practice. Even though CCI could have addressed the issue by virtue of section 4 of the Competition Act, 2002, it took a drastic turn to allow a sector-specific regulator to deal with a

[9] About SEBI, SEBI, https://www.sebi.gov.in/about-sebi.html (last visited Sep 4, 2022).
[10] SEBI Act, 1992, §3.
[11] SEBI Act, 1992, Long Title.
[12] SEBI Act, 1992, §32.
[13] SEBI Act, 1992, §11(2), §11(e), §11(h).
[14] Advocate Jitesh Maheshwari vs. National Stock Exchange of India Ltd., 2019 SCC OnLine CCI 52.

matter of abuse of dominance. Even though both SEBI Act and Competition Act contain a provision for jurisdiction *"in addition to and not in derogation to other laws"*, neither statute provides any solution in case of jurisdictional overlap.[15] This leads to concurrent jurisdiction for both regulators, which will have a domino effect in the form of conflicting decisions and uncertainty in-laws.

CCI and TRAI

India's telecom sector is regulated by TRAI. TRAI was set up in 1997[16] under the TRAI Act 1997. The act empowers the regulator to make suggestions to the Telecom Department regarding the quality of service, licensing policy, spectrum allocation and measures to facilitate competition in the sector.[17] It should also be noted that heads and members of the authority are expected to be experts in telecommunication, management and finance but are not expected to be well versed with competition law.[18]

Furthermore, section 11 of the TRAI Act states that TRAI can make recommendations regarding spectrum allocation terms, conditions of licences to service providers[19], etc., and all these aspects directly influence the competition in the market. CCI recently criticised this unilateral manner of recommendation by the regulator to the Department of Telecom and stated that such recommendations should be made after consulting CCI as it directly impacts competition in the market.[20]

Another primary concern is how TRAI manages tariff fixation and monopoly pricing. For the sake of consumers, TRAI decides low may fix low tariffs. Though it may benefit the consumer, in the long run, this may create an entry barrier for new entrants and, as a result, may prove to be detrimental to the competition.[21]

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[15] Deepanshu Agarwal, SEBI IN THE SHOES OF CCI: THE JURISDICTIONAL TUSSLE CONTINUESTHE HNLU CCLS BLOG (2020), https://hnluccls.in/2020/08/01/sebi-in-the-shoes-of-cci-the-jurisdictional-tussle-continues/ (last visited Sep 6, 2022).
[16] TRAI Act, 1997, §3.
[17] TRAI Act, 1997, §11.
[18] TRAI Act, 1997, §4.
[19] TRAI Act, 1997, §11.
[20] Harsimran Singh, TRAI and CCI fighting the turf war, THE ECONOMIC TIMES, http://articles.economictimes.indiatimes.com/2007-07-18/news/28461865_1_consultation papernumberportability-trai-chairman (last visited, Sep 6, 2022).
[21] Hemant Singh, *Telecom Regulatory Authority of India & Competition Commission of India: Jurisdictional Conflicts,* 1 SOCIAL SCIENCE RESEARCH NETWORK (2013).

So far as mergers and acquisitions are concerned, TRAI recommends that the merged entity's market share should never exceed 40%.[22] But so far as CCI is concerned, it does not have any such bar while reviewing mergers. It will disallow a merger only if it feels that such a merger will be detrimental to the competition in the market; that is, it will have an Appreciable Adverse Effect on Competition (AAEC).[23]

Another interesting point to be noted is that the provision which establishes the adjudicatory arm of TRAI, that is, Telecom Dispute Settlement Appellate Tribunal[24] (TDSAT), states that *"nothing in this provision will apply to any dispute subject to the jurisdiction of Monopolies and Restrictive Trade Practices Act (MRTP), 1969."*[25]This provision makes it evident that the legislature has failed to even bring a corresponding amendment to the act to remove MRTP from the provision and replace it with Competition Act, 2002. And as a consequence, a grey area has now been created for jurisdictional conflicts and limitations between CCI and TDSAT while adjudicating the overlapping dispute. This is because CCI was created by virtue of the Competition Act 2002.[26]

This grey area had been addressed by both TDSAT and TRAI differently. For instance, in Sea TV ltd vs. Star India Ltd,[27] the Petitioner challenged the acts of Star network as being violative of TRAI Act and Interconnectivity rules issued by TRAI. The Respondent disputed the jurisdiction of TDSAT by relying upon the proviso to section 14 of TRAI Act, 1997, to contend that the matter was concerning monopolistic practices. The proviso to section 14 states that the Appellate Tribunal shall not adjudicate any dispute concerning monopolistic trade practices. This ultimately led to a dispute concerning jurisdiction between TRAI and the now-defunct MRTP Commission.

The Tribunal, however, ruled that the matter was about a violation of rules and regulations passed under the TRAI Act and not about anti-competitive practices. The Tribunal further ruled that the MRTP commission cannot entertain matters which deal with rights and liabilities arising out of the TRAI Act or regulations, even if it involves the issue of restrictive

[22] TRAI, Recommendations of the TRAI on Intra Circle Mergers and Acquisition Guidelines, 27th October 2003.
[23] Competition Act, 2002, §6(1).
[24] Competition Act, 2002, §14.
[25] *Id.*
[26] Competition Act, 2002, §3.
[27] Sea TV ltd vs. Star India Ltd., (2006) 2 CompLJ (Telecom DSAT).

practices and monopoly.[28] Such a broad view of the TRAI Act taken by the Tribunal will virtually exclude almost all the matters from the jurisdiction of the MRTP Commission since almost all the matters are somehow or the other related and connected to MRTP Act and guidelines issued under it. This view, however, can be justified as TRAI Act, being special legislation, will prevail over general legislation like the Competition Act, 2002 and also, TRAI consists of experts in the telecom industry. Hence, TRAI should be entitled to decide matters arising out of the TRAI Act, even if it involves an aspect of Competition, considering the TRAI Act is still not amended to include CCI.

CCI, however, had expressed a view contrary to the above in Consumer Online Foundation vs. Tata Sky Ltd.[29] In the instant case, the Dish TV operators were alleged to have intentionally decided to prevent interoperability of setting up boxes with other DTH operators.[30]Consequently, consumers faced difficulties switching from one service provider to another. On the contention that the matter was not within the jurisdiction, the commission ruled that even though TRAI Act is special legislation which should prevail over general legislation, competition in the market falls within the exclusive jurisdiction of the CCI.[31]

The commission also referred to the guidelines issued by TRAI regarding the upgradation of technology in set-up boxes and adopting the interoperability regulations. The commission found that these guidelines were not adhered to and enforced by the service providers. The observations of CCI, as mentioned, make it apparent that contrary to the observation of TRAI as mentioned above, even if there is a trace of competition issue involved which comes up due to non-compliance of TRAI regulations, CCI will have the exclusive jurisdiction.[32] It is pertinent to note that in the same case, when CCI was asked to adjudicate two technical issues, the commission declined to adjudicate by dismissing the complainant's case and refusing to comment on telecom technology.

[28] *Id.*
[29] Consumer Online Foundation vs. Tata Sky Ltd., MANU/CO/0011/2011.
[30] *Id.*
[31] *Id.*
[32] *Id.*

EFFECTS OF OVERLAPPING OF COMPETITION COMMISSION OF INDIA JURISDICTION

In the regulation of disputes between different sectors, there exist different regulatory bodies which operate concurrently to determine whether the transaction undertaken complies with a multitude of laws. In India, there also exist different regulatory bodies that adjudicate various disputes between different sectors and grant approval to transactions undertaken under the various sectors. The conflict of jurisdiction between CCI and sectoral-specific regulators has become a hotbed of disputes. There have been instances of overlapping of the jurisdiction where both the legislation contains a non-obstante clause. The courts, in different instances, have applied various principles such as special legislation would apply over general legislation[33], newer legislation applied over older legislation etc.[34] The Hon'ble supreme court had opined that special legislation prevails over general legislation as the rule of interpretation. Similar to the application of newer legislation over older legislation, the legislature's purpose in applying the latter legislation over the former can be seen by including a non-obstante clause in the statute.[35]

Despite the apparent overlapping of the jurisdiction, the competition is not enacted in a way to resolve the conflicting jurisdictional situations. While section 60 of the act gives overriding effect to the act by inserting the non-obstante clause under it, section 62 states that the act should be read in consonance with other statutes. The exclusion of CCI Jurisdiction can turn problematic mainly due to three reasons-

1- First, the functional separation between the competition authority and other sectoral regulators requires an efficient granting of institutional responsibilities by inserting unambiguous legislative language. However, this hasn't happened in the context of India. When the objectives of competition law and those of other regulations conflict, the majority of sectoral laws do not offer tenable answers.
2- Secondly, giving sectoral regulators exclusive control could lead to the perpetuation of laws and regulations that are in contradiction with what the market requires. Sectoral regulators can be biased toward particular regulations, which impose intrusive obligations instead of allowing fair and active competition in the market.

[33] Allahabad Bank v. Canara Bank, [2000] 2 SCR 110
[34] KSL and Industries Ltd. v Arihant Threads Ltd., (2008) 9 SCC 763.
[35] Bank of India v Ketan Parekh, AIR 2008 SC 2361.

Such unwarranted regulations may derogate the market economy by misallocation of resources, market distortions and unstable growth of the economy as a whole. In similar parlance, market regulators will be more reluctant to strike out regulatory obligations to serve their vested interests.

3- The CCI is based on the dual principle of imposition of damages and private enforcement, which embraces ICC with higher consumer welfare standards. Most Indian sectoral laws lack this protection and rely instead on regulators to enact and enforce laws.[36]

4- Sector-specific legislation does broadly state the objectives of the competition. For example, the TRAI legislation requires the TRAI to take practical, proactive steps to "promote efficiency in the operation of telecommunication services" and "promote competition."[37] Also, the electricity act 2003 mandates the central electricity commission to “issue orders” on abuse of dominant position by the licensee, which is likely to cause an adverse effect on competition.[38] Also, the petroleum and natural gas regulatory board act 2006 mandates the petroleum authority to promote and foster fair trade and competition.[39] However, such laws have blurred the strategic importance of competition law allowing for potential conflicts between the CCI and the abovementioned regulators. This could lead to overseeing given crucial adversity creating a burdensome task for regulatory authorities.

5- Due to the existence of hazy jurisdiction between the CCI and other sectoral regulators, there is the unnecessary filing of writ petitions in the high courts, which leads to a multiplicity of proceedings and wastage of time for the Judiciary. The conundrum between the judgments of Bharti airtel[40] and Ericsson[41] regarding the supremacy of CCI jurisdiction and specific sector controller still needs clarity for the effective exercise of CCI jurisdiction. This implies the high risk of creating gaps and conflicts in the functioning of the agencies. The concurrent jurisdiction between specific sectoral regulators and CCI paves the way for conflicting decisions and legal uncertainty.

[36]Rahul Singh, ‘The Teeter-Totter of Regulation and Competition: Balancing the Indian Competition Commission with Sectoral Regulators’ (2009) 8 Wash U Global Stud L Rev 71, 95.
[37] Section 11 (1) (a) (iv) of TRAI Act.
[38]Section 60 of the Electricity Act, 2003.
[39]Regulation 7 of the Petroleum and Natural Gas Regulatory Board (Guiding Principles for Declaring or Authorizing Natural Gas Pipeline as Common Carrier or Contract Carrier) Regulations, 2009.
[40]CCI vs. Bharti Airtel, CA No. 11843 of 2018.
[41]Ericsson vs. CCI, WP© 464/2014.

6- There persists a considerable conundrum in the applicability of the competition law. Firstly, section 21 under the competition law grants power to the statutory authority to refer to the competition commission on issues raised before it, and the commission provides a reply to the statutory authority. However, the reply of the commission is not binding on the authority. Secondly, under the TRAI act, all the decisions are adjudicated, keeping in purview the rulings of the MRTP commission under section 14. Thirdly, it has been seen that CERC is under the authority to promote competition and efficiency in the production and supply of electricity. Thus it is evident that CERC has the primary role in adjudicating electricity disputes. So after analysing all three laws, it is evident there is no consistency and absolute vagueness between the abovementioned laws. Thus, the government must bring a consistent and unified competition policy that would clear the conundrum of whether the competition issue would come under the ambit of the competition commission of India or the sectoral regulators or give concurrent jurisdiction to both regulatory bodies.

POSSIBLE SOLUTIONS TO THE PROBLEMS

Toaddress the jurisdictional confusion between the regulator and the commission, it would be suggested to create a model of cooperation between regulators of the sector and CCI.

Firstly, the working relationship between both the bodies should be clearly defined; that is, the legislature should try to reduce the ambiguity of the wordings because the number of conflicts between both the bodies is directly proportional to the law's ambiguity. Secondly, it would be suggested to create the following mechanism to address the overlapping issue. If a matter comes before CCI and one of the parties to the case is, say, Tata Sky, then CCI must send a notice to the concerned regulator, that is, TRAI. Similarly, if TRAI thinks the case may have implications on the competition in the market, it should take the initiative and send a notice to CCI regarding the matter before it.

After sending the notice, an internal meeting should be arranged wherein both the bodies sit together and decide the jurisdictional aspect of the matter and who is better equipped to deal with the case. If the bodies are not able to reach an agreement, then the Competition Appellate Tribunal should be approached and let it decide as to who should adjudicate the matter, or if needed, should there be a bench formed with representatives from both the regulator and CCI. This model will also eliminate the possibility of forum shopping where a

party gets to choose the court that will treat his claims more favourably because once the Appellate Tribunal decides which body shall have the jurisdiction to entertain the matter, the other body will not be approached at the same time to adjudicate the matter. As a result of such an approach, we will not face a situation wherein CCI refuses to comment on TRAI regulations stating them to be technical issues, as was done earlier.[42]

The abovementioned model is based on the success of the United Kingdom Concurrency Regulations. The Competition Act 1988 (Concurrency) Regulations 2014 prescribes a proper framework for the relationship between sector-specific regulators and the Competition and Market Authority (CMA). As per the regulation, if the CMA or the regulator believes that they may have concurrent jurisdiction over the matter, then the body which beliefs this to be the case should send a notice to another body if it intends to adjudicate the matter.[43] After notifying, the regulator and CMA should mutually agree upon who has the jurisdiction to adjudicate the matter and who will play the role of an advisory.[44] If no agreement is reached within a reasonable period, then CMA will decide who shall adjudicate the matter.[45]

CONCLUSION

Globally, implementation of Competition Act has been proven as a challenge. While regulatory bodies and the competition agencies have their own strengths and weaknesses, the legislative dark whole has paved way to varied responses of CCI over the same issue of sectorial overlapping. CCI with regards to SEBI was of the opinion that it didn't have the competent jurisdiction to deal with the matter where as in the case of TRAI, it has retained its jurisdiction.

It is important to make sure the smooth communication between the sectorial board and CCI when it comes to the approval of matters. For Instance, if SEBI approves the action of a company and CCI's approval is awaited than the company can't process with the transaction resulting in entailing penalties on account of delay resulting in the slow economic growth.

Hence, in order to ensure that there won't be any or minimum overlapping it's important to implement the solutions proposed by the authors in the paper. These solutions were

[42] Consumer Online Foundation vs. Tata Sky Ltd., MANU/CO/0011/2011.
[43] Competition Act 1988 (Concurrency) Regulations 2014, Regulation 4(1).
[44] Competition Act 1988 (Concurrency) Regulations 2014, Regulation 4(2).
[45] Competition Act 1988 (Concurrency) Regulations 2014, Regulation 5(1).

successful in United Kingdom and has the great potential to be successful in India as well. These solutions will also ensure the healthy competition amid the market.

Considering the fact that special law prevails over general law, if certain actions won't be taken to remove the overlapping between CCI and other sectors then the principal act may lose its intrinsic value as explained above. Therefore, the solutions proposed should be taken into consideration and this issue should be resolved.