

**INTERFACE BETWEEN**  
**COMPETITION COMMISSION OF INDIA**  
**AND**  
**SECTORAL REGULATORS**

**INTRODUCTION**

The process of globalization and liberalization has brought a considerable awareness towards improving the competitive process in developing economies such as India. Until recently, most of the developing countries have operated without a structured competition policy, and have justified the interventions by the state over economic activities. 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 framework of competition law in India, envisages a Competition Commission of India through Competition Act, 2002 (hereinafter referred to as 'the Act') as a competition authority. The aftermath of a securities scam in 1992 has seen several sector specific regulators emerging on the Indian regulatory horizon. Apparently, the huge number of regulators, many a time, may regulate similar aspects of a corporate behavior.

The sector specific regulations bring 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. On one hand, sector specific regulation identifies a problem *ex ante*, and builds an administrative machinery to address behavioral issues before the problem arises, while on the other hand, competition policy would usually 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". Undoubtedly, this mandate is extraordinarily wide. It is also agnostic about sector specific regulators. A similar language has been used in the preamble of the Act and is also covered in S. 18.<sup>1</sup>

Specific provisions contained within the legislation demonstrate the probable tension. Section 60 of the Competition Act, 2002 is the usual non obstante provision asserting the supremacy of competition legislation within the domain of competition enforcement.<sup>2</sup> However, Section 62 of the Competition Act, 2002 encouragingly declares that competition legislation ought to work along with other enactments.<sup>3</sup> Both sections 60 and 62, ironically, are couched in mandatory language.

If sections 18, 60 and 62 weren't sufficient to cause enough mystery, section 21 of the Competition Act, 2002, suggests that in any proceedings before a statutory authority<sup>4</sup>, if such a need arises, the statutory authority may make a reference to competition authority.<sup>5</sup> Incidentally, upon reference, the opinion of the competition authority is not

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<sup>1</sup> 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."

<sup>2</sup> 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."

<sup>3</sup> 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".

<sup>4</sup> 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."

<sup>5</sup> 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."

binding upon the statutory authority.<sup>6</sup> The competition authority is bound to deliver its opinion to the statutory authority within a stipulated time period of two months.<sup>7</sup>

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

## **THE INTERFACE OF REGULATION AND COMPETITION**

There is unique interface between sector specific regulation and competition law in India. In the immediate past, India has witnessed a massive spurt in its rate of growth.<sup>8</sup> While the fast-paced development has uplifted millions of people from poverty levels, it has also led to concomitant challenges.<sup>9</sup> There have been many economic scandals and other crises during the period of economic boom. Numerous regulatory authorities have come into picture in the economic and legal sector during this period. As so many regulatory authorities came into existence during the same period, overlapping of jurisdiction was natural.

The interface of CCI *vis-à-vis* sectoral regulators is critical. The basic premise to be recognized is that sectoral regulators have domain expertise in their relevant sectors.

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<sup>6</sup> Section 21(2) states: "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*".

<sup>7</sup> Proviso to section 21 states: "Provided that the Commission shall give its opinion under this section within sixty days of receipt of such reference"

<sup>8</sup> See *generally*, Economic Survey, 2006-2007, Ministry of Finance, and Government of India.

<sup>9</sup> Post-1991, with the ushering in of an era of liberalization in India, the percentage of poor people in India has been a subject matter of intense debate. The official estimate pegs it around 26%. The figures released by the government are allegedly based upon severely flawed methodology and hence have attracted scathing criticisms from economists. See *generally*, Angus Deaton & Jean Dreze, "Poverty and Inequality in India: A Re-Examination", *Economic and Political Weekly*, September 7, 2002, pp. 3729 – 3748.

The Commission, on the other hand, has been constituted with a broad mandate to deal with competition for which certain very specific parameters are laid down under the Act. A formal mechanism for coordination between CCI and the sectoral regulators is therefore of key importance. In essence a framework for an interface between a competition regulator and a sectoral regulator should deliver the following benefits:

- a) Appropriately identify issues of concern
- b) Ensure appropriate channelization of various concerns to the appropriate forum and obtaining corrective action at the earliest;
- c) Establish a framework that avoids duplication of effort;
- d) Conserve the Commission's resources and limit its ambit only to matters of competition; and
- e) Promote capacity building and developing expertise both at the level of the competition regulator and the sectoral regulator.

### **BIRTH OF INDIAN STRAND OF REGULATION**

The history behind Indian strand of regulation has a close connection with the initiation of the process of liberalization, privatization and globalization in 1991. Gradually it was also realized by the government that it needs to focus on governance.

Along with this realization, the Indian legal system has been characterized by a sudden proliferation in the birth of regulatory authorities. One of the first regulatory authorities in India, consequent upon securities scandal was the Securities and Exchange Board of India ("SEBI") through the Securities and Exchange Board of India Act, 1992 ("SEBI Act").

Globally, it is understood that pursuant to emergence of a “risk society”, there has been rise of a new regulatory state.<sup>10</sup> India is no exception to that. There have been unpredictable scandals during this period of fast and robust growth. This has ensured that governmental approach to regulation is ostensibly paradoxical. 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. For instance, in ***Monnet Sugar Limited v. Union of India***, (MANU/UP/0823/2005) the Allahabad High Court dealt with Industrial (Development and Regulation) Act, 1951 which prior to the process of liberalization was the epitome of license and permit controls. Indeed, economic reforms has led government to reinvent itself through doing less “rowing” and more “steering”. For instance, when government thought 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. In case of ***Reliance Airport Developers Pvt. Ltd. v. Airports Authority of India***, [2006 (11) SCALE 208; MANU/SC/4912/2006], the Supreme Court of India endorsed the public private partnership approach to development.

Unlike the socialist hue that pervaded governance till 1991, India increasingly relies upon market rivalry for allocation as well as distribution of resources.<sup>11</sup> Also there is a realization that the textbook model of perfect competition does not exist in reality. One

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<sup>10</sup> “Risk society” doesn’t mean that the society *per se* has become more risky. It means that as a modern society, we spend increasingly enormous amount of time in order to manage the society’s response to emerging risks. For instance, the ubiquitous plastic money is supposed to make life simpler by eschewing the necessity of carrying cash. Nonetheless, any holder of credit card in India knows that one has to spend time at the end of the month minutely going through each transaction as credit card companies are known for their obscure trade practices, which usually leads the consumers to cough up more money. Indeed, the Reserve Bank of India recently came up with a set of guidelines to address the practices of credit card companies. See *generally*, Christine Parker & John Braithwaite, “Regulation” in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, p. 122.

<sup>11</sup> The latest step in reliance upon market is freeing up of exploration of oil and gas sector for private players. See *for instance*, Raghuvir Srinivasan, “Well of paradoxes”, The Hindu Business Line, <http://www.blonnet.com/bl10/stories/2004012800732300.htm>.

of the intervention strategies to address the market imperfections that may induce welfare-reducing monopolies is that of competition law and policy.<sup>12</sup>

## **FOUNDATION OF COMPETITION LAW IN INDIA**

The prevailing competition law has been taken from two dominant paradigms – the US antitrust model and the EU competition law model. It was believed that till 1975, these were the only two competition law models available; however, India had a *sui generis* model of competition law way back in 1969 in the form of Monopolies and Restrictive Trade Practices Act.<sup>13</sup> The concerns of the government rose right after the first plan period. Uneven impact of growth upon poor people could be noticed. 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.<sup>14</sup>

The influence of the Constitution of India is eminently visible. 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.<sup>15</sup> Further, the Constitutional mandate is also clearly in favor of serving the common good of the society.<sup>16</sup>

While the MRTP Act was an embodiment of the constitutional mandate, it exempted the governmental companies from its purview and focused only upon the private entities.<sup>17</sup>

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<sup>12</sup> Paul A. Samuelson, pp. 353 – 360.

<sup>13</sup> Hereinafter MRTP Act for the sake of brevity.

<sup>14</sup> See, the preamble of the MRTP Act.

<sup>15</sup> 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”.

<sup>16</sup> 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”.

<sup>17</sup> 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

Perhaps the philosophy underlying the MRTP Act was that governmental companies were the harbinger of public interest and private companies were the only entities in need of regulation to promote public interest.<sup>18</sup> 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.<sup>19</sup> Hence, India opted for a modern legislation on competition law that was mandated to enhance consumer welfare through sustaining competition in the market. Hence the present Act was passed with the preamble “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”.

Section 3 of the Act deals with agreements among enterprises or persons or association of persons, which causes or likely to cause appreciable adverse effect on competition. Such agreements are rendered void pursuant to this section. While the abuse of dominance is prohibited under Section 4 of the Act. ‘Dominance’ or ‘Dominant Position’ means a position of strength, enjoyed by an enterprise, in the relevant market, in India which enables it to –

- a) Operate independently of competitive forces in the relevant market; or
- b) Affect its competitors or consumers or the relevant market in its favor.

Dominance is determined by several factors e.g. market share of the enterprise concerned, market share of competitors, entry barriers, size and resources commanded by the enterprise or competitors, etc.

Examples of abuse include:

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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...”

<sup>18</sup> 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”.

<sup>19</sup> *See generally*, Rahul Singh, "Shifting Paradigms, Changing Contexts: Need for a New Competition Law in India", Vol. 8, Issue 1, *Journal of Corporate Law Studies*.

- Exclusionary practices such as predatory pricing, denying market access, use of dominance in one market to enter into, or protect, other relevant market.
- Exploitative practices such as discriminatory pricing and imposing discriminatory conditions of trade, conclusion of main contract contingent upon accepting supplementary obligations unrelated to main contract.

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 advantage point on the economy. Such a broad, sweeping advantage 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.<sup>20</sup> The EU competition law intends to promote market integration and protect competition.<sup>21</sup>

Anti competitive practices committed overseas but having effect in India has been covered under section 32 of the Act. In order to enable the Commission to implement this section, enabling provision (section 18) has been provided whereby the Commission, with the prior approval of the Central Government, may enter into arrangements and memorandum of understanding with foreign agencies and enforce the law by way of 'effects doctrine'. Competition Advocacy is one of the main pillars of modern competition law which aims at creating, expanding and strengthening awareness of competition in the market. Section 49 of the Act, mandates the CCI to undertake advocacy for promoting competition.

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<sup>20</sup> Robert H. Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged", 34 *Hastings Law Journal* 67 (1982).

<sup>21</sup> David J. Gerber, "Competition" in Peter Cane & Mark Tushnet, *The Oxford Handbook of Legal Studies*, Oxford University Press, Oxford, 2003, pp. 522 - 526.



## **SPLIT BETWEEN REGULATION AND COMPETITION**

Business regulation is perhaps as old as the businesses themselves. While modern, liberalized economies have increasingly relied upon markets for allocation of resources, markets can also fail and lead to undesirable upshots.<sup>22</sup> These extreme possibilities with the market has ensured that governments oscillate between the limbs of regulation and competition in order to ensure that when market fails, it doesn't crash land but is provided with a suitable parachute. Regulation, implemented through sector specific regulators and competition regulation, through the competition authority, differ in their approach to regulating business in the market.

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

Regulations, on the other hand, are public constraints on market behaviour or structure. They usually refer to a diverse set of instruments by which governments set requirements on businesses and citizens. Regulations can be categorized as under:

- (i) Economic Regulations – Those which intervene in market decisions such as pricing, competition and entry/exit.
- (ii) Technical Regulations: Those which regulates the technical aspects which are distinct and unique to the sector
- (iii) Social regulations – Those which protect public interest such as health, safety, environment.
- (iv) Administrative regulations – administrative formalities through which government collects information and intervenes in individual economic decisions.

The objective of a sectoral regulator is to provide good quality service at affordable rates, but the promotion of competition and prevention of anticompetitive behaviour may

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<sup>22</sup> See generally, Cass R. Sunstein, *Free Markets and Social Justice*, Oxford University Press, Oxford, 1997, p.3. (where he looks at free market and free trade as not only the engine of growth and productivity but also that of social justice and equity).

not be high on its agenda or the laws governing the regulator may be silent on this aspect. It is not uncommon for sectoral regulators to be more closely aligned with the interest of the firms being regulated, which is also known as 'regulatory capture'. Besides, a sectoral regulator may not have an overall view of the economy as a whole and may tend to apply yardsticks which are different from the ones used by the other sectoral regulators. In other words, there is a possibility of the lack of consistency across sectors.

The following table summarizes the difference in their approach.

<b>Sector specific Regulator</b>	<b>Competition Authority</b>
Tells businesses “what to do” and “how to price products”	Tells businesses “what not to do”
Focuses upon specific sectors of the economy	Focuses upon the entire economy and functioning of the market
<i>Ex ante</i> – addresses behavioral issues before problem arises	<i>Ex post</i> – addresses behavioral issues after problem arises
Focus upon orderly development of a sector that would presumably trickle down in a sector ensuring consumer welfare	Focus upon consumer welfare and unfair transfer of wealth from consumers to firms with market power
Sectoral regulators are usually more appropriate for access and price issues such as changing the structure of the market, reducing barriers to entry and opening up the market to effective competition.	Competition legislation is usually more appropriate for affecting conduct and maintaining competition

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

## **OVERLAPPING JURISDICTIONS**

The conflicts between CCI and the sectoral regulators could be caused by legislative ambiguity or jurisdictional overlap or legislative omission. Interpretational bias of the bureaucracy involved could further aggravate the conflicts. Conflicts between two may be generated by the market players and legal arbitrators for obvious reasons. Conflicts are bound to hurt consumers and the uncertainties that go with them can increase risk of investment. Conflict resolution by a court of law may perhaps be time consuming, and therefore, be only the last alternative.

There are innumerable instances of ostensibly overlapping jurisdictions on questions of competition. Allocation of specific areas of work for sectoral regulators, does not appear to have been done very carefully. The tangled understanding of framers of the legislation is evident both in recent legislations as well as past ones. Besides clumsiness, there is also lack of comprehension of regulatory jurisprudence.

### **A. PETROLEUM REGULATOR**

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”<sup>23</sup> and “protect the interest of consumers by fostering fair trade and competition amongst the entities”.<sup>24</sup>

The Petroleum and Natural Gas Regulatory Board (“PNGRB”) is mandated to be mindful of competition while dealing with access to common carriers or contract carrier<sup>25</sup> as well as distribution networks<sup>26</sup>. Specifically, if PNGRB is interested in declaring existing pipeline or distribution network as a common carrier, it still needs to be guided by the principles of competition.<sup>27</sup> Subject to an entity’s right of first use, the entity’s excess capacity is to be distributed by PNGRB in accordance with ‘fair competition’.<sup>28</sup> Further, while determining transportation tariffs<sup>29</sup>, PNGRB is expected to keep considerations of competition and efficiency at the back of its mind<sup>30</sup>.

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<sup>23</sup> 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”.

<sup>24</sup> 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”.

<sup>25</sup> Section 11(e)(i) states that the “Board shall regulate, by regulations, access to common carrier or contract carrier so as to ensure *fair trade and competition* amongst entities and for that purpose specify pipeline access code”.

<sup>26</sup> Section 11 (e) (iii) of the PNGRB Act states that the “Board shall regulate, by regulations, access to city or local natural gas distribution network so as to ensure *fair trade and competition* amongst entities as per pipeline access code”.

<sup>27</sup> Section 20(5) of the PNGRB Act states that “for the purposes of this section, the Board shall be guided by the objectives of *promoting competition* among entities, avoiding infructuous investment, maintaining or increasing supplies or for securing equitable distribution or ensuring adequate availability of petroleum, petroleum products and natural gas throughout the country and follow such principles as the Board may, by regulations, determine in carrying out its functions under this section”.

<sup>28</sup> Section 21(1) of the PNGRB Act states: “The entity laying, building, operating or expanding a pipeline for transportation of petroleum products or laying, building, operating or expanding a city or local natural gas distribution network shall have right of first use for its own requirement and the remaining capacity shall be used amongst entities as the Board may, after issuing a declaration under section 20, determine having regard to the needs of *fair competition* in marketing and availability of petroleum and petroleum products throughout the country”.

<sup>29</sup> Section 22(1) states: “Subject to the provisions of this Act, the Board shall lay down, by regulations, the transportation tariffs for common carriers or contract carriers or city or local natural gas distribution network and the manner of determining such tariffs.”

<sup>30</sup> Section 22(2) states: “For the purposes of sub-section (1), the Board shall be guided by the following, namely :- (a) the factors which may *encourage competition, efficiency, economic use of the resources, good performance and optimum investments...* (c) the principles rewarding *efficiency in performance...*”.

Interestingly, the PNGRB Act borrows the concept of 'restrictive trade practice'<sup>31</sup> from the Monopolies and Restrictive Trade Practices Act, 1969.<sup>32</sup> After four years of drafting the competition legislation, the framers of legislation appear to have either forgotten about the earlier legislation or developed cold feet about the need for modern competition legislation.

In order to deter the infringers of the enactment, a la other regulatory enactments, contravention of the directions given by the Petroleum and Natural Gas Regulatory Board attracts civil penalty.<sup>33</sup> A complaint based upon the phoenix entitled 'restrictive trade practice' ensures that penalty is enhanced by five times.<sup>34</sup> However, unlike the electricity regulator, the PNGRB Act does have any overriding, *non obstante* provision.

## **B. ELECTRICITY REGULATOR**

The Electricity Act, 2003 is redolent of the conundrum caused by overlapping jurisdictions of regulatory authorities in India. The Electricity Act was passed on May 26, 2003, which is a good four and a half months after the Competition Act, 2002 was passed on January 13, 2003, but still, one of the objectives behind the Electricity Act is

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<sup>31</sup> As per Section 2 (zi) of the PNGRB Act, "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular – (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to petroleum, petroleum products or natural gas or services in such a manner as to impose on the consumers unjustified costs or restrictions."

<sup>32</sup> As per section 2(o) of the MRTPA Act, "restrictive trade practice" means a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner and in particular, - (i) which tends to obstruct the flow of capital or resources into the stream of production, or (ii) which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified costs or restrictions."

<sup>33</sup> 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".

<sup>34</sup> Proviso to section 28 states that "... in the case of a complaint on restrictive trade practice, the amount of civil penalty may extend to five times the unfair gains made by the entity or ten crore rupees, whichever is higher".

that of promotion of competition.<sup>35</sup> Indeed, the framers of the legislation also conferred power upon the regulator to deal with anti-competitive agreements, abuse of dominant position and mergers related to impediment to competition in electricity.<sup>36</sup> This is similar to the language used in section 3 and 4 of the Competition Act, 2002 which pertain to anti-competitive agreements, abuse of dominant position and regulation of combinations.

In ***Shri Neeraj Malhotra, Advocate vs. North Delhi Power Ltd. & Ors. [Case No. 6/2009]***, in which the anti-competitive behavior of the electricity distribution companies was alleged, there was clear confusion regarding the jurisdictional authority in competition related issues. The Discoms alleged before the CCI that only the Delhi Electricity Regulatory Commission (DERC) under the Electricity Act, 2003 had jurisdiction to deal with the issues relating to anti-competitive behavior of electricity distribution companies. However, this regulator appears to be in favor of leaving the competition related issues exclusively in the hands of the competition authority and retaining the responsibility of deciding on the technical issues with themselves. The DERC, in the said case categorically stated in its communication to the CCI that although all matters pertaining to electricity tariff have to be decided as per the provisions of the Electricity Act and DERC Regulations, allegations of anti-competitive behaviour, including abuse of dominant position by the Discoms fall within the jurisdiction of the CCI.

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<sup>35</sup> The preamble of the Electricity Act, 2003 states that it is “[a]n Act to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, *promoting competition therein*, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.”

<sup>36</sup> Section 60 of the Electricity Act, 2003 states: “The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is *likely to cause or causes an adverse effect on competition* in electricity industry”.

The regulator, while fixing tariff levels, is to be guided by the principle of competition and efficiency.<sup>37</sup> 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.<sup>38</sup> The regulator has also been entrusted with the task of advising the government in competition within electricity sector.<sup>39</sup> The regulator has been mandated to be guided by the lodestar of competition while evolving scheme for reorganization of provincial electricity boards that were under financial distress.<sup>40</sup>

The electricity regulator, too, has been armored with the *non obstante* powers that stipulate that the electricity legislation trumps other enactments.<sup>41</sup> Like competition authority, the electricity regulator also finds itself constrained by a duty to act in aid of other regulators.<sup>42</sup>

### **C. THE AIRPORT ECONOMIC REGULATORY AUTHORITY OF INDIA**

The Airports Economic Regulatory Authority (AERA) is a statutory body constituted under the Airports Economic Regulatory Authority of India Act, 2008 (27 of 2008). The

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<sup>37</sup> Section 61 in, relevant parts, state: "The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely, :-... (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimal investments; ... (e) the principles rewarding efficiency in performance...". Further, the second proviso to section 62(1) states that "in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity".

<sup>38</sup> Section 23 of the Electricity Act, 2003 states: "If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and *promoting competition*, it may, by order, provide for regulating supply, distribution, consumption or use thereof."

<sup>39</sup> Section 79(2), in its relevant part, states: "The Central Commission shall advise the Central Government on all or any of the following matters, namely: - (a) (ii) *promotion of competition*, efficiency and economy in activities of the electricity industry...". See also, Section 86(2) (i) that stipulates for the counterpart provincial regulator that "[t]he State Commission shall advise the State Government on all or any of the following matters, namely ... *promotion of competition*, efficiency and economy in activities of the electricity industry..."

<sup>40</sup> Section 131 (5) (a) states that: "[a] transfer scheme under this section may ... provide for the formation of subsidiaries, joint venture companies or other schemes of division, amalgamation, merger, reconstruction or arrangements which shall promote the profitability and viability of the resulting entity, ensure economic efficiency, *encourage competition* and protect consumer interests..."

<sup>41</sup> See, Section 174 of the Electricity Act, 2003 states: "Save as otherwise provided in section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act." This is similar to the mandate of the competition authority under section 60 of the Competition Act, 2002.

<sup>42</sup> Section 175 of the Electricity Act, 2003 states: "The provisions of this Act are in addition to and not in derogation of any other law for the time being in force."

objective of the said Act is to regulate tariff for the aeronautical services, determine other airport charges for services rendered at major airports and to monitor the performance standards of such airports.<sup>43</sup>

The operating environment in the domestic airline industry has become extremely competitive over the last few years with increase in the number of players leading to a fragmented market share, growing competition and pricing pressure on players. The scope for competition in provision of air navigation services is limited and direct competition between different air navigation service providers within the same airspace is not a practical possibility. Therefore, to protect the user from abuse of dominant position, greater transparency could be insisted upon.

However, under the said Act, the jurisdiction of the Act is specifically ousted in matters that fall under the purview of the Competition Act, 2002.<sup>44</sup>

#### **D. TELECOM REGULATOR**

The telecom regulator is perhaps another interesting instance. It was established, *inter alia*, in order to ensure orderly development of telecom sector.<sup>45</sup> Accordingly, one of the critical functions of the telecom regulator is to 'facilitate competition and promote efficiency'.<sup>46</sup> Nevertheless, the appellate authority established to adjudicate telecom disputes<sup>47</sup> excludes competition matters, albeit those arising under the old, MRTP Act<sup>48</sup>.

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<sup>43</sup> Preamble of the Airport Economic Regulatory Authority of India Act, 2008 – *An Act to provide for the establishment an Airports Regulatory Authority to regulate tariff and other charges for the aeronautical services rendered at airports.....*

<sup>44</sup> S. 17(a)(iii) of the Airport Economic Regulatory Authority of India Act, 2008.

<sup>45</sup> The preamble of the Telecom Regulatory Authority of India Act, 1997 states that it is "an Act to provide for the establishment of Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunications services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto".

<sup>46</sup> Section 11 of the Telecom Regulatory Authority of India Act, 1997 states: "(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the functions of the Authority shall be to (a) 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 telecommunications services so as to facilitate growth in such services... (viii) *efficient* management of available spectrum".

<sup>47</sup> Section 14 of the TRAI Act, 1997 states: "The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to – (a) adjudicate any dispute –



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<sup>49</sup> and does not possess any overarching powers over other regulators.

In the case of ***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 Telecom Regulatory Authority of India (TRAI) and Telecom Disputes Settlement and Appellate Tribunal (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 Competition Act, 2002 enabling CCI to exercise its jurisdiction.

## **POSSIBILITY OF REDUCTION OF CONFLICT BETWEEN SECTORAL REGULATORS AND CCI**

Having settled for some sort of framework overseeing business conduct, the Indian policy makers are faced with the dilemma of choice between sectoral regulation and competition law. In order to organize the division of labor between sectoral regulators and competition authorities, there are three board options available:

### **(a) Clear separation of competition enforcement functions from technical functions:**

Sectoral regulator may be vested with powers of *ex ante* control and the competition authority may be given the *ex post* authority. E.g. fixation of

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(i) between a licensor and a licensee; (ii) between two or more service providers; (iii) between a service provider and a group of consumers...”.

<sup>48</sup> Proviso (A) to section 14(a) of the TRAI Act, 1997 states: “Provided that nothing under this clause shall apply in respect of matters relating to – (A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969”.

<sup>49</sup> Section 38 of the TRAI Act, 1997 states: “The provisions of this Act shall be in addition to the provisions of the Indian Telegraph Act, 1885 and the Indian Wireless Telegraphy Act, 1933 and, in particular, nothing in this Act shall affect any jurisdiction, powers and functions required to be exercised or performed by the Telegraph Authority in relation to any area falling within the jurisdiction of such Authority.”

electricity tariffs may be left to the electricity authority constituted under the Electricity Act unless the prices are claimed to be excessive or predatory which then may require an *ex post* review by the competition authority.

**(b) 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.<sup>50</sup>

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.<sup>51</sup>

**(c) Concurrent 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.<sup>52</sup>

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,

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<sup>50</sup> "Subgroup 3: Interrelations between antitrust and regulatory authorities", Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Third ICN Annual Conference, Seoul, April 2004, pp. 20-23.

<sup>51</sup> Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Third ICN Annual Conference, Seoul, April 2004, p. 5.

<sup>52</sup> "Subgroup 2: Interrelations between antitrust and regulatory authorities", Antitrust Enforcement in Regulated Sectors Working Group, International Competition Network, Report to the Fourth ICN Annual Conference, Bonn, June 2004, p. 9.

privileges competition authority, the UK grants explicit concurrent powers to sectoral regulators.<sup>53</sup>

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.

## **SUGGESTIONS**

1. Formal schemes for coordination can be considered, as is done in various countries, for example:
  - a) The right to participate/observe proceeding before the other;
  - b) Formal referrals;
  - c) Appeal to a common authority;
  - d) Non-interference in other's jurisdiction;
  - e) Delineation of jurisdiction; and
  - f) Presence of competition authority on sectoral regulator agency.
  
2. As a matter of policy, formal and informal exchanges between various sectoral regulators and CCI should be encouraged. The consultation process could be at two levels, one, at the policy level and two, in respect of individual cases. A

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<sup>53</sup> See generally, Department of Trade and Industry and HM Treasury, "Concurrent Competition Powers in Sectoral Regulation", May 2006, URN 06/1244.

forum should be created where the CCI and the sector regulators could meet on regular basis with a view to promote policy level coordination and make sector regulation as much competition driven as possible. This mechanism could also help in evolving principles for sharing information and determining the jurisdiction in different categories or types of cases.

3. Other mechanisms for coordination should also be explored such as:
  - (a) Use of experts from each other for facilitating enquiry/investigations.
  - (b) Exchange of personnel on deputation or internship basis.
  - (c) Participation in each others' training programmes, workshops, seminars, etc.
  - (d) Conducting regular training programmes by CCI for representatives of the sector regulators so that they are in a better position to appreciate various competition issues.

## **CONCLUSION**

The seemingly uneasy interface between the two is evident from the legislative framework. A closer examination of the interface requires exploratory as well as normative insights. Unlike sectoral regulators, competition authority combines the twin powers of private enforcement with right to claim damages. In the absence of the two, sector specific regulators cannot possibly serve as an effective instrument for promotion and protection of consumer welfare. Competition enforcement is a sophisticated, complex process. Therefore, in order to reduce transaction cost and efficiently enhance legal certainty, the realm of competition law enforcement ought to be left in the hands of the competition authority.

This does not necessarily mean that the sector specific regulators must wind up their shops. However, clarity about the jurisdiction of the sectoral regulators and the competition authority is must for the smooth functioning of both.