Competition and Regulatory Overlaps: The Case of India

Introduction

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

However, the pattern changed greatly, following a new wave characterised by liberalisation, privatisation and globalisation from the early 1990s, which saw a changing picture in the manner in which economic activity was conducted. As private players started embracing the liberalisation calls through active participation, a glaring need for sector regulation became apparent.

Although the Reserve Bank of India (RBI) was established on April 01, 1935, in line with the provisions of the Reserve Bank of India Act, 1934, its Board for Financial Supervision (BFS), responsible for overseeing the supervisory role of the Bank, was only constituted as a committee of the Central Board of Directors in November 1994 (RBI, not dated), in response to anticipated and actual private participation in line with the liberalisation drive. In the electricity sector, the need for a regulator was only felt during the post-liberalisation era, when it was felt the co-existence of divergent private and government interests in the electricity sector warranted the creation of an autonomous and independent regulator which was at arm's length from the government (CUTS, 2007).

This saw the Central and state electricity regulatory commissions being set up. In some cases, the regulatory authorities were established well after the players had already begun operating under the liberalised environment. For example, the telecommunications regulator, the Telecom Regulatory Authority of India (TRAI), was set up in 1997 at a time when mobile services were already about two years in existence (CUTS, 2006).

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

The MRTP Act was enacted at a time when India was pursuing the 'command-and-control' paradigm for the administration of the economic activities of the country, giving it little influence over the process attributes of competition, which was largely non-existent. As the new paradigm of economic reforms took effect in the early 1990s, the MRTP Act was found to be hardly adequate as a tool and a law to regulate the market and ensure the promotion of competition. This saw a lengthy process towards competition reforms, eventually resulting in the extant Competition Act, 2002 (as amended). This saw the creation of two competition bodies, the Competition Commission of India (CCI) and the Competition Appellate Tribunal (CAT), to administer the competition law in India.

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

Some sector laws which were enacted after the Competition Act, 2002, also bestow sector regulators some competition functions and these include the Airports Economic Regulatory Authority (AERA) Act, 2008; Petroleum and Natural Gas Regulatory Board (PNGRB) Act, 2006 and Electricity Act, 2003. As a result, a scenario where agencies with overlapping jurisdictions were co-existing was created.

This paper makes an attempt at assessing the issue of jurisdiction overlap between sector regulators and competition authorities. It makes an attempt at analysing whether the current structure and legislative environment in India allows for a proper harnessing of expertise between the competition authority and sector regulators.

The rest of the paper is organised as follows. Section 2 looks at the regulation scenario in India, focusing on the legislative and institutional set up for the banking, telecommunication, electricity, oil and natural gas as well as the capital markets sectors. Section 3 assesses the extent to which there are some overlaps between the functions, as set out in the legislations, of the sector regulators and the competition authority. Section 4 takes a look at the international scenario, exploring how the issue of overlaps is being handled in other jurisdictions. Section 5 concludes with some recommendations on the best way to harness the expertise of the regulators well.

Sector Regulator in India – Overview

As already mentioned, there are several regulators who were introduced in India in a bid to regulate both behavioural and structural issues in their respective sectors. Among those regulators which might have a bearing on competition regulation are the following:

Financial Sector

There are a couple of regulators of the financial sector in India, although some of them regulate only some specific aspects of the sector. For example, the Insurance Regulatory Development Authority (IRDA) focuses on insurance issues and the Pension Fund Regulation and Development Authority (PFRDA) focuses on issues to do with pension funds, while the Securities and Exchange Board of India (SEBI) promotes the interest of shareholders in the securities market. RBI can be regarded as the main regulator as it has overarching powers, which also overlaps with other regulators in the financial sector. All these regulators, who have been established in terms of their specific legislations, report to the Ministry of Finance, who becomes the umbrella body in the financial sector by virtue of its policy making powers. A brief look at the regulators in each of these sub-sectors follows.

Banking Sector

The RBI, which started operating on April 01, 1935, in line with the RBI Act of 1934, has a myriad of objectives. These include ensuring monetary stability; operating the currency and credit system of the country; foreign exchange and reserves management, government debt management, financial regulation and supervision and acting as banker to the banks and to the government (RBI, not dated). In that regard, its legislation bestows upon it powers to design and implement the policy framework for banking and non-banking financial institutions, which generally serve to provide people access to the banking system, protect depositors' interest and maintain the overall health of the financial system.[1]

Capital Markets
SEBI was established in terms of the Securities and Exchange Board of India Act, 1992, to promote the development of the securities market as well as protecting the interests of the investors in the sector. In addition to its enabling Act, SEBI also operates under other legislations, which include the Securities Contracts (Regulation) Amendment Act, 2007, the Depositories Act, 1996 - No. 22 of 1996 and the Securities Contract (Regulations) Act 1956. An appellate body, the Securities Appellate Tribunal, was also established in terms of Section 15K of the SEBI, Act.

Among the functions of SEBI, as outlined under Section 11(2) (e) and (h) of the Securities and Exchange Board of India Act, 1992, are the functions with a possible overlap with the competition authority. The Sections mandate SEBI to prohibit fraudulent and unfair trade practices relating to securities markets and regulate substantial acquisition of shares and takeover of companies in the sector.

In that regard SEBI came up with the SEBI (Substantial Acquisition of Shares and Takeovers) Regulations, 1997 (the Takeover Code). This outlines procedures which SEBI expects stock exchange-listed firms to observe when merging. These mergers thus pass through the scrutiny of the SEBI, which also brings in a possible overlap with CCI.

Insurance
IRDA was established in 1999 under the IRDA Act, 1999. The regulator was established to regulate, promote and ensure proper growth and development of the insurance and re-insurance sector. As provided for under Section 14(2) of the IRDA Act, the duties of IRDA do not overlap much 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 the registration of 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.

In addition, IRDA's recently produced regulations on amalgamations and transfer of business also have 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.

Telecom

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

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[1] RBI controls entry and merger of banks, expansion of branches and ATMs, besides controlling policy on banking service charges, and, therefore, there is a distinct possibility of overlap with CCI.

information society.[2] 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 is also the objective of 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 and Information Technology, is the responsible government department dealing with policy issues relating to telecommunications.

Electricity

Electricity regulation in India is governed by the Electricity Act, 2003. The Act envisages Electricity Regulators at State level (State Electricity Regulatory Commission, SERC) to take care of intra-state affairs while the Central regulator (Central Electricity Regulatory Commission, CERC) to take care of inter-state matters. The SERCs are given powers to perform roles such as licensing, tariff-setting, service standards maintenance and promoting competition in the electricity sector in their respective states (Mehta, Pradeep S, 2009). 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 (CUTS, 2009).

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 give 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.

However, the scope for conflicts remains limited due to the limited number of players in the sector, who are mostly public sector players, with private participation still to take significant effect. Although the Electricity Act, 2003, allows for private investment in power generation, the call is yet to receive many takers for incumbents (public sector players) to feel competitive pressures. As a result, the role of CCI in the sector, particularly with respect to business-to-business anticompetitive practices, is yet to be called for.

Oil and Natural Gas

The oil and natural gas sectors are regulated by the PNGRB, which was established under the PNGRB 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.

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[2] TRAI at its website http://www.trai.gov.in/aboutus.asp, accessed on 23 August, 2011.

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 of 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,[3] 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.

Overlaps with Competition Authority – Real or Imagined?

There are areas of overlaps between the competition authority and the sector regulators. Overlaps are expected to either give rise to conflicts on the part of stakeholders or confusion on the part of the regulated companies and consumers as they struggle to know which regulator is best suitable to deal with their grievances. In addition, this gives rise to forum shopping, delays and multiplicity of proceedings resulting in conflicting views of two regulators. Since the competition authorities and the sector regulators have been co-existing for a while now, it is important to assess whether there have been any problems.

There are generally two sectors which have already proved to be potentials for future clashes between CCI and the sector regulators. One of the sectors is the banking sector. The RBI made it quite clear that it felt it was the best entity to regulate financial services and tried to influence the Corporate Affairs Minister to have the financial sector exempted from the whole Act. There are a couple of roles that RBI performs that can be regarded, at face value, as similar to those offered by CCI.

In addition to the RBI Act, 1934, there are also other legislations governing the functions of RBI, which also include the Banking Regulation Act, 1949. Section 44A of this Act, which outlines the procedure for amalgamation of banking companies, also provides that bank mergers need to be sanctioned by RBI before taking effect. Among other issues, the Section could probably be the basis of the contentious issues which resulted in the delay of the notification of the whole Competition Act, followed by further delays in the notification of Sections of the Act dealing with mergers.

Just like other central banks, RBI can be regarded as the most important regulator in the economy, given the critical role that the banking sector plays in the economy (the recent global financial crisis is testimony enough). As the banking sector is widely recognised as more ‘special’ compared to other sectors (Carletti E. and Hartmann P., 2002), these ‘special’ characteristics are normally given as the basis for the need for a different approach for the sector in comparison with others. This results in central banks playing roles which also affect and overlap with those of competition authorities.

[3] This definition was lifted from now repealed MRTP Act (Section 2(o)).

RBI would thus be expected to ensure that they constantly check the vulnerability of banks, as they are constantly exposed to risks through borrowings. RBI also has to ensure that, as the banks source money for lending by pooling short-term demand deposits (which they invest in long-term loans), they fund only viable projects for which there would be return, given that the money loaned out would be belonging to various creditors. In addition, the bank has to constantly check for a possible mismatch between the maturity of the bank's assets and liabilities, which could make the banks prone to a constant threat of bank runs. This results in interventions and directions having implications on competition.

In addition, unlike other firms which can survive without direct contacts with competitors, banks heavily depend on each other by lending to each other through the inter-bank lending markets. Banks face daily liquidity fluctuations, giving rise to surpluses and deficits, for which deficits have to be cushioned by borrowings from other banks with surpluses. This demonstrates the banks' need for rival banks for survival, a situation not usually expected under competition principles, which could also give rise to interventions by the RBI calling for such strategic alliances, thereby seen to be undermining competition principles.

There are also other intervention mechanisms that the central bank can engage in which could be seen to be overlapping or conflicting with competition norms. These include those given in Box 1.

Box 1: Regulated Activities for Banks with Overlaps with Competition

Whilst there could be other channels that can be used by the central bank to influence outcomes of the banking sector (e.g., bailouts or directives on mergers), there are generally some specific issues that are covered by specific statutory and administrative regulatory provisions, which include the following:

- Restrictions on branching and new entry;
- Restrictions on pricing (interest rate controls and other controls on prices or fees);
- Line-of-business restrictions and regulations on ownership linkages among financial institutions;
- Restrictions on the portfolio of assets that banks can hold (such as requirements to hold certain types of securities or requirements and/or not to hold other securities, including requirements not to hold the control of non financial companies);
- Capital-adequacy requirements, normally enforced through forced or encouraged mergers;
- Requirements to direct credit to favoured sectors or enterprises (in the form of either formal rules or informal government pressure), resulting in some needy firms failing to access credit;
- Special rules concerning mergers (not always subject to a competition standard) or failing banks (e.g., liquidation, winding up, insolvency, composition or analogous proceedings in the banking sector);
- Other rules affecting cooperation within the banking sector (e.g., with respect to payment systems).

Source: ICN, 2005.

This could have been the basis for spirited attempts by the central bank to have CCI exempted from having a role in the banking sector. First, the RBI felt that it has the required expertise and competence to deal with bank mergers and subjecting such mergers to the scrutiny of the Competition Commission of India (CCI) would only result in more delays in processing of such requests. The RBI also felt that having another authority with a mandate in the banking sector would go against the spirit of the RBI Act, which grants the RBI the power to act as the central authority in all banking issues. While it was acknowledged that the RBI has a limited role to play in abuse of dominance cases and anticompetitive agreements cases, the government appears to have bought into the RBI idea. As a result, when merger provisions of the Competition Act were notified in March 2011, CCI was exempted from playing a role in mergers in the banking sector, as it was felt the RBI would be best suited to do the task. The Minister of State for Finance was quoted as saying:

"Amalgamations, reconstructions, mergers are approved in consultation with the Reserve Bank of India (RBI) and sanctioned by the Central government under specific statutes of Parliament. The mergers are approved primarily in public interest or in the interest of depositors or of the banking system in India or to secure proper management of the banking company. RBI is of the view that reference to CCI may cause avoidable delays in the process. As timeliness is most critical and crucial, it is felt that the process of amalgamation, mergers, etc., should not hamper by seeking approval from multiple authorities".[4]

It is quite apparent that it is the RBI which influenced the decision. Due to the acknowledged difficulties in having the Banking Act regulating competition issues of mergers in the same manner as CCI, it was suggested that there should be a legislation placed before parliament to deal with the issue. However, this is yet to happen.

Another sector which has brought out some 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, the Indian Oil Corp Ltd, the Bharat Petroleum Corp Ltd and the 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 in 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.

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 per cent of the meters installed by these power companies being faulty, showing a reading that was 2.5 per cent higher than necessary.[5] 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

[4] Minister of State for Finance at website http://www.business-standard.com/india/news/banking-sector-ma-deals-outside-cci-radar/427865/ accessed 23 August, 2011.

[5] Source: http://www.allbusiness.com/trends-events/investigations/15761670-1.html#ixzz1WPctTaN4 , accessed on August 29, 2011.

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 August 24, 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 the TRAI Act, even though the Regulation incidentally trenches on the subject of monopoly and restrictive trade practice (Joshi M., 2008).

It was, however, acknowledged that, as envisaged under the TRAI Act, anticompetitive practices would remain under the jurisdiction of the MRTP Commission. Section 14 2 (a) provides that, in exercising its functions, Section 14 (2 shall not apply in respect of matters relating to the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the MRTP Commission. The same principle should be observed when it comes to CCI, a successor to 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 Act, both CCI and the sector regulators may[6] 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.

International Experience in Regulatory Overlaps

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

It can also be established that some countries have opted for a concurrent jurisdiction approach, having noted problems brought about by an exclusive jurisdiction approach. Concurrent jurisdiction would give both competition authorities and sector regulators mandates, with the

[6] The Committee on National Competition Policy and allied matters has recommended that the words in Section 21 of the Competition Act, 2002: ‘may’ be substituted by ‘shall’, thus making it mandatory. However, the proposed amendments to the Act are yet to be adopted.

success of such an approach being hinged on the establishment of a working framework between the two regulators to harness their respective expertise. Co-operation and coordination would be called for, which can range from informal cooperation to formalised working arrangements between the two authorities.

Other countries have also opted for a cooperation approach, where the sector regulator and the competition authority have to cooperate in dealing with cases of common interest, though the competition authority would still have the final say on competition issues.

There are countries with competition laws giving an exclusive jurisdiction approach, which has left some grey areas, as conflicts often arise. However, there are a few countries that can be used as examples on concurrent jurisdiction approach and cooperation approach.

Concurrent Jurisdiction

The UK

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

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

This thus implies that the regulators are free to decide whether to use the Competition Act powers against anticompetitive behaviour or to enforce the sector specific provisions.

Necessary provisions were also put under the Competition Act to accommodate concurrent powers of sector regulators. Under Sections 54 and Schedule 10 of the Act, the necessary tools for the competition authority to engage the sector regulators are provided. In addition, the Competition Act (Concurrency) Regulation 2004 gives guidelines on how concurrency can be determined. Among the issues covered by the guidelines are the following:

- The sector regulators and OFT are both classified as 'competent persons' to handle competition issues.
- The sector regulators and OFT have to decide which is more competent to handle a matter once it arises, using procedure that is outlined under the regulation.
- OFT and the regulators are obliged to circulate information which would be used for the purposes of determining which of them is more competent to handle the case.
- The procedure that has to be followed if agreements are not being reached among the parties is also provided for.[7]

[7] See the Competition Act 1998 (Concurrency) Regulations 2004.

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

The Netherlands

A concurrent system was also adopted in the Netherlands, in the form of a Cooperation Protocol between the Netherlands Competition Authority (NMa) and the Commission of the Independent Post and Telecommunications Authority (OPTA). The protocol contained a series of agreements on the nature of cooperation between OPTA and the NMa in exercising their powers to strengthen their enforcement effectiveness. It was intended to structure this cooperation and to facilitate OPTA and the NMa to pursue the following functions:[8]

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

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

South Africa

South Africa can be regarded as a country which has embraced both the concurrent jurisdiction approach as well as the cooperation approach. Section 82 of the Competition Act, 1998, outlines the basis upon which the Competition Commission can seek cooperation with sector regulators.

In addition to that, Section 3 (3) of the Act provides that, in sectors subject to the jurisdiction of another regulator, the Competition Act, together with the other legislation, must be construed as establishing concurrent jurisdiction in regulating conducts. The sector regulator is given room to exercise primary authority to establish conditions within the industry that it regulates, while the Competition Commission is also given primary authority to review mergers and to detect and investigate alleged prohibited practices within that sector.
The Section also provides for an agreement between the Competition Commission and the sector regulator to be reached, spelling out the administrative manner in which the concurrent jurisdiction would be managed.

In pursuit of this, the Competition Commission has signed some memoranda of understanding with some sector regulators including those in the energy, postal services and communications sectors.

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[8] See the Agreements between the Commission of the Independent Post and Telecommunications Authority (OPTA) and the Director General of the Netherlands Competition Authority (the NMa) on the method of cooperation in matters of mutual interest.

Cooperation Approach

Jamaica

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

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

Singapore

The basis for cooperation between the Competition Commission of Singapore (CCS) and sector regulators on competition matters is outlined under Section 87 of the Competition Act, 2004, of Singapore. The Section provides that CCS may enter into cooperation agreements with any regulatory authority for the purposes of facilitating co-operation between the Commission and the regulatory authority in the performance of their respective functions in so far as they relate to issues of competition between undertakings. The identified rationale was to avoid duplication of activities by the Commission and the regulatory authority in pursuing their mandate, particularly in the determination of the effects on competition of any act done or proposed to be done, so as to ensure consistency between decisions and steps taken by the Commission and the regulatory authority.

In 2005, the Info-communications Development Authority of Singapore (IDA), the telecommunications regulator in Singapore, came up with its 'Code of Practice for Competition in the Provision of Telecommunications Services in Singapore'. The Code outlines cooperation guidelines on how IDA will handle a range of competition matters, including issues of dominance and its abuse which also fall under the mandate of CCS.

Under its 'Guidelines on the Major Provisions', CCS undertakes that, on cross-sector competition cases, it would work out with the relevant sector regulator on which regulator is best placed to handle the case in accordance with the legal powers given to each regulator to prevent double jeopardy and minimise regulatory burden in dealing with the case.[9]

Conclusion: Possible Framework for India

As already mentioned, there are several regulatory authorities in India with overlaps with CCI, as far as competition is concerned. These include the TRAI and its associated appellate tribunal; CERC at the federal level (with an independent appellate tribunal) and SERCs at state level in most states; the SEBI with its appellate tribunal; the RBI; and the IRDA. While the nature of

[9] This also implies some concurrency aspects to the cooperation framework.

overlaps is not similar among all the regulators, it might be important for a general framework which would govern the overlap issue to be formulated.

A look at the international experience described in Section 4 reveals some slight similarities with the Indian framework. A look at the TRAI Act and the AERA Act would reveal some elements of exclusivity, given that the legislations try to bar any other regulator from exercising jurisdictions in their sectors. In addition, the platform for consultation provided for under Sections 21 and 21A can be regarded as some form of concurrency as the regulators are given opportunities to decide which regulator's opinion carries the day.

However, whereas South Africa provides for an agreement between the competition regulator and the sector regulator to be reached, spelling out the administrative manner in which the concurrent jurisdiction would be managed, such a framework is missing in India. In addition, unlike the Jamaica case, where consultation is provided for under the sector regulation, in India, sector regulatory laws are generally silent on such cooperation. Formal guidelines that have been established by some sector regulators on dealing with competition matters, such as those in Singapore, are yet to be established in India.

The current cooperation framework envisaged under the Act cannot be regarded as an adequate framework for the two sets of regulators to harness their expertise. While Sections 21 and 21A of the Act provide for consultations between both CCI and the sector regulators, these consultations are not mandatory. In addition, the wording of the Section also implies that the decision to seek the opinion is not something that can be forced upon either of the parties, which brings loopholes into the system.

Going by some recently observed problems, it is important that a framework governing coexistence between CCI and the regulators be mapped soon. A cooperation approach appears easier, as it does not entail much change in the legislation and regulation system. A cooperation framework requiring memoranda of understanding with different regulators would do better than the current system.

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

In addition, the recent Delhi High Court judgement trying to bar CCI from the oil and gas regulatory sector is testimony enough to the difficulties that can be encountered by trying to enforce a regime which would not be backed by legislation. As a result, an approach, which is adequately backed by legislation, would do better, as it would force the regulators to map down ways of harnessing expertise.

A concurrent jurisdiction approach is what is likely to work in India. Such an approach would call for amendments to the current Competition Act, 2002, as well as the respective sector regulation, to ensure that the need for cooperation becomes binding. The amendment would give some powers to sector regulators to enforce the provisions of the Competition Act, 2002, in their respective sectors, but in collaboration with CCI. Whilst amendments to legislation are known to take long, once they are in place, they become more legally binding, unlike MoUs. In addition, a platform for referring disagreements on the best-placed regulator to deal with the case would also have to be created, such disagreements are bound to happen.

However, the regulations and guidelines to be crafted have to recognise that the CCI has the expertise to deal with issues centred on the control of abuse of dominance, anticompetitive agreements and how mergers can end up becoming anticompetitive, while sector regulators also have expertise in enforcing product and process standards and controlling or specifying production technologies, as well as granting and policing licences. While CCI would have expertise in determining competition issues, it would also need the expertise of regulators to understand other sector-specific technical issues involved in the business line of the sector, such as industry structure, market design and socioeconomic issues, making it imperative that consultation is done.

An all-encompassing framework is thus being called for, as opposed to the current vague cooperation framework suggested under the Competition Act. The draft National Competition Policy, which seeks to harmonise the working of CCI and sectoral regulators, is one initiative in the right direction. The Policy seeks to persuade different ministries of the Central government to initiate the process of harmonisation.

References

- Carletti E and Hartmann, P **(**2002), *Competition and Stability: What's Special about Banking?*, Monetary History, Exchange Rates and Financial Markets: Essays in Honour of Charles Goodhart Vol. 2, ed. P. Mizen, Edward Elgar.
- CUTS (2006), *Fairplay Please (Advocacy and Capacity Building on Competition policy and law in Asia: 7Up2 project)*, CUTS International, Jaipur, India.
- CUTS (2007), *Political Economy of Regulation in Electricity Sector in India***,** Policy Brief # 3, CDRF 3/07.
- CUTS (2009), *Creating Regulators Is Not the End, Key Is the Regulatory Process*, Serials Publications, New Delhi, India, 2009.
- ICN (2005), *An Increasing Role For Competition In The Regulation Of Banks*, International Competition Network Antitrust Enforcement In Regulated Sectors Subgroup 1, BONN, JUNE 2005.
- Joshi Madhav (2008), *Status of Dispute Settlement Scenario in Telecom & Broadcasting Sectors (ppt)*, Tata Teleservices Limited, 2008.
- Mehta, Pradeep, S (2009), *Competition and Regulation in India, 2009* Book, XIV+168, CUTS, Jaipur.
- RBI (not dated), *Reserve Bank of India: Functions and Working*, Reserve Bank of India, New Delhi.