Interface between Competition & Sector Regulators
Resolution of The Clash of Regulators

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Ishita Gupta
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**Executive Summary**

The controversy regarding conflict of jurisdiction between Competition Commission of India (CCI) and other sectoral regulators like Reserve Bank of India (RBI) and Telecom Regulatory Authority of India (TRAI) has been an issue of debate and discussions. The competition commission is an institution which has the power to bring the true benefits of market economy to consumers in India. However, there is no reason why the sectoral regulators cannot have concurrent jurisdiction with CCI if the specifics of their jurisdiction is clearly defined and are mutually respected by the regulators. The areas of jurisdiction of the commissions and the regulators are broadly different with only slight overlaps. The nub 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.

As far as overlapping of jurisdictions is concerned, the requirement is to create systems to ensure cooperation between CCI and other Sectoral Regulators. Both CCI and the Sectoral Regulators have their areas of expertise and both cannot replace each other. It may also be noted that the objectives of CCI and sectoral regulators are complementary. While sectoral regulators have socio-economic benefits as their objective, CCI’s objective is 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. Conflicts 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. sectoral regulators here, by way of reference. Creation of a ‘regulator’s forum’ was considered, which would allow CCI and sectoral authorities to work in close cooperation and coordinate their action. This would also allow the regulators to achieve policy coherence while simultaneously getting sensitised to competition law. A few recommendations which may be considered by the Commission are as follows:

**Recommendation 1** - On the lines of CCG of the Competition Commission of Pakistan, a Regulator’s Consultative Group may be made, which will regularize the exchange of information and promote healthy interaction between the commission and sector regulators. The recently formed Eminent Persons Group is a welcome move and on the same lines be considered this competition-mandated consultative group consisting of sector regulators, field experts and commission officers. The meetings of the group may be conducted quarterly. The Agenda for each meeting may be decided well in advance, keeping in mind the cases coming before the various regulators. These meetings may be conducted across the country, hosted by various regulators which will attract media attention and promote the efforts made by the Group. The RCG will enhance the efficiency of all regulators as the best expertise from all fields will be gathered in a common pool of knowledge. Also, the forum of regulators must be re-structured to promote competition mandate & increase effective participation.

**Recommendation 2** – Commission may consider drafting The Concurrency Regulations on the lines of the Concurrency Regulations, 2004 in UK, setting out rules on how the concurrency of sector regulators and CCI are to work in practice.
Recommendation 3 – Commission may consider constituting a Concurrency Working Group which would facilitate a consistent approach by the CCI and the sector regulators in the exercise of their competition powers and provide a vehicle for discussions on technical matters of common interest.

Recommendation 4 - Competition and Markets Authority (CMA) to act as a central resource for the sectoral regulators, changing legislation to permit joint investigations. CMA could be accorded a bigger role in the regulated sectors, for example, by enabling the CMA to take over an ongoing case when it considers that it is better placed to conduct the investigation or requiring the sectoral regulators to consult or inform the CMA before taking a decision on whether to proceed on a case.

Recommendation 5 – There could be frequent information exchanges between the regulators and CCI. Members of the regulators could be appointed as associate members in the Commission and vice versa to bridge the knowledge & communication gap that exist between the authorities, based on the Australian model. The importance of forum of regulators must be emphasized and used as an opportunity to exchange expert opinion & technical knowledge.

Recommendation 6 – Commission may like to consider inserting a provision for Mandatory Consultation clauses in the statute, where specific sectors are involved. It is important that like other jurisdictions, India also follows the reference mechanism in letter & spirit by ensuring that the consultation of sector experts is put to constructive use in a case on hand.

Recommendation 7 – Empowering CCI to enter into Memorandums of Understanding with sector regulators, clarifying their respective roles and jurisdictions.

Recommendation 8 – CCI may be given the right to participate before the proceedings of the other regulators. There should be compulsory inclusion of all sector experts including competition experts in deciding a matter. Government may consider establishing a common Appellate Court for the regulators & CCI on the lines of UK competition model.

Recommendation 9 - Authorize competition agency to veto actions of sector regulators over competition related mandates.

Recommendation 10 – As I understand, informal exchange of views, inclusion of industry experts & contact persons have been in vogue. Such constructive interaction should be increased and the process as a whole should be catalysed. Joint working groups/ joint investigations maybe considered in order to provide a holistic view on the case. Joint guidelines & statutory definition of jurisdictional boundaries could also limit the recent clashes between the regulators.
**Introduction**

Following a structural adjustment program in 1991, India embarked on the path of market liberalization, and consequently it increasingly relies upon market rivalry as the organizing principle for economic activity. The seminal role of markets in ensuring allocation of resources has generally been understood to be efficient. Nevertheless, considering that markets are imperfect and many a time prone to failures, the role of competition law and policy can hardly be overemphasized. The Indian competition law framework, through Competition Act, 2002, envisages the Competition Commission of India as a competition authority. The aftermath of a securities scam in 1992 has seen several sector specific regulators emerging on the Indian regulatory horizon. Ostensibly, the multitude of regulators, many a time, may regulate similar aspects of a corporate behaviour.

Sector specific regulation presents distinct challenges in competition law and policy. The role of competition authority and sector specific regulator can be complimentary. However, at times, the interface between the two could also be a source of tension. While a sector specific regulation seeks to identify a problem ex ante, and creates an administrative machinery to address behavioural issues before the problem arises, competition policy generally would address the problem ex post in the backdrop of market conditions.

**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”. Indubitably, this mandate is extraordinarily wide. It is also agnostic about sector specific regulators. The wide amplitude contained in s. 18 reverberates in the preamble of the enactment as well, where similar language has been used.¹

Specific provisions contained within the legislation exemplify the possible 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.² Nonetheless, section 62 of the Competition Act, 2002 declares that competition legislation ought to work along with other enactments.³ Both sections 60 and 62, ironically, are couched in mandatory language.

If the triumvirate of sections 18, 60 and 62 weren’t adequate to cause sufficient conundrum, **section 21** of the Competition Act, 2002, suggests that in any proceedings before a statutory authority⁴, if such a need arises, the statutory authority may make a reference to competition

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¹ The preamble of the Competition Act, 2002 reads: “An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission 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.”

² 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.” (emphasis supplied)

³ 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”. (emphasis supplied)

⁴ 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 therefore or any matter connected therewith or incidental thereto”
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 nub 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. the Securities Exchange Board of India (SEBI), Telecom Regulatory Authority of India (TRAI), Central Electricity Regulatory Commission (CERC), Insurance Regulatory Development Authority (IRDA) and Petroleum and Natural Gas Regulatory Board.

**Inception of competition law**

The prevailing wisdom in competition law literature is aware of only two dominant paradigms - the *US antitrust model* and the *EU competition law model*. There is also a belief that till 1975, these were the only two competition law models available. Contrary to this belief, India had a sui generis model of competition law way back in 1969 in the form of *Monopolies and Restrictive Trade Practices Act*.

Right after the first plan period, the government was increasingly concerned about the uneven impact of growth upon poor people. There was an evident anxiousness that there has been a disproportionate amount of economic power being vested with a privileged few. Accordingly, the MRTP Act was enacted in order to “provide that the operation of the economic system does not result in the concentration of economic power to the common detriment, for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices” and other related matters.

The Indian Constitution in its part on directive principles of state policy clearly lays down that the economic system should function in such a manner that it does not lead to concentration of wealth in the hands of the few. Further, the Constitutional mandate is also clearly in favour of serving the common good of the society.

While the MRTP Act was an embodiment of the constitutional mandate, it exempted governmental companies from its purview and focused only upon the private entities. Perhaps the philosophy underlying the MRTP Act was that governmental companies were the harbinger of public interest and private

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5 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.”

6 Article 39 (c) of the Constitution states: “The state shall, in particular, direct its policy towards securing (c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment”.

7 Article 39 (b) of the Constitution states: “The state shall, in particular, direct its policy towards securing (b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good”.

8 Section 3 of the MRTP Act, *inter alia*, states: “Unless the Central Government, by notification, otherwise directs, this Act shall not apply to – (a) any undertaking owned or controlled by a Government company, (b) any undertaking owned or controlled by the Government, (c) any undertaking owned or controlled by a corporation (not being a company) established by or under any Central Provincial or State Act…”
companies were the only entities in need of regulation to promote public interest. Pursuant to liberalization of the economy in 1991, the MRTP Act was found to be inadequate to address the needs of the new, globalized economy. It would have been a monumental task to amend MRTP Act to address the needs of the economy. Hence, India opted for a modern legislation on competition law that was mandated to enhance consumer welfare through sustaining competition in the market.

Section 18 of the Competition Act, 2002 entrusts the competition authority with an overarching duty of sustaining competition in the market. The amplitude of the duty, as a corollary, entails that the competition authority is vested with a comprehensive, overall vantage point on the economy. Such a broad, sweeping vantage point is unavailable to any sector specific regulator. It is in keeping with goals of competition law in advanced jurisdictions such as the US and the EU. The US antitrust law frowns upon the unfair transfers of wealth taking place between consumers and powerful firms. The EU competition law intends to promote market integration and protect competition.

**Competition Authority**

Competition Authority promotes efficiency, innovation, higher productivity and growth in the economy. The primary concern of the authority is consumer interest. It ensures that there are wider choices and abundant availability of goods at competitive prices.

The existence of a competition regulator is also in the interest of competitors and other market players. Competition law enables action against deviation from principles of competition in markets and restores contestability in markets. *It is an ‘off-market’ regulator and intervention is usually ex-post.* The authority aims to create maximum impact through minimum intervention by relying on market forces. The essence of such a regulator lies in its neutrality and unbiased character. It is independent and objective, not prone to influence of market players therefore there is limited likelihood of ‘capture’ by dominant enterprises.

The regulator acts as a specialized forum for deciding competition issues by applying competition principles uniformly across all sectors. *The Four basic elements of a modern competition law are anti-competitive agreements, abuse of dominant position (ex ante) combinations (ex post) and advocacy.*

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9 The term “public interest” in law has attracted interesting comments. See for instance, Per D.A. Desai, J. in Baldev Raj v. State of Punjab, 1984 Supp SCC 221, where he finds that “public interest is an unruly horse”.


12 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”.

13 Robert H. Lande, “Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged”

**Sector Regulations**

**Emergence of regulators**

With the economic liberalization initiated in the year 1991, India began to vacate some of the commanding heights of the economy, where state responsibility for the provision of services was synonymous with state ownership. The command and control mode of governance that relied on state ownership gradually started moving towards a new mode of regulatory governance where public private partnerships and private sector participation require governmental priorities to be achieved through economic regulation. It is also important to understand the various reasons behind emergence of economic regulation, some of which may include:

(a) **Remedial of information failures** (e.g. SEBI regulations for initial public offers of corporations, Stock Exchange listing agreements);

(b) **Prevention of abuse of market power** (e.g. TRAI for telecom companies and cable television service providers);

(c) **Correction of externalities like pollution** (Pollution Control Boards) and market failure (e.g. Monopoly Cotton Procurement Scheme);

(d) **Technical and Highly Sophisticated nature of the sector involved** (Intellectual Property Regulatory authorities);

(e) **Prevention of inefficient use of resources and protect consumers**;

These sectoral regulators achieve their objectives by being the ‘in-market’ regulators setting the ‘rule of the game’ by regulating entry conditions, technical details, tariff, safety standards, access, control over price, quantity and quality etc. These regulators carry out several functions, including balancing conflicting interests, promoting competition, facilitating investment and ensuring overall development of the sector.

However, despite sharing a common goal, it also needs to be appreciated that sector regulators and competition authorities generally have different legislative mandates and their perspective regarding competition matters may be different. Both competition authorities and sectoral regulators approach the issue from different angles. Sectoral regulators co-exist and provide specialized regulation for sectors that require in-depth domain knowledge for their regulation. Competition laws seek to protect the process of competition, not the participants in the market, with a view to maximizing productive and allocative efficiencies.

The major difference between sectoral regulation and competition is that sectoral regulators address the question of market power directly (for example, restraining the possibility of pricing a monopoly service below a certain threshold), while competition authorities restrain indirectly (for example, prohibiting a merger to monopoly, or impeding the monopolization of a neighboring market.) Simply put, competition regulation tells the participants in the market what they should not do, while sector regulation tells market participants what to do.
Many new regulators have emerged in the last 20 years. Some have done well, others have struggled to deliver. To attract foreign investment and provide a level playing field to the new players and the incumbent, the government set up regulatory bodies in many sectors.

For instance, mobile telephony came into India in 1995-96 but interconnection with the public sector operator, BSNL, was not easy. Following multiple disputes, the High Court asked the government to set up a Telecom Regulatory Authority of India (TRAI) in 1997. Justice S.S. Sodhi became the first chairman of TRAI, and built a foundation which subsequent regulators used to bring in radical changes. The Tariff Authority for Major Ports (TAMP), was constituted in April 1997 to regulate all tariffs at major ports. But ports under the state governments (non-major ports) are free to decide on their charges. There is now a move to do away with tariff regulations and create a common regulator for all ports, which will monitor service and performance standards.

In some countries, there are strong general pro-competition laws and thus sector regulators in those countries need fewer additional powers. In other countries the general pro-competition laws are weaker or even non-existent, in which case regulators need relatively greater powers if they are to do their job effectively.

Independent regulatory agencies have entered India through the back-door, little remarked upon and even less understood. Proponents of regulatory bodies, notably donor agencies view the mechanism as a way to insulate politics from decision making. Insiders to Indian government and administration, notably including some regulators and regulated, dismiss regulatory bodies as one more layer of government, barely distinguishable from preceding layers. Regulation in India has certainly not fulfilled the naïve expectations of the designers, but that it has led to a process of re-making governance in India, opening doors to the construction of regulation as a new democratic space. There are good reasons to believe that regulation in developing countries will have distinct features from that in either the United States, or the emergent regulatory state in Europe. Common features that shape regulatory outcomes in developing countries include the greater presence and authority of external actors, particularly donors, as vectors of policy transfer, the importance of consultants as knowledge carriers and as implementers, the overbearing but paradoxically also weak state, and the propensity for thin state legitimacy. From a practical perspective, states in the developing world are self consciously re-orienting themselves toward forms of steering over ownership, without much reflection on whether and how this shift changes the nature of politics and concerns of democratic legitimacy and accountability.

**Sector Specific Regulators**

1. **Oil and Natural Gas Regulator**

The oil and natural gas sectors are regulated by the *Petroleum and Natural Gas Regulatory Board (PNGRB)*, which was established under the *Petroleum and Natural Gas Regulatory Board Act, 2006*. PNGRB was established to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas. The PNGRB was also given some functions which can be seen to be overlapping with those of the competition authority. Under section 11 of the Act, part of its mandate includes protecting the interest of consumers by fostering fair trade and competition amongst the entities.
In addition, the regulator is empowered to monitor prices and take corrective measures to prevent restrictive trade practice by the entities in respect to petroleum products and natural gas. The Act also defines a restrictive trade practice to mean practices which have the effect of preventing, distorting or restricting competition in any manner, giving the regulator powers over anticompetitive practices similar to that CCI has.

The regulator has also put in place regulations to guide its operations, some of which also have a bearing on competition, although they might not necessarily conflict with competition regulations. These include regulations governing the common carrier principle, where players share common infrastructure for essential services as a way of encouraging competition and avoiding unnecessary duplication, which might also influence the level of competition. The Access Code for Common Carriers or Contract Carriers of Natural Gas Pipelines regulations is a good example. In spite of the Competition Act, 2002 already on statute book, one of the objectives behind the Petroleum and Natural Gas Regulatory Board Act, drafted as recently as March, 2006 is “to promote competitive markets”¹⁵ and “protect the interest of consumers by fostering fair trade and competition amongst the entities”.¹⁶

Interestingly, the PNGRB Act borrows the concept of ‘restrictive trade practice’ from the Monopolies and Restrictive Trade Practices Act, 1969 that Competition Act, 2002 seeks to repeal.

In order to deter the infringers of the enactment, and other regulatory enactments, contravention of the directions given by the Petroleum and Natural Gas Regulatory Board attracts civil penalty.¹⁷ A complaint based upon the phoenix entitled ‘restrictive trade practice’ ensures that penalty is enhanced by five times. However, unlike the electricity regulator, the PNGRB Act does not have any overriding, non obstante provision.

2. Electricity regulator

Electricity regulation in India is governed by the Electricity Act, 2003. Under the Act, two sets of regulators were set up, others being at State level, the State Electricity Regulatory

¹⁵ See, the preamble to the Petroleum and Natural Gas Regulatory Board Act, 2006 that states that it an “Act to provide for the establishment of Petroleum and Natural Gas Regulatory Board to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto”. (emphasis supplied)

¹⁶ Section 11 (a) of the Petroleum and Natural Gas Regulatory Board Act, 2006 states that the “Board shall protect the interest of consumers by fostering fair trade and competition amongst the entities”. (emphasis supplied)

¹⁷ Section 28 of the PNGRB Act states: “In case any complaint is filed before the Board by any person or of the Board is satisfied that any person has contravened a direction issued by the Board under this Act to provide access to, or to adhere to the transportation rate in respect of a common carrier, or to display maximum retail price at retail outlets, or violates the terms and conditions subject to which registration or authorization has been granted under section 15 or section 19 or the retail service obligations or marketing service obligations, or does not furnish information, document, return of report required by the Board, it may, after giving such person an opportunity of being heard in the matter, by order in writing, direct that, without prejudice to any other penalty to which he may be liable under this Act, such person shall pay, by way of civil penalty an amount which shall not exceed one crore rupees for each contravention and in case of a continuing failure with additional penalty which may extend to ten lakh rupees for every day during which the failure continues after contravention of the first such direction”.

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Commissions (SERCs) and the main one being the national regulator, the Central Electricity Regulatory Commission (CERC). The SERCs are given powers to perform roles such as licensing, tariff setting, service standards maintenance promoting competition in the electricity sector in their respective states. The CERC on the other hand regulates tariffs for central, power generating units, inter-state transmission tariffs as well as issuing licences to private investors for inter-state transmission.

Given that both the SERCs and the CERC have the mandate to ensure fair competition in the electricity sector, there are potential conflicts with the competition authority. In addition, section 60 of the Electricity Act can gives rise to conflicts with CCI if not properly managed. The section gives SERCs and CERC powers to take corrective action if a licensee or a generating company enters into an anticompetitive agreement, abuses its dominant position or enters into a combination which causes an adverse effect on competition in electricity industry.

The regulator, while fixing tariff levels, is to be guided by the principle of competition and efficiency. In order to promote competition, it is open to the regulator to issue directions to the licensees engaged in transmitting, distribution or trading in electricity. The regulator has also been entrusted with the task of advising the government in competition within electricity sector.

The electricity regulator has been armoured with the non obstante powers that stipulates that the electricity legislation trumps other enactments. Like competition authority, the electricity regulator also finds itself hamstrung by a duty to act in aid of other regulators.

3. Insurance regulator

IRDA was established in 1999 under the Insurance Regulation and Development Authority Act, 1999. The regulator was established to regulate, promote and ensure the proper growth and development of the insurance and re-insurance sector. As provided for under section 14(2) of the IRDA Act, duties of IRDA do not have much overlaps with those of CCI, although it is important that the regulator be conscious of competition provisions in pursuing some of its functions. For example, when the regulator modifies, suspends or cancels registration for an entity, it is important that the effect on competition be factored into the decision.

In addition, when the regulator devises methods for promoting efficiency in the conduct of insurance business as well as when adjudicating disputes between insurers, it is also important to ensure that such decisions are not competition distorting. IRDA’s recently produced regulations on amalgamations and transfer of business also has the potential to overlap with CCI’s mandate to regulate combinations. Under the IRDA (Scheme of Amalgamation and Transfer of General Insurance Business) Regulations, 2011, IRDA now has the authority to regulate combinations in the insurance sector, which would also have to pass through the scrutiny of CCI.

4. Telecom regulator

The regulation of telecommunication services rests on the shoulders of TRAI, which was set up in March 1997 under the Telecom Regulatory Authority of India Act, 1997. TRAI was established to create and nurture conditions for growth of telecommunications in the country in a manner and at a pace which will enable India to play a leading role in emerging global
information society. In this regard, TRAI also pursues numerous objectives, including those that have overlaps with the competition authority. Under section 11 (1) (h) of the TRAI Act, 1997, TRAI has powers to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services. Among its objectives, TRAI seeks to provide a fair and transparent policy environment which promotes a level playing field and facilitates fair competition, which are also objectives sought by CCI.

The TRAI Act has also sought to ensure that cases specific to the telecom sector are not heard during the normal court processes by creating an appellate body where parties aggrieved by TRAI’s rulings can appeal. The Telecom Disputes Settlement and Appellate Tribunal (TDSAT) was set up in May, 2000 with the powers to adjudicate disputes as well as to hear and dispose appeals against decisions of TRAI for telecom, cable and broadcasting sector related cases. In addition, the Department of Telecommunications, under the Ministry of Communications & Information Technology is the responsible Government department dealing with policy issues relating to telecommunications.

One of the critical functions of the telecom regulator is to ‘facilitate competition and promote efficiency’. Nevertheless, the appellate authority established to adjudicate telecom disputes excludes competition matters, albeit those arising under the old, MRTP Act. Unlike the insurance regulator, the telecom regulator, does not have a generic, but a limited duty to aid other authorities existing in the telecom sector and does not possess any overarching powers over other regulators.

5. Securities market regulator

The securities market regulator, the Securities and Exchange Board of India (“SEBI”), is one the oldest regulators and was set up at the cusp of the inception of market reforms in India. The securities market regulator has been entrusted with the dual task of protection of investors’ interest as well as development of the securities market. The securities market regulator is also responsible for ‘fraudulent and unfair trade practices’. While the enactment does not venture to define fraudulent and unfair trade practice, nevertheless, the regulator oversees mergers. Interestingly, though the securities regulator is one of the first to emerge on the Indian regulatory horizon, it has been mandated with a duty to aid other regulators. Unlike the electricity regulator, the securities market regulator does not possess any overarching powers. The absence of overarching powers accentuates the potential overlapping jurisdiction on merger review from competition law perspective.

Sector Regulators v. Competition Authority

Both competition agencies and regulators usually share a concern for economic efficiency. Their empowering statutes and administrative practices usually differ though on the weight that must be assigned to this objective and the number and diversity of other objectives which must be considered. Many competition agencies generally concentrate on the economic efficiency objective and give it clear primacy over objectives like ensuring small businesses have “fair” access to markets, or contributing to balanced regional development.
Regulatory agencies on the other hand usually are assigned or adopt a much wider set of policy concerns rooted in distributinal issues or a desire to correct for various market failures (besides the existence of market power). Indeed, sometimes these other concerns might even lead regulators to tolerate or encourage anticompetitive market structures as where cross-subsidies are believed necessary to ensure universal service obligations are met.

Most competition agencies see their primary job as enforcing a set of economy wide prohibitions that, together with other framework laws of general application, constitute a type of market constitution. The prohibitions set important boundaries and are designed to deter firms from suppressing competition either by colluding with rivals or eliminating or disadvantaging them by means which are at odds with long term consumer welfare. The underlying assumption behind competition law enforcement is that, absent important externalities, healthy competition can ensure maximum consumer welfare.

Sector-specific regulation in contrast is generally adopted in situations where direct government intervention is deemed to be required because markets are either inherently imperfect or will not produce a desirable distribution of benefits. It follows that regulation usually seeks not so much to change or fine tune market incentives, as to replace them with direct control. The difference has been well expressed as follows:

“In general, competition law seeks to safeguard the operation of market forces, by preventing or providing remedies for specific behaviour that can impede such forces. Moreover, intervention is focused on the maintenance of competition as a process, rather than on the survival of individual competitors. In contrast, regulation even where it does not actively seek to suppress competition, often serves as a substitute for market forces, in that it involves stipulating a fairly complete set of prices and accompanying commitments regarding supply and quality of service.”

There is a danger that this difference can be overplayed.

Competition policy is chiefly ex post (merger review excepted) whereas regulation is primarily ex ante and continuous. When regulation is applied there will typically be a pre-supposition that market forces cannot be relied on to produce a satisfactory outcome and this cannot be rectified merely by trying to change firms’ incentives. In such situations, firms may be better served through ex ante instructions rather than by being surprised with unexpected requirements once sunk cost investments have been made.

Consumers should also benefit if consequent lower costs of capital are passed on in the form of reduced prices or better products. Instead of being involved in monitoring firms on a continuous basis, competition offices usually begin to acquire information only when they receive a complaint or otherwise believe that the competition law has been broken or a merger requires review. In contrast, because they are seeking to change behaviour without altering market based incentives, regulators have little choice but to continually monitor regulated firms. The type of information required is also different. Regulators need much more in the way of accounting information than is usually required in competition cases. Regulators may also need the power to specify accounting systems to ensure they have relevant, understandable information, especially if they wish to engage in comparison, or “yardstick” regulation.
In addition, with their wider set of objectives, regulators will typically need a greater variety of information than competition agencies. This is especially true in connection with ensuring that universal service obligations are met and safety and environmental protection rules followed.

With their focus on regulating entry and lines of business, setting prices, ensuring appropriate levels of product quality, and policing universal service obligations, regulators clearly require legal, economic and accounting expertise, with the accent probably on accounting. Competition agencies also require these three types of expertise, but they would have relatively less need of accounting expertise since, except for predatory pricing cases, they are not normally involved in judging the appropriateness of particular prices. At the same time, competition agencies will need relatively more in the way of legal and economics skills. The former are extensively required in conducting case specific investigations and, for many agencies, in persuading courts to take action. Economic skills are especially necessary in undertaking market definition, determining whether a firm is dominant, and estimating the anticompetitive potential of a particular practice or merger.

Whenever there is a new regulator people want to be outside the purview of that regulator. The argument given is that some sectors already have sectoral regulators, but the conceptual framework is very clear that those regulators have certain specific functions relating to those areas but not market functions.

The Interface

While liberalization process of the government meant cutting through the red-tape and making industrialization more entrepreneur-friendly, there has been emergence of independent regulatory authorities for several sectors of the economy.18 Indeed, economic reforms has led government to reinvent itself through doing less “rowing” and more “steering”.19 Unlike the socialist hue that pervaded governance till 1991, India increasingly relies upon market rivalry for allocation as well as distribution of resources. Nonetheless, there is also 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.

There are innumerable instances of ostensibly overlapping jurisdictions on questions of competition. Drafters of legislation haven’t been very careful while allocating specific areas of work for economic regulators. The muddled understanding of framers of the legislation is evident both in recent legislations as well as past ones. Besides inelegance, sometimes legislations reflect lack of comprehension of regulatory jurisprudence. Sector which has brought out some

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18 See for instance, Monnet Sugar Limited v. Union of India, MANU/UP/0823/2005 where 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.

19 For instance, when government though it fit that the department of telecom cannot be regulator as well player in the telecom sector it replaced the department of telecom with the Telecom Regulatory Authority of India. See also, Reliance Airport Developers Pvt. Ltd. v. Airports Authority of India, 2006 (11) SCALE 208; MANU/SC/4912/2006 where the Supreme Court of India endorsed the public private partnership approach to development.
sign of confusion due to overlaps is the oil and gas sector, which saw the Delhi High Court compounding the overlapping jurisdiction woes by a stunning judgement. After losing a bid to rivals, Reliance Industries Ltd filed a complaint with CCI alleging that its rivals; Indian Oil Corp Ltd, Bharat Petroleum Corp Ltd and Hindustan Petroleum Corp Ltd had actually formed a cartel in the supply of aviation turbine fuel to Air India.

However, during the course of investigations by CCI, the companies filed an application at the Delhi High Court, challenging the jurisdiction of CCI to handle the matter. The companies alleged that although this is a competition case, the fact that it was taking place in a sector under the authority of another regulator, PNGRB, implies that CCI did not have jurisdiction. And surprisingly, the High Court ruled that CCI did not have jurisdiction, although it is quite apparent that PNGRB does not have any tight regulations to deal with cartels. As mentioned previously, the PNGRB Act also mandates the regulator ‘to protect the interests of consumers by fostering fair trade and competition among the entities’ operating in the sector, which can be construed as being an adequate tool to regulate all competition issues, particularly by ill-informed decision makers.

The electricity sector has also seen some problems of overlapping jurisdictions surfacing. CCI issued notices after finding leading power distributors - BSES Rajdhani Power, BSES Yamuna Power and North Delhi Power Ltd (NDPL) guilty of abusing their dominant positions, which among other things resulted in 90% of the meters installed by these power companies being faulty, showing a reading that was 2.5% higher than necessary. However, it is reported that CCI’s intervention was not considered in good light by the Delhi Electricity Regulatory Commission (DERC), as it believes such matters to be exclusively under their domain pursuant to the powers vested in them by the Electricity Act, 2003. It can also be established that jurisdiction cases due to overlaps in regulations also existed during the MRTP era. In Sea TV Network judgment of 24th August 2005, TDSAT made a ruling trying to clear some confusion after jurisdiction issues between the MRTP Commission and TRAI had surfaced by observing that the MRTP commission cannot adjudicate a dispute based on violation of a regulation made under TRAI Act, even though the Regulation incidentally trenches on subject of monopoly and restrictive trade practice. It was however acknowledged that as envisaged under the TRAI Act, anticompetitive practices would remain under the jurisdiction of the MRTP Commission.

Through the Competition Amendment Act, 2007, attempts were made to ensure that the Competition Act, 2002 resolves turf wars with sector regulators. The original law permitted reference to CCI by another regulator only when any party requested for it. Now, the regulator can refer suo motu as well. The amendments also inserted the requirement of recording reasons for disagreeing with CCI. Under sections 21 and 21A of the 2002 Act, both CCI and the sector regulators may cooperate when it comes to dealing with issues that appear to have an impact on the jurisdiction of the other. If a sector regulator is handling a case and it turns out that there is a possibility of the decision to be taken infringing the Competition Act, the sector regulator may refer the matter to CCI for its opinion. CCI is obliged to give its opinion within sixty days. In a similar fashion, if CCI is investigating a case and it is pointed out that there is a possibility of the decision being contrary to the provision of the law entrusted to a sector regulator, then CCI may
make a reference to the sector regulator, asking for its opinion and input into the matter. However, opinions from both the sector regulator and CCI will not be binding.

**Statutory provisions suggesting concurrency**

**The Competition Act, 2002**

**Section 18. Duties of Commission**

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.

**Section 21. Reference by statutory authority**

(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 provisions of this Act, then such statutory authority may make a reference in respect of such issue to the Commission.

(2) On receipt of a reference under sub-section (1), the Commission shall, after hearing the parties to the proceedings, give its opinion to such statutory authority which shall thereafter pass such order on the issues referred to in that sub-section as it deems fit: Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference.

**Section 21A. Reference by Commission**

(1) Where in the course of a proceeding before the Commission an issue is raised by any party that any decision which the Commission has taken during such proceeding or proposes to take, is or would be 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:

Provided that the Commission, may, suo motu, make such a reference to the statutory authority.

(2) On receipt of a reference under sub-section (1), the statutory authority shall give its opinion, within sixty days of receipt of such reference, to the Commission which shall consider the opinion of the statutory authority, and thereafter give its findings recording reasons therefor on the issues referred to in the said opinion.

**Section 49. (Referral by Central/ State Government) Competition advocacy**

(1) In formulating a policy on competition (including review of laws related to competition), the Central Government may make a reference to the Commission for its opinion on possible effect of such policy on competition and on receipt of such a reference, the Commission shall, within
sixty days of making such reference, give its opinion to the Central Government, which may thereafter formulate the policy as it deems fit.

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government in formulating such policy.

(3) The Commission shall take suitable measures, as may be prescribed, for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

**Section 60. Act to have overriding effect**

The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

**Section 62. Application of other laws not barred**

The provisions of this Act shall be in addition to, and not in derogation of, the provisions of any other law for the time being in force.

Hence, any statutory authority/Central or State Government may make reference to the CCI and the Commission is bound to reply within sixty days. However, this opinion is not binding on the statutory/regulatory authority. Similarly CCI may also refer to a sector regulator for its expert advice in a technical matter. This reference again is not mandatory. Combined reading of the sections gives an impression that CCI has the primary jurisdiction to try cases on competition related matters.

**The Electricity Act, 2003**

**Section 79. Functions of Central Commission**

(1) The Central Commission shall discharge the following functions, namely:

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

**The TRAI Act, 1997**

**Section 11. Functions of Authority**

(1) ...the functions of the Authority shall be to-

(2) Make recommendations, either suo motu or on a request from the licensor, on the following matters, namely:

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

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**Consumer Online Foundation v. Tata Sky Ltd. & Other Parties [Case 2/2009]**

Dish TV submitted that the CCI could not claim jurisdiction over this matter as TRAI and TDSAT were already vested with the jurisdiction and responsibility to govern and regulate the telecommunication industry covering telecom, broadcasting and cable TV services. CCI held that any matter that raises competition concerns would fall within the purview of the Comp. Act enabling CCI to exercise its jurisdiction.
The PNGRB Act, 2006

Section 11. Functions of the Board

The Board shall-

(a) Protect the interest of consumers by fostering fair trade and competition amongst entities;

Thus we witness the interface between several sectoral regulations and the watchdog of fair competition in the markets. These statues are all bound by the common objectives of promoting efficiency, growth and fair competition. They aim is to safeguard the interest of consumers by fostering trade and development in the economy.

Essentially and conceptually the two regulators have to work in coordination and according to us there is no issue of conflict of jurisdiction and certainly no case for keeping some outside the ambit of the competition Commission.

International experience

In Australia, the competition authority (ACCC) incorporates industry-specific regulators, e.g. telecom, electricity, gas. The Canadian Competition Bureau is statutorily empowered to intervene before federal and provincial regulatory bodies in policy determination. Regulatory forbearance where competition prevails. In Germany, laws recently amended to minimise parallel competencies and enhance coordination. Cartels and mergers exclusively in jurisdiction of competition authority (FCO). Mandatory consultation by law. In EU, competition guidelines/directives issued by EU provide that ex-ante rules apply only in absence of competition, and specify how relevant market to be determined. In South Korea – head of competition authority is given Cabinet rank-helps in pushing pro-competitive agenda within Government. In South Africa, sector regulations were initially exempted from the jurisdiction of competition authority, but later the exemption was withdrawn. In Zambia, competition authority is represented on other regulatory boards. In addition, all sector regulators are required to consult the competition authority. In France, a new law provides for mandatory consultation between radio & television sector regulator and competition authority. The sector regulator provides technical inputs while the competition authority applies competition law on the basis of given technical inputs. Competition authority retains full jurisdiction on competition issues.

In UK, the OFT and the sector regulators have concurrent jurisdiction. Appeals lie to Competition Appellate Tribunal (UK CAT). In Mexico, the Competition Commission was established prior to most sector regulation, so it was possible to shape sector regulation around an important role for the competition agency in the design and implementation of sector-specific regulatory mechanisms. The active role of the Competition Commission in helping to design regulations has made it possible to avoid conflicts between regulations and competition policy. Contradictions that could give rise to legal uncertainty have largely been avoided and duplications have been reduced in order to create a clear separation of functions and tasks between the agencies. In Japan; cooperation between JFTC and sector regulators is not statutory but is guided by government diktat. JFTC relies heavily on its advocacy role with regulators to
prevent anticompetitive policies. In Finland, the competition authority signed an MoU in 2003 with the telecom regulator defining ways to eliminate overlaps. The jurisdictions of the competition authorities and sector regulators are blurred in Sri Lanka, Botswana, Kenya and Pakistan. Conflicts are left to be resolved by courts. If status quo is maintained, India will be in this League.

**UK – CASE STUDY**

*The Competition Commission (CC)* is an independent public body which helps to ensure healthy competition between companies in the UK for the ultimate benefit of consumers and the economy. It conducts in-depth investigations into mergers and markets and also has certain functions with regard to the major regulated industries. The CC does not initiate inquiries independently. All its activities are undertaken following a reference to it by another authority.

- Mergers are referred for investigation by the Office of Fair Trading (OFT) or, sometimes, the Secretary of State.
- Market investigations may be referred by the OFT, sector regulators (for markets falling within their sectoral jurisdictions) or the Secretary of State.
- Reviews of merger/market investigation remedies may be referred by the OFT.
- Regulatory references and appeals can be made by the sector regulators in gas, electricity, energy, water and sewerage, railways, airports and postal services.

*The Office of Fair Trading (OFT)* is the principal competition authority whose responsibility is to enforce competition and make markets work well for the benefit of consumers. The OFT derives most of its powers from the Enterprise Act 2002 and the Competition Act 1998. The OFT investigates anti-competitive practices in markets, mergers and enforces consumer law.

One of the paramount aims of the founding fathers of the European Community - statesmen around Jean Monnet and Robert Schuman - was the establishment of a Single Market. To achieve this, a compatible, transparent and fairly standardised regulatory framework for Competition Law had to be created. The constitutive legislative act was Council Regulation 17/62 (now superseded). To avoid different interpretations of EC Competition Law, which could vary from one national court to the next, the Commission was made to assume the role of central enforcement authority.

The arrangements in place worked fairly well until the mid-1980s, when it be clear that with the passage of time, as the European economy steadily grew in size and anti-competitive activities and market practices became more complex in nature, the Commission would eventually be unable to deal with its workload. The central dominance of the Directorate-General for Competition was challenged by the rapid growth and sophistication of the National Competition Authorities (NCAs) and by increased criticism from the European courts with respect to procedure and interpretation.

To all these challenges, the Commission responded with a strategy to decentralise the implementation of the Competition rules through the so-called *Modernisation Regulation*. EU Council Regulation (1/2003) placed National Competition Authorities and Member State national courts at the heart of the enforcement of Arts 101 & 102. Decentralised enforcement
has for long been the usual way for others. EC rules, Reg 1/2003 finally extended this to competition law as well. **The Commission still retained an important role in the enforcement mechanism, as the co-ordinating force in the newly created European Competition Network (ECN). This Network, made up of the national bodies plus the Commission, manages the flow of information between NCAs and maintains the coherence and integrity of the system. Since May 2004, all NCAs and national courts are empowered to fully apply the Competition provisions of the EC Treaty.** In its 2005 report, the OECD lauded the modernisation effort as promising, and noted that decentralisation helps to redirect resources so the DG Competition can concentrate on complex, Community-wide investigations.

**It is a well-established feature of the UK competition enforcement regime that certain sectoral regulators**\(^{20}\) **have concurrent powers, with the Office of Fair Trading (OFT), to apply the competition rules in the sectors which they regulate.** Such concurrent powers apply not only in relation to the application and enforcement of the Chapter I and II prohibitions in the Competition Act 1998 and Arts 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), but also to the making of market investigation references (MIRs) under Part 4 of the Enterprise Act 2002. The operation of the concurrency arrangements has been reviewed on several occasions in recent years, including in a joint report by the then Department of Trade and Industry and HM Treasury in 2006,\(^{21}\) in a report by the House of Lords Select Committee on Regulators in 2007 and in a report by the National Audit Office in 2010.\(^{22}\) Although none of these reports resulted in any significant changes to the existing arrangements, concerns were expressed in all of the reports regarding the relatively small number of cases brought by the sectoral regulators using their competition powers and the apparent preference of the sectoral regulators to rely instead on their sector-specific powers.

In its recent consultation on the reform of the UK competition regime,\(^{23}\) the Department for Business Innovation & Skills (BIS) returned again to the issue of concurrency and highlighted similar concerns to the previous reports regarding the relative paucity of competition cases in the regulated sectors. In order to address these concerns, BIS proposed various changes to the existing concurrency arrangements. Although some of these changes would represent a significant departure from the current arrangements, the proposals are arguably much less far-reaching than the reforms proposed to other features of the competition regime.\(^{24}\)

Most recently, the government has proposed legislative changes, which would have the effect of extending the scope of the existing concurrency arrangements.\(^{25}\) The UK is relatively unusual in

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\(^{20}\) The following sectoral regulators currently have concurrent competition powers in their respective sectors: the Office of Communications (Ofcom); the Gas & Electricity Markets Authority (Ofgem); the Office of Rail Regulation (ORR); the Water Services Regulation Authority (Ofwat); the Civil Aviation Authority (CAA); and the Northern Ireland Authority for Utility Regulation (NIAUR).

\(^{21}\) *Concurrent competition powers in sectoral regulation*, a report by the Department of Trade and Industry.

\(^{22}\) *House of Lords Select Committee on Regulators, UK Economic Regulators*, 2007.


\(^{24}\) At the time of writing, the government’s response to the consultation has not yet been published. However, based on the options discussed in the consultation document, it seems unlikely that significant changes will be made to the concurrency arrangements.

\(^{25}\) The Civil Aviation Bill, which was laid before Parliament on 19 January 2012, would give the CAA the power to apply and enforce the Chapter I and II prohibitions and Arts 101 and 102 TFEU, as well as the power to make
having a system of concurrent enforcement of competition law, where responsibility for enforcing the competition rules is vested in both the general competition authority and sectoral regulators. Within the EU, the only other country to have such a system is Ireland (but solely in relation to the electronic communications sector). The rationale for having a system of concurrency in the UK was discussed briefly during the parliamentary debates prior to the adoption of the Competition Act 1998. In response to a proposal to delete the provisions in the draft legislation giving the sectoral regulators concurrent jurisdiction, the government noted that the sectoral regulators already exercised certain competition functions concurrently with the Director General of Fair Trading under the monopoly provisions under the Fair Trading Act 1973, and the provision relating to the control of anti-competitive practices under the Competition Act 1980, and it was felt that a departure from this approach would represent a major change in policy. In support of retaining a system of concurrency, the government highlighted the sectoral regulators’ specialist expertise in their respective sectors and the lack of a clear distinction between sectoral regulation and competition law, meaning that sector regulators were inevitably drawn into competition issues. It was also considered that the availability of competition powers added to the credibility and therefore to the effectiveness of the sectoral regulators.

The Competition Act 1998 (Concurrency) Regulations 2004 (the Concurrency Regulations) set out rules on how the concurrency arrangements are to work in practice in relation to the application of the Chapter I and II prohibitions and Arts 101 and 102 TFEU. Where the OFT or the relevant sector regulator is proposing to exercise its competition powers, it is required to inform the other competent authority, with a view to agreeing who should exercise such powers. In the absence of agreement, the Secretary of State will decide who should consider the case. In order to avoid the risk of double jeopardy, it is provided that not more than one competent authority may exercise its powers in relation to the same case, although the Concurrency Regulations do provide for the possibility of transferring cases between competent authorities. The Concurrency Regulations also set out rules on the use of staff from one competent authority to assist in relation to a case being conducted by another competent authority.

The Concurrency Regulations are supplemented by guidance published by the OFT (the Concurrency Guidelines). The Concurrency Guidelines state that a case will be dealt with by whichever of the OFT or the relevant sectoral regulators is better or best placed to do so, although, in general, an agreement or conduct which relates to a regulated sector will be dealt with by the regulator for that sector. Factors which are relevant in determining who should deal with a particular case include: the sectoral knowledge of the regulator; whether the case affects

MIRs, in relation to the provision of airport operation services. The CAA already has these powers in relation to the provision of air traffic control services.

26 Since the coming into effect of the Communications Regulation (Amendment) Act 2007, the Commission for Communications Regulation (ComReg) has concurrent powers to apply the Irish and the EU competition rules in the electronic communications sector together with the Irish Competition Authority. This system of concurrency does not apply in other regulated sectors.

27 See, in particular, the comments of Lord Simon of Highbury, the Government Minister responsible for the passage of the bill through the House of Lords, Hansard, Lords Debates, vol 583, col 913–917 (25 November 1997).

28 OFT, Concurrent application to regulated industries, OFT 405 (December 2004).
more than one regulatory sector; and any previous experience in dealing with any of the same parties involved or similar issues. Where the OFT has been involved, this has tended to be in cases which are more peripheral to the regulated sector.\textsuperscript{29}

The OFT and the sector regulators have also established a working group – the \textit{Concurrence Working Party} (CWP) – the purpose of which is, among other things, to facilitate a consistent approach by the OFT and the sector regulators in the exercise of their competition powers and to provide a vehicle for discussions of matters of common interest.

The concurrency arrangements work in a similar way in relation to the power to make MIRs as for the power to apply the Chapter I and II prohibitions and Arts 101 and 102 TFEU. The OFT’s published guidance on Market Investigation References (the MIR Guidelines)\textsuperscript{30} states that the competent authorities will consult each other whenever they are considering making a reference in a regulated sector. Where the relevant market is ‘unambiguously part of a regulated industry’, the reference would normally be made by the sectoral regulator. In other cases, it will be made by whichever authority is better placed to do so. The factors considered in determining which authority deals with a potential MIR include the extent to which sectoral experience is relevant and recent experience of dealing with the markets concerned.

In its recent consultation on the reform of the UK competition regime, BIS set out various proposals for improving the existing concurrency arrangements.\textsuperscript{31} These proposals include:

- strengthening the primacy of competition law over sectoral regulation by imposing an obligation on the sectoral regulators to use their competition powers in preference to their sectoral powers wherever legally permissible and appropriate or, alternatively, to work together towards a common set of factors for deciding which of their powers to use;
- increasing opportunities for resource sharing among the authorities with concurrent competition powers, including getting the new Competition and Markets Authority (CMA) to act as a central resource for the sectoral regulators, changing legislation to permit joint investigations and/or increasing the number of secondments between the authorities; and
- giving the CMA a bigger role in the regulated sectors, for example, by enabling the CMA to take over an ongoing case when it considers that it is better placed to conduct the investigation or where there are concerns about the approach the regulator is taking and/or requiring the sectoral regulators to consult or inform the CMA before taking a decision on whether to proceed on a case by making use of their sectoral or competition powers. A common theme behind all of these proposals is a desire to increase the use of competition powers in the regulated sectors. This relates back to the concern which has been expressed in all previous reviews of the concurrency arrangements regarding the relatively small number of cases brought by the sectoral regulators using their competition powers. To date, only two antitrust

\textsuperscript{29} For example, the OFT investigated a complaint alleging a collective boycott by various telecommunications operators in the market for submarine cable laying and landing (see Cityhook Ltd v Office of Fair Trading and Others (Case No 1071/2/1/06) [2007] CAT 18, [2007] CompAR 813). On the basis that the case concerned the communications sector, it also fell within Ofcom’s jurisdiction.

\textsuperscript{30} OFT, Market Investigation References: guidance about the making of references under Part 4 of the Enterprise Act, OFT 511 (March 2006).

\textsuperscript{31} BIS, \textit{op cit} n 6, above, at paras 7.13–7.34.
infringement decisions have been taken by the sectoral regulators: a decision by the ORR in November 2006 finding that EWS had abused a dominant position in the market for the supply of coal haulage by rail in breach of the Chapter II prohibition and Art 102 TFEU,\(^\text{32}\) and a decision by Ofgem in February 2008 finding that National Grid had abused a dominant position in the market for the supply of domestic sized gas meters in breach of the Chapter II prohibition and Art 102 TFEU.\(^\text{33}\) There has only been one MIR by one of the sectoral regulators to the Competition Commission, a reference by ORR in respect of the rolling stock leasing market in April 2007. In addition, Ofcom accepted undertakings from BT in lieu of making a MIR in September 2005.

According to BIS: ‘Given that regulated sectors contain many of the most dominant companies and uncompetitive market structures and cover services of considerable consumer interest, this comparative lack of activity in the regulated sectors seems surprising.’

Given that concerns have been expressed on several occasions regarding the relatively limited use made by the sectoral regulators of their competition powers, and at a time when sweeping changes are being proposed to the UK competition landscape, it would seem appropriate to consider whether the government’s proposals for reforming the concurrency arrangements go far enough or whether a more radical change in approach is warranted. As noted above, the UK is relatively unusual in having a system of concurrency. There are various alternative approaches taken in other countries.

In Greece, the Hellenic Telecommunications and Post Commission (EETT) has the power to apply both sector-specific rules and the competition rules in the electronic communications sector, but this is at the exclusion of the jurisdiction of the general competition authority, the Hellenic Competition Commission (HCC). If the concern is that the sectoral regulators are not making greater use of their competition powers, it is not clear how giving them exclusive jurisdiction to apply the competition rules in their respective sectors would address this concern. On the contrary, it might actually lead to even less enforcement activity and would potentially lead to a greater risk of inconsistency in the application of the competition rules. There could also be a risk of uncertainty as to which authority has jurisdiction over a particular case, for example, where a case is only tangentially relevant to a regulated sector or straddles more than one sector.\(^\text{34}\)

An alternative solution and the approach taken in most other countries would be to have a clear split between sector-specific regulation (handled by the sectoral regulators) and general competition law (handled by the competition authorities). While this may lead to increased enforcement of the competition rules, it would lose many of the benefits of the system of concurrency. As noted above, part of the rationale for giving the sectoral regulators concurrent competition powers was their sectoral expertise and understanding of the markets which they regulate. There may also be a greater risk of conflicts arising between the approach

\(^{32}\) Decision of the Office of Rail Regulation of 17 November 2006, English Welsh and Scottish Railway Limited.

\(^{33}\) Decision of the Gas and Electricity Markets Authority of 21 February 2008, Investigation into National Grid (formerly known as Transco), Case CA98/STG/06.

\(^{34}\) For a discussion of the jurisdictional issues which arise in Greece, see E Truli, ‘Competition in the telecommunications sector: delineation of competences between the NCA and the NRA – the example of Greece’ (2009) 15(8) CTRL 188.
taken by the sectoral regulators and the competition authorities on a particular issue. The interplay between competition law and sector-specific regulation can give rise to difficult issues and there is benefit in having a single authority deal with these issues.

A third, more radical, solution, would be to transfer some or all of the sectoral regulators’ sector-specific powers to a new ‘mega regulator’. A similar approach is being considered in the Netherlands, where there is a proposal to merge the *Netherlands Competition Authority* (NMa) with the *Post and Telecommunications Authority* (OPTA), which would result in the general competition authority also exercising sector-specific powers. It is not clear that this approach would be an improvement to the current system in the UK. Any authority with both competition and sector-specific powers would still have to make decisions about which powers to exercise in which circumstances and there is no guarantee that this approach would lead to a greater use of competition powers in the regulated sectors. The authority would also face difficult questions of how to prioritise its resources between sectors, including those not subject to regulation.

The concurrency arrangements have come under scrutiny on several occasions in recent years. On each occasion, a concern has been expressed regarding the extent to which the regulators are making sufficient use of their competition powers. While there are alternative systems of competition enforcement which could, in theory, lead to an increased use of competition powers in the regulated sectors, there are also benefits of the current system of concurrency which would be lost under any alternative approach.

**US- CASE STUDY**

*The Federal Trade Commission's Bureau of Competition* enforces the nation’s antitrust laws, which form the foundation of our free market economy. The antitrust laws promote the interests of consumers; they support unfettered markets and result in lower prices and more choices.

*U.S. antitrust laws are enforced by both the FTC’s Bureau of Competition and the Antitrust Division of the Department of Justice.* The agencies consult before opening any investigation. The Antitrust Division handles all criminal antitrust enforcement. The mission of the Commission is to prevent business practices that are anticompetitive or deceptive or unfair to consumers; to enhance informed consumer choice and public understanding of the competitive process; and to accomplish this without unduly burdening legitimate business activity.

A U.S. economy characterized by vigorous competition among producers and consumer access to accurate information, yielding high-quality products at low prices and encouraging efficiency, innovation, and consumer choice. Their Strategic Goals are to Protect Consumers; Prevent fraud, deception, and unfair business practices in the marketplace; Maintain Competition: Prevent anticompetitive mergers and other anticompetitive business practices in the marketplace;

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35 See JC Laguna de Paz, ‘Regulation and competition law’ (2012) 33(2) ECLR 77.
Advance Performance: Advance the FTC’s performance through organizational, individual, and management excellence.

The FTC is the only federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy. The FTC pursues vigorous and effective law enforcement; advances consumers’ interests by sharing its expertise with federal and state legislatures and U.S. and international government agencies; develops policy and research tools through hearings, workshops, and conferences; and creates practical and plain-language educational programs for consumers and businesses in a global marketplace with constantly changing technologies. FTC’s work is performed by the Bureaus of Consumer Protection, Competition and Economics. That work is aided by the Office of General Counsel and seven regional offices. When the FTC was created in 1914, its purpose was to prevent unfair methods of competition in commerce as part of the battle to “bust the trusts.” Over the years, Congress passed additional laws giving the agency greater authority to police anticompetitive practices. In 1938, Congress passed a broad prohibition against “unfair and deceptive acts or practices.” Since then, the Commission also has been directed to administer a wide variety of other consumer protection laws, including the Telemarketing Sales Rule, the Pay-Per-Call Rule and the Equal Credit Opportunity Act. In 1975, Congress gave the FTC the authority to adopt industry-wide trade regulation rules.

The Antitrust Modernization Commission was created pursuant to the Antitrust Modernization Commission Act of 2002. The Commission consists of 12 members, 4 of which were appointed by the President, 4 of which were appointed by the leadership of the Senate, and 4 of which were appointed by the leadership of the House of Representatives.

The Commission is charged by statute:

1. to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;

2. to solicit views of all parties concerned with the operation of the antitrust laws;

3. to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and

4. to prepare and submit to Congress and the President a report.

The report is to “contain a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate.”

In the 1800s, there were several giant businesses known as “trusts.” They controlled whole sections of the economy, like railroads, oil, steel, and sugar. Two of the most famous trusts were U.S. Steel and Standard Oil; they were monopolies that controlled the supply of their product—as well as the price. With one company controlling an entire industry, there was no competition, and smaller businesses and people had no choices about from whom to buy. Prices went through the roof, and quality didn’t have to be a priority. This caused hardship and threatened the new
American prosperity. While the rich, trust-owning businessmen got richer and richer, the public got angry and demanded the government take action.

President Theodore Roosevelt broke up many trusts by enforcing what came to be known as “antitrust” laws. The goal of these laws was to protect consumers by promoting competition in the marketplace. The U.S. Congress passed several laws to help promote competition by outlawing unfair methods of competition:

- **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 Act also makes it illegal for a business to be a monopoly if that company is cheating or not competing fairly. Corporate executives who conduct their business that way could wind up paying huge fines—and even go to jail!

- **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 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 agencies talk to each other before opening any investigation to decide who will investigate the facts and work on any case that might be brought. But each agency has developed expertise in certain industries. Every state has antitrust laws, too; they are enforced by each state’s attorney general. There’s an office in your state capitol that helps consumers or businesses who might be hurt when businesses don’t compete fairly. Antitrust laws were not put in place to protect competing businesses from aggressive competition. Competition is tough, and sometimes businesses fail. That’s the way it is in competitive markets, and consumers benefit from the rough and tumble competition among sellers.\(^\text{36}\)

There are no sectors in which regulators are the principal enforcers of US antitrust law. There are a very few sectors (e.g., railroads) in which the regulator has principal authority to evaluate the effect of mergers on competition, but there are no sectors in which regulators have the lead in investigating and preventing anticompetitive activities such as price-fixing. In some instances, regulators must assess competitive impacts or take into account antitrust standards or policies in making regulatory decisions under their own statutes, but no regulator has primary responsibility for antitrust enforcement. A very limited number of sectors have exemptions from antitrust law for business activities other than mergers, in which case normal application of the antitrust laws by the Department of Justice (“DOJ”), the Federal Trade Commission (“FTC”) or private

litigants is ruled out. However, in those cases, the regulators apply statutes and regulations that in whole or in part are designed to fulfil objectives in addition to or other than competition (e.g., financial soundness, universal service).

Regulatory programs in the United States traditionally have had objectives beyond, or other than, increasing competition, though current regulatory initiatives place far more emphasis on promoting competition and the free play of market forces than in the past. Industry-specific regulation is the responsibility of separate specialized agencies. Companies are generally subject to antitrust law and may in addition be subject to industry-specific regulatory requirements; companies are not exempt from the antitrust laws merely because they are regulated, and compliance with both the antitrust laws and applicable regulation should not lead to incompatible requirements being placed on companies. Situations where incompatibility theoretically could arise are likely to involve antitrust immunities, either express or implied. Express immunities, of course, involve explicit Congressional statements that antitrust law is displaced by regulation. Where there is no such explicit statement, there may still be an implied exemption where necessary to preserve the integrity of the regulatory scheme that Congress mandated. US courts will draw implied immunities narrowly, and will only find them where required to avoid disruption of a comprehensive regulatory program called for by Congress. 37

In certain cases, antitrust courts may determine that a regulatory agency has "primary jurisdiction" over a particular issue and stay judicial decision pending initial agency resolution. Application of the doctrine of primary jurisdiction depends on the relevance of the agency’s decision to the issue before the court and the value of the agency’s expertise and fact-finding. The doctrine only postpones but does not supplant federal court review of the antitrust concern.

The relationship between competition agencies and regulators, in industries affected by both antitrust law and regulation, is typically defined not by any formal, published agreements between the agencies, but by the difference between the limited types of conduct that are reached by the antitrust laws and the broader range of activities and statutory objectives that are usually subject to the regulatory jurisdiction of an industry-specific regulator. Also, regulatory agencies usually consider interests beyond competition ones. For example, regulatory agencies would have no power to prosecute anticompetitive price-fixing or market allocation agreements; such conduct would be dealt with exclusively by the federal and state antitrust agencies. At the same time, the antitrust agencies have no power to license participants in a market, to set prices charged by firms or to guarantee universal service; all such things would be handled exclusively by the industry-specific regulator. To the extent that overlapping oversight may occur, this is most likely in the areas of merger review in a regulated industry, and civil enforcement directed at particular types of anticompetitive conduct by a dominant firm (e.g., discrimination, cross-subsidization).

In addition, competition agencies may play an advisory role in proceedings concerning the need for regulation, the treatment of particular firms as dominant, and the determination of whether particular firms should be permitted to enter a market. As part of the Executive Branch, DOJ engages in competition advocacy as a member of task forces or interagency committees which

formulate the Administration’s policy on number of economic issues. Both DOJ and FTC have participated in an interagency working group on electricity issues. The FTC is also empowered to gather information and issues reports (s. 6 FTCA). Studies about regulatory issues by FTC staff have applied staff expertise about the operation of competitive markets to examine the economic consequences of regulation. One example is a staff study showing that the allocation of airport landing slots by market methods was not leading to anti-competitive behavior that furnished the basis for FTC comments in the Federal Aviation Administration’s proceeding on the effectiveness and viability of the FAA’s High-Density Rule adopted to alleviate delays caused by congestion at certain airports.

Various statutes provide avenues for competition advocacy by either authorizing DOJ or the FTC to participate in industry-specific regulatory proceedings (e.g. in the energy area - section 7(a) of the Deep Water Port Act of 1974, section 205(b) of the Outer Continental Shelf Lands Amendment Act of 1978 or requiring regulatory agencies to seek advice from DOJ or the FTC on competition matters (e.g. - in the telecommunications sector -- Section 271 of the Telecommunications Act of 1996 requires the FCC to consult with the Attorney General regarding the proposed Bell company entry into long distance and to accord "substantial weight" to the Attorney General’s evaluation.) Even where there is no explicit authorization, regulatory agencies regularly request DOJ and FTC views on competition issues. Competition agencies, like other agencies of the Executive Branch, may file comments in regulatory proceedings before independent agencies such as the FCC offering their expert advice and opinions, just as private companies may do.

In their advocacy efforts, DOJ and FTC have opposed, for example, governmental approval of joint ratemaking where such activities unnecessarily harmed consumers (transportation) and limitations on entry where competition was feasible (transportation, telecommunications, energy and professional services). Competition agencies also have urged that potential rivals be provided access to monopoly or essential facilities where such access was needed to promote new entry against firms that had maintain monopoly positions under prior regulatory regimes (e.g. telecommunications, energy.)

There are several sectors in which federal regulators have some overlapping authority with the competition agencies to enforce certain parts of the antitrust laws, or, more commonly, competition oriented provisions of regulatory laws, primarily in the merger area. Those sectors include telecommunications, electrical and gas utilities and banking. For example, the Federal Communications Commission has concurrent authority with DOJ to enforce Section 7 of the Clayton Act with respect to telecommunications carriers that it regulates. The various federal bank regulators exercise a similar responsibility with respect to assessing the competitive impact of mergers in the banking industry. The mandates of these agencies all extend beyond enhancing competition, however, and thus their actions may differ in subtle or not so subtle ways from actions by the antitrust enforcement agencies in similar circumstances.

Section 11 of the Clayton Act entrusted enforcement of certain parts of the Act such as Section 7 regarding acquisitions to particular regulatory bodies with respect to specific industries or activities instead of the FTC. The DOJ’s enforcement authority is not affected by Section 11. The pertinent agencies were the Federal Reserve Board, the predecessors to the Surface
Transportation Board and Department of Transportation, and the Federal Communications Commission. It should also be noted that the FTC Act itself imposes certain limitations on the FTC’s antitrust jurisdiction. For example, Section 5(a)(2) of the Act prohibits the Commission from exercising jurisdiction with respect to banks, savings and loan associations, federal credit unions, transport and telecommunications common carriers, air carriers and activities subject to the Packers and Stockyards Act of 1921.

The decision whether to give an expert industry-specific regulator exclusive jurisdiction over mergers in its industry, and relegate the antitrust agencies to an advisory role, or to authorize concurrent jurisdiction over mergers for both the regulator and the antitrust agencies, has been made by Congress on a case-specific basis over time, and so it is not possible to identify any obvious general principle underlying how particular industries have been treated. In some instances of exclusive regulatory jurisdiction, Congress may have sought to insulate an industry from the likelihood of more vigorous merger enforcement by antitrust agencies. In other industries where concurrent jurisdiction exists, Congress may have been concerned that the regulator would be insufficiently attentive to competitive problems on its own and sought to promote competition through dual oversight. Although concurrent oversight clearly involves some duplication of resources, and exclusive jurisdiction in the hands of a regulatory agency has on occasion led to transactions being approved that the antitrust agencies probably would have challenged, situations where concurrent jurisdiction has led to conflicting analyses or decisions have not been frequent, and there are no specific legislative proposals pending in the US to change the respective authority of the antitrust agencies or the regulatory agencies over competition related matters.

**AUSTRALIA- CASE STUDY**

There has been significant debate in Australia as to the most appropriate framework for administering economic, technical and competition regulation. Among the issues debated have been the merits of general versus industry specific competition regulators and of integrated versus separate administration of economic, technical and competition regulation.

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. In the case of the NCC, the main regulatory function is in relation to establishing rights of access to the services of certain essential infrastructure facilities. Other significant aspects of economic regulation such as the granting of licences are typically administered by industry specific regulators or by more general government regulators. Technical regulatory issues that do not have a significant competition element are typically administered by industry specific regulators or may be subject to goods and services standards set by *Australia’s principal standards organisation, Standards Australia*.

As noted above, Australia has a national competition law that is consistently applied across all industries and is administered by a single independent regulator (the ACCC). This general approach promotes consistency, certainty and fairness in the universal application of the competition law. It also enhances the regulator’s ability to take an economy-wide perspective; reduces the risk of regulatory ‘capture’ by industry; and minimises duplication. There may also be administrative savings. There may be advantages in having industry-specific competition regulation in industries characterised by complex technology or having natural monopoly or other special elements. In the case of telecommunications, specific competition laws are contained in Part XIB of the TP Act, which is administered by the ACCC and which complements rather than replaces general competition law.

Industry specific competition provisions are also contained in Part X of the TP Act, which provides a regime for regulating the conduct of those international liner cargo shipping companies which collaborate as conferences under agreements registered with the Australian Department of Workplace Relations and Small Business (which has responsibility for maritime policy). Part X provides special (but conditional) exemption for exporters from the competitive conduct provisions of the TP Act without the need for authorisation by the ACCC. Failure on the part of conferences to meet Part X conditions and provide efficient and economical services can result in an investigation by the ACCC and a recommendation to the Minister for Workplace Relations and Small Business.

Technical regulation and some significant aspects of economic regulation are administered in Australia by industry specific bodies or more general government regulators. This recognises that the national competition authority should focus on anti-competitive conduct and not become embroiled in overly detailed or complex regulatory matters unless they have a clear connection with competition issues in, for example, network industries.

Separation of regulatory duties between competition, technical and economic regulators does entail the risk that competition regulators will not always have the same level of technical knowledge that can be achieved by an integrated industry regulator. This has not been a serious problem to date in Australia and the risks are less in industries where the ACCC has both an economic regulatory role as well as its normal competition role. In addition, various mechanisms are in place to improve co-ordination between regulators.

*The ACCC* is the independent statutory body responsible for administering and enforcing the TP Act and the Prices Surveillance Act 1983. The TP Act are the primary regulatory mechanism
for dealing with anti-competitive and unfair market practices, including misuse of market power, secondary boycotts and anti-competitive mergers. The Prices Surveillance Act provides for the surveillance and monitoring by the ACCC of prices in industries identified for prices oversight by the Government. While the ACCC is responsible for enforcing the TP Act, individuals and companies may commence their own legal proceedings and seek damages and other remedies against parties that allegedly breach the Act.

In addition to its core ‘competition’ function, the ACCC has a number of key ‘economic regulatory’ functions. Under the general or ‘economy wide’ access regime for essential infrastructure facilities established in Part IIIA of the TP Act, the NCC advises the Government as to rights of access and, where these are established, the ACCC acts as an ‘arbitrator of last resort’. That is, the ACCC has the power to arbitrate access disputes and determine the final terms of access (including price) if access seekers and owners of essential facilities fail to reach a commercially negotiated settlement. More specific ‘economic regulatory’ functions are performed by the ACCC under the access regimes for telecommunications (discussed below) and for gas transmission pipelines (with the exception of those in the State of Western Australia). The gas role includes monitoring compliance with ring fencing obligations and approving access arrangements (covering services, reference tariffs, trading and expansions) in accordance with an industry code. In addition, from 1999 the ACCC will assume the role of transmission regulator for the electricity industry. This will involve setting a revenue cap for electricity transmission networks. There is a strong emphasis in all these areas on the desirability of commercially negotiated outcomes. Generally speaking the regimes establish frameworks within which industry participants operate commercially and the role of the regulator is as light-handed as possible.

State regulators

Economic regulation of State based markets mainly occurs at the State government level. This State based regulation is moving toward more general regulators such as the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Office of the Regulator General. These bodies have responsibilities, including technical ones, across a range of industries and, as discussed below, have a close association with the ACCC.

With the ‘division of labour’ between various regulators, there is potential for some degree of overlap of functions between the ACCC, which administers competition regulation across all sectors of the 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 minimise uncertainty regarding the jurisdiction of particular regulators and avoid confusion for consumers and the business community.

For example, the ACCC has frequent information exchanges with a variety of economic and technical regulators through regular liaison meetings and the exchange of publications and other information. The ACCC also has a significant public and business education role. In addition, chairpersons of various Commonwealth and State economic regulators (such as the Australian Broadcasting Authority, the New South Wales Independent Pricing and Regulatory Tribunal and the Victorian Office of the Regulator General) are associate members of the ACCC; and certain
members of the ACCC are appointed as associate members of the Australian Communications Authority and the Australian Broadcasting Authority. This helps to bridge the ‘knowledge gap’ that can arise when competition, economic and technical regulators are separate bodies.

Further, in conjunction with a number of Commonwealth and State regulatory agencies and policy advisers, the ACCC publishes a quarterly newsletter, the Public Utility Regulators Forum. The Forum was established in recognition of the need for co-operation among the various state-based regulators. It aims to focus understanding of similar issues and concepts faced by different regulators; minimise regulatory overlap for large users operating across jurisdictions; provide a means of exchanging information; and enhance the prospects for consistency in the application of regulatory functions.

Australia’s competition law provides some scope for exemptions from the anti-competitive provisions of the TP Act to be made by State and Commonwealth legislation. Such legislative exemptions must be clearly expressed in order to exclude the operation of the TP Act and, hence, the competition role of the ACCC. This exemption mechanism acts as a ‘regulated conduct’ or ‘state action defence’. In addition, provisions of the TP Act allow the ACCC to authorise certain forms of anti-competitive conduct where the public benefits of such conduct outweigh the associated anticompetitive detriment. Parties gaining authorisation from the ACCC are granted immunity from legal proceedings under the TP Act in relation to the authorised conduct. As part of a series of inter-governmental agreements on competition policy signed in April 1995, the Commonwealth, State and Territory governments undertook to review by the year 2000 all legislation restricting competition or exempting conduct from the anti-competitive provisions of the TP Act. Subsequently, legislation that restricts competition is to be systematically reviewed at least once every ten years. The NCC oversees this review process and publishes annually a report on the reforms introduced by each government. The ACCC does not have a formal role in this regulation review process but may be asked to comment on government proposals to amend legislation which restricts competition.

**Resolution of the Clash of Regulators – A derived solution**

- **Mandatory consultation provisions**

  **France** – legislation enabled co-operation as sector regulator must consult competition authority

  **Ireland** – formal co-operation agreements in accordance with law

  **Germany** – formal consultation by law

  **Zambia** – statutory requirement on regulators to consult

- **Right to intervene in the working of sector regulation**

  **UK** - competition authority has statutory right to study existing as well as proposed sector regulations and issue a public statement government responds within 90 days

  **Italy** – opportunity to competition authority to air views to which sector regulator must respond
Canada – competition authority can intervene in a case before any federal regulator

- **Giving statutory powers to the competition authority for some aspects of sector regulation**

Mexico – competition authority’s opinion about absence of competition and determination of market power of an enterprise is the condition precedent for regulation of prices or of that enterprise by the sector regulator, e.g. civil aviation, railroad, gas

EU – Competition authority plays significant role in identification of relevant market, and then telecom regulator determines market power using competition benchmark before ex ante obligation can be imposed on identified enterprise

The relationship between sector specific laws and competition policies can be depicted through the jurisdictional division of power between competition authorities and regulatory institutions. When there are separate entities enforcing telecommunications and competition rules, balancing the interplay and jurisdiction between these two entities is a key element in allowing the industry to expand. On the other hand, where a single entity exists, policies applicable to the telecommunications market should encourage growth and competition in the industry. Examples of different models adopted include:

The most common scenario where countries have both a sector regulator and one or more entities with jurisdiction over economy-wide competition matters (e.g., the United States, Chile, and South Africa); or a sector regulator and a competition authority with a specific mandate over competition in the sector (e.g., Australia); A model adopted in certain developing countries where there is no competition authority, but a sector-specific regulator with sector-specific competition mandates (e.g., Dominican Republic); The least common model adopted in New Zealand, where a sector-specific commissioner is part of the general, economy-wide competition authority.

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There are three main approaches: (i) primacy to the competition agency, (ii) primacy to the sector regulator, (iii) concurrent jurisdiction to be shared by both. Of these, the Planning Commission in 2006 has recommended that the best approach for India is a type of a concurrent framework, which involves continuous mutual mandatory cooperation/consultations between sector regulators and competition.

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**Suggested Approaches**

1. **Sectoral regulator supplants competition authority**

The notion that sector specific regulator ought to take primacy over competition authority, at the first blush, appears very attractive. The sector specific regulator is closest to the sector and would naturally be a repository of pertinent information available within the sector. It would be more in tune with the needs of the businesses within the sector.
However, in an institutional set-up where sector specific regulator has jurisdiction over both sectoral regulation and competition matters arising within the sector, there is a possibility of a conflict that may arise between the objective of protecting competition and other goals such as, for instance, orderly development of a specific market. Additionally, sectoral regulators may shy away from enforcing competition law in order to reduce the potential for any conflict with the regulated entities.

2. Competition authority substitutes sectoral regulator

Another option is to make competition authority responsible for both sector specific regulation as well as overarching competition enforcement. This approach is advantageous as this reduces the problem of multiplicity of regulators and accumulates sectoral expertise. Indeed, Australia has taken this approach to settle for an economy-wide economic regulator that integrates technical and competition regulation.

However, experts have expressed their concern that this may lead to complex bureaucratic structure. There is also a lingering danger that the regulator may prefer using direct regulatory power over indirect competition enforcement powers.

Consolidation of sector regulatory functions under competition advocacy

The most complete form of coordination of organisations is to combine the organizations. One well-known example of this approach occurs in Australia where the ACCC (Australian Competition and Consumer Commission) combines many of the functions of competition agencies and sector regulatory agencies in other countries.

Veto Rights

One step short of merging sector regulation into the competition agency is to give the competition agency authority to veto actions of the sector regulator. This approach creates considerable leverage for the competition agency in its competition advocacy efforts. However, the competition agency may have to exercise this veto right with discretion in order to avoid being viewed as obstructionist. There is a risk that the veto right will be removed if it is overused.

3. Co-existence of competition authority and sectoral regulator

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.

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Further, experiences of other countries aren’t of much assistance. There is a wide diversity in models that are available. While Australia on one hand, privileges competition authority, the UK grants explicit concurrent powers to sectoral regulators.\(^4\) Empirically, there is no final, definitive conclusion available.\(^4\) Indeed, as the UK experience shows, despite concurrent competition powers exercised by sectoral regulators, there hasn’t been any infringement decision till September 2005.\(^5\)

The optimal, sui generis model must be rooted in contextual legal milieu. To be sure, both sector specific regulator and competition authority have unique core competencies to offer. Nevertheless, there are pragmatic, descriptive as well as normative justifications why Indian competition authority ought to trump sectoral regulators.

Descriptively, the compelling justification behind primacy of competition authority is that unlike legislations governing sector specific regulators, competition legislation grants private right of action along with provision of damages. The twin rubrics of private enforcement and damages ensure a qualitatively higher standard of consumer welfare which is unavailable under the legislative framework of any sector specific regulator. Normatively, since enforcement of competition law is a sophisticated, specialized field it would reduce transaction cost and enhance efficiency to leave it in the hands of competition authority.

**Forms of Cooperation**

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\(^{43}\) See generally, Department of Trade and Industry and HM Treasury, “ Concurrent Competition Powers in Sectoral Regulation”, May 2006, URN 06/1244.


\(^{45}\) Department of Trade and Industry and HM Treasury, “ Concurrent Competition Powers in Sectoral Regulation”, May 2006, URN 06/1244, para. 5.1, p. 28.
Informal & Soft Techniques
Informal exchange of views, inclusion of industry experts & contact persons, joint working groups/ joint investigations

Abstention
Assignment of lead jurisdiction to mitigate overlapping of powers

Written Delimitation
Joint guidelines & statutory definition of jurisdictional boundaries

Clear Separation of Competition Enforcement functions
Sector regulator having ex ante control while Commission be given ex post authority

Veto Rights
Authorize competition agency to veto actions of sector regulators over competition related mandates.

Shared Jurisdiction
Like in UK, where regulators apply & enforce the provisions of competition legislation while OFT issues guidance on levy of penalty
Participation in proceedings

Right to participate before the proceedings of the other regulators. Inclusion of all sector experts including competition expert in deciding a matter.

Organized cooperation

Competition Authority provides expert reports to sectors for complementary expertise, Same appellate Court for both.

Reference Mechanism

The reference mechanism under s. 21 must be made mandatory thus substituting ‘shall’ instead of ‘may’ in the Act. The regulators must have to respond to requests from each other on the competition issue, within a stipulated time.

Memorandums of Understanding

Empowering CCI to enter into Memorandums of Understanding with sector regulators, carving out their respective roles and jurisdictions.

Competition Consultative Group – Pakistan

- informal “think tank” for the Commission.
- platform for informal feedback and guidance with respect to the Commission’s ongoing activities and proposed initiatives.
- small, select body comprising of around 15 eminent persons essentially drawn from sector-specific regulatory agencies, relevant professional bodies, and the private sector.
- The regulatory bodies represented - The Oil and Gas Regulatory Authority, Pakistan Electronic Media Regulatory Authority, National Energy & Power Regulatory Authority, Pakistan Telecommunications Authority, State Bank of Pakistan, Civil Aviation Authority, & the Securities and Exchange Commission of Pakistan.
- convenes quarterly to discuss and deliberate on issues pertaining to competition. The CCG’s efforts are bringing together these participants, and this indicates the holistic and realistic approach.
being taken by the Commission to address the concerns of all stakeholders, in a positive manner.

- useful in promoting awareness of the competition regime as well as raising interesting points for research and further investigation by the Commission.

Regulator's Consultative Group (RCG)

On the lines of CCG of the Competition Commission of Pakistan, a Regulator’s Consultative Group may be made, which will regularize the exchange of information and promote healthy interaction between the Commission and sector regulators. The recently formed Eminent Persons Group is a welcome move and on the same lines be considered this competition-mandated consultative group consisting of sector regulators, field experts and Commission officers. The meetings of the group may be conducted quarterly. The Agenda for each meeting may be decided well in advance, keeping in mind the cases coming before the various regulators. These meetings may be conducted across the country, hosted by various regulators which will attract media attention and promote the efforts made by the Group. The RCG will enhance the efficiency of all regulators as the best expertise from all fields will be gathered in a common pool of knowledge. Also, the forum of regulators must be re-structured to promote competition mandate & increase effective participation.

Framework suitable for Indian system

There is no single framework or model to completely address the issue of conflict of jurisdictions between the competition authorities and the sectoral regulator. More than one model or framework may be employed within a country to address this issue. In a single jurisdiction, while in one sector the competition authority may have statutory powers for some aspects of regulation, in another sector, the sector regulator and the competition authority may exercise concurrent jurisdiction.

Competition authority as the principal enforcer and overseer of competition issues: Indian regulators appear to be in favor of leaving competition related issues exclusively in the hands of the competition authority and retaining the responsibility of deciding on the technical issues with themselves. This practice has also been adopted in several countries, including the United States (US). An industry-specific regulator may have jurisdiction to set prices, but not have jurisdiction to criminally prosecute price fixing. - Sector regulators and competition authorities concurrently oversee competition issues and enforce competition laws:

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46 Samir R. Gandhi, ELP advocates and associates, Interface between competition law and sectoral regulators.
The allocation of work between the agencies in case concurrent jurisdiction of competition authorities and sector regulators in regulating a sector may be implemented in a number of ways, including effective use of the reference mechanism under Section 21 of the Competition Act and MoUs between the CCI and sectoral regulators. The Government of India may consider making it mandatory for the CCI and the concerned sector specific regulator to respond to the requests from each other to give their opinion under the reference mechanism (envisaged under section 21 of the Competition Act), on the competition issue at hand within the timeline stipulated in the Act. In the event that the regulators fail to reach a consensus, the Government may reserve the power to make a final decision in national interest. **Empowering the CCI, possibly via an amendment to the Competition Act, to enter into Memorandum of Understanding with other sector specific regulators will help in effectively setting out the respective roles of the agencies.** Such an approach has been adopted by countries such as Ireland and Canada.

**Conclusion**

Firms that are in dominant and monopoly positions would strive to abuse that position through engaging in anti-competitive behaviour. This is one rationale for the introduction of regulatory regimes, i.e. to monitor and control such abusive behaviour, and mimic competition where there are natural monopolies. Regulators generally fall into two categories – those with a mandate pertaining to specific sectors (sector regulators) and competition authorities, established to enforce national competition laws. Competition authorities have a regulatory mandate over competition issues which cover all sectors of the economy. The two sets of regulators share a common goal of protecting and enhancing social/economic welfare.

Despite sharing a common goal, it needs to be appreciated that sector regulators and competition authorities generally have different legislative mandates and their perspective regarding competition matters may be different. Competition laws seek to protect the process of competition, not agents in the market with a view to maximising productive and allocative efficiencies. Competition rules tell the agents in the market what they should not do, while sector regulation does the reverse and tells market agents what to do. The differences in the methods and approaches to competition matters may result in different outcomes, thereby causing confusion for stakeholders and also leading to forum shopping. Moreover, there is normally an absence of clearly defined jurisdiction in regulatory matters, leaving a lot of subjectivity as to which of the two authorities can be more effective in handling specific cases. This also results in regulatory authorities being asked or forced to reverse their decisions by line ministries, thereby undermining their authority. **There is, therefore, a need for defining boundaries between mandates as well as understanding respective competencies to ensure that each regulatory body is given a mandate that is best suited for it.**

We will assume the role of a dynamic regulator keen to promote and sustain competition and prevent practices having adverse on competition. At the same time, a soft or lax regulator we won’t be. Our approach would be result-oriented, constructive and positive so that our credibility is soon established. We will play the role of a neutral umpire—no bias for or against the private sector, government or PSUs, small or big firms, although when we address the abuse of dominant position, smaller players are sure to benefit. We have three basic objectives: economic development, protecting the interest of consumer and freedom of trade. - KG Narendranath, ET Bureau
Concurrent jurisdiction implies that both competition authorities and sector regulators have mandates in regulatory matters, regardless of the issue. This implies that the two regulators have to find a way of harnessing their respective expertise. This is the approach used in the UK. Due to the difficulties in delineating functions, the best approach is one which involves cooperation between sector regulators and competition authorities. The sector regulators should have the leading role in regulating technical issues. Thus for structural issues, which in most cases are ex ante, sector regulators should take a leading role. For competition issues, which are largely behavioural and ex post, competition authorities should take a leading role. However, though either agency can take a leading role, there should always be consultations between the two bodies to ensure that remedial measures taken by one agency are not against the mandate of the other. For cases in which it is difficult to classify either as structural or behavioural, there could be some complications. The competition authority should be allowed to carry out a competition analysis while the sector authority examines related technical issues. Both regulators need to be satisfied before the transaction can go ahead. Deadlines can be used to ensure urgency, or else there might be delays in getting the necessary approvals. Cooperation and consultation is therefore of paramount importance. In European Union (EU) member states, both sets of laws (competition as well as that pertaining to sector regulation) mandate, the need for the two agencies to confer with each other, while leaving behavioural issues to the competition agency and structural issues to the sector regulator. This appears to be the best model to ensure that there is cooperation and joint resolution.