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COMPARATIVE ANALYSIS OF SECTOR REGULATORS AND COMPETITION LAW-REGULATORY LAW

AUTHORED BY - A.JONAH ELISA SHINY

ABSTRACT:

This research study aims to explore regulatory conflicts in India and other countries and also assesses the approaches taken at various stages to address them. This also tried to compare conflict of jurisdiction between sector regulation and Competition in Indian as well as world experience. The objective of the study is to draw on the experiences of different countries to tailor an effective cooperative regime for India. Countries world over have adopted approaches to address regulatory overlap conflicts to fit with their varied realities. India needs to do the same in terms of tailoring the best approach that suits its needs while taking helpful lessons from global best practices studied in this paper.

In all that countries which are studied in this research paper, overlap conflicts arose after liberalization and opening up of the economy. Lack of clarity in the respective roles of two regulatory bodies was the main source of such conflicts.

LIST OF ABBREVIATION

1. OFGEM - Office of Gas and electricity
2. OFWAT- Office of Water Services
3. OFCOM- Office of Communication
4. ORR- Office of Rail Regulation
5. CAA- Civil Aviation Authority
6. OFREG -Office for the Regulation of Electricity and Gas
7. OFT -Office of Fair Trading
8. OUR- Office of Utilities Regulation
9. FTC- Fair of Trading Commission
10. CCS -Competition Commission of Singapore
11. IDA -Info Communication Development Authority of Singapore
12. RBI -Reserve Bank Of India
13. DOT -Department of Telecommunication
14. DOA- Department of Antitrust

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15. FRB- Federal Reserve Bank
16. EC- European Commission

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INTRODUCTION:

Competition authorities and sector regulators share a common objective which is to improve economic performance through competition by preventing market failures and associated economic inefficiencies.

The two, however, differ in their core competencies. Competition authorities are mandated and therefore well-equipped with the skills necessary for delineating relevant markets, assessing likelihood of harm to competition, entry conditions and market power. Sector regulators on the other hand, are specifically mandated to ensure reasonable tariffs, third party access, service standards etc, and to promote competition in the regulated sector, particularly addressing entry barriers and access issues. Having extensive and ongoing knowledge of technical aspects of products and services, sector regulators are likely to be better suited for technical regulation than competition authorities.

Despite a common goal, friction may arise as a result of differences in the prioritization of objectives and the methods used by sector regulators and the competition authority. One of the main causes of such conflict is legislative ambiguity and the lack of clarity about powers vested in the competition authorities as well as sector regulatory bodies. Furthermore, in case of an overlapping jurisdictional conflict, which regulator has the overriding jurisdiction is also not clear from the relevant enactments. In many cases, sector regulators were brought in before competition regime was ushered in, hence the earlier view the latter as an encroachment in their turfs in so far as the sectors they are mandated to regulate.

Policy-makers world over are facing the issue of whether some or all activities of some of the traditionally monopolistic sectors can be subjected to economy-wide competition rules rather than sector-specific regulation and how to manage the interface between competition and sector regulation. The issue has been discussed and debated in international forum in recent years. Many recent studies by the Organization for Economic Cooperation and Development (OECD), United Nations Conference on Trade and Development (UNCTAD) and others have attempted to analyses such conflicts and suggested ways to resolve them.

A growing number of countries since the 1990s have undertaken major reforms aimed at the breaking down of monopoly structures in infrastructure and financial markets. These reforms have particularly focused on the liberalization, privatization and deregulation of telecommunications, electricity, natural gas, transportation, and financial service industries and the introduction of an economy-wide competition regime aimed at curtailing anticompetitive practices and abuse of market power. The reforms have brought in private players at multiple levels and issues of regulatory overlap need more attention than ever.

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The Objective of Competition and Sector Regulatory Laws:

Competition law:

1. Promote efficiency
2. Encourage competition in market.
3. Ensures abundant availability of goods and service of acceptable quality at affordable price.
4. offer wider choice to consumer.

Sector Regulators:

1. These prevent inefficient use of resources and protect consumer.
2. Technical Expertise necessary to determine access, maintain standard ensures safety and determine tariffs, price fixing and regulation

Areas of conflicts

The most common industries where competition law interacts with sector or industry specific laws are in the network industries involving access to network facilities sometimes considered as essential facilities or interconnection, monopoly pricing, anticompetitive agreements and merger control.

The overlap problem and jurisdictional disputes typically arise in the following areas:

- Licensing Conditions: The number of licenses and the conditions of the licenses will have an effect on the intensity of competition;
- Dominance: Market definition and assessment of dominance by the sector regulator in establishing which operator should offer interconnection services on one hand and by the competition authority in establishing abuse of market power by an operator;
- Monopoly Pricing: Some competition regimes include rules, which restrict excessive or unjust prices. Such rules could also conflict with industry specific pricing rules established under utility sector or industry specific regulation.
- Restrictive Business Practices: Where we have one vertically integrated monopoly firm then there are no competitors, hence there is no one with which to enter into agreements or to behave in a manner that would restrict or lessen competition in the market for relevant services.
- Merger Control: Restriction on mergers between utilities and other firms, or restrictions on reintegration, are often provided for under industry or sector specific regulatory laws. In the new unbundled environment of infrastructure firms, common ownership

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for example of generation firms with transmission or generation with distribution firms is normally restricted under sector specific regulation.

The liberalization of the Indian economy in 1991 brought with it the need for some changes in the general regulatory environment. Before the opening up of the economy, economic activity was mainly dominated by the government and government-owned companies. In addition, most of the factors that determine the level of competition in the economy, such as entry, price, scale, Location, etc., were controlled. Telecommunication services were under the control of Government firms. Oil exploration, drilling, refining and marketing were a government monopoly, while the same pattern of government dominance was also apparent in other sectors Such as banking and electricity. This situation did not call for independent regulators as government was generally believed to be acting in the interest of the public.

1. INCEPTION OF SECTOR REGULATOR:

The pattern changed greatly, following a new wave characterized by liberalization, privatization and globalization from the early 1990s, which saw a changing picture in the manner in which economic activity was conducted. The Reserve Bank of India (RBI) was established on April 01, 1935, in line with the provisions of the Reserve Bank of India Act, 1934, its Board for Financial Supervision (BFS), responsible for overseeing the supervisory role of the Bank, was only constituted as a committee of the Central Board of Directors in November 1994 (RBI, not dated), in response to anticipated and actual private participation in line with the liberalization drive. In the electricity sector, the need for a regulator was only felt during the post-liberalization era, when it was felt the coexistence of divergent private and government interests in the electricity sector warranted the creation of an autonomous and independent regulator which was at arm's length from the government.

This saw the Central and state electricity regulatory commissions being set up. In some cases, the regulatory authorities were established well after the players had already begun operating under the liberalized environment. For example, the telecommunications regulator, the Telecom Regulatory Authority of India (TRAI), was set up in 1997 at a time when mobile services were already about two years in existence.

For instance, in Monnet Sugar Limited v. Union of India, (MANU/UP/0823/2005) the Allahabad High Court dealt with Industrial (Development and Regulation) Act, 1951 which prior to the process of liberalization was the epitome of license and permit controls. Indeed, economic reforms has led government to reinvent itself through doing less "rowing" and more "steering". For instance, when government though it fit that the department of telecom cannot

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be regulator as well player in the telecom sector it replaced the department of telecom with the Telecom Regulatory Authority of India.

In case of Reliance Airport Developers Pvt. Ltd. v. Airports Authority of India, [2006 (11) SCALE 208; MANU/SC/4912/2006], the Supreme Court of India endorsed the public private partnership approach to development.

Unlike the socialist hue that pervaded governance till 1991, India increasingly relies upon market rivalry for allocation as well as distribution of resources.

Also there is a realization that the textbook model of perfect competition does not exist in reality. One of the intervention strategies to address the market imperfections that may induce welfare-reducing monopolies is that of competition law and policy.

While new regulatory bodies were being set up to tackle various issues emanating from actual and anticipated private player behavior and other structural issues, the same concerns were also being felt about the competition arena. Prior to the early 1990s liberalization period, India had an operational competition law in the form of the Monopolies and Restrictive Trade Practices (MRTP) Act, 1969.

2. INCEPTION OF COMPETITION LAW:

The new paradigm of economic reforms took effect in the early 1990s, the MRTP Act was found to be hardly adequate as a tool and a law to regulate the market and ensure the promotion of competition. This saw a lengthy process towards competition reforms, eventually resulting in the extant Competition Act, 2002 (as amended). This saw the creation of two competition bodies, the Competition Commission of India (CCI) and the Competition Appellate Tribunal (CAT), to administer the competition law in India.

GENESIS OF OVERLAPPING JURIDICTION

The objective of putting in place a modern competition law, together with its implementing agencies to co-exist with the regulatory bodies, was on the observed differences in objectives between the two set of regulators. However, these institutions were established at different time periods and there are bound to be overlaps in their objectives. Some sector regulators were also given the responsibility to instill competition in the areas they were regulating, an objective which was later given to the competition authority, when eventually established.

Some sector laws which were enacted after the Competition Act, 2002, also bestow sector regulators some competition functions and these include the Airports Economic Regulatory Authority (AERA) Act, 2008; Petroleum and Natural Gas Regulatory Board (PNGRB) Act,

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2006and Electricity Act, 2003. As a result, a scenario where agencies with overlapping jurisdictions were co-existing was created.

CONFLICT BETWEEN SECTOR REGULATORS AND COMPETITION LAW

Section 18 of the Competition Act, 2002 states that:-

"It shall be the duty of the Competition Commission of India 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".

Undoubtedly, this mandate is extraordinarily wide. It is also agnostic about sector specific regulators. A similar language has been used in the preamble of the Act and is also covered in S. 18. Specific provisions contained within the legislation demonstrate the probable tension. Section 60 of the Competition Act, 2002 is the usual non obstante provision asserting the supremacy of competition legislation within the domain of competition enforcement. However, Section 62 of the Competition Act, 2002 encouragingly declares that competition legislation ought to work along with other enactments. Both sections 60 and 62, ironically, are couched in mandatory language. If sections 18, 60 and 62 were not sufficient to cause enough mystery, section 21 of the Competition Act, 2002, suggests that in any proceedings before a statutory authority, if such a need arises, the statutory authority may make a reference to competition authority. Incidentally, upon reference, the opinion of the competition authority is not binding upon the statutory authority. The competition authority is bound to deliver its opinion to the statutory authority within a stipulated time period of two months.

The essence of the interface between competition authority and sector specific regulators in India lies on the four limbs of sections 18, 21, 60 and 62 of the Competition Act, 2002. Competition authority could have potential interface with the jurisdiction of sector-specific regulators viz. Telecom Regulatory Authority of India (TRAI), Central Electricity Regulatory Commission (CERC), and Petroleum and Natural Gas Regulatory Board (PNGRB). The Competition authority unites the power of private enforcement with the claim of damages and hence can ensure healthy consumer welfare.

1.TYPES OF REGULATION AND COMPETITION:

Competition law seeks to promote efficient allocation and utilization of resources, which are usually scarce in developing countries. A good competition law lowers the entry barriers in the market and makes the environment conducive to promoting entrepreneurship.

Regulations, on the other hand, are public constraints on market behavior or structure. They

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usually refer to a diverse set of instruments by which governments set requirements on businesses and citizens. Regulations can be categorized as under:

(i) Economic Regulations – Those which intervene in market decisions such as pricing, competition and entry/exit.

(ii) Technical Regulations: Those which regulates the technical aspects which are distinct and unique to the sector.

(iii) Social regulations – Those which protect public interest such as health, safety, environment.

(iv) Administrative regulations – Administrative formalities through which government collects information and intervenes in individual economic decisions.

The objective of a sector regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anticompetitive behavior may not be high on its agenda or the laws governing the regulator may be silent on this aspect. It is not uncommon for sector regulators to be more closely aligned with the interest of the firms being regulated, which is also known as "regulatory capture. Besides, a sector regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sector regulators. In other words, there is a possibility of the lack of consistency across sector.

SECTOR SPECIFIC REGULATOR

1. Tells businesses "what to do" and "how to price products".
2. Focuses upon specific sectors of the economy.
3. Ex ante-addresses behavioral issues before problem arises.
4. Focus upon orderly development of a sector that would presumably trickle down in a sector ensuring consumer welfare.
5. Sectoral regulators are usually more appropriate for access and price issues such as changing the structure of the market, reducing barriers to entry and opening up the market to effective competition.

COMPETITION AUTHORITY

1. Tells business "what not to do"
2. Focuses upon the entire economy and functioning of the market.
3. Ex post-addresses behavioral issues after problem arises.

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4. Focus upon consumer welfare and unfair transfer of wealth from consumers to firms with market power.
5. Competition legislation is usually more appropriate for affecting conduct and maintaining competition.

Therefore, it is evident that the role of sector specific regulators is overlapping but quite distinct. Unlike the sector specific regulators, competition authority takes a holistic view of the economy and addresses behavioral issues after the problem arises. The competition authority also addresses the unfair transfer of wealth that may take place between the consumers and firms wielding market power.

The conflicts between CCI and the sector regulators could be caused by:

1. Legislative ambiguity or jurisdictional overlap or legislative omission.
2. Interpretational bias involved could further aggravate the conflicts.
3. Conflicts between two may be generated by the market players and legal arbitrators for obvious reasons. Conflicts are bound to hurt consumers and the uncertainties that go with them can increase risk of investment.
4. The tangled understanding of framers of the legislation is evident both in recent legislations as well as past ones.

2. INTERNATIONAL EXPERIENCE

NAMIBIA

Competition regulation in Namibia is governed by the Namibian Competition Act, (Act No. 2 of 2003). The Act establishes the Namibia Competition Commission (NaCC) which has jurisdiction to deal with all matter related to anti competitive activities.

Financial sector

The Central Reserve Bank of Namibia, also referred to as the Bank of Namibia (BoN) is vested with the power to supervise and regulate banking financial institutions through the BoN Act, (Act No. 15 of 1997) and the Banking Institutions Act (BIA), Act No. 2 of 1998.

Section 54 of the Banking Institutions Act states that:

(1) A banking institution shall not, without the prior written approval of the Bank –

(a) Enter into a merger or consolidation;

(b) Transfer, or otherwise dispose of, the whole or part of its property, whether situated in or Outside Namibia, other than in the ordinary course of business;

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Telecom sector

The Communications Regulatory Authority of Namibia (CRAN) is the body responsible for regulating the communication sector which includes telecommunications services and networks, broadcasting, postal services and the use and allocation of radio spectrum. The authority was established by an Act of Parliament; the Communications Act, (Act No. 8 of 2009). Amongst its many functions, it is tasked with the responsibility of establishing the general framework for the opening of the telecommunication sector in Namibia to competition, to provide for the regulation and control of communications activities by an independent regulatory authority.

Section 2 of the Communications Act states that the objectives of the Act are:

(a) To establish the general framework governing the opening of competition of the telecommunication sector in Namibia to competition;
(b) To provide for the regulation and control of communications activities by an independent Regulatory authority;
(c) To ensure competition and consumer protection in the telecommunications sector

Namibia ports authority:

Namibia port was established in terms of the Namibian Ports Authority Act and is responsible for operating and managing the country's ports, namely; the Port of Luderitz and the Port of Walvis Bay. The authority is tasked with the duties of managing the port facilities in order to cater for current trade needs and develop the ports for future demands as well as contribute to the competitiveness of the SADC region's trade through the efficient, reliable and cost-effective supply of port services.

Both CRAN and BoN have clear overlaps with the Commission in terms of competition issues. The Namibia port and the NAMFISA Acts do not specify any clear competition mandate for the two institutions. Even in that case, situations can arise which create overlaps between the agencies' functions and make it difficult for them to carry out their respective mandates.

EUROPEAN UNION

European Commission is responsible for enforcing EC competition law. Article4, chapter II of the Regulation1/2003 provides for the power of the commission for the purpose of applying Article 81 and 82 of the treaty establishing the European Community. Where the Commission, acting on a complaint or in its own initiatives, find that there is an infringement of Article or

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of Article of the treaty, it may by decision require the undertaking and association of undertaking concern to bring such infringement to an end.

United Kingdom sectoral Regulators such as

(a) Of gem-in the energy markets;
(b) Of wat-in the water industry;
(c) Of com-in the communications sector;
(d) ORR-for railway services;
(e) CAA-in relation to air traffic services; and
(f) OFREG-for gas and electricity in Northern Ireland, have played a pivotal role in promoting or facilitating competition within their sectors, which has been achieved in a complementary manner to the Competition regulator/principal Authority, within their sectors.

As in case of Electricity Act where Sections 60 and 66 give ample powers to the Electricity regulatory Commission to deal with Anti-competitive behavior of the licenses, these regulators have all the powers of the OFT to apply and enforce the Act to deal with anti-competitive agreements or abuse of market dominance relating to relevant activities in their designated sector. The OFT alone, however, has powers to issue guidance on penalties and to make and amend the Procedural Rules. The Competition Act, 1998 (Concurrency) Regulations 2000 have been made for the purpose of coordinating the exercise of the concurrent powers and the procedures to be followed.

In USA,

U.S. antitrust laws are enforced by both

1. FTC's Bureau of Competition and
2. Antitrust Division of the Department of Justice.

The Sherman Act is the nation‘s oldest antitrust law. Passed in 1890, it makes it illegal for competitors to make agreements with each other that would limit competition. So, for example, they can‘t agree to set a price for a product—that‘d be price fixing.

The Clayton Act was passed in 1914. With the Sherman Act in place, and trusts being broken up, business practices in America were changing. But some companies discovered merging as a way to control prices and production (instead of forming trusts, competitors united into a single company. The Clayton Act helps protect American consumers by stopping mergers or

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acquisitions that are likely to stifle competition.

With the Federal Trade Commission (FTC) Act (1914), Congress created a new federal agency to watch out for unfair business practices—and gave the Federal Trade Commission the authority to investigate and stop unfair methods of competition and deceptive practices. Today, the Federal Trade Commission‘s (FTC‘s) Bureau of Competition and the Department of justice‘s Antitrust Division enforce these three core federal antitrust laws.

The department of Justice and Federal Trade Commission often advice industry-specific regulators, on matters that may affect competition. The US antitrust agencies, like any private person may file comments offering their competition expertise in regulatory proceedings before independent agencies.

In Australia

Australia has a general competition law, the Trade Practices Act 1974 (TP Act) that applies across all industries and is administered by a single competition authority, the Australian Competition and Consumer Commission (ACCC). The Australian Competition Tribunal is an appellate body able to review certain adjudication decisions made by the ACCC. The ACCC and the National Competition Council (NCC) also perform several important economic regulatory functions. For example, the ACCC has various responsibilities in relation to the terms and conditions of access to certain essential infrastructure facilities such as telecommunications, gas and electricity and in monitoring prices in industries where competition is weak. It also has a quality of service monitoring role in respect of airports. These responsibilities reflect a government view that there are advantages in placing these economic regulatory functions with the general competition agency.

Australian Competition Authority has a number of key economic regulatory functions. With the division of labor between various regulators, there is potential for some degree of overlap of functions between the Australian Competition Authority which administers competition regulation across all the sectors of economy and those technical and economic regulators that operate within specific industries or within certain States across a number of industries. For this reason, a number of steps have been taken to minimize uncertainty regarding the jurisdiction of particular regulators and avoid confusion for consumers and the business community.

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Similar options can be looked into taking into consideration the international experience as to how the interaction between sector and competition regulators is managed through different institutional approaches. The sector regulators must play a lead role in a complementary manner and should not abdicate their duties and leave the competition issues to be dealt with competition authority particularly in the high technical sectors. Both sector regulators and the competition regulators have to mutually respect each other and must have all options of communication open in true spirit of co-operation and they must complement each other to effectively deal with issues and help in building a robust and open economy.

RELATIONSHIP BETWEEN SECTOR REGULATORS AND COMPETITION LAW

Regulation is a very general word covering many different types of public constraints on market behavior or structures.

The enforcement of competition law vary from sector to sector there are some sector where sector regulation prevent competition law from being enforced and on the other hand there some sector where competition law is enforced under sector regulator.

The goals of sector regulations differ considerably from sector to sector :-

1. In telecommunication, electricity, gas, and rail transport, one goal of sector regulation is usually to open these sectors to competition. In other sectors, such as professional services, health services or environmental waste services, the goal of regulation is often to limit competition because of some perceived market failure.
2. Some sectors the goal of the sector regulation is, at least in principle, not to promote or to restrain competition but rather to pursue some other social goal. For example protect consumer from fraud.

There are different types of relationship exit between sector regulator and Competition law. They are:-

COMPLEMENTARY RELATIONSHIP

The competition law cannot fully deliver all its benefits and there is a need to monitor the behavior of the incumbent operator. There is a need to define and control the access price to the facility to allow market entry. Furthermore, it is sometimes argued that monitoring the timing of entry in the industry is also an important factor to ensure that entrants do not fail during the first years following their entry. Thus it is argued that there is a specific need to monitor the sector. This type of regulation is generally not inconsistent with competition law. The enforcement of competition law may help ensure that the incumbent does not abuse its market power by engaging in anticompetitive strategies (such as predatory pricing or cross

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subsidization) when providing the services open to competition. The Canada illustrate the potential complementarily between sector regulations in sectors newly opened to competition and general competition law by stating: "The purpose of Canadian competition law is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy and achieve other objectives. Sector regulation in Canada often complements this goal. This has particularly been the case in network industries such as telecommunications and energy where regulation of access to monopoly or near monopoly essential facilities has been instrumental in promoting open and effective competition in related markets. In certain sectors there has been a high degree of cooperation between sector regulators and Canadian competition authorities in detecting and preventing competition abuse".

1. Another example of complementarily relationship is: Hughes Echostar Merger case in the United States. The proposed merger between Hughes and Echostar in the US in 2001 concerned the concentration of the two most significant nationwide direct broadcast satellite (DBS) companies offering multichannel video programming distribution (MVPD) services (also known as Pay TV) in the United States. It required approval from the Federal Communications Commission (FCC) for the transfer of licenses for DBS service and was subject to review by the Antitrust Division of the Department of Justice (DOJ). The DOJ and FCC had informal meetings about the transaction, concerns arising from the merger, and the timing of the investigations. Although the two agencies employ different standards, both agencies identified similar concerns with the proposed merger, and each attempted to complete its review process as quickly as possible.
2. In most countries, competition law applies to the insurance sector, the nature of the business of insurance is such that in certain cases, co-operation between competing insurance companies can yield efficiency benefits. Examples are cooperation for the purposes of sharing information on the magnitude of risks, and cooperation for the sharing of large risks. These practices, to the extent that they promote competition and are beneficial to insurance policyholders and insured.

CONFLICTING RELATIONSHIP:

• Regulated Conduct Defense (RCD):-

In this Activities that are regulated are not directly subject to the Competition Act due to the "Regulated Conduct Defense" under Canadian competition law. The RCD protects conduct

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which would otherwise be subject to the Competition Act, if the conduct is specifically authorized by valid provincial or federal legislation. RCD is an interpretive tool developed by the courts to resolve apparent conflicts between two different laws. The Bureau's approach to the RCD is to determine where the Competition Act and a statutory regulatory regime are in conflict. The RCD applies, and the Competition Act becomes inoperative where there is clear operational conflict between the regulatory regime and the Competition Act, such that obedience to the regime means contravention of the Act. An example of such situation can seen in 1999 when the Fleet Financial/Bank Boston merger was examined, the DoJ and the FRB staff's reached different conclusions on the remedy needed to address competitive concerns and that the FRB did not require divestitures in a limited number of markets favored by the DoJ.

• Self regulation: -

There are cases in which the goal of regulation is to limit (or even eliminate) competition, possibly because of a perceived market failure. In France, lawyers, architects, public notaries, doctors and surveyors have legally binding self-regulations enforced by their respective professional associations. These self regulations limit competition by restricting entry, freedom of establishment, advertising and, in certain cases, price competition. The official justification for these restrictions on competition is usually that consumers would be unable to exercise their choice because of lack of information, all the more so that consulting such professionals is usually not an often repeated experience, and therefore consumers need to be protected against unfair practices.

These type of relationship are seen in the European Union, Mexico, Norway, Sweden, the United Kingdom and the United States.

RESOLUTION OF CONFLICT

Resolving or Managing the Problem

International experience shows that the interaction between sector and competition regulators can be managed through institutional approaches. Primacy can be given either to Sectoral regulatory law or to competition law. Another approach could be a concurrent one, where both competition law and industry or sector regulation law possess equal jurisdiction, through consultative approach.

Within the three institutional models (sector regulation, competition law, concurrent) there are

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five approaches in practice governing the regulatory interface:

1. There is no economic regulation in one or more sectors; instead the competition agency applies general competition rules to accomplish some or the entire objective commonly associated with economic regulation. In the initial case New Zealand used the competition agency as the Utility Regulator. General Legislation, i.e. the Competition Act states that practices which lesson competition or abuse of dominant position is prohibited. New Zealand has no separate sector legislation.
2. Sector or industry regulators are given primacy to deal with competition issues in the regulated industry. They are the principal enforcers of competition laws, if any, applying to their sectors.
3. The economy wide competition law enforced through the competition authorities takes primacy over industry or sector regulatory law. Competition agencies are also the principal economic regulators.
4. Sector or industry regulators and competition authorities are given concurrent jurisdiction to enforce competition rules in the regulated sectors.
5. A general mandate driven division of labor, i.e. competition laws are exclusively applied by the competition agencies and regulation exclusively by technical and economic regulators.

International Experience:

A look at international experiences would reveal that countries have adopted different strategies to try and deal with the issue of overlaps between competition authorities and sector regulators. Some have opted for an exclusive jurisdiction approach, where the legislative provisions make it clear that either the competition authority or the sector regulator has jurisdiction and not both. However, the overlaps between the regulated issues might pose some challenges in the implementation of such an exclusive jurisdiction framework. Merger regulation by the competition authority, for example, may warrant structural remedies, thereby encroaching on the functions of sector regulators. The standards imposed by sector regulators may also result in exclusive licensing and marketing, which holders can easily abuse, which a competition authority may see some reason in challenging. It can also be established that some countries have opted for a concurrent jurisdiction approach, having noted problems brought about by an exclusive jurisdiction approach.

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a. Concurrent jurisdiction would give both competition authorities and sector regulators mandates, with the success of such an approach being hinged on the establishment of a working framework between the two regulators to harness their respective expertise.
b. Co-operation and coordination would be called for, which can range from informal cooperation to formalized working arrangements between the two authorities. Other countries have also opted for a cooperation approach, where the sector regulator and the competition authority have to cooperate in dealing with cases of common interest, though the competition authority would still have the final say on competition issues. There are countries with competition laws giving an exclusive jurisdiction approach, which has left some grey areas, as conflicts often arise. However, there are a few countries that can be used as examples on concurrent jurisdiction approach and cooperation approach.

1. Concurrent Jurisdiction

□□The UK

The Competition Act, 1998, gives the Office of Fair Trading (OFT) and the sector regulators concurrent powers to enforce the Chapter I and Chapter II prohibitions of the Act (dealing with anti-competitive agreements and the abuse of dominance respectively). Among those regulators which were bestowed the power to enforce the Competition Act in their sectors include the following:

1. OFGEM – Office of Gas and Electricity Markets;
2. OFWAT – Office of Water Services;
3. OFCOM – Office of Communications (Telecommunications and Broadcasting);
4. ORR – Office of Rail Regulation;
5. CAA – Civil Aviation Authority; and
6. OFREG – Office for the Regulation of Electricity and Gas (Northern Ireland).

This thus implies that the regulators are free to decide whether to use the Competition Act powers against anticompetitive behavior or to enforce the sector specific provisions. Necessary provisions were also put under the Competition Act to accommodate concurrent powers of sector regulators. Under Sections 54 and Schedule 10 of the Act, the necessary tools for the competition authority to engage the sector regulators are provided. In addition, the Competition Act (Concurrency) Regulation 2004 gives guidelines on how concurrency can be determined. Among the issues covered by the guidelines are the following:

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1. The sector regulators and OFT are both classified as 'competent persons' to handle competition issues.
2. The sector regulators and OFT have to decide which is more competent to handle a matter once it arises, using procedure that is outlined under the regulation.
3. OFT and the regulators are obliged to circulate information which would be used for the purposes of determining which of them is more competent to handle the case.
4. The procedure that has to be followed if agreements are not being reached among the parties is also provided for.

In the event of a dispute on jurisdiction, the matter will be referred to the Secretary of State for arbitration.

The Netherlands:

A concurrent system was also adopted in the Netherlands, in the form of a Cooperation Protocol between the Netherlands Competition Authority (NCA) and the Commission of the Independent Post and Telecommunications Authority (OPTA). The protocol contained a series of agreements on the nature of cooperation between OPTA and the NCA in exercising their powers to strengthen their enforcement effectiveness. It was intended to structure this cooperation and to facilitate OPTA and the NCA to pursue the following functions:

1. Coordinate the exercise of concurrent powers when taking decisions, in order to prevent forum shopping;
2. Apply the same interpretations of terms used in the law on competition, post and telecommunications;
3. Establish consistent policy rules for cases arising; and
4. Provide each other with information on the abuse of dominant positions and the regulatory control of mergers and on the regulation of the post and telecommunications sectors, which may be of importance to each other's operations.

The protocol was also a result of the provisions in the respective laws, which provided for such cooperation. Article 18.3, Clause 4 of the Telecommunications Act, 1998, and Article 15, Clause 2 of the Post Act, require for an agreement to be reached between OPTA and the NMa on the handling of matters of mutual interest. Article 24 of the Independent Post and Telecommunications Authority Act and Article 91 of the Competition Act, which request the authority of OPTA and the NMa to exchange information, were also motivational in this framework.

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NAMIBIA

Section 67 of the Namibian Competition Act deals with issues of concurrent jurisdiction and relationships with other regulatory authorities. It states that:

(1) If a regulatory authority, in terms of any public regulation, has jurisdiction of any conduct regulated in terms of Chapter 3 or 4 within a particular sector, the commission and that authority –

(a) Must negotiate an agreement to co-ordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector and to ensure the consistent application of the principles of this Act; and

(b) In respect of a particular matter within their jurisdictions, may exercise jurisdiction by way of such an agreement.

It further states that:

(2) In addition to the matters contemplated in paragraph (a) of subsection (1), an agreement in terms of that subsection must –

(a) Identify and establish procedures for the management of areas of concurrent jurisdiction;

(b) Promote co-operation between the regulatory authority and the Commission; and

(c) Provide for the exchange of information and the protection of confidential information.

The experience with Telecommunications: CCSA vs. Telkom SA Ltd

The case between the Competition Commission of South Africa and Telkom South Africa Ltd provides a perfect example of cases of concurrent jurisdiction between competition authorities and sector regulators. The case dealt with the concurrent jurisdiction of the Competition Commission and the Independent Communications Association of South Africa (ICASA). The Commission investigated a complaint against Telkom for an alleged contravention of the Competition Act. Telkom was of the opinion that neither the Commission nor the Tribunal had either the power or the competence to adjudicate the conduct of Telkom. Telkom, which was established by the Post Office Act, Act 44 of 1958, had the exclusive power to conduct the telecommunications service. Telkom was however obliged under the Post Office Act to lease the facilities to a person providing a telecommunication service. Should Telkom refuse to grant such a lease, ICASA was entitled and tasked with the adjudication of the dispute. There were four complaints lodged against Telkom with the Commission and all related to the failure by Telkom to grant a license of its facilities to the prospective licensees. The issue of Jurisdiction

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was raised when Telkom sought to rely on the defense that the four complaints laid against Telkom related to conduct which it was by the Telecommunications Act or alternatively by ICASA.

Section 3 of the Competition Act provides that the Act "shall apply to all economic activity within, or having an effect within, the Republic". Originally a regulatory body such as ICASA would have had jurisdiction, since section 3(1) (d) which has now been repealed provided that the Act did not apply to acts which were subject to or authorized by pubic regulation. The acts of Telkom were authorized by the Telecommunications Act, however this section has been repealed and the Act has jurisdiction granted to it by Section 3 of the Competition Act. The Supreme Court of Appeal affirmed that the Competition Act applies to all economic activity within or having effect within South Africa and that ICASA cannot and does not have exclusive jurisdiction with regard to Telkom and went further to hold that the Competition authorities are the appropriate authorities to deal with the complaint.

2.Cooperation Approach

□□Jamaica

The cooperation approach for Jamaica can be inferred from the regulation of competition issues in the telecommunications sector. The Office of Utilities Regulation (OUR) is the sector regulator, responsible for the implementation of the Telecommunications Act, 2000, while the Fair Trading Commission (FTC) is the competition authority, drawing its mandate from the Fair Competition Act, 1993.

The Telecommunications Act gives OUR an overlapping jurisdiction with the FTC with respect to some competition issues in the sector, as promoting fair and open competition is among its key objectives. However, OUR is obliged to refer and consult with the FTC before making decisions on issues such as defining dominance in the voice telephony market and before prescribing corrective measures. The consultation can be through written submissions, formal meetings between the two organizations (at the level of staff and sometimes management) or through joint working groups.

□□Singapore

The basis for cooperation between the Competition Commission of Singapore (CCS) and sector regulators on competition matters is outlined under Section 87 of the Competition Act, 2004, of Singapore. The Section provides that CCS may enter into cooperation agreements with any regulatory authority for the purposes of facilitating co-operation between the Commission and

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the regulatory authority in the performance of their respective functions in so far as they relate to issues of competition between undertakings. The identified rationale was to avoid duplication of activities by the Commission and the regulatory authority in pursuing their mandate, particularly in the determination of the effects on competition of any act done or proposed to be done, so as to ensure consistency between decisions and steps taken by the Commission and the regulatory authority.

In 2005, the Info-communications Development Authority of Singapore (IDA), the telecommunications regulator in Singapore, came up with its 'Code of Practice for Competition in the Provision of Telecommunications Services in Singapore'. The Code outlines cooperation guidelines on how IDA will handle a range of competition matters, including issues of dominance and its abuse which also fall under the mandate of CCS. Under its 'Guidelines on the Major Provisions', CCS undertakes that, on cross-sector competition cases, it would work out with the relevant sector regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator to prevent double jeopardy and minimize regulatory burden in dealing with the case.

INDIA:

In India this type of approach is provided under Competition Act,2002 are:-

Sec.21 Reference by Statutory: - 1. Where in the course of a proceeding before any statutory authority an issue is raised by any party that any decision which such statutory authority has taken or proposes to take, is or would be, contrary to any of the provision of this Act, then such statuary authority may make a reference in respect of such issue to the commission.

Sec.21A Reference by Commission: - Where in the course of a proceeding before the commission an issue is raised by an party that any decision which the commission has taken during such proceeding or proposes to take, is or would contrary to any provision of this Act whose implementation is entrusted to a statutory authority, then the commission may make a reference in respect of such issue to the statutory authority.

Sec.49 Competition Advocacy: - The Central Government may in Formulating a policy in competition or any matter and State Government may in formulating a policy on competition make a reference to the commission for it opinion on possible effect of such policy on competition and on receipt of such a reference gives its opinion to the Central Government and State Government.

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INDIAN PERSPECTIVE- A LESSON FOR INDIA:

As seen in International experience, countries over world have adopted approaches to address regulatory overlap conflicts to fit their varied realities. India needs to do the same in terms of tailoring the best approach that suits its needs while taking helpful lessons from global best practices in this area. Two such approaches are briefly discussed below

a. Clarifying Jurisdictional Roles

Competition agencies are best suited to examine behavioral issues while sectoral regulators are better equipped for structural matters. Therefore, giving primacy to one over the other as some jurisdictions have done is not sound judgment. All sector regulators have the duty to promote competition in their respective sectors as drafted in their preamble. However, this is not to be interpreted in a manner that they are also required to check anticompetitive practices in their sector and preclude the CCI from performing its legitimate duties. This was argued recently in the clash between PNGRB and CCI. The CCI has been set up with a specific mandate and is best suited to look into matters concerning competition such as mergers, abuse of dominance etc. that are detrimental to economic democracy and consumer interests.

Furthermore, the preamble and section 18 of the Competition Act entrusts the CCI with the duty of sustaining competition in whole economy of India. Notwithstanding this reasoning, regulators such as RBI and Department of Telecommunications (DoT), which oversees mergers in the telecom sector as against the regulator: TRAI) have been pushing for exemptions from the CCI over mergers in their domain.

Furthermore, a discrepancy is clearly visible in some of the statutes that have been drafted with a clear legislative intent to vest consumer related issues within the jurisdiction of the Consumer Protection Act but do not have the same treatment to the Competition Act or its predecessor MRTP Act. For example, the Electricity Act, while giving overriding powers to the Consumer Protection Act in matters of conflicts between the two statutes under Section 173, has kept core competition issues of market dominance which also serves to protect consumer welfare, within the ambit of the sector regulator under Section 60 of the Electricity Act. We have already seen how the statutory application has varied in interpretation.

On the other hand, a good statutory application of this principle can be witnessed in the Airport Economic Regulatory Authority (AERA) Act which has not discriminated between the Consumer Protection Act and the Competition Act in granting exemptions from the purview of the jurisdiction of the AERA Act.

Drawing inspiration from countries such as South Africa and Brazil, India needs to make

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attempts at attacking the roots of the overlap conflict problem by addressing the existing legislative ambiguities.

b. Designing a Mandatory Cooperative Framework

The importance of coordination between the competition authorities and sectoral regulators has been highlighted by a Working Group on Competition Policy established by the Planning Commission of the Government of India in 2006 and its recommendations were inserted in the Policy Document on the Five Year Plan: Inclusive Growth under Chapter 11: Consumer Protection and Competition Policy. This was adopted by the National Development Council in December, 2007. Para: 11.33 recommends:

"The interface between the Competition Commission vis-à-vis sectoral regulators is critical. The basic premise to be recognized is that sectoral regulators have domain expertise in their relevant sectors. The Competition Commission, established under the Competition Act, 2002 on the other hand, has been constituted with a broad mandate to deal with competition for which certain very specific parameters are laid down under the Act. A formal mechanism for coordination between the Competition Commission and the sectoral regulators is, therefore, of key importance. Coordination between sectoral regulators and Competition Commission should be made mandatory through suitable provisions in the Competition Act, 2002 and sectoral laws".

Emerging from the discussions held in this paper, a concurrent framework is probably the most desirable approach for India to follow. Such a framework should however provide for mandatory mutual consultations on overlapping issues. Currently India follows a cooperative regime between the two regulators although this is not mandatory in law. Sections 21 and 21A and sec.49 of the Competition Act have provided for such cooperation that has been made mutual after an amendment to the Act in 2007. However this is not sufficient as the outcomes of such consultations are not binding. The Ministry of Corporate Affairs recently set up a committee last year to draft a National Competition Policy for India and allied matters.

Accordingly, in the proposal for amendments in the Competition Act, 2002 the word "may" in Section 21 of the Act which reads in part: any statutory authority may make a reference to the CCI is to be substituted with the word "shall" thus making such consultation mandatory. However, the proposed amendments to the Act and the Policy are yet to be adopted.

There are three broad options available for dividing the task: (a) The sector regulator supplants the competition authority, (b) the competition authority replaces the sector regulator, and (c) The competition authority and sector regulator coexist. After considering the pros and cons of

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options (a) and (b), this section posits that, though sector regulators may coexist with the competition authority in India, the Commission ought to trump sector-specific regulators.

A. Sector Regulators Supplant the Competition Commission

The notion that a sector-specific regulator ought to take primacy over a competition authority appears very attractive at first blush. The sector specific regulator is closest to the sector and would naturally be a repository of pertinent information available within that sector. In other words, it would be more in tune with the needs of the businesses within its sector.

However, when the institutional setup grants a sector-specific regulator jurisdiction over both sector regulation and competition matters arising within the sector, conflicts may arise between the objective of protecting competition and other goals such as, for instance, the orderly development of a specific market. Additionally, sector regulators may shy away from enforcing competition law in order to reduce the potential for any conflict with regulated entities.

B. The Competition Commission Replaces Sector Regulators

Another option is to make the Commission responsible for both sector specific regulation as well as overarching competition enforcement. This approach is advantageous, as it reduces the multiplicity of regulators and accumulates sector expertise. Indeed, Australia has used this approach to create an economy-wide economic regulator that integrates technical and competition regulation. However, experts have expressed their concern that this scheme may lead to a complex bureaucratic structure. There is also a lingering danger that the regulator may prefer using direct regulatory power over indirect competition enforcement powers.

C. Co-existence of the Competition Commission and Sector Regulators

Institution-building is a complex, time-consuming exercise. At a pragmatic level, sector-specific regulators are here to stay, as it would be practically impossible to abolish the authorities that have already come into existence.

Further, the experiences of other countries are not of much assistance. There is wide diversity in the models available. Australia, on one hand, privileges its competition authority, while the UK, on the other hand, grants explicit concurrent powers to sector regulators. Empirically, there is no final, definitive conclusion on which regulatory body should be favored. Indeed, even in the UK, despite concurrent competition powers exercised by sector regulators, no infringement decisions had been made until September 2005. The optimal, sui generis model must be rooted in the legal context. To be sure, both sector-specific regulators and competition authorities have

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unique core competencies to offer. Nevertheless, there are pragmatic, descriptive, and normative reasons why the Commission ought to trump sector regulators in India. Descriptively, the compelling justification for the primacy of the Commission is that, unlike legislation governing sector specific regulators, competition legislation grants a private right of action and provides for damages. The twin rubrics of private enforcement and damages ensure a qualitatively higher standard of consumer welfare that is unavailable under the legislative framework of any sector-specific regulator. Normatively, since enforcement of competition law is a sophisticated, Specialized field, leaving it in the hands of the Commission would reduce transaction costs and enhance efficiency.

CONCLUSION & SUGGESTION:

There is a requirement is to create a system to ensure cooperation between CCI and other sector regulators. Both CCI and sector regulator have their areas of expertise and both cannot replace each other. It may also be noted that the objectives of CCI and sector regulators are complementary. While sectoral regulators have socio economic benefits as their objective, CCI's objectives are to promote and sustain competition in the market in order to protect the interest of the consumer.

Cooperation will make sure that the activities of the regulators is well coordinated, thereby ensuring best use of their respective resources. It may also happen that conflicts may arise due to different prioritization of their respective goals by the CCI and sector regulators. Even the different method used for the resolution of the same problem may cause conflict.

Conflict can be sorted out through consultation. It is for this reason that Competition Act provides for consultation between CCI and other statutory authorities i.e. sector regulators here, by way of reference. Government may also consider creating 'regulator's forum' (as has been done in some other countries for example Australia) which would allow CCI and sector Authorities to work in close cooperation and coordinate their action. This would also allow the regulators to achieve policy coherence while simultaneously getting sensitized to competition law.

It cannot be denied that there is a requirement of competition in all the industries in order to improve on their efficiencies and benefit the consumer. Temporary exceptions for certain sectors may be acceptable because certain sector in India may not be ready to face open competition. Therefore, a formal mechanism for coordination between CCI and the sectoral regulators is of key importance.

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