

HARMONISING REGULATORY CONFLICTS

**Evolving a Cooperative Regime to Address Conflicts
Arising from Jurisdictional Overlaps between
Competition and Sector Regulatory Authorities**

A Study for the Indian Institute of Corporate Affairs, New Delhi



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EXECUTIVE SUMMARY

Regulators generally fall into two categories – those with a mandate pertaining to specific sectors (sector regulators) and competition authorities, established to enforce national competition laws with an economy wide remit.

Following the introduction of market reforms, sector regulators were put in place to control anticipated market failures, and part of their mandate included ensuring that there was fair competition and promotion of consumer interest in their respective sectors. The need for regulation of competition in the whole economy however, saw the enactment of competition laws with competition authorities being given the mandate to regulate competition in all sectors of the economy.

Both competition agencies and sector regulators have a common objective of promoting economic growth through pro-competitive regulation. Regulators often focus on preventing “excessive pricing” through regulation of tariffs, ensuring access to essential facilities and ensuring that barriers to entry are reduced which are also shared by competition authorities. Given their roles, it is therefore also necessary for governments to ensure that a “competition culture” encompasses the functions of both sector regulators and competition authorities. Particularly in the case of natural monopolies, sector regulators are required to mimic competition in the sector.

Despite sharing a common goal, it needs to be appreciated that sector regulators and competition authorities generally have different legislative mandates and their perspective regarding competition matters may be different. Technical regulation is generally a structural issue, while competition enforcement qualifies as a behavioural issue. Thus, sector regulators are primarily responsible for structural and *ex ante* issues, while the competition authority looks into the behavioural and *ex post* issues.

Furthermore, a clear delineation of the jurisdictional roles of two authorities is still missing. When competition agencies and sector regulators have overlapping jurisdictions, concerns will arise if the agencies do not coordinate their decisions and processes because failure to do so will create regulatory risk for investors and increase compliance costs. Both can harm consumers by raising costs and prices.

Due to the gravity of this issue globally, many studies have been undertaken to arrive at an appropriate mechanism for resolving conflicts arising from regulatory overlaps by jurisdictions as well as at international fora. Most such studies have provided useful theoretical frameworks for coordination, however little has been done to trace the resolution of the problem through evolution of such conflicts. This is the core issue of this study and therefore will enrich the body of research.

These theoretical frameworks show that interaction between sector regulators and competition regulators can be managed through well-defined institutional approaches. Primacy can be given either to sectoral regulatory law or competition law, depending upon the circumstances. Another approach could be a concurrent one, the UK being an example, where both competition law and industry or sectoral regulation law possess equal jurisdiction, through consultative approach. Within the three institutional models (sectoral regulation, competition law, concurrent) there are

five approaches in practice governing the regulatory interface that have been elaborated in the paper with illustrations from various jurisdictions. These are:

- Use of competition authority to administer sectoral regulatory rules;
- Concurrent jurisdiction;
- Collaborative approaches with coordination agreements;
- Appellate interventions; and
- Mandatory consultations.

This research study aims to explore the historical genesis of regulatory conflicts in India and other countries (namely Brazil, South Africa, South Korea and Spain) and assess the approaches taken at various stages to address them. The objective of the study is to draw on the experiences of these countries to tailor an effective cooperative regime for India. Countries world over have adopted approaches to address regulatory overlap conflicts to fit with their varied realities. India needs to do the same in terms of tailoring the best approach that suits its needs while taking helpful lessons from global best practices studied in this study.

This research study is significant and timely. The identification of specific sources of conflicts between Competition Act 2002 and sector regulatory Acts in India and recommendations to address the identified problems would inform the on-going debate in a meaningful manner.

1. Genesis of Regulatory Overlaps

The introduction of competition and regulation into the political economy of a country is not new. US has, for decades, combined antitrust laws with sector specific regulatory laws and has had to contend with the jurisdictional problem created by the two types of regulatory instruments. As far back as in 1977 David Boies¹ remarked that:

'The interface between antitrust (competition law is referred to as antitrust in the United States) and regulation is a veritable no-man's land for students and practitioners alike. Since the theories of antitrust and regulation reflect differing assumptions about government intervention into the market place, it is often difficult to rationalise their impact on particular industry behaviour. The antitrust laws, to borrow a phrase, are brooding omnipresence, with pervasive, almost constitutional meaning in our jurisprudence. Direct economic regulation (which is entrusted to agencies rather than the USA Courts) may supplant the antitrust laws and specific industries for carefully carved-out purposes. But at the edges these purposes thin out and the antitrust laws inevitable reappear in the background. At this point it is no small matter to blend the policies of the two conflicting regimes into an overall regulatory purpose that preserves the values of both'.

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

In most of the countries, two types of government interventions have evolved as separate and distinct regimes with relatively limited formal relationships. The historical experience, therefore, has been one of overlap of responsibilities and jurisdictional conflicts. The potential interactions or overlap between sector regulators and competition authorities are usually at the levels of domain, rules and or institutions. In countries where the roles and responsibilities amongst the two types of regulatory institutions are ill defined, the opportunities for turf-disputes and legal wrangling are magnified.

In the post-war years outside the US and especially in developing countries the infrastructure and financial industries have typically been operated as monopoly state enterprises and hence the issue of dealing with jurisdictional conflicts until recently has typically been less relevant. The global trend of utility privatisation and the proliferation of sectorial regulatory agencies, however raise these issues with a new urgency for countries undertaking the process of privatisation and market reform.

¹ David Boies (1977) 'Public Control of Business', Little Brown

1.1 The Regulatory Interface

With the introduction of competition and sector regulatory laws, new mechanisms are needed to ensure effective interface between the two regimes. Secondly, there is an increased need to exploit complementary expertise and perspectives of two types of regulators. Whatever the current division of labour between competition agencies and sector regulators, there are very few countries where the problem can be regarded as finally settled, especially since the transition to greater competition is far from complete.²

The US has had a tradition of antitrust regulation going back some 100 years. Under the American approach where market failure is said to favour restrictions to entry, with typically one franchised operator providing services to the market. Until recently, American utility regulatory laws gave long exclusivity periods to the privately owned vertical and horizontal monopoly infrastructure firms and the law operated to preserve the *status quo*, preventing new entrants into the industry. Public interest consideration of privately owned monopolies arose from market failure. Although the objective of regulation was to strike a balance between public interest and producer interest, regulations in the US came to protect the regulated firm at the expense of the consumer.

In the 1980s when the UK embarked on privatisation and liberalisation of the publicly-owned utility and transport industries the government adopted a different approach from the US. The UK model called for the creation of new industry-specific regulators for each of the newly privatised utility with the mandate, not only to regulate sectors of the industry which continued to carry natural monopoly characteristics, but also to encourage competition in some parts of the industry. Regulation in the UK, therefore, has been about remedying structures; permitting new entrants to the market, as well as about application of price control and correcting market failure, whilst competition has essentially been about conduct.

Historically therefore, there have been two conflicting philosophies, the American approach which until recently restricted the reach of competition law on regulated industries and the UK approach which provided for the promotion of competition and the application of general competition laws in once regulated industries. Since the 1990s, several developing countries have followed the UK. Amongst the early reformers to have liberalised the infrastructure sector and privatised these vertically integrated monopoly utilities were Chile, New Zealand and Jamaica.

The challenge for developing country legislators in the reform process, therefore, is to prevent the transfer of utilities from public monopoly to private monopoly and the determination of the extent to which general competition laws should apply to the privatised regulated utilities and the role each of the two different types of government interventions should play.

1.2 The Objective of Competition and Sector Regulatory Laws

Any assessment of the current regulatory practice needs to be placed in the context of the strategic objectives for sectoral regulation and the operation and enforcement of competition law in the economy generally. Specific sectoral regulatory regimes in relation to competition primarily reflect the need to actively inject and promote effective competition into the sector, and to address the risk that businesses in these sectors have inherited.

² DTI Report, Concurrent Competition Powers in Sectorial Regulation, URN06/1244, May 2006

The objectives for sectoral regulation are, of course, set out in legislation, and the details of these objectives vary from sector to sector. One of the key roles of sectoral regulation is to act as a surrogate for competition. This explains the focus of economic regulation on monopoly elements in the market, be they inherently a natural monopoly or a market in transition to full competition. Sectoral regulation seeks to give benefits similar to a competitive market by setting and raising quality standards for services, removing barriers to entry and by ensuring efficient pricing. General competition law could and does deal with markets which have dominant players where competition is not self-sustaining; and where industry agreements and codes need to underpin the functioning of the market.

Economists take the view that competition is the best economic regulator in that it ensures productive and allocative efficiencies and provides for lower cost and prices. In doing so, both consumer and producer welfare is maximised. From the economist point of view where competition is possible regulation is hardly needed. Regulation is second best and invariably leads to misallocation of resources, wrong investments and reduction of consumer welfare. Regulation also carries costs including transactional cost which the consumer or the society must pay for and therefore the benefits must be greater than the costs.

The rationale for regulation is that of market failure which arises in the utilities mainly from natural monopoly: like water which is the classic natural monopoly. For Baumol,³ a natural monopoly exists when a single firm produces a desired level of output at a total lower cost than any output combination of more than one firm. Natural monopoly is characterised by economies of scale and scope. Economies of scope exist in a multi-product firm if it is less costly for it to produce a given combination of outputs, than to produce the same level of each of the distinct output in separate unbundled firms.

The traditional economic view was that network utilities; electricity, rail, transport, water and telephones were natural monopolies characterised by massive economies of scale, scope or density, with high sunk costs. In such industries it would be a waste of society's resources to have several parallel networks of the same type competing with each other. If they were to compete, only one firm would survive.

Network systems not only display high sunk costs, they also require large and lumpy investments to enter their markets and to maintain operation. Market failure also arises for reasons of information asymmetry: consumers cannot be expected to have the necessary information to make informed choices as compared to producers.⁴ This creates mismatch between willingness to pay and willingness to accept, thereby deterring the market in that specific good to develop in the first place. Information asymmetries are a common type of market failure in financial markets.

Another important reason for market failure is externalities. Externality is unaccounted cost (or benefit) that arises from the actions of one party affecting another party not involved in the transaction or activity in question. Externality can be both positive and negative. Knowledge spillovers generated from investment in R&D is a positive externality. Environmental pollution is a negative externality. In addition, the public good nature of many products/services also entails the externality argument and attracts regulation.

³ William J. Baumol "On the Proper Cost Test for Natural Monopoly in the Multi Product Industry", *American Economic Review*, Vol. 67, (1977), p. 809

⁴ See, George Akerlof (1970), "Market for Lemons: Quality Uncertainty and Market Mechanism," 84 *Quarterly Journal of Economics*, 488

Today, the view is that telecommunications and electricity generation and retail supply businesses are no longer characterised by natural monopoly features and competition should be the regulator. The role of the industry or sector regulator therefore should be to facilitate competition and regulate interconnection and access charges on reasonable terms and not to restrict market entry.

Competition law, on the other hand, sets the economy-wide market rules in an economy. It simply states what market agents must not do. Competition law invariably expressly prohibits price fixing, bid rigging, tied sales, collusion, cartelisation and retail price maintenance. It also aims to achieve consumer protection and deals with product and price information and unfair marketing. It is an *ex-post* function, except when reviewing a merger. Industry specific regulation on the other hand sets out what market agents must do and is *ex-ante*.

The regulatory interface problem is centered on the degree to which sectors being opened up to greater competition should also be subject to general competition laws and how and by whom such laws are to be administered. The new wisdom is “competition where feasible and regulation where not” suggests that regulation should be confined to the natural monopoly elements, typically the networks, with network services subject to competition law principles.

The technological developments which transformed these utilities, have been more pronounced in the telecommunications and electricity industries with the result that major segments of these industries, once treated as vertically integrated monopolies can and are now being subjected to competition. In the financial markets the global trend has been a move towards liberalisation of financial markets and reduction of public ownership of financial enterprises with regulation focussed on fiduciary conduct and systemic risk.

The interface issue is not confined to network infrastructure industries and extends into other economic sectors. In some sectors of the economy, regulation expressly provides for or condones anticompetitive behaviour. In professional services industries for instance, regulation has been used to set standard schedules of fees, prohibit advertising and prohibit association with other professional service providers. The links between such practices and advancing consumer interests in higher quality services are questionable.

Regulation usually in the form of self-regulation as is practiced in these service industries unnecessarily restricts competition to the detriment of the consumer (higher prices). Part of the solution to this problem has been withdrawal of exemptions of professional service providers and exposure to the reach of the general competition law (as was introduced in Jamaica in 1993).

1.3 Specific Areas where Overlap Exists

The most common industries where competition law interacts with sector or industry specific laws are in the network industries involving access to network facilities sometimes considered as essential facilities or interconnection, monopoly pricing, anticompetitive agreements and merger control.⁵

Illustratively, competition rules on the misuse of a dominant position take on added importance in relation to access to essential facilities for the network industries. In telecommunications,

⁵ Warrick Smith and David Gray, “Regulatory institutions For Utilities and Competition, International Experiences” unpublished, World Bank Paper, p. 27, (1998)

electricity and railway, the network segments remain natural monopoly, therefore non-discriminatory access to encourage new entrants to the industry is critical if competition is to develop in the competitive segments. In some regimes, competition rules and judicial precedents on interconnection prohibit misuse of dominant market position and this may be sufficient to address the problem.

Refusal to allow a competitor to a network on fair, reasonable, and non-discriminatory terms (FRAND)⁶ could be ruled unlawful. This rule, therefore, has the potential to overlap or conflict with industry specific rules dealing with network access and interconnection under utility regulation law especially where exclusive licences are granted by the industry regulator to an incumbent operator.

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

Licensing Conditions: The number of licences and the conditions of the licences will have an effect on the intensity of competition;

Market Dominance: market definition and assessment of dominance by the sector regulator in establishing which operator should offer interconnection services on one hand and by the competition authority in establishing abuse of market power by an operator;

Monopoly Pricing: some competition regimes include rules, which restrict excessive or unjust prices. Such rules could also conflict with industry specific pricing rules established under utility sector or industry specific regulation.

Restrictive Business Practices: where we have one vertically integrated monopoly firm then there are no competitors, hence there is no one with which to enter into agreements or to behave in a manner that would restrict or lessen competition in the market for relevant services.

Merger Control: restriction on mergers between utilities and other firms, or restrictions on reintegration, are often provided for under industry or sector specific regulatory laws. In the new unbundled environment of infrastructure firms, common ownership for example of generation firms with transmission or generation with distribution firms is normally restricted under sector specific regulation.

Subsequent sections give examples of regulatory disputes arising in the above-mentioned areas in India as well as other select jurisdictions such as Brazil, South Africa, South Korea and Spain.

⁶ For more on FRAND, refer to *FRAND terms: A challenge for Competition Authorities*, Journal of Competition Law and Economics, Vol.7, Issue 3 available at: <http://jcle.oxfordjournals.org/content/7/3/523.abstract>

2. Cases of Overlap Conflicts: Experiences of India, South Africa, South Korea, Brazil and Spain

2.1 India

The present competition statute in India is the Competition Act of 2002. Prior to this, it had a competition law in the form of the Monopolies and Restrictive Trade Practices (MTRP) Act since 1969. However, in an environment of widespread state owned public sector monopolies in the utilities and financial industries there was relatively little application of competition law in India in the utility sector, until the Act was amended in 1991 to include public sector under its jurisdiction

The Competition Act of 2002 (as amended in 2007) created two competition institutions; the Competition Commission of India (CCI) and the Competition Appellate Tribunal (COMPAT). Liberalisation of the national economy and privatisation of state owned monopolies resulted in a wave of sector legislation in telecommunication, energy, transport, and the financial and banking industries and the creation of quasi-independent sector regulators, with many more to come.

The Preamble of the Competition Act as well as Section 60 which confers an overriding effect on the provisions of the Act in times of conflict clearly give powers to the competition agency appointed under the Act to prevent practices having adverse effects on competition, to promote and sustain competition in markets, to protect interests of consumers and to ensure freedom of trade carried on by other participants in markets in India. Nonetheless, with lack of clarity in the roles of the competition authorities and the multiplicity of sector regulators and conflicts emanating from the sectoral regulations, India has been experiencing several conflicts and turf wars between the CCI and sector regulators.

Case Studies

a. Restrictive Business Practices

In a case before the Delhi High Court, for example, after losing a bid to rivals, Reliance Industries Ltd filed a complaint to the Competition Commission of India alleging that its rivals, all public sector firms: Indian Oil Corporation Ltd, Bharat Petroleum Corporation Ltd and Hindustan Petroleum Corporation Ltd had been engaged in a cartel arrangement in the supply of aviation fuel for Air India.

During the course of the investigation of the case by CCI, the three companies filed a suit in the Delhi High Court challenging the competence of the CCI to hear the matter claiming that the matter fell under the jurisdiction of the Petroleum and Natural Gas Regulatory Board, the sector regulator. The High Court gave an interim order that CCI did not have jurisdiction over the matter despite the fact that the Petroleum and Natural Gas Regulatory Board (PNGRB) Act did not give the sector regulator exclusive jurisdiction on the matter.⁷ The case is yet to be decided.

b. Market Dominance

The electricity sector is probably more problematic in this regard. Section 60 of the Electricity Act clearly confers powers over market dominance issues with the sector regulator; the practice

⁷ www.allbusiness.com/trends-events/investigations/15761670-1.html#ixzz1WPctTaN4, accessed August 29, 2011

has often been inconsistent with the law as well as well varied from case to case. For example, in a case CCI issued notices after it found three power distributors; BSES Rajdhani Power, BSES Yamuna Power and North Delhi Power Ltd (NDPL) guilty of abusing their dominant positions.⁸

However, the Delhi Electricity Regulatory Commission, the state electricity regulator objected to CCI's intervention claiming that such matters to be exclusively under their domain pursuant to the powers vested in them by the Electricity Act, 2003. However, a contrarian position was taken by the DERC in Neeraj Malhotra, Advocate vs. North Delhi Power Ltd. & Ors., the Discoms alleged before the CCI that only the Delhi Electricity Regulatory Commission under the EC Act had jurisdiction to deal with the issues relating to anticompetitive behavior of electricity distribution companies. In this case, the DERC 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 EC Act and the DERC Regulations, allegations of anticompetitive behaviour, including abuse of dominant position by the DISCOMS fell within the jurisdiction of the CCI.

c. Merger Control

In the banking sector, RBI has argued that the banking sector should be exempted from the jurisdiction of the CCI, on merger and acquisition matters on the grounds that the Central Bank has the required expertise and competence to deal with bank mergers and subjecting such mergers to CCI would only delay the process. The Government of India seems to have been persuaded to accept the position of RBI, with the result that under the Banking Regulation Amendment Bill, currently before the Parliament, it is proposed to exclude CCI from playing a role in mergers in the banking sector.⁹

In the past, it has been argued that such a step will disturb the integrity of the economic governance system and may lead others to ask for similar exemptions, and that even if the RBI has the primary role to evaluate banking mergers, it should do it jointly with the CCI.¹⁰ The recent amendments passed by the Cabinet have fortunately appreciated this fact and ruled out any such exemptions to be granted to a sector.

2.2 South Africa

Post-apartheid, South Africa saw the introduction of a new Competition Act in 1998¹¹ providing for new institutional structures consisting of an independent Competition Commission with investigative and prosecutorial responsibilities; a CAT with adjudicative powers over matters referred to it from the Competition Commission and a Competition Appeals Court which is a dedicated bench of five judges in the High Court of South Africa, where cases from the Tribunal may be appealed.¹² The primary responsibilities of the Competition Commission are to deal with anticompetitive matters, to facilitate the development of the economy and provide consumers with competitive prices and product choices.

Section 2(1) of the Competition Act of 1998 gave the Competition Commission the authority to enforce the competition law subject to the proviso:

“This Act applies to all economic activity within, or having an effect within the Republic, *except-*

⁸ *Ibid*

⁹ www.business-standard.com/india/news/cci-ambit-to-shrink-after-banking-law/472830/

¹⁰ www.cuts-ccier.org/ArticlesJan10-CCI_has_a_role_to_play_in_bank_mergers.htm

¹¹ Competition Act, 89 of 1998 (as amended) Section 2 ,pp.14-15

¹² Competition Act 89 of 1998 (as amended), pp. 3

(d) Acts subject to or authorised by public regulation.”¹³

a. Restrictive Business Practices

Despite the amendment of section 3(1) of the Competition Act, there have been further challenges to the jurisdiction of the competition authority with regard to the telecommunications sector.

Until the Electronic Communications Act of 2006 telecommunication regulation was governed by the Telecommunications Act of 1996 which was enacted before the Competition Act. The 1996 Act provided for competition matters in the regulated telecommunications industry to be carried out by the telecommunications regulator; Independent Communications Authority of South Africa (ICASA). On establishment, the Competition Commission and ICASA the sector regulator took a cooperative approach and signed a memorandum of understanding.

However, concurrency eventually resulted in firms filing the same complaint with ICASA and the Competition Commission at one and at the same time to take advantage of regulatory arbitrage resulting in forum shopping. A seminal case brought by the incumbent fixed line telecommunication operator; Telkom, challenged the Competition Commission’s jurisdiction in a matter that the Commission had investigated involving allegations of price discrimination and failure to provide access to another operator. Before the matter could be heard further in the competition arena, Telkom took the case to the High Court asking the Court to set aside the Competition Commission’s recommendation and additionally, challenged the Commission’s power to refer the matter to the Competition Tribunal as well as questioning the Competition Tribunal’s competence to adjudicate on the matter. The case was later appealed to the Supreme Court of Appeals which ruled to the effect that the competition authorities carried the jurisdictional competence to hear such cases and in addition that the Competition Commission had followed proper procedure.¹⁴

In 2006, with the introduction of the Electronic Communications Act (ECA), the situation has been made more complex, as Section 67 (9) reads: “*subject to the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry*”. It was argued that the ECA removed the principle of concurrent jurisdiction and the application of the Competition Act and on the face of it gave ICASA greater powers to regulate competition *ex-post*, thereby leading to further jurisdictional challenges.

b. Merger Control

In a banking merger case between Nedcor and Stanbic, on appeal the Supreme Court held that upon a literal interpretation of section 3 (1), the section precluded the Competition Authorities from exercising their jurisdiction upon all regulated sectors.¹⁵

Government responded in the year 2000 with legislative amendments to section 3(1) removing subsection (d) to recognise the principle of ‘concurrency’ to address the jurisdictional issues and the interface between competition law and industry specific regulatory law (akin to UK Competition Act 1998).

¹³ Section 2 (1) of the 1998 Competition Act

¹⁴ The Competition Commission of South Africa vs. Telkom SA and The Competition Tribunal of South Africa, SCA case number 623/2008

¹⁵ Standard Bank Investment Corporation and the Competition Commission, 2000 (2) SA 797 (SCA) available at: www.saflii.org/za/cases/ZASCA/2000/20.html

However, this amendment failed to deter the future occurrence of overlap conflicts even though Section 21(1) (h) of the Act further provides that the Commission is responsible to negotiate agreements with any regulatory authority to coordinate and harmonize the exercise of jurisdiction over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of this Act. Existing legislative provisions however continue to contribute towards the overlap problem. For example, there is a legislative provision preventing the competition authorities in South Africa from exercising jurisdiction over banking mergers. In these cases, the Minister of Finance still carries sole jurisdiction and may call upon the Competition Commission for assistance if required.

2.3 South Korea

In South Korea, Article 63 of the MRFTA requires that the competent administrative authority shall seek, in advance, consultation with the Korea Fair Trade Commission(KFTC), where it wishes to propose legislation or amend enactments containing anti-competitive regulations such as restrictions on the fixing of prices or the terms of transaction, entry to markets, business practices, unfair collaborative acts, prohibited practices of an enterpriser or an enterprisers organization, etc. and where it wishes to approve or make other measures involving anti-competitive factors against an enterpriser or an enterprisers organization.

Despite the clearly laid out provision, overlap conflicts exist to a large extent in the telecommunications industry as well as with the Financial Services Commission (FSC) in the financial services industry.

A careful reading of the conflicts would reveal that the problem has emerged largely since the industry specific regulators have had their laws amended to accommodate liberalisation and the new requirement to address anticompetitive practices and mergers & acquisitions (M&As) in their respective industries. The net effect of all the above is that lack of clarity of responsibility in respect of the two types of regulatory authorities continues to prevail in Korea. And so the duplicity of functions and inconsistency of decision and process continues creating uncertainty of regulatory process and outcome for the investor and consumer.

Without clear legislative directive declaring and delineating their respective regulatory responsibility; or mandating cooperation between the competition authority and the sector regulator in the exercise of their separate or concurrent regulatory remit (although subject to numerous legal challenges) the unsatisfactory situation of regulatory conflict and overlap continues.

a. Restrictive Business Practices

The problem of overlap between the KFTC with responsibility for enforcement of the MRFTA and the sector regulator, Korea Communications Commission (KCC) emerged in 1991 following the amendment of the 1984 Telecommunications Business Act and the introduction of new players in a natural monopoly setting.

The Monopoly Regulation and Fair Trade Act (MRFTA) provide that any act that substantially restricts competition is prohibited. However, Article 54 of the Telecommunications Business Act

seems to preclude application of the MRFTA when a telecommunications carrier has violated any of the above prohibited anticompetitive practices.

Resolving the regulatory overlaps and conflicts has created a dichotomy of opinions with respect to resolving the issues under Article 54. One school advances the pre-eminence of the Telecommunications Business Act as a special law; and precludes MRFTA's remit from areas that are within the scope of the Telecommunications Business Act. The other school of thought states that since Article 54 is limited to cases in which corrective measures or fines are stipulated, the KFTC may initiate an investigation or impose corrective measures or fines if the KCC has not already done so.

Price fixing is an area of overlap. Article 28 of the Telecommunications Business Act provides that a telecommunications carrier must notify KCC and obtain prior authorisation of its service rates, that the KCC decision should be based on the impact such rates will have on the market, whether such rates are reasonable in light of the general public interests and whether such rates harm competition. In what seems to be direct conflict with that process MRFTA prohibits abusive pricing under Article 3-2, as well as unfair discounts under Article 23.

In the case of new service rates, MIC in September 2006 recommended that the new telecommunication rates should be modified because an operator, LG Telecom's new rates could indirectly exclude competing landline carriers. In contrast, the KFTC determined that the new rates were not sufficiently low to exclude competing landline carriers, and approved the new rates. In 2005, MIC and KFTC simultaneously investigated the three mobile telecommunication operators in connection with the opening of wireless networks. This was preceded in 2004 by simultaneous investigation by both authorities in connection with false and misleading advertising by three carriers.

The financial industry in Korea is regulated by the Financial Services Commission, as provided under the relevant financial laws. Up until 1981 MRFTA's remit did not extend to the financial sector. With the Enforcement Decree of July 1984 MRFTA's remit was extended to competition matters in the financial and banking sectors, effectively introducing overlapping regulatory remit in the financial and insurance sectors. Both the MRFTA and several financial regulatory laws in Korea prohibit unfair business practices by financial institutions. MRFTA also prohibits abuse of market dominance.

b. Merger Control

The Telecommunications Business Act, required common telecommunication carriers to obtain the approval of the Minister of Postal Service when seeking to acquire or merge with another telecommunications carrier.¹⁶ The Act provided that the Minister of Postal Service may intervene to foster a reasonable level of competition among telecommunications carriers.¹⁷ However, since the MRFTA Act also provided that all business combinations must be examined by the KFTC (the competition authority) all mergers and acquisitions between telecommunications carriers implied a requirement for concurrent examination. The Ministry of Postal Service was then reorganized into the Ministry of Information and Communication with the supervisory role on the Korea Communications Commission.

¹⁶ Telecommunications Business Act, Article 9

¹⁷ Telecommunications Business Act, Article 37

The first case of overlapping regulatory orders emerged in 2008 when the Ministry of Information and Communication (MIC),¹⁸ on the recommendations of the KCC, approved business combinations in the telecommunications industry, only for the KFTC to issue its own corrective orders. In 2003, the MIC attempted to elevate the status of the “Types and Criteria of Prohibited Acts in the Telecommunications Business,” from a notification to a Presidential Decree, only to encounter opposition from the KFTC during the inter-ministerial consultation process.

KFTC argued that (1) regulating a matter already under the jurisdiction of KFTC (as provided under MRFTA) with an enforcement decree under the Telecommunications Business Act subjected telecommunications carriers to dual regulations, (2) that the KFTC was better qualified to handle matters pertaining to unfair business practices and (3) identical criteria should be applied to all industries.

The Office of Government Policy Coordination in the Prime Minister’s Office intervened to resolve the matter and proposed an amendment to address the problem of overlapping jurisdiction between MIC-KCC and KFTC.

Regulatory conflict and differing rationale is also evident in merger approvals: In a case involving conflicting decisions, SK Telecom, a mobile telecommunications operator, acquired 51.19 percent of the shares of Shinsegi Communications, another mobile telecommunications operator, in December 1999, and filed a business combination report to the KFTC. The KFTC determined that the proposed merger would restrict competition in the mobile telecommunications market, and granted a conditional approval of the merger in May 2000, the condition being that the merged company’s market share should be reduced to below 50 percent by the end of June 2001.

In September 2001, SK Telecom having reduced its equity holding submitted its application to MIC for approval of the merger, only for MIC in January 2002 to approve the decision of the KFTC without any additional conditions, another case of overlapping jurisdiction.

In December 2007, in another case involving SK Telecom the KFTC determined that a proposed stock acquisition would restrict competition in the landline telephone market, and suggested to the MIC that such acquisition be conditioned upon prohibition of restrictive tying arrangements and prohibition of refusal to grant requests for 800MHz roaming without justifiable reasons. The MIC adopted the KFTC’s suggestions, except for the prohibition of refusal to grant requests for roaming and some other conditions, and approved the stock acquisition. KFTC concluded that MIC’s decision was unreasonable, and issued its own corrective order including the prohibition of the refusal to grant requests for roaming in March 2008, to which the MIC made no official objection or response.

Article 18 of the Telecommunications Business Act requires authorization by the KCC of acquisitions of businesses from common carriers: for mergers, sale of approved telecommunications line facilities and instances where 15 per cent or more of the stocks issued by a common carrier is held. Section 6 of the same Article also provides that the KCC, in approving such activities, must confer with the KFTC regarding anti-competitive effects that may arise from all mergers and acquisitions between and among telecommunications carriers. KFTC must

¹⁸ Established in 1994, and then transferred to the Korea Communications Commission and other ministries including the Ministry of Knowledge Economy

examine the potential anti-competitive effects of all mergers and acquisition and give its opinion to the KCC. There have however been instances where the KCC approved a merger only for KFTC to determine that the merger could have anti-competitive effects. There are no clear provisions as to whether the KCC should fully adopt the KFTC's opinions without any amendments, or whether the KCC may amend or supplement such opinions hence, jurisdictional conflicts arises in KCC carrying out its responsibilities.

In the case of merger and acquisition in the financial sector, the Structural Improvement of the Financial Industry Act and the Financial Holding Companies Act require mergers between financial institutions to be authorised by the FSC. In examining a merger proposal, the FSC must confer with the KFTC. Since such Act only requires consultation with the KFTC, there is disagreement as to whether the FSC is obliged to adopt the KFTC's opinion or not.

2.4 Brazil

Brazil's regulation and antitrust policies are relatively recent. When some issue involves both the regulatory agency and the antitrust authority, case of overlapping functions may occur and there is a need to cooperate. The analysis of a concentration act in a regulated sector is a classic example. In these cases, the remedies that are available to the antitrust authorities may not be sufficient to establish competition, leading to suggestions for improving regulations. So the complementary role of the regulatory agency with the antitrust authorities is necessary, with the need for them to co-operate. In the past few years, the antitrust authorities in Brazil, namely, CADE, SDE and SAE have looked into several competition matters pertaining to specific sectors. CADE has considered numerous conduct and merger cases sent to it by ANATEL. In 2001, for example, CADE addressed an abuse of dominance claim against the Globo Group, Brazil's largest broadcast television network.

a. Restrictive Business Practices

The telecommunications sector is regulated by Law No. 9472/97 (General Telecommunication Law), which created the National Agency for Telecommunication (Agência Nacional de Telecomunicações, ANATEL). In telecommunications sector, regulation of competition includes measures that require prior notification of any merger or acquisition among market agents, Moreover, incumbents were obliged to allow their competitors access to disaggregated elements and/or alternative points in their networks. The General Telecommunications Law (GTL) gives power to the ANATEL to monitor market behavior, as in the case of interconnection agreements. Parties to these agreements seek to inhibit tariff subsidies by means that include artificially reducing tariffs, unauthorized use of information obtained from competitors, omission of technical information, obstruction, and restrain. SDE and SEAE also pursue both merger and conduct investigations into aspects of the telecommunications sector that are outside ANATEL's jurisdiction.

b. Merger Control

Although GTL has determined that ANATEL is responsible for the enforcement of antitrust laws, ANATEL's analysis do not replace competition law, as CADE remains, even in the telecommunication sector, as the Tribunal that decides whether the transaction is to be approved or not. Even though the GTL is not clear enough on this subject (as regards to Article 7, §§ 1º and 2º), ANATEL primarily remains the authority in charge of supervising, preventing and repressing

actions against the economic order except for those belonging to CADE.¹⁹ SDE and SEAE also pursue both merger and conduct investigations into aspects of the telecommunications sector that are outside ANATEL's jurisdiction.

The conflict of attributions between Central Bank and CADE started long after the creation of the two organs. Since the decade of the 60s until the mid-90s, CADE and the Central Bank had a harmonious relationship. In 1999, a task force with people from Central Bank and CADE was created for defining their respective functions in the markets in which financial institutions operated. However, these discussions failed to produce any practical results.

In 2001, the Federal Attorney General's Office issued a legal opinion concluding that the specificity of Brazil's banking law took precedence over the more general language in Law 8884, and thus effectively vested the Central Bank with sole jurisdiction over banks for all purposes. CADE has never assented to that opinion, taking the position that competition law is applicable by its terms to all commercial enterprises, and that CADE is not bound by a legal opinion issued by the Executive Branch.²⁰

Two courts of first instance have considered the issue of whether bank mergers must be notified to CADE under Article 54. One court held that they did, concluding that Article 54 applied even where the merger had been reviewed by the Central Bank. A second court in a different bank merger held the opposite; on the grounds that the Central Bank's review was pre-emptive and that the Federal Attorney General's legal opinion bound the entire Federal Government, including CADE.²¹

Negotiations between CADE and Central Bank were undertaken to resolve the controversy by agreement. A consensus bill provides that the Central Bank will have exclusive responsibility for reviewing mergers that involve a risk to the overall stability of the financial system. In all other merger cases, CADE will have dispositive authority. Authority for handling conduct cases in the banking sector will be lodged exclusively with the SBDC. CADE and Central Bank have long had a working agreement that is employed principally as a mechanism for exchanging information.²²

In 2010 some results show the increased convergence between antitrust authorities and the regulatory agencies, which were crucial to increase competition enforcement in the banking sector. In respect of merger filings concerning the banking sector, the Brazilian Superior Court rendered a decision establishing that only Central Bank has responsibility to oversee competition in the Brazilian banking market (the aforementioned transactions were overseen by CADE before the judicial decision). Good examples of this phenomenon are the cases in the banking sector, as the acquisition by the consortium Santander/Fortis/RBS of the ABN/Amro Bank group, the merger between Itaú and Unibanco and the acquisition by Banco do Brasil of the Nossa Caixa.

Recently, in April 2012, Central Bank issued "Circular 3590" inaugurating a new phase in relations with the CADE in which both agents have the legal competence to analyze and judge the effects of mergers on competition in the financial sector specifically. According to this

¹⁹ ICN 2004

²⁰ OECD, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, PEER REVIEW OF BRAZIL'S COMPETITION LAW AND POLICY, DAF/COMP(2005)28, Paris, 2005.

²¹ *ibid*

²² *ibid*

document, Central Bank had delegated itself as the antitrust agency of the financial system, beyond the already established competence of a regulator.

2.5 Spain

The problem of institutional overlap between the competition authorities and sector regulatory agencies was a direct result of European Union directives in the 1990s which sought to liberalise and introduce competition in various regulated industries commencing with transportation, telecommunications, postal service and energy.

a. Licensing issues etc.

In the utility sector issuance of license responsibility is that of the relevant sector regulator. Similarly in the case of the financial markets and the banking sector licensing and surveillance of licensees is entrusted to the National Securities Commission and the Central Bank of Spain respectively. In the case of the telecommunications sector, in addition to licensing and surveillance of licensing terms, matters such as numbering, spectrum allocation, universal services obligation and the imposition of regulatory obligations in the non-competitive sector of the industry are allocated to the Telecommunications Commission.

b. Restrictive Business Practices

The telecommunications sector regulator (CMT) was created in 1996 and is currently governed by Law 32 of 2003. The allocation of responsibility for pricing in this sector has been problematic. Excessive, predatory and discriminatory pricing are prohibited by competition law and are not matters for the CMT to oversee.

A well-known Spanish case involving aggressive promotion by Telefonica illustrates the problem of jurisdictional overlap between CMT and the Competition Authorities. Whilst the sector regulator: CMT ruled that the advertising campaign was not contrary to competition principles, the competition authorities took the opposite stand and not only banned the campaign, but also fined Telefonica. The matter was appealed to the Supreme Court, which dismissed the arguments advanced by Telefonica and ruled in June 2006, that the Competition Authority did have the competence to review the case of anti-competitive practice and to adjudicate on the matter.

c. Market Dominance

In a previous case in February 2006 involving jurisdictional overlap the Supreme Court was asked to decide CMT's competence to rule on anti-competitive practices and in particular on abuse of dominant position in the telecommunication sector. The Court recognised some degree of overlap, but annulled the decision of CMT stating that CMT was encroaching on the powers of the competition authorities.

Illustratively, in a case involving the gas industry in Spain in 2009, a regional Competition Authority when faced with the challenge to its authority concluded that its task is different from sector regulators and that it is competent to determine whether a conduct amounts to an abuse of dominant position.²³

²³ Decision of the Regional Competition Authority of Valencia of 11, September 2009, File 1 of (2008)

In a similar case in 2002, involving rights of access to the electricity grid, the competition authorities ruled that there was existence of abuse of dominance consisting of refusal to grant access and that the right of access to the electricity grid is guaranteed by both the electricity and the competition laws. The Court's position is that despite the fact that the matter had been ruled on by the National Electricity Commission and the Ministry of Industry within the framework of their competencies, this act does not amount to an obstacle for a decision by the Competition Authorities and by the Court in light of the Law for the Defense of Competition. In effect it would appear that decisions of the competition authorities in Spain are not precluded by prior decision of the sector regulator.

3. Managing/Resolving the Problem

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

Within the three institutional models (sectoral regulation, competition law, concurrent) there are five approaches in practice governing the regulatory interface:

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

3.1 Practical Examples of the Models

3.1.1 Use of Competition Authority to Administer Sectoral Regulatory Rules

This is a variation of the New Zealand approach and involves the use of the competition authority to administer the sectoral regulatory rules. It is an alternative for the administration of industry specific rules; Australia's reforms illustrate this approach. Responsibility for the administration of industry specific rules on access and related matters has been entrusted to the competition agency; the Australian Competition and Consumer Commission (ACCC).

In the Netherlands, the government has created chambers within the Competition Authority, the NMa for sector regulation. The energy regulator in the Netherlands, the Office of Energy Regulation (DTe) is placed under the oversight of the NMa. DTe is responsible for the implementation and supervision of the Electricity Act of 1998 and Gas Act of 2000. In 2004, the Office of Transport Regulation was set up as another chamber in the NMa. A chamber model allows highly specialised technical knowledge related to sectors to exist within the structure of competition authority which focuses on broad issues of improving competition.

Another approach was also followed by Zambia where a member of the Zambian Competition Commission (ZCC²⁴) also acts as an ex-officio member of regulatory boards of other sectors so that the ZCC representative can bring in technical inputs qua the competition law in the deliberations of the regulatory bodies

3.1.2 Concurrent Jurisdiction

Concurrent power refers to the application of competition law in a regulated industry by either the industry or sectoral regulator and the competition authorities. The UK system best illustrates this model; from the beginning the utility regulators shared power with the Director General of the Fair Trades Practices Authority (DGFT) to make references to the old Mergers and Monopolies Commission (MMC) (with the exception of merger matters where the responsibility was with the Secretary of State). In some ways Brazil presents a similar picture. For instance, after the enforcement of the new competition law, ANATEL no longer has jurisdiction over competition matters in the telecommunications sector that it earlier.

In accordance with the provisions of the Enterprise Act 2006; the sectoral regulators have all the powers of the Office of Fair Trading (OFT) to deal with competition issues under the Competition Act 1998 in their respective regulated sectors. However, experiences thus far have shown that such a role has seldom been taken up by sector regulators. Concurrency working arrangements as between the OFT and the sectoral regulators are set out in the Competition Act 1998 (Concurrency) Regulations (SI 2004/1077)¹⁸. The OFT has issued guidance on the arrangements for concurrency. Once it has been decided which UK authority will exercise prescribed functions in relation to a case, the Concurrency Regulations prevent another authority from exercising prescribed functions unless the case is formally transferred under the Concurrency Regulations. Prescribed functions are defined in the Concurrency Regulations.²⁵

Merger remit is excluded from the concurrency arrangements and responsibility for dealing mergers lies with the OFT and the Competition Commission, subject to any intervention by the Secretary of State on public interest grounds. However, the regulators are typically consulted by the OFT and the Competition Commission on merger cases relating to their sector. There are other regulated sectors where the regulator does not have concurrent functions: for example, the financial services sector, where the Financial Services Authority has a subsidiary duty to promote effective competition but no concurrent competition powers. Broadcasting is another area of exclusion.

Appeals against competition law decisions of the OFT, sector regulators and the Competition Commission are all heard by a common apex body known as the Competition Appeal Tribunal (CAT) set up under the Enterprise Act in 2002. Such a convergence is a sound principle as it provides for one specialist judicial body with cross-disciplinary expertise in law, economics, business and accountancy competent to decide cases involving competition and/or economic regulatory issues instead of having multiple appellate bodies.

²⁴ Renamed as Competition and Consumer Protection Commission by the Competition and Consumer Protection Commission No. 24 of 2010

²⁵ See Concurrency Regulations, 2004 at <http://www.legislation.gov.uk/uksi/2004/1077/contents/made>

3.1.3 Collaborative Approaches

Mexico has adopted a collaborative approach. Here the competition agency is entrusted with the responsibility for determining whether or not the conditions for effective competition exist or are sufficiently absent to justify the continued regulation of prices. Administration of price control rules is then entrusted to the sectoral regulator in the event that conditions for effective competition do not exist and such conditions are justified.

3.1.4 Coordination Agreements

Section 34 of the Competition Act of Ireland provides for formation of a “cooperation agreement” between competition authority and sector regulators. The agreement provides for information sharing, authorisation of forbearance when another agency is already dealing with a matter involving competition issues, and mandatory consultation when an agency is taking up a matter already being considered by another agency.

In South Africa, a memorandum of agreement was signed between the Competition Commission and the Independent Communications Authority of South Africa pursuant to the provisions of the Competition Act, which provides that the Commission has a responsibility to negotiate agreements with any regulatory authority according to which concurrent jurisdiction is exercised over competition matters within the relevant industry or sector, and to ensure the consistent application of the principles of the Competition Act.

Brazil presents the most fragmented institutional structure especially with respect to the number of institutions involved in applying competition laws. However there are several cooperation agreements in place between the competition authorities and some regulatory agencies, such as Aneel, ANTT and Anatel²⁶. These are key to the agencies’ and the competition authorities’ efforts to better coordinate. The two bodies cooperate on merger review matters as well. With some agencies, this coordination is very efficient while with others it is not so.

3.1.5 Mandatory Consultations

Argentina has a legal requirement for consultation between competition agency and sector regulators but the requirement applies to the competition agency and not the sector regulators. In sectors such as telecommunications, transport and distribution of electricity, transport of gas, shipping and infrastructure, the National Commission for the Defence of Competition (CNDC), according to Law No. 25.156 (Law on Defence of Competition) must solicit the opinion of the corresponding regulatory agency.

In Turkey, under Electronic Communications Law No. 5809, the Competition Board, the decision-making body of the Turkish Competition Authority, has the statutory duty to receive and take account of the opinion of the relevant regulatory authority (the Information Technologies and Communications Authority) when enforcing the Competition Law in the telecommunications sector. Moreover, the Competition Authority sends its opinion to the Information Technologies and Communications Authority regarding draft regulations in the consultation process.

Similarly, Article L.37-1 of the French code of postal and electronic communications law (*Code des postes et communications électroniques*) defines the consultation procedure and holds that the *Autorité de Régulation des Communications* (ARCEP) determines, after publication of the

²⁶ National Agency of Telecommunication (ANATEL), National Agency of Energy (ANEEL), National Agency of Terrestrial Transportation (ANTT)

Conseil de la Concurrence's opinion, the markets on which it wishes to impose specific ex ante obligations on operators having a significant influence.

3.1.6 Use of Courts to Interpret the Rules

Where the regulatory boundaries are not delineated clearly in the legislation, the matter is left to the courts to interpret the language of the legislation and determine the appropriate and respective responsibilities. This approach, however, can be costly and time consuming. The preferred course is to clearly determine the roles of the two classes of regulators in the new legislative structure.

In UK, the Competition Appeals Tribunal is the common appellate body for decisions by the Competition Commission and by sector regulators with respect to application of competition law.

Similarly in Poland, the Anti-monopoly Court has jurisdiction both over competition authority cases and appeals of regulatory authorities such as electricity, telecom, and railway sectors. Similar practice is adopted in France where the Appellate review of decisions by the *Conseil de la Concurrence* and both the telecom and energy regulators lies with a common court, *Cour d'appel de Paris*.

3.2 Approach to Minimise Overlap Conflicts: Comparative Study of Foreign Jurisdictions under Research Study

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<p>Legislative changes have been introduced to strengthen the principle of concurrency so as to ensure that the Competition Act applies to all regulated industries in the Republic.²⁷</p> <p>The result has been further amendment to the Competition Act, the amendment of 2009, repealing Section 67 (9) of the Electronic Communications Act. Section 3 of the Competition Act has been amended to provide for concurrent jurisdiction.</p> <p>It is still too early however to determine whether the 2008 ECA legislative amendment has finally provided for South Africa a lasting solution to the jurisdictional problem.</p>	<p>Two major amendments have been made in the past two years to address this matter.</p> <p>In 2011, the Spanish Competition Act was amended by the Sustainable Economy Act which in turn introduced some rules of coordination to minimise the potential for actual conflicts of competence between NRAs and the Competition Authority.</p> <p>This Act contains an Article 17 which attempts to make coordination between the Competition Authority and sector regulators smoother.</p> <p>Further, in the area of merger control, sector regulators were afforded a key (if only because it is a procedural requirement) consultative role foreseen by the Competition Authority.</p>	<p>South Korea is increasingly curtailing the exemptions to sectoral regulators.</p> <p>There is mandatory consultation which has been provided by the Article 63 of the Monopoly Regulation and Fair Trade Act (MRFTA). This requires a regulatory authority to consult with or notify the KFTC in advance when intending to propose potentially anticompetitive legislation or revise laws to have anticompetitive provisions.</p> <p>Accordingly, if a regulatory agency intends to introduce a law that contains</p>	<p>CADE and ANATEL had established a working group to address the potential problems presented by the overlapping jurisdictional provisions. CADE advises that, since 2000, the two agencies have successfully developed a cooperative working arrangement under which ANATEL assumes the role of SDE and SEAE in merger cases involving telecommunications services.</p> <p>Resolution 76/1998 approves Norm 4/98 and establishes that ANATEL examines merger documents first and CADE issues final approval. ANATEL is the only agency with such authority to investigate merger cases, replacing SEAE and SDE in this case. SEAE and SDE only issue opinions if specifically requested by a commissioner from CADE.</p> <p>ANATEL has special units for general management of</p>

²⁷ Presentation by the Department of Industry to the Portfolio Committee on Trade and Industry and Nedlac, (2008)

SOUTH AFRICA	SPAIN	SOUTH KOREA	BRAZIL
	<p>Article 17 made coordination a requirement in that the sector regulators are required to report to the competition authorities any conduct that they are aware of within the framework of their activities and which may be contrary to competition law.</p> <p>The Amended Act also conferred on the sector regulators key consultative and advisory responsibilities in merger control matters in that the competition authorities must request an opinion from the relevant sector regulator.</p> <p>Finally, where the competition authority initiated an investigation against an entity operating in a regulated industry for breach of competition rules an opinion on the matter was required from the sector regulator. Article 17.3 of the Competition Act contains a general co-ordination mechanism between the Competition Authority and the sector regulators.</p> <p>However, this framework did not sufficiently address the overlap conflicts. In light of these conflicts, the Spanish government has announced a proposal for merger of regulators into one body. The plan is to bring the energy, telecoms, gaming, airports and postal agencies under the umbrella of the antitrust agency, the National Commission of the Markets and Competition (NMC). The preliminary draft law creating the new NMC establishes that the new body will combine the functions related to the proper functioning of markets and sectors previously supervised by the National Energy Commission,</p>	<p>potentially anticompetitive regulations such as entry or price regulations on the grounds of the nature of a regulated industry, the authority should first seek consultation with the KFTC, which reviews whether a proposed legislation includes anticompetitive aspects and, if so, delivers its opinions to make correction to the authority.</p> <p>However there still remains ambiguity regarding whether the opinion/advice of the KFTC after such consultation on modification of such aspects is binding. Further there are certain conflicting provisions in sectoral laws that serve as breeding grounds for regulatory conflicts.</p>	<p>competition defense. Resolution 195/99 approves Norm 7/99 and establishes procedures for investigation of violations of competition rules: In the context of mergers, the responsibility would be with the competition authority. Under the arrangement, ANATEL conducts the investigation and provides a technical opinion, while CADE makes the final decision. On the other hand, in conduct cases ANATEL shares concurrent jurisdiction with SDE and SEAE, so that any one or all three of those agencies may perform investigative functions and present recommendations to CADE.</p> <p>Recently, in April 2012, Central Bank issued “Circular 3590” inaugurating a new phase in relations with the CADE in which both agents have the legal competence to analyse and judge the effects of mergers on competition in the financial sector. According to this document, Central Bank has delegated itself as the antitrust agency of financial system beyond the already established competence of regulator.</p> <p>The position of the Central Bank formalizes an institutional arrangement of concurrent jurisdiction in which the competition authority and regulatory agency exercise power over the laws of competition. This configuration requires a high degree of clarity in the rules regarding the division of powers in order to mitigate potential legal uncertainty.</p> <p>In May 2012, Brazil enacted a new merger law. It is important to note that the analysis methodology of competition as well as the scope evaluated by the Central Bank in the Circular 2012 has different characteristics to those produced by the new</p>

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	Telecommunications Commission, the National Competition Commission, the Committee of Rail Regulation, the National Commission on the Postal Sector, the National Gaming Commission, the Airport Economic Regulatory Commission and the State Board of Audio-visual Media.		competition law. While the former requires an ex-post evaluation of the merger, the second requires that economic agents involved provide information before the transaction.

4. Learnings for India from International Experiences

In India, while the current framework rightly provides for consultations between two regulatory authorities, it is not adequate as the opinions of authorities in these matters are not binding. Furthermore, sectoral laws are highly inconsistent with one another in that while some clearly define the different roles to be played by both authorities, others have conferred powers on the sector regulator to look into competition matters.²⁸

Much ground was covered in the 2007 amendments to the Competition Act. While the original law permitted reference to Competition Commission of India (CCI) by a sector 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.

Furthermore, in efforts to enhance mutual cooperation, Section 21A, a mirror image of Section 21, applicable to reference by CCI to sector regulators was also inserted. However a glaring loophole continues to remain in this framework because the opinions received from consultations under sections 21 and 21A are not binding.

The current framework which until recently rightly provided for non-mandatory consultations between two regulatory authorities was not adequate. Section 21 of the Competition Act said that any statutory authority may²⁹ make a reference to the CCI, and its opinion be rendered in 60 days which shall be considered by the statutory authority. The problem envisaged is that in this case it was optional for the regulator to consult CCI, and not mandatory. Till date, there has been only one reported case of the Maharashtra Electricity Regulatory Commission which referred a matter to CCI, but it is not known whether the opinion was ultimately adopted.

4.1 Recommended Approach

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

Having seen various models and looking at the various attempts by select jurisdictions studied in this project to imbibe a concurrent framework, it seems like the best approach for India is also a type of a concurrent framework which involves continuous mutual mandatory

²⁸ The Indian landscape gets further complex because of the seniority of the head, when they were in service, who are mainly retired civil servants from the Indian Administrative Services (IAS). Because of the rigid hierarchical structure of the IAS and similar services, seniority leads to ego clashes as well. There have been few exceptions to the practice of appointing non-civil servants as heads of regulators: once an economist as the first chairman of Central Electricity Regulatory Commission and a retired high court judge as the first chairman of the Telecom Regulatory Authority of India (TRAI). In TRAI two more non-civil servants have been heads, but since then the radar gets restricted to retired IAS officers. Furthermore, there is another problem in India, which can be similar to other countries as well. The sector regulators are established and overseen by line Ministries and thus turf issues also arise leading to tussles even in the discourse.

²⁹ 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. The proposed amendments to the Act have now been adopted.

cooperation/consultations between sector regulators and competition authorities. Such an approach would however call for amendments to the respective governing legislations which has been done in other countries to clearly demarcate the roles to be performed by each.

4.1.1 Clarifying Jurisdictional Roles

In a case of jurisdictional overlap between the Central Electricity Regulatory Commission and the Forward Markets Commission on futures trade in electricity, the Bombay High Court has ruled that neither of them can claim exclusive jurisdiction in the matter, and that they should establish an expert body to decide on the matter.

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

Furthermore, the preamble and section 18 of the Competition Act entrusts the CCI with the duty of sustaining competition in whole economy of India. Notwithstanding this reasoning, regulators such as RBI and Department of Telecommunications (DoT, which oversees mergers in the telecom sector as against the regulator: TRAI) have been pushing for exemptions from the CCI over mergers in their domain. Fortunately, a recent amendment has been passed by the GoM headed by P. Chidambaram that has ordered for all merger control matters to fall under the purview of the CCI with no exceptions for any sector.

Despite such reforms being introduced in the times, problems continue in some of the sectoral laws and policies. The Central Electricity Regulatory Commission passed regulations in 2012 namely, Prevention of Adverse Effect on Competition Regulations, 2012. In response to this, Shri Ashok Chawla, Chairman, CCI wrote a letter to the Prime Minister condemning such a move on part of the sector regulator. These provisions will not only create duplication and jurisdictional overlaps but also create regulatory uncertainty and result in forum shopping amongst the consumers not to mention wastage of public resources. Aside from this the Electricity Act, while giving overriding powers to the Consumer Protection Act in matters of conflicts between the two statutes under Section 173, has kept core competition issues of market dominance which also serves to protect consumer welfare, within the ambit of the sector regulator under Section 60 of the Electricity Act. On the other hand, a good statutory application of this principle can be witnessed in the Airport Economic Regulatory Authority (AERA) Act which has not discriminated between the Consumer Protection Act and the Competition Act in granting exemptions from the purview of the jurisdiction of the AERA Act.

4.1.2 Towards a Mandatory Cooperative Framework

The importance of coordination between the competition authorities and sectoral regulators has been highlighted by a Working Group on Competition Policy established by the Planning

Commission of the Government of India in 2006 and its recommendations were inserted in the Policy Document on the Five Year Plan: Inclusive Growth under Chapter 11: Consumer Protection and Competition Policy. This was adopted by the National Development Council in December, 2007. Para: 11.33 recommends:

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

Emerging from the discussions held in this paper, a concurrent framework as mentioned earlier is probably the most desirable approach for India to follow. In order for such a framework to work well, the following elements are necessary:

- a. Recognition of the role and competency of both the sector regulator and competition authority
- b. Designing a framework mandating cooperation between the two
- c. Creation of an independent body to take over when conflicts arise between the two

The Ministry of Corporate Affairs recently set up a committee last year to draft a National Competition Policy for India and allied matters.³⁰ The same committee has been empowered to propose amendments to the Competition Act to fine tune it. By virtue of this, the Committee also examined the issue of regulatory overlaps between the Competition Commission of India and sector regulators. The Committee has *inter alia* recommended that a) the National Competition Policy at paragraph 8.6 provides that coordination between sectoral regulators and Competition Commission should be made mandatory through suitable provisions in the Competition Act, 2002 and relevant sectoral laws. Accordingly, in the proposal for amendments in the Competition Act, 2002 the word ‘may’ in Section 21 of the Act which reads in part: any statutory authority may make a reference to the CCI is to be substituted with the word ‘shall’ thus making such consultation mandatory. In another applaudable reform, the proposed amendment was recently been approved by the GoM headed by Shri P. Chidambaram.

Further, in one of the recommendations to the Planning Commission’s Draft Regulatory Reform Bill³¹ which has been doing the rounds for over two years now, CUTS International has emphasised the need to introduce a chapter on regulatory overlaps and to hold mandatory consultations between the Commission and the sector regulators and between sector regulators on matters which are overlapping in order to avoid conflicts.

In conclusion, it is important that both the competition authority and sector regulators should try and appreciate the difference between technical and behavioural issues. The sector regulators should have the leading role in regulating technical issues. Thus, for structural issues, which in most cases are *ex-ante*, sector regulators should take a leading role. But, for competition issues which are largely behavioural and *ex-post*, competition authorities should take a leading role.

³⁰ www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf

³¹ <http://infrastructure.gov.in/pdf/Regulatory%20Bill%2020.pdf>

In an interesting case of a dispute between the Forward Markets Commission and the Central Electricity Regulatory Commission on the issue of which body has the role to supervise futures trading in electricity, the Bombay High Court observed that both the laws do not have exclusive jurisdiction on the matter and they should set up a (joint) expert body to resolve the dispute.³² This judgment is extremely relevant to the matter under this research study.

Hence if the sector regulators and competition authorities fail to resolve the issues amicably, then by drawing from the above referred Bombay High Court judgment, the same could be resolved by an expert body. To discharge such a function, we would suggest a standing committee comprising chairpersons of relevant appellate tribunals: Competition Appellate Tribunal, Securities Appellate Tribunal and Appellate Tribunal for Electricity. Such a body would be appropriate to hear such disputes as it would comprise of judges, and secondly because they are working on regulatory issues who would bring with them expertise on issues pertaining to sectors as well as competition.

³² www.thehindubusinessline.com/industry-and-economy/article1165344.ece

BRAZIL'S EXPERIENCE AND LESSONS FROM REGULATORY OVERLAP: BANKING AND TELECOMMUNICATION CASES

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INTRODUCTION

The institutional environment in Brazil was significantly altered during the nineties with less direct intervention in economic activity and the state taking on more of a regulatory role. Between 1996 and 2002, Brazil establishes independent regulatory agencies for infrastructure sectors as part of a large privatization program.

This regulatory transformation reflects the profound economic and social change of the past few decades in Brazil. Since then, the creation of regulatory agencies has been the subject of intense controversy. Specifically, the level of political and administrative independence and autonomy in relationship to the executive power has been the principal point of debate.

When countries undertake in regulatory reform in specific sectors, which aim at narrowing the scope of regulation and ensuring that it better serves public interests, an adequate definition of the relationship between sector regulatory authorities and competition oversight bodies is a core concern. A clear division of tasks and complementary approach between them, and cooperative behavior are prerequisites for the regulatory system to function properly as a whole.

The main goal of this paper is to devise an effective mechanism to clearly demarcate the jurisdiction of the regulatory bodies, specifically between competition authority and sectors regulators.

This paper is divided into four sections. The first section emphasizes the Brazilian economic history by exposing some main structural changes in the economic and political setting from 1990's to today. These structural transformations of the Brazilian economy are relevant to understand the evolution of the competition policy which precedes the emergence of regulatory agencies.

Section 2 there will be an overview of the Brazilian both competition authorities and regulatory agencies. This section provides a brief summary of both telecommunications and banking sectors and its corresponding regulatory agencies, respectively Brazilian Telecommunications Regulatory Agency (ANATEL) and Central Bank of Brazil (BACEN). Also in this section, the paper will describe the Brazilian antitrust system. In Brazil, competition authorities are fragmented, and are part of the Brazilian Competition Policy System. An important point is that some conflicts emerge from this fragmentation.

The purpose of section 3 is to investigate the historical conflicts between the sector regulators and competition authority. First, it will demarcate the regulatory roles of each

regulatory body. Second, it will present some mechanism adopted to minimize regulatory conflicts. Section 4 summarizes the main results and presents some comments about conflicts resolution.

1. STRUCTURAL REFORMS: BACKGROUND FOR THE EMERGENCE OF REGULATORY AGENCIES

After a long period of state intervention, Brazil experienced a move towards liberalisation and privatisation in the early 1990s. According to Oliveira and Konichi (2006), there were four main structural changes that influenced the institutional changes Brazil. These changes were trade liberalization, privatization, regulation and stabilization. Additionally, the Real Plan (1994) created a favourable environment for regulatory reform with greater economic openness, institutional reforms, stable inflation and a modern competition framework (OECD, 2008).

Hudson (1997) study on the Brazilian economy states that on the 1950's the government adopted an explicit policy of import-substitution industrialization to change the structure of the Brazilian economy. Under the import-substitution model, the Brazilian government intervened in several economic sectors in order to induce industrialization. This model was characterized as a closed economy, which produces for the domestic market.

As a consequence, the Brazilian economy showed high growth rates that were sustained until the mid-seventies. However, after the oil shock this model presented several limitations due to lack of external funds and a fiscal crisis of the Brazilian state. By the eighties, inflation had already soared to triple digits and Brazil experienced hyperinflation. These factors, combined with falling productivity in the state sector, led to major changes in the policy regime.

The emergence of competition and regulatory agencies had not been a consequence of the natural evolution of a market economy. But, an attempt to correct state sector inefficiencies and to disseminate market institutions after years of import- substitution policy during which the state played a predominant role in the market.

The first structural change was the trade liberalization. The policy adopted eliminated special import regimes and reduced non-tariff barriers. The result of this change was a drop of the maximum tariff from over 100% to 38.1% in 1998.

The second change (privatization) reduced the state intervention in the market. In the first phase, the enterprises privatized had been acquired by the state owing to financial difficulties, and their privatization simply meant resale to the private sector. During the 90's decade, the program focused on privatizing enterprises in steel, petrochemicals and fertilizers that did not require major regulatory changes. In the third phase, under the first Cardoso administration (1995-98),

the program comprised the sale of the state-owned enterprises most directly active in infrastructure sectors such as telecommunications, electricity and railroads. (Oliveira and Konichi, 2006)

In all, the privatization program represented gains of US\$ 86.9 billion; of which US\$ 70.3 billion corresponded to actual revenue from sales (Chart 1).

Chart 1: Brazil - privatization program data (1991-1998)

Sector	Number of companies	Assets sold	Debt Transferred	Total
Federal companies	81	46581	11326	57907
<i>Steel</i>	8	5562	2625	8187
<i>Petrochemicals</i>	27	2698	1003	3701
<i>Electricity</i>	3	3907	1670	5577
<i>Railroads</i>	6	1697	-	1697
<i>Mineral extraction</i>	2	3305	3559	6864
<i>Telecommunications</i>	21	26970	2125	29095
<i>Others</i>	14	2442	344	2786
State-government firms	26	23724	5311	29035
Total	107	70305	16637	86942

Source: Pinheiro and Giambiagi (1997)

Due to the importance of this policy and the elements of natural monopoly involved in many economic sectors, the regulatory issues became the central debate of the public policy agenda.

As part of the infrastructure was privatized, it became clear that the state would have to design specific regulatory frameworks. Note that in the U.S. many regulatory agencies preceded the antitrust authorities. In contrast, in Brazil they were created after a competition law was in place. Antitrust bodies were the ones with certain expertise to deal with the vertical and horizontal problems which typically arise in regulated industries (Oliveira and Konichi, 2006).

The fourth change was the stabilization plan focus to control inflation in Brazil. Facing imminent hyperinflation and a virtually bankrupt public sector, the government introduced several stabilization plans to promote fiscal and monetary stability. But only in 1994, with the Real Plan, the inflation was controlled and Brazil started to attract foreign investments again. In this stage of the twentieth century, the Brazilian economy became a more open market.

In sum, the objectives of regulatory reform and privatization were to facilitate the environment for attracting new private investment, including from abroad, to increase efficiency and reduce the public debt.

2. CREATION AND FUNCTIONING OF THE BRAZILIAN REGULATORY AGENCIES

The Brazilian regulation policy is a reflection of structural and institutional changes mentioned in last section. Although it seems obvious that Brazil needs regulatory agencies and more competition to improve economic efficiency, there were several challenges and peculiarities to implement competition policy and regulatory agencies in developing countries.

The general characteristics of the institutional environment posed in the previous section show certain specificities depending on the sector that is regulated. Although most elements of institutional endowments are common to all sectors within a same country, regulatory design can vary across sectors. Empirical data show that there are a wide variety of government choices for regulatory design, producing different outcomes across sectors.

Creation of regulatory agencies accompanied the process of opening infrastructure sector markets to the private sector, either through total privatization (telecommunications and rail transport), or through partial privatization (electricity), or by means of a mere permission for private organizations to enter the market without privatizing the state enterprise. For instance, although the privatization program was one of the largest in the world in absolute terms, many state companies still have maintained dominant position in various markets, such as postal services, water and sewage and oil.

Chart 2 shows some different kinds of regulatory agencies in Brazil.

Chart 2: Different kinds of Regulatory Agencies

Oth ANCINE – National	
	ANATEL - Federal
	ANEEL – Federal
	ANP - National
	ANTT – National Agency of
Natural	ANTAQ – National Agency of
	ANA – National Agency of
	BACEN - Brazilian
CVM - Brazilian	CNSP – National Council of
Infra-	Competition
	CADE - Brazilian equivalent to US's FTC –
ANS – National Agency of	ANVISA - National Agency of
Financial	
	INPI – National Institute of
ADA – Agency for the Development of	ABENE – Agency for the

Fonte: Oliveira, Machado e Werneck (2004)

The “New Regulatory State” was defined by the country’s Constitutional Amendments 5, 6, 7, and 8. These established the legal regime of natural gas exploitation by the states; research and extraction of mineral resources; air, aquatic and terrestrial transportation; and telecommunications services. Amendment 9 abolished the legal oil and natural gas monopolies and created the regulatory agency for the oil and gas sector (OECD, 2008).

A common characteristic among these agencies is that they promote concessions for the use of public resources or they engage in the provision of services. Precise delineation of the functions of regulatory agencies is provided by the rules determining the ministerial connection of the agency, its attributes and the influence of other institutions in the decision making process. Ministerial connections of agencies were conceived on the lines of a legal form of a quasi-independent government agency under a special regime, connected to a Ministry, but not hierarchically subordinated to it.

The creation of regulatory agencies as quasi-independent agencies under a special regime was important to ensure financial and structural independence, and avoid subordination to any particular Ministry. This enabled these agencies to enjoy political and decision making independence and to take decisions on the basis of technical rather than political criteria, as is frequently the case in bodies subordinated to Ministries.

In the Brazilian case, the role of regulatory agencies, as corporate entities under public law, involves supervising, regulating, rule making and implementing policies drafted by ministries. At times, agencies also perform arbitration and mediation. In the next subsections, the characteristics related to both petroleum and electricity agencies are closely specified.

In relation to the coordination, less influence of other bodies of the direct administration in decision making processes (as determined by their intervention in the procedures of the agency, such as the power to bring cases before the agency, proceed to conduct investigations, make agreements, etc) heightens the agency's degree of autonomy, since it will have greater authority to mediate or arbitrate disputes. An agency's credibility is greater when, after conducting all investigations and analyses, it has the authority to apply any sanctions necessary without them being reviewed by other instances of the administration.

The action of an agency will not necessarily be connected only to the sector that it is part of. In the cases involving more than one sector, decision-making requires coordination across agencies. However, there is no overall legal provision governing the relations between agencies and other organs of the Government, in particular with the competition policy authorities. Thus, an agency may delegate concessionary powers to another agency or work together with it in the decision making process, without constituting interference in the delineation of its functions, or in

the extent of this agency independence from these other agencies. During President Lula's Government there had been a lot of pressure of the Executive branch to regain at least part of the decision making ability of the agencies. The Government was quite successful mainly in ANATEL and ANEEL.

Finally, Brazilian government is setting up a Program for the Strengthening of the Institutional Capacity for Regulatory Management (PRO-REG). The main of PRO-REG is to increase the quality of regulatory system at introducing new mechanisms for accountability, participation and monitoring from civil society and boost coordination among the institutions that participate in the regulatory process. This program has been developed with the support of the Inter-American Development Bank (IADB) with the purpose of contributing to the improvement of the regulatory system and co-ordination among the institutions that participate in the regulatory process. PRO-REG will introduce RIA to measure regulation quality of regulators.

A. NATIONAL AGENCY OF TELECOMMUNICATIONS (ANATEL)

According Mattos & Coutinho (2005), *“the reform of telecommunications in Brazil was one of the most well structured reforms in Latin America (LA) and arguably around the world in terms of transparency of the regulatory framework before privatization and the introduction of competition”*.

When the privatization of TELEBRAS, the Brazilian state-owned holding entity the main regulatory rules had already been settled, including the General Law of Telecommunications (GLT). The concession contracts, published before privatization, contained several regulatory provisions. The telecommunications regulatory body, ANATEL, was already operating. Establishing ex ante the regulatory rules explains much of the success of the this sector reform (Mattos & Coutinho,2005).

ANATEL is administratively independent and financially autonomous, not hierarchically subordinate to any government agency. The regulatory agency has wide powers:

- i. enact rules on the use,
- ii. establishment and control of maximum tariffs and prices for services rendered under the public regime;
- iii. apply sanctions;
- iv. regulate interconnection;
- v. issue licenses;
- vi. manage radiofrequency and spectrum;

- vii. settle disputes between service providers and between them and consumers;
- viii. impose sanctions; and
- ix. protect consumers' interests in the field of telecommunications.

The GTL determine that ANATEL is responsible for the enforcement of antitrust laws, determining, in Article 97, that every split-up, merger, acquisition, consolidation, decrease of the capital stock of the company and transfer of the company's controlling interest needs to be examined by it.

B. CENTRAL BANK OF BRAZIL (BACEN)

The BACEN was created by Law no. 4.595 of December 31st, 1964. It is an autonomous federal institution and part of the National Financial System (SFN). The 1988 Constitution sets down Central Bank's matters, such as the exclusive attribution of the Union to issue money, the need to submit both president and director of the Central Bank, appointed by the Republic President, to prior approval by the Senate, and the prohibition to direct or indirect granting of loans to the National Treasury. The 1988 Constitution also establishes the drawing up of a Complementary Law of the National Financial System, to substitute Law no. 4.595, dealing with varied and important aspects of the structure and activities of the agency.

The BACEN has regulatory responsibility for banks and other financial institutions. It exercises "prudential" regulatory control over new bank charters and bank mergers; sets requirements for capital, reserves, and investments; and mandates internal control and accounting systems. Separate regulatory bodies exist within the Ministry of Finance for the insurance and securities sectors.

OCDE (2000) noted that although banking is not exempt from the competition law, "*the Central Bank continues [to] exercise sole authority over competitive issues in the sector.*" In particular, the Bank has demanded exclusive control over bank mergers on the grounds that it must assure the proper disposition of "*problem banks*" and enforce constitutional limits on entry by foreign banking institutions.

C. BRAZILIAN COMPETITION POLICY SYSTEM (SBDC)

As a part of the 1994 reforms, a new competition law (No. 8884) was enacted with the expectation that it could be employed to deal with inflated prices. Law 8 884 granted the CADE the status of independent government agency and legislated about the prevention and repression

to infractions against the new economic order. The new law also implemented merger control and made important institutional changes.

In Brazil, competition authorities are fragmented. An important point is that some conflicts emerge from this fragmentation. This system consists of three bodies:

- a) CADE, the Administrative Council for Economic Defense, an autonomous agency which has dispositive adjudicative authority in SBDC cases;
- b) SDE, the Economic Law Office in the Ministry of Justice, which has the principal investigative role; and
- c) SEAE, the Secretariat for Economic Monitoring in the Ministry of Finance, which also has investigative authority but is primarily responsible for providing economic analysis in SBDC proceedings.

Chart 3 shows the evolution of the competition law.

Chart 3: Evolution of competition institutions in Brazil

LAW	4.137 (1962)	8.158 (1991)	8.884 (1994)	12.529 (2011)
INSTITUTIONS	CADE	SNDE CADE	CADE SDE SEAE	CADE SEAE
SCOPE	CONDUCT	CONDUCT	CONDUCT STRUCTURE	CONDUCT EX-ANTE STRUCTURE
DEGREE OF AUTONOMY	-	-	CADE gets more independent; member have a two-years mandate	CADE achieves special autonomy; members have four years mandate

Fonte: Adapte from Oliveira, Machado e Werneck (2004)

Importantly to note that the regulatory framework of the competition defense in Brazil suffered recent amendment to the institutionalization of 12.529/11, that repealed the Law 8.884/94 and created a new institutional design to the SBDC. Now, CADE will be responsible beyond the judging processes, procedural instruction and economic analysis of mergers and anticompetitive conduct.

The main aspect is the diminution of bureaucracy. Under the new act, the function of the three authorities in relation to the competition defense will be consolidated into one single body, reducing the number of stages in the review process. From the previous three bodies, it would remain two (CADE and SEAE). In this new configuration, SDE would only regulate consumer

protection, CADE would be the only to instruct and judge cases and SEAE would be in charge of the interaction of competition policy with regulatory agencies and competition promotion.

Another essential change enacted was the requirement of prior review of merger, prevented the consummation of the transaction to a Council decision on it. The processes submitted to CADE will face more restrictive and coherent criteria. This measure that would certainly reduce the amount of cases judged.

The new legislation introduces more two important changes: amendment of the merger notification thresholds and new provisions concerning the enforcement of anticompetitive practices, particularly regarding the setting of fines for anticompetitive conduct and leniency.

The new institutional environment suggests a greater degree of autonomy of the CADE and some analysts at the time of promulgation of the new device, referred to the new institution as "Super-CADE". For the present study this means a step forward in allowing greater social legitimacy to the local authority reducing potential interference from entities such as the Executive.

3. OVERLAP ASPECTS

Brazil's regulation and antitrust policies are relatively recent, So it is expected to find problems related to overlapping jurisdiction between the various actors of the institutional system.

The focus of the competition agency resides in the non-competitive markets, in which there are a higher proportion of unlawful acts. A considerable portion of the problems, however, is associated with failures in regulation. Thus, the establishment of pro-competition rules can eliminate, or at least attenuate, market failures. The focus of the sectorial regulatory agency, on the other hand, resides in natural monopolies – a single company has ever-decreasing costs as its activity increases.

Competition policy and control of the monopoly power had larger importance in sectors that moved forward more in the privatization process and us which, for the following model and for the technological characteristics, the access to the essential infrastructure is shown decisive for the acting of the sector, as is the case, for instance, of telephony, electric power and even railroads. (Machado et al., 2004)

When some issue involves both the regulatory agency and the antitrust authority, cases of overlapping functions may occur and there is a need to cooperate. The analysis of a concentration act in a regulated sector is a classic example. In these cases, the remedies that are available to the

antitrust authorities may not be sufficient to establish competition, leading to suggestions for improving regulations. So it is necessary complementary role of the regulatory agency and the antitrust authorities with the need for them to co-operate. (OCDE, 2008)

As regards the interaction between the sectorial regulatory agencies and the antitrust authorities, the SBDC proposed that the law should provide that only its administrative bodies (SEAE, SDE and CADE) should have power to apply the antitrust legislation. It could also request to the sectorial agencies to issue one expert opinion on the sector, with the purpose of assisting the SBDC in the appreciation of the merger or the anticompetitive behavior. (ICN, 2004)

Moreover, institutional cooperation is important not only to avoid the duality of regulatory power, but also to ensure enforcement and credibility of regulation and to harmonize procedures and procedural rules. In other words, SBDC also considered that the regulatory agencies are required to request a legal opinion from administrative bodies on drafts of norms and regulations, before its disclosure for public consultation, so these could reveal on possible impacts on the competitive conditions of the sector.

This is not the case of ANEEL and ANP, for example. As show OECD (2008), actual the relationship between ANP and ANEEL is very distant, and the regulatory framework does not encourage dialogue even on matters that are highly relevant for both. For instance, ANEEL has jurisdiction over input for thermoelectricity but ANP is the natural gas regulator, and distribution is regulated at the sub-national level. A strong dialogue could help ensure that specific regulatory developments in each sector are mutually reinforcing and consistent regulators.

In addition, ANEEL legislation charges the agency by overseeing competition policy, making rules to curb market concentration and providing joint actions with the state agencies and the Secretariat of Economic Law. The competition policy and control of the monopoly power are of great importance within this sector. Due to the technological characteristics, the access to the essential infrastructure is decisive for this sector to operate. (Machado et al., 2004)

In the case of ANP, the legislation merely enjoins that the Brazilian antitrust authority must be notified of the matters involving infraction against the economic order.

A. TELECOMMUNICATIONS SECTOR

The telecommunications sector is regulated by Law No. 9472/97 (General Telecommunication Law), which created the National Agency for Telecommunication (Agência Nacional de Telecomunicações, ANATEL). In telecommunications sector, regulation of

competition includes measures that require prior notification of any merger or acquisition among market agents. Moreover, incumbents were obliged to allow their competitors access to disaggregated elements and/or alternative points in their networks. The General Telecommunications Law (GTL) gives power the ANATEL to monitor market behavior, as in the case of interconnection agreements. Parties to these agreements seek to inhibit tariff subsidies by means that include artificially reducing tariffs, unauthorized use of information obtained from competitors, omission of technical information, obstruction, and restraint.

Although GTL has determined that ANATEL is responsible for the enforcement of antitrust laws, ANATEL's analysis do not replace competition law, as CADE remains, even in the telecommunication sector, as the Tribunal that decides whether the transaction is to be approved or not. Even though the GTL is not enough clear on this subject (as regards to Article 7, §§ 1º and 2º), SEAE and SDE have not been analyzing transactions in the telecom sector to send it to CADE, remaining ANATEL as the agency that is developing such work. So, the authority is in charge of supervising, preventing and repressing actions against the economic order except for those belonging to CADE. (ICN, 2004)

Briefly, the GTL establishes complementary competencies between CADE and ANATEL. The regulatory agency has specific rules related to competition aspects and observes the competition legislation when it does not diverge with the rules and principles established by the GTL. The agency also needs to consider competition principles when reaching decisions. (OCDE, 2008)

This reflects the tendency among OECD countries to allow for joint responsibility in the telecommunications sector between competition authorities and the sector-specific regulator. In certain cases formal mechanisms exist for co-operation, while they do not exist in other cases. In Brazil as in OECD countries, good co-operation between the two types of authorities is essential. At the moment, there is no formal co-operation agreement between CADE and ANATEL, but co-ordination seems to have operated well until now, based on informal procedures. In addition, ANATEL has taken several resolutions that regulate administrative procedures involving competition. (OCDE, 2008)

CADE and ANATEL had established a working group to address the potential problems presented by the overlapping jurisdictional provisions. CADE advises that, since 2000, the two agencies have successfully developed a cooperative working arrangement under which ANATEL assumes the role of SDE and SEAE in merger cases involving telecommunications services. (OCDE, 2005)

Resolution 76/1998 approves Norm 4/98 and establishes that ANATEL examines merger documents first and CADE issues final approval. ANATEL is the only agency with such authority to investigate merger cases, replacing SEAE and SDE in this case. SEAE and SDE only issue opinions if specifically requested by a commissioner from CADE. ANATEL has special units for general management of competition defense. Resolution 195/99 approves Norm 7/99 and establishes procedures for investigation of violations of competition rules. In the context of mergers, the responsibility would be with the competition authority. ANATEL has issued several decisions on these issues, such as the one that defines the concept of Significant Market Power. (OCDE, 2008)

Under the arrangement, ANATEL conducts the investigation and provides a technical opinion, while CADE makes the final decision. In the other hand, in conduct cases ANATEL shares concurrent jurisdiction with SDE and SEAE, so that any one or all three of those agencies may perform investigative functions and present recommendations to CADE. Over the years, CADE and ANATEL have signed several written cooperation agreements, each of which has subsequently expired. (OCDE, 2005)

CADE has considered numerous conduct and merger cases sent to it by ANATEL. In 2001, for example, CADE addressed an abuse of dominance claim against the Globo Group, Brazil's largest broadcast television network. Globo controlled both the Globo Channel, the prime broadcast channel in Brazil, as well as Sky TV, the most important Brazilian pay TV satellite company. The complainant was TVA, the owner of competing satellite company DirectTV (OCDE, 2005).

TVA asserted that Globo wrongfully refused to license the Globo Channel to TVA for satellite broadcast. ANATEL investigated and concluded that there was no abuse of dominance because the Globo Channel was not an essential facility for satellite TV service. CADE agreed and dismissed the case, observing that TVA was a viable competitor even without the channel and that requiring satellite TV services to share programming would reduce competition and retard incentives for innovation. In a 2002 merger case, CADE approved without restrictions a joint venture by Portugal Telecom and Telefonica Internacional to create the cellular service company Vivo.(OCDE, 2005)

In merger cases, ANATEL has statutory authority to issue an order preventing consummation of a transaction until review is complete. CADE may issue a separate precautionary measure to deal with aspects of a merger that are not within ANATEL's jurisdiction. For example, in the News Corporation, ANATEL issued an order preventing the two satellite TV companies from consummating the underlying transaction, while CADE issued an

order barring the parties from establishing any new contracts providing for exclusive distribution in Brazil of television programming. (OCDE, 2005)

CADE has sometimes requested that SDE or SEAE (or both) provide supplementary technical opinions in merger cases falling within ANATEL's jurisdiction and in conduct cases that SDE and SEAE had not investigated. Likewise, opinions from both SDE and SEAE were sought in an abuse of dominance case against São Paulo Telecommunications (Telesp). The complaining firm in that case, Telecommunications Brazil Enterprise (Embratel), asserted that Telesp was charging discriminatory tariffs for accessing Telesp's network. SDE and SEAE agreed that the conduct was likely to be discriminatory and CADE issued a precautionary order following their recommendations.

SDE and SEAE also pursue both merger and conduct investigations into aspects of the telecommunications sector that are outside ANATEL's jurisdiction. Merger investigations in recent years have generally involved markets that are vertically related to telecommunications services. Acquisitions by land-line telephone companies of Internet service providers and by satellite TV firms of TV program suppliers have been a particular focus of interest. Thus, in 2002, SEAE examined another transaction involving the Globo Group, which (in addition to SkyTV) also owns SporTV, the prime Brazilian pay-TV sports channel. The transaction involved Globo's acquisition of a 25% stake in ESPN Brasil, a competing pay TV sports channel.

SEAE concluded that Globo was in a monopolistic position respecting the "premium sports channels for pay TV" market and in a monopsonistic position respecting the market for pay TV presentations of premium sporting events. Entry was difficult in both markets, and SEAE therefore recommended imposing certain restrictions to reduce the prospect that Globo could abuse its market power. SEAE's proposals were designed to prevent Globo from providing exclusive licenses to SkyTV for the satellite broadcast of premium sporting events, or demanding exclusive broadcast rights for such events. (OCDE, 2005)

Conduct investigations by SDE and SEAE in markets related to, but outside of, ANATEL's jurisdiction include yet another case against the Globo Group. An abuse of dominance complaint by Associação Neo TV asserted that Globo was refusing to negotiate the license for SporTV channel to Globo competitors of satellite TV services (SkyTV and NET). SEAE's proposals were similar to those in the ESPN Brasil acquisition case. (OCDE, 2005)

According to the typology proposed by Oliveira (2001), the telecommunications sector presents a model of complementary jurisdictions. That's the case in which more than one agency may have jurisdiction over subjects relating to a sector, though from different points of view. Such an arrangement institutionalizes high degree of specialization of both regulators and

antitrust authorities since it is clear delimitation of powers between the two agents. Despite minimize duplication of decisions requires strong cooperation between authorities which can result in high transaction costs of bureaucracy, in the limit excluding the benefits generated by the complementarities.

B. BANKING SECTOR

The Brazilian financial system is the largest and most sophisticated in Latin America. In spite of its large size, Brazil is similar to other countries in terms of the degree of concentration, as well as the efficiency ratio and capital adequacy. However, credit is relatively low compared with other countries and a significant portion of bank assets is invested in government bonds (WORLD BANK, 2007).

The conflict of attributions between Central Bank and CADE started long after the creation of the two organs. Since the decade of the 60s until the mid-90s, CADE and the Central Bank had a harmonious relationship. In 1999, a task force with people from Central Bank and CADE was created for defining their respective functions in the markets in which financial institutions operated. However, these discussions failed to produce any practical results.

In 2001, the Federal Attorney General's Office issued a legal opinion concluding that the specificity of Brazil's banking law took precedence over the more general language in Law 8884, and thus effectively vested the Central Bank with sole jurisdiction over banks for all purposes. CADE has never assented to that opinion, taking the position that competition law is applicable by its terms to all commercial enterprises, and that CADE is not bound by a legal opinion issued by the Executive Branch. (OCDE, 2005)

Two courts of first instance have considered the issue of whether bank mergers must be notified to CADE under Article 54. One court held that they did, concluding that Article 54 applied even where the merger had been reviewed by the Central Bank. A second court in a different bank merger held the opposite; on the grounds that the Central Bank's review was preemptive and that the Federal Attorney General's legal opinion bound the entire Federal Government, including CADE. (OCDE, 2005)

Negotiations between CADE and Central Bank were undertaken to resolve the controversy by agreement. A consensus bill provides that the Central Bank will have exclusive responsibility for reviewing mergers that involve a risk to the overall stability of the financial system. In all other merger cases, CADE will have dispositive authority. Authority for handling conduct cases in the banking sector will be lodged exclusively with the SBDC. CADE and

Central Bank have long had a working agreement that is employed principally as a mechanism for exchanging information. (OCDE, 2005)

In this sense, there are complementary Law under consideration in Congress that divides authority among the organs, ensuring exclusivity analysis of mergers and acquisitions that offer systemic risk to the Central Bank, leaving the analysis of operations and other potential anticompetitive conduct in charge of the SBDC.

In 2010 some results show the increased convergence between antitrust authorities and the regulatory agencies, which were crucial to increase competition enforcement in the banking sector. In respect of merger filings concerning the banking sector, the Brazilian Superior Court rendered a decision establishing that only Central Bank has responsibility to oversee competition in the Brazilian banking market (the aforementioned transactions were overseen by CADE before the judicial decision). Good examples of this phenomenon are the cases in the banking sector, as the acquisition by the consortium Santander/Fortis/RBS of the ABN/Amro Bank group, the merger between Itaú and Unibanco and the acquisition by Banco do Brasil of the Nossa Caixa.

In the Itaú-Unibanco case, the opinions of the two organs (CADE and Central Bank) despite approving the merger went separate ways for the application of restrictions and terms of engagement performance. The Central Bank had chosen to restrict the merger in such a way that the new conglomerate would share with the civil society of the gains of the transaction. For this the new organization should maintain their bank rates unchanged for a certain period of time. CADE cleared the transaction unconditionally. CADE concluded that the sector was characterized by sufficient rivalry to challenge any possible exercise of market power.

The other relevant transaction was the acquisition by Banco do Brasil of Nossa Caixa³³. After the review by the Central Bank (BACEN) and the other antitrust authorities (SEAE and SDE), CADE concluded that, although some Brazilian cities in the São Paulo State would have units of only one of them, the transaction would not raise competition concerns. However, the transaction was approved with restrictions and a performance settlement agreement was executed between the parties and CADE, according to which Banco do Brasil undertook to implement free call centre services for customers in 157 cities in the São Paulo States, where overlaps were higher than 40 per cent.

Recently, in April 2012, Central Bank issued “Circular 3590” inaugurating a new phase in relations with the CADE in which both agents have the legal competence to analyze and judge the effects of mergers on competition in the financial sector specifically. According to this

³³ Banco do Brasil e Nossa Caixa are two important public Brazilian banks.

document, Central Bank had delegated itself as the antitrust agency of financial system beyond the already established competence of regulator.

According to Oliveira (2001) the position of the Central Bank formalizes an institutional arrangement known as concurrent jurisdiction in which the competition authority and regulatory agency exercising power over the laws of competition. This configuration requires a high degree of clarity in the rules regarding the division of powers in order to mitigate potential legal uncertainty.

It is important to note that the analysis methodology of competition as well as the scope evaluated by the Central Bank has different characteristics to those produced by the new competition law. While the former produces an ex-post evaluation of the merger, the second requires that economic agents involved providing information before the transaction.

Finally, the conflict of attributions between the Central Bank and CADE does not involve other sectors of the national financial system, as it is the case of insurance companies, whose activities are regulated by Superintendence of Private Insurance (SUSEP), or in case of health insurance, regulated by the National Agency of Supplementary Health (ANS).

CONCLUSION

The transparent, technical and open nature of antitrust actions in Brazil resulted with more proximity between the SBDC and the sector regulators (such as ANATEL, ANEEL, BACEN, etc), spreading some expenditure and antitrust expertise to the merger review in those branches. In other words, once a transaction affects regulated markets in Brazil, the responsible Agency participates in the antitrust analysis of the merger, usually giving a technical, but non-binding, opinion that will be regarded by CADE in the antitrust scrutiny of the case.

Regulatory decisions taken without any systematic or formal coordination are having a clear impact on the economic performance of the country. One major problem is the overlapping of regulatory competences, which in some cases is due to an unclear definition of responsibilities.

In the specific case of telecommunications industry, this paper suggested that the model of complementary jurisdictions applies. In this model there is no overlapping of the two authorities' functions. The division of tasks is clear and determines that the regulatory agency deals exclusively with economic and technical tasks, while the competition authority enforces antitrust law. The current efforts to coordinate activities between ANATEL and CADE, show that this model is the optimal institutional configuration. A similar scheme exists in almost all the mature jurisdictions in a more or less formal manner. The solution to avoid conflicts and delay in the resolution of problems resides in inter-institutional co-operation through operational agreements.

It's important to note that the telecommunications sector is the unique in the Brazilian regulated industry that the regulatory agency supplanted SDE and SEAE in the review process.

In banking sector, there are new Law under consideration in Congress that divides authority among the organs, ensuring exclusivity analysis of mergers and acquisitions that offer systemic risk to the Central Bank, leaving the analysis of operations and other potential anticompetitive conduct in charge of the SBDC. However, the "Circular 3590" of the Central Bank establishes the model of concurrent jurisdiction, in which both the competition authority and regulatory agency exercising power over the laws of competition, as predominant institutional arrangement

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4. 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.³⁴

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 information society.³⁵ In this

³⁴ 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.

³⁵ TRAI at its website <http://www.trai.gov.in/aboutus.asp>, accessed on 23 August, 2011.

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.

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,³⁶ 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.

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

³⁶ This definition was lifted from now repealed MRTP Act (Section 2(o)).

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”.*³⁷

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.³⁸ However, it is reported that CCI’s intervention was not considered in good light by the Delhi Electricity Regulatory Commission (DERC), as it believes such matters to be exclusively under their domain, pursuant to the powers vested in them by the Electricity Act, 2003

It can also be established that jurisdiction cases due to overlaps in regulations also existed during the MRTTP era. In Sea TV Network judgment of August 24, 2005, TDSAT made a ruling trying to clear some confusion after jurisdiction issues between the MRTTP Commission and TRAI had surfaced by observing that the MRTTP 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).

³⁷ 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.

³⁸ Source: <http://www.allbusiness.com/trends-events/investigations/15761670-1.html#ixzz1WPctTaN4> , accessed on August 29, 2011.

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 may³⁹ 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 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.

³⁹ 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.

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.⁴⁰

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

⁴⁰ See the Competition Act 1998 (Concurrency) Regulations 2004.

their enforcement effectiveness. It was intended to structure this cooperation and to facilitate OPTA and the NMa to pursue the following functions:⁴¹

- 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.

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.

⁴¹ 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.

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.⁴²

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 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

⁴² This also implies some concurrency aspects to the cooperation framework.

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.

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Competition and Regulatory Overlaps: Experience of South Africa

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Executive Summary

Regulation in South Africa took flight in the mid 1990s in the post Apartheid era. There were new regulators formed or restructured committed to particular sectors or industries. These regulators being creatures of statute are funded by the government and in part by fees they charge (licensing or otherwise). They are subject to scrutiny by the Auditor General, have to publish an annual report and remain answerable to their respective Ministries or Parliament. “The fact that some Ministers have expressed concern that certain regulators have adopted a policy-making role independent of government serves as an indication of their level of independence.”⁴³

It is important for competition and sector regulators to play to their strengths and within their jurisdiction. Competition authorities should focus on firms’ behaviour and market forces that lead to anticompetitive behaviour while sector regulators are in a position to handle the technical and economic regulation to prevent anticompetitive outcomes. The Organisation for Economic Cooperation and Development (OECD) provided a guide on the need for regulation being:

- “competition protection-controlling anticompetitive conduct and mergers;
- access regulation – ensuring non-discriminatory access to necessary inputs, especially network infrastructures;
- economic regulation – adopting cost based measures to control monopoly pricing; and
- technical regulation – setting and monitoring standards so as to assure compatibility and to address privacy, safety, and environmental protection concerns.”⁴⁴

Bearing these points in mind the competition and sector regulation have been enforced to monitor market forces in South Africa. Identifying where their roles begin and end may not be an easy task, and in some cases, have been subject to litigation. This paper shows how competition authorities were set up to make decisions independent of political influence with the focus being on improving a competitive economy for the country. The sector regulators have been proactive in monitoring and implementing policy and regulations. Issues of concurrent jurisdiction have been interrogated and there have been attempts to resolve jurisdictional issues through legislation. South Africa as a growing democracy has many challenges to face in this arena.

⁴³ REFERENCE T4

⁴⁴ OECD (2004) ‘Relationship between regulators and competition authorities’. *Competition Law and Policy* pg 8. Also available at: www.oecd.org/dataoecd/35/37/1920556.pdf

Enactment of the Select Sector Regulations and Competition Law: Historical Perspective

Prior to the new dispensation, the competition enforcement was conducted by the Ministry of Trade and Industry who formed the Competition Board. The Minister who had the final decision on all cases reviewed all decisions by this Board. There was a great lack of autonomy and a heavy political influence on all decisions taken. The regulatory force of competition law in South Africa was borne out of legislation enacted after the fall of Apartheid. This legislation was the Competition Act 89 of 1998, which was later amended. The purpose of this Act is “to promote and maintain competition in the Republic in order:

- (a) to promote the efficiency, adaptability and development of the economy;
- (b) to provide consumers with competitive prices and product choices;
- (c) to promote employment and advance the social and economic welfare of South Africans;
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
- (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy, and
- (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”⁴⁵

This Act created three crucial institutions to achieve its purpose. The Preamble to the Act states that “...credible competition law, and effective structures to administer the law, are necessary for an efficient functioning economy”.⁴⁶ The Competition Commission which is the investigative and prosecutorial body has jurisdiction to assess the impact of mergers and acquisitions (except banking mergers) and prohibited practices (vertical and horizontal restraints and abuse of dominance). The Competition Tribunal adjudicates on the matters referred to it by the Commission. Cases from the Tribunal can be appealed to the Competition Appeal Court. The decisions made by these three institutions act independently of each other and free in terms of the Act from Government or Ministerial interference.

The Independent Communications Authority of South Africa (ICASA), the communications, broadcasting and postal services regulator was established on July 01, 2000 as an amalgamation of the Independent Broadcasting Authority (IBA) and the South African Telecommunications Regulatory Authority (SATRA). This foresight to have a converged regulator was in pre-emption of the convergence of technologies to occur. ICASA was given the mandate to:

- license broadcasters, signal distributors, providers of telecommunication services and postal services;
- make regulations;
- impose license conditions;
- plan, assign, control, enforce and manage the frequency spectrum;
- ensure international and regional cooperation;
- ensure the efficient allocation of numbers;
- ensure interoperability of networks;
- receive and resolve complaints.⁴⁷

⁴⁵ Competition Act 89 of 1998 (as amended) Section 2 pg 14-15.

⁴⁶ Competition Act 89 of 1998 (as amended) pg 3.

⁴⁷ Functions of ICASA. See www.icasa.org.za/AboutUs/OverviewMandate/tabid/56/Default.aspx

Sibanda and Akinboade list the advantages of having such a merged regulatory structure being:

- “In a converged environment, services that were traditionally separate such as voice, data and broadcasting transmission may be indistinguishable. It would be difficult for two separate regulators to deal with such overlaps.
- From licensing, regulation enforcement and dispute resolution perspectives, it is much easier for industry to deal with one authority and it is easier for that one authority to coordinate its tasks;
- A merged entity removes the duplication of services and frees up public resources for other uses.
- There is one government department responsible for the broadcasting and telecommunications sectors. It is also logical to have a single regulator in the sector.
- International best practice points to consolidated regulatory structures.
- Merged regulators offer the sector an opportunity to benefit from economies of regulation”⁴⁸

Unlike the competition authorities who have separate investigative and adjudicative institutions (the Competition Commission and Competition Tribunal and Appeal court respectively), ICASA has processes of adjudication within its institution. Seven councillors are appointed by the Minister of Communications.⁴⁹ These councillors take on the decision making role after the requisite investigations have been completed. Decisions by ICASA cannot be appealed but can however be reviewed by the High Court.

Banking sector regulation has a Registrar of Banks appointed by the South African Reserve Bank governor and approved by the Minister of Finance. The Registrar’s “primary responsibility will be to ensure and promote the safety and soundness of banks and banking groups registered in South Africa through the effective application of international regulatory and supervisory standards. This entails, among other things, ensuring the existence of sound risk management practices, sound corporate governance structures, fit-and-proper management and financial stability.”⁵⁰

The Registrar provides prudential regulation and supervision to ensure financial stability.⁵¹ The South African Reserve Bank has the jurisdiction to oversee activities in the banking sector, and may lend funds to bank if they are in financial straits. Within the Reserve Bank is the National Payment System which oversees the financial and economic stability of the system.⁵²

There are also self regulating industry bodies such as the Office of the Banking Ombudsman which provides help and dispute resolution assistance to banking customers.⁵³ The other recognised industry body is the Payments Association of South Africa (PASA) whose mandate is to “organise, manage and regulate the participation of its members in the payment system”.⁵⁴ PASA works closely with the Reserve Bank to sure security and integrity of the payment system.

⁴⁸ Fungai Sibanda and Oludele A Akinboade “Regulating for Competition: The case of Telkom, South Africa” pg 4.

⁴⁹ See Independent Communications Authority of South Africa Act no 13 of 2000.

⁵⁰ www.info.gov.za/speeches/2003/03091913461001.htm

⁵¹ www.resbank.co.za/RegulationAndSupervision/Pages/RegulationAndSupervision-Home.aspx

⁵² [www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem\(NPS\)/Pages/National%20Payment%20System%20\(NPS\)-Home.aspx](http://www.resbank.co.za/RegulationAndSupervision/NationalPaymentSystem(NPS)/Pages/National%20Payment%20System%20(NPS)-Home.aspx)

⁵³ www.obssa.co.za

⁵⁴ www.pssa.org.za

Historical Conflicts between the Sector Regulators and the Competition Authority

The roles and jurisdiction of sector regulators and competition authorities has been the cause of much debate. The Competition Act of 1998 gave the authorities to enforce competition law with the proviso that:

“This Act applies to all economic activity within, or having an effect within the Republic, except-

(d) acts subject to or authorised by public regulation.”⁵⁵

This section came under a wave of argument in the banking merger between Nedcor and Stanbic.⁵⁶ On appeal, the Supreme Court held that upon a literal interpretation of section 3(1), this section precludes the Competition Authorities from exercising its jurisdiction upon all regulated sectors.⁵⁷

Parliament reacted swiftly to avoid this unfortunate scenario by amending section 3(1) and removing subsection (d) to read:

“(a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act⁵⁸, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct.”

Notwithstanding this section which now introduced concurrent jurisdiction between the sector regulators and competition authority, there is still an exclusion preventing the competition authorities from having jurisdiction over banking mergers. In these cases, the Minister of Finance has sole jurisdiction and may call upon the Commission for assistance if required.

Also, despite the amendment of section 3(1) of the Competition Act, there were challenges to jurisdiction especially with regard to the telecommunications sector. Until the Electronic Communications Act of 2006, ICASA the telecoms regulator was governed by the Telecommunications Act of 1996. This regulation, which was enacted before the Competition Act, included aspects of competition analysis to be conducted by the regulator. Although the regulator and the Commission signed a memorandum of understanding, this too did not end the debate. Firms filed the same complaints with ICASA and the Competition Commission, some were accused of forum shopping, double jeopardy or deference and the whole procedure lacked clarity.

There was also a seminal case brought by the incumbent fixed line operator, Telkom, challenging the Commission’s jurisdiction in a matter that they had investigated involving allegations of price discrimination and refusing to provide access to essential facilities amongst others. Before the matter could be heard in the competition arena, Telkom took the decision on review to the High Court to set aside the Commission’s recommendation and challenged the Commission’s power to refer the matter and the Competition Tribunal’s jurisdiction to adjudicate such matter.

⁵⁵ Section 3(1) of the Competition Act

⁵⁶ REFERENCE

⁵⁷ *Standard Bank Investment Corporation and the Competition Commission*, 2000 (2) SA 797 (SCA).

⁵⁸ Chapter 2 referring to prohibited practices and chapter 3 referring to Mergers and Acquisitions

Telkom argued that conduct complained of fell solely within the jurisdiction of ICASA which had now been empowered not just to adjudicate *ex ante* telecommunications regulation but also to adjudicate on *ex post* competition issues as well. This case went on appeal to the Supreme Court of Appeal who issued a ruling that the Competition authorities had jurisdiction to hear this case and that the Competition Commission had followed proper procedure.⁵⁹ This case was then referred back to the Tribunal to be heard on its merits. The outcome of this case is still pending.

The concept behind the Electronic Communications Act 36 of 2006 (ECA) was to update the legislation to accommodate the progressively converging telecommunications environment, which the aging 1996 Telecommunications Act had not quite envisaged. Despite the arguments from the Competition Authorities when the legislation was still in Bill form to clarify the issue of concurrent jurisdiction between ICASA and the Commission, these pleas went unheard.⁶⁰

Section 67 (9) of the ECA read “*subject to the provisions of this Act, the Competition Act applies to competition matters in the electronic communications industry*”. The ECA removed the concurrent jurisdiction and the application of the Competition Act and gave ICASA greater powers to regulate competition *ex post* and thereby causing greater jurisdictional challenges and confusion.

In 2008, apart from the other proposals for amendment to the Competition Act, the Department of Trade and Industry tried to address this glaring issue and its motivation to amend the Competition Act recognised that “there exists inconsistencies in the Electronic Communications Act and the Competition Act in the exercise of authority on competition matters in the telecommunications sector”.⁶¹ In order to remove any inconsistency they proposed in the Competition Amendment Bill that:

“(a) the Competition Act should be the central governing statement of competition policy in the Republic, with recognition that other, industry-specific legislation will often play an important role in fine-tuning the general policy for specific application to particular industries; and

(b) the Competition Act should continue to provide for a flexible mechanism for establishing the details by which over-lapping jurisdiction on competition matters is to be managed.”⁶²

The Competition Amendment Act 1 of 2009⁶³ now repeals section 67(9) of the ECA. Section 3 of the Competition Act has been amended to state:

⁵⁹ The Competition Commission of South Africa v Telkom SA and The Competition Tribunal of South Africa, SCA case number 623/2008

⁶⁰ South African Competition Commission and Competition Tribunal ‘Submission of the Competition Commission and Competition Tribunal on the Convergence Bill (B9-2005)’ considered by the Parliamentary Portfolio Committee on Communications. See www.compcom.co.za/policyresearch/Comments%20on%20the%20Convergence%20Bill%20April%202005.doc

⁶¹ Presentation by the Department of Industry to the Portfolio Committee on Trade and Industry and Nedlac (2008). See www.thedti.gov.za/parliamentary/compaBill.pdf

⁶² Competition Amendment Bill Government Gazette GG31101 of May 29, 2008

⁶³ The Act was signed by the President of South Africa on August 28, 2009, but has not been given an effective date as yet. The status quo remains till then.

“3. (1) *Despite anything to the contrary in any other legislation, public regulation or agreement, this Act applies to all economic activity within, or having an effect within, the Republic, subject to subsections (2) and (3).*

(2)...

(3) *In so far as this Act applies to any conduct arising within an industry or sector of an industry that is subject to the jurisdiction of another regulatory authority in terms of any other legislation—*

(a) this Act, and that other legislation, must be construed as establishing concurrent jurisdiction in respect of any such conduct that is regulated in terms of both this Act, and that other national legislation, subject to paragraph (b), such that—

(i) any other regulatory authority contemplated in this subsection will exercise primary authority to establish conditions within the industry that it regulates as required to give effect to the relevant legislation in terms of which that authority functions, and this Act; and

(ii) the Competition Commission will exercise primary authority to detect and investigate alleged prohibited practices within any industry or sector, and to review mergers within any industry or sector, in terms of this Act; and

(b) details of the administrative manner in which any concurrent jurisdiction contemplated in paragraph (a) is to be exercised, must be determined by an agreement between the Competition Commission and that other regulatory authority, as provided for in sections 21(1)(h) and 82(1).’.

This amendment appears to resolve the conflict by taking away the connotations in section 67(9) of the ECA which states that the act is “*subject to*” and imposing a definite stance on competition jurisdiction in the Amendment Act with “*despite anything to the contrary*” in Section 3(1). Concurrent jurisdiction is once again embedded where there may be overlapping jurisdictional issues.

Demarcating Regulatory Roles in Each Select Sector

Competition authorities believe that they are best suited to investigate aspects relating to anticompetitive practices and merger regulation. With regard to telecommunications the Commission has an *ex post* function whereas the sector regulator, ICASA would be most competent to analyse technical industry specific issues (*ex-ante*). As stated earlier, the Commission can analyse mergers in all sectors with the exception of banking mergers.

ICASA views its role as being complementary to the Competition authorities when it comes to matters of competition.⁶⁴ Amongst its functions, ICASA is responsible for issuing licences, regulating tariffs and access to essential facilities and number and frequency allocation, drafting guidelines on facilities leasing and interconnection, resolving complaints by operators and/or their customers, determination and ensuring universal service obligations, number portability and consumer protection.

⁶⁴ www.icasa.org.za/AboutUs/OverviewMandate/tabid/56/Default.aspx.

An example of the demarcation of roles between the competition authorities and the sector regulator would be where complaints were filed with the Competition Authorities with regard to excessive pricing of mobile termination rates and interconnection and possible collusion amongst mobile operators. The Commission deferred the matter of setting interconnection rates to ICASA being the regulator responsible for ex ante remedies, and they both agreed that the Commission should continue to pursue the case of collusion.

In 2006 the Competition Commission began its first market enquiry into the retail banking industry. This enquiry arose out of concerns over banking charges and fees, products, access to payment systems and the setting of interbank fees, branded payment cards and services. After months of hearings by an independent panel, in 2008 the Commission published a report based on the outcome of the enquiry.⁶⁵

Borne out of this report were several recommendations on how to improve the competitiveness of retail banking. Some recommendations will require political and legislative changes which go beyond the Competition authority's reach. However, the Commission and the South African Reserve Banks with its National Payment System Department and the industry formed Payment Association of South Africa have been liaising with each other with the aim to develop a memorandum of understanding and workable solutions to current and future competition issues.

Instruments of Coordination between Sector Regulators and Competition Authority

With the powers of the competition authorities secured in the Competition Amendment Act, this gives them the ability to set out where the lines could be drawn when it comes to sector specific complaints and anti-competitive complaints. A memorandum of understanding seems to be the most effective way to do this. Keeping in line with Section 82(3) of the Competition Act, the MoUs all have the basic premise to:

- (a) *“identify and establish procedures for the management of areas of concurrent jurisdiction;*
- (b) *promote co-operation between the regulatory authority and the Competition Commission;*
- (c) *provide for the exchange of information and the protection of confidential information; and*
- (d) *be published in the Gazette.”*

The Competition Commission has a number of MoUs with sector regulators such as the Postal Regulator; the National Energy Regulator of South Africa (NERSA); the Independent Communications Authority of South Africa (ICASA); and the National Liquor Authority. The MoUs also call for a joint working committee with representatives from the Commission and the regulator. These committees have not been well established or run, and many of the contact persons listed in the agreements no longer work at the respective institutions.

In the Telkom case, one of the arguments raised in the alternative was that even if there was concurrent jurisdiction, the Commission and ICASA did not adhere to the provisions in the MoU. The Commission in this case argued that it was not mandatory to adhere to the MoU. The High Court in this matter held that the obligation to follow through with the provisions in the MoU did exist between ICASA and the Commission.

⁶⁵ REFERENCE “Banking Enquiry: Report to the Competition Commissioner by the Enquiry Panel” June 2008.

The concept of a memorandum of understanding only works if there is a mutual initiative and corporation. Many of these MoUs are being currently being reviewed especially the light of the Competition Amendment Act No 1 of 2009. There may be hope yet to revive this commitment.

Framework of Conflict Resolution (*Ex-Post Study*)

The recent steps taken by the Competition authorities and sector regulator to review the current MoUs and the precise delineation of ex ante and ex post roles should bring clarity where anti-competitive practices plague concurrent jurisdiction. It is recognised by most sector regulators (except the banking sector) that the Competition authorities are best suited to analysing the economic and competitive outcomes of mergers and acquisitions.

Conclusion

The cases in the telecommunications sector which challenged the competition authorities jurisdiction brought about a realisation that the demarcation of sector specific and competition roles are not clear cut. Much time and money has been spent on these legal battles. Most important, is that these institutions need to know where their responsibilities lie. During the discussions of the Competition Amendment Act and in order to address this conflict the then Deputy Minister (now Minister) of Trade and Industry expressed:

...the 2008 Amendment Bill seeks to improve the interface between the competition authorities and sector regulators by demarcating distinct responsibilities and providing a framework for cooperation. The Bill thus seeks to clarify the respective roles in competition authorities and other regulatory authorities. It provides for “other regulatory authorities” to exercise primary authority to establish conditions within the industry over which they have regulatory power, while giving the competition authorities primary authority to detect and investigate alleged prohibited practices under competition law as well as exercise powers of merger control. The Bill provides further for the details of the exercise of concurrent jurisdiction to be defined by was of an agreement between the regulatory authority and the competition authorities.

Following this approach, these ideas have been entrenched in the Competition Amendment Act. There have been questions regarding what constitutes a primary authority? There may also be uncertainty when the competition authorities are investigating an anticompetitive complaint against a respondent who may be subject to an ex ante remedy.⁶⁶ We wait to see whether the ideals mentioned and implemented are achieved once the Amendment Act comes into effect.

⁶⁶ Moodaliyar and Weeks REFERENCE

Overlapping Regulations by Sector-specific Regulators and the Competition Authority in South Korean Telecommunications and Financial Industries

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Introduction

While problems associated with overlapping regulations between sector-specific regulators and the KFTC in Korea are severe, it does not appear that the prospects for a resolution are bright. There is a mandatory consultation which has been provided by Article 63 of the MRFTA. This requires that the competent administrative authority shall seek, in advance, consultation with the Fair Trade Commission(FTC), where it wishes to propose legislation or amend enactments containing anti-competitive regulations such as restrictions on the fixing of prices or the terms of transaction, entry to markets, business practices, unfair collaborative acts, prohibited practices of an enterpriser or an enterprisers organization, etc. and where it wishes to approve or make other measures involving anti-competitive factors against an enterpriser or an enterprisers organization. Nonetheless several conflicting provisions and jurisdictional ambiguities remain that have contributed to overlap conflicts over the years.

The MRFTA was enacted in 1981 and, during the early years of the MRFTA, there were no problems associated with overlapping regulations. However, problems associated with overlapping regulations appeared in the financial industry when the KFTC included such industry within the scope of the MRFTA in 1984. With respect to the telecommunications industry, problems associated with overlapping regulations appeared in the 1990s, due to entrance of new types of businesses, such as data communications, into the telecommunications market and issues regarding restraints on competition surfaced.

This article will review problems associated with overlapping regulations in the telecommunications and financial industries below, where such problems are particularly severe, and provide possible solutions.

Overlapping Regulations in the Telecommunications Industry

History of Overlapping Regulations in the Telecommunications Industry

One area in which problems associated with overlapping regulations by sector-specific regulators and the KFTC has been prominent is the Korean telecommunications industry. Previously, the telecommunications industry was regulated by the MIC and the Ministry of Postal Service prior to the MIC. However, from 2008, the KCC, which is an integrated regulatory agency that was formed to deal with the modern trends of integration/convergence between broadcasting and

communications, regulates the telecommunications industry in order to more efficiently regulate the broadcasting and communications industries.

The MRFTA has been enacted since 1981 and the KFTC has been the agency in charge of its enforcement. With respect to the Public Telecommunications Business Act (effective as of September 01, 1984), which was enacted subsequent to the MRFTA, there were no provisions that overlapped with those of the MRFTA. Also, while the Basic Act on Telecommunications (effective as of September 01, 1984) included a provision concerning the duty to share essential facilities among telecommunications carriers, there were no overlapping provisions in the MRFTA regarding such a duty.

Problems associated with overlapping regulations did not arise for about ten years after the enactment of the MRFTA. The first instance where telecommunications industry-related laws overlapped with the MRFTA appears to be the Telecommunications Business Act, which became effective as of December 11, 1991. Specifically, the Telecommunications Business Act required common telecommunications carriers to obtain the approval of the Minister of Postal Service (currently the Chairman of the KCC) when seeking to acquire or merge with another telecommunications carrier in whole or in part (Telecommunications Business Act, Article 9). Such Act also provided that the Minister of Postal Service may intervene to foster a reasonable level of competition among telecommunications carriers (Telecommunications Business Act, Article 37).

However, since the MRFTA provided that all business combinations must be examined by the KFTC, all mergers and acquisitions between telecommunications carriers were concurrently examined by the KFTC and the Ministry of Postal Service. Problems regarding overlapping regulations began to arise in the 1990s when the Telecommunications Business Act started to regulate unfair business practices and business combinations. The foundation for such regulation was laid by the diversification in communications services, as manifested by new forms of telephone services such as data communications, which, in turn, were brought about by advances in communications technologies as well as through the introduction of competition in the telecommunications industry, which was previously considered a monopolistic industry.

Also, Article 36-3 of the Telecommunications Business Act (effective as of January 31, 1997) added a new provision that prohibited telecommunications carriers from engaging in unfair business practices. Specifically, it identified discriminatory practices, refusal to share facilities and unreasonably high costs for interconnection as such unfair business practices.

In 2003, the MIC attempted to elevate the status of the “Types and Criteria of Prohibited Acts in the Telecommunications Business,” from a notification to a Presidential Decree. However, it faced opposition from the KFTC during the inter-ministerial consultation that followed. The KFTC argued that (1) regulating a matter already regulated by the MRFTA with a strengthened Enforcement Decree of the Telecommunications Business Act would subject telecommunications carriers to dual regulations, (2) the KFTC was better qualified to handle matters pertaining to

unfair business practices and (3) identical criteria should be applied to all industries. The Office of Government Policy Coordination in the Prime Minister's Office eventually stepped in to resolve the resulting conflict (the circumstances surrounding such conflict will be discussed in greater detail below). Since then, amendments by the MIC or the KCC have consistently given rise to conflicts between one of those agencies and the KFTC.

In Korea, bills (or amendments) are submitted by the government or by National Assemblymen directly to the National Assembly. While inter-ministerial consultations were conducted prior to submissions by the government, submissions by members of the National Assembly did not involve inter-governmental consultations in the past and this resulted in overlapping regulations that were undetected. Such practices are believed to be the cause for increasing overlapping regulations in the Korean telecommunications industry. Fortunately, submissions by members of the National Assembly now involve inter-governmental consultations, under the supervision of the Ministry of Legislation, and instances of overlapping regulations are expected to decrease dramatically in the future.

Current Status of Overlapping Regulations in the Telecommunications Industry

Regulation of Business Combinations among Telecommunications Carriers

All telecommunications carriers must be licensed by the KCC and a licensed carrier which intends to conduct an M&A through business transfer or merger, among other means, must report it to, and be approved by, the KCC, regardless of the size of its business.

Article 18 of the Telecommunications Business Act provides that the authorisation of the KCC is required for acquisitions of businesses from common carriers, mergers, the sale of approved telecommunications line facilities and instances where 15 percent or more of the stocks issued by a common carrier are held. Section 6 of the same Article provides that the KCC, in approving such activities, must confer with the KFTC. It is mandatory for the KCC to confer with the KFTC regarding anti-competitive effects that may arise from all M&As between and among telecommunications carriers.

If the KCC receives an application for approval of an M&A from a telecommunications carrier, it should examine the application based on the Telecommunications Business Act and, in the process, request the KFTC to examine potential anticompetitive effects. The KCC requested the KFTC's opinion in 10 cases in 2009, 10 cases in 2010 and eight cases in 2011. The KFTC must examine the potential anticompetitive effects of the relevant M&A and give its opinion to the KCC. In the past, there was a case where the KCC approved an M&A, although the KFTC determined that the M&A could have anticompetitive effects, which is explained below.

The above provision overlaps with Article 7 of the MRFTA. Specifically, the MRFTA provides that any act that substantially restricts competition is prohibited and identifies stock acquisitions, interlocking directorates, mergers, acquisitions of other businesses by assignment and participation in the establishment of a new company as such acts.

Since both the Telecommunications Business Act and the MRFTA fail to explicitly state that telecommunications carriers need to report only to the KCC, there is disagreement among scholars⁶⁷ and businesses are also uncertain whether to report to only the KCC or to both the KCC and the KFTC. Owing to this lack of clarity, some M&As between telecommunications carriers were reported to the KFTC (seven cases in 2009, 10 cases in 2011 and no case in 2011), all of which were transferred to the KCC.

Furthermore, because there are no clear provisions as to whether the Chairman of the KCC should fully adopt the KFTC's opinions without any amendments or whether the KCC may amend or supplement such opinions, confusion arises in practically performing the agency's responsibilities.⁶⁸

Regulations on Unfair Business Practices by Telecommunications Carriers

Article 50 of the Telecommunications Business Act defines prohibited acts as those acts that injure or are likely to harm fair competition or the interests of users. Specifically, unfair discrimination or refusal to deal under the above Article is described as: (1) unfair discrimination or refusal to deal regarding provision or joint use of telecommunications facilities, (2) use, for one's own business operations, of other telecommunications carriers' information which was acquired in the course of providing or jointly using telecommunications facilities, (3) calculating rates for the use of telecommunications facilities in an unfair manner, (4) providing telecommunications service in a manner that deviates from the terms and conditions of user agreements and (5) refusing to share profits with content-providers or limiting such profit-sharing.

Also, Article 54 of the Telecommunications Business Act precludes application of the MRFTA when a telecommunications carrier that has violated any of the above prohibited acts is ordered to take corrective measures under Article 52 of the same Act or is fined under Article 53 of the same Act by the KCC.

With respect to the meaning of Article 54 above, there are two competing schools of thought.⁶⁹ The first school of thought is the belief that, since the Telecommunications Business Act is a special law, the MRFTA is precluded from areas that are within the scope of the Telecommunications Business Act. The other school of thought is that, since Article 54 is limited to cases in which corrective measures or fines have already been imposed, the KFTC may initiate an investigation or impose corrective measures or fines if the KCC has not already done so.

⁶⁷ Won Woo Lee et al., *A Study on the Relationship between General Competition Authority and Sector-Specific Regulators of the Telecommunications Industry: Recommendations for Establishment of Their Respective Desirable Roles* (December 2008).

⁶⁸ Ho Young Lee, *A Study on the Relationship between Industry Regulation and Competition Laws* (October 2009).

⁶⁹ Lee et al., *supra* note 1.

In connection with the unfair business practices as set forth under the MRFTA, Appendix 3 of the Enforcement Decree of the Telecommunications Business Act identifies specific practices in the following table:

MRFTA, Article 23	Enforcement Decree of the Telecommunications Business Act, Appendix 3
Refusal to deal: Collaborative refusal to deal Unilateral refusal to deal	Delay in reaching or refusal to reach an agreement
Discriminatory practices: Price discrimination Discriminatory contract terms Favouring of subsidiaries Collaborative discrimination	User discrimination Carrier discrimination Imposition of discriminatory conditions
Exclusion of competitors: Unfair discounts Payment of unfairly high prices	None
Unfair inducement of customers: Inducement by offering unfair benefits False inducement of customers Other forms of unfair inducement	Unfair user discrimination Disruption of selective use of telecommunications services
Coercive dealing: Tying Coerced sales to employees Miscellaneous (threat of retaliation)	Product bundling Restriction of user options
Abuse of bargaining position: Coerced purchases Demand for a certain level of profits Forced sales targets Retaliation, interference with management	Disruption of selection or use of telecommunications services
Restrictive conditional dealing: Exclusive conditional dealing Restriction on market or trading counterparts	Disruption of selection or use of telecommunications services
Disruption of business activities: Unfair use of technology Unfair employment and inducement of competitors' employees Disruption of business relocation	Refusal to reach an agreement
Unfair assistance in funds, assets and personnel	None

Regulation of Service Rates

Article 28 of the Telecommunications Business Act provides that a telecommunications carrier should notify the KCC of its service rates and obtain authorisation thereof and that the KCC should make its decision based on the impact such rates will have on the market, whether such rates are reasonable in the light of general public interests and whether such rates harms competition.

The MRFTA prohibits abusive pricing under Article 3-2 and regulates unfair pricing practices such as unfair discounts under Article 23.

Regulation of Essential Facilities

With respect to essential facilities, the Telecommunications Business Act contains the following provisions: (1) permission for multiple system operators to provide transmission and line facilities to common carriers under Article 31, (2) permission for common carriers to provide telecommunications facilities under Article 35, (3) duty to grant joint utilisation of subscriber lines for common carriers to other telecommunications carriers when requested under Article 36, (4) permission for common carriers to grant joint utilisation of radio communications facilities to other common carriers under Article 37, (5) permission for telecommunications carriers to grant interconnection of telecommunications facilities to other telecommunications carriers when requested under Article 39, (6) permission for common carriers to grant joint use of their telecommunications facilities to other telecommunications carriers when requested under Article 41, (7) permission for common carriers to provide information when requested under Article 42 and (8) duty to report any agreements reached with other telecommunications carriers for common carriers and facilities management agencies under Article 44.

Article 5 of the Enforcement Decree of the MRFTA defines refusing, discontinuing or limiting the use or access to essential facilities to other enterprises without justifiable reasons as abuse of market dominance.

Examples of Overlapping Regulations

SK Telecom's Acquisition of Shinsegi Communications

SK Telecom, a mobile telecommunications operator, acquired 51.19 percent of the shares of Shinsegi Communications, another mobile telecommunications operator, in December 1999, and filed a business combination report to the KFTC. However, since the KFTC determined that the proposed merger would restrict competition in the mobile telecommunications market, it granted a conditional approval of the merger in May 2000 on the condition that the merged company's market share should be reduced to below 50 percent by the end of June 2001, which reduction SK Telecom was able to achieve within the prescribed period.⁷⁰

In September 2001, SK Telecom submitted its application for approval of the merger to the MIC and the MIC adopted the decision of the KFTC by approving the merger without any additional conditions in January 2002.

⁷⁰ SK Telecom did not have to drop any of its subscribers to meet the KFTC's requirement because the number of mobile network subscribers was increasing exponentially at the time. Instead, it only needed to restrain itself in accepting new subscribers. Also, the KFTC allotted a sufficient period for SK Telecom to meet the market share target. Since the KFTC's condition that the merged company's market share be below 50% applied only for a specific period, there are currently no restrictions on SK Telecom's market share.

SK Telecom's Acquisition of Hanaro Telecom

In December 2007, SK Telecom became the largest shareholder of Hanaro Telecom, a local landline telephone operator, by acquiring 38.89 percent of Hanaro's shares, and submitted an application for approval of the stock acquisition to the MIC, which then consulted with the KFTC under the Telecommunications Business Act. The KFTC determined that the proposed stock acquisition would restrict competition in the landline telephone market and suggested to the MIC that such acquisition be conditioned upon prohibition of restrictive tying arrangements and prohibition of refusal to grant requests for 800MHz roaming without justifiable reasons. The MIC adopted the KFTC's suggestions, except for the prohibition of refusal to grant requests for roaming and some other conditions, and approved the stock acquisition. On the other hand, the KFTC believed the MIC's decision was unreasonable and issued its own corrective order containing the prohibition of the refusal to grant requests for roaming in March 2008, to which the MIC made no official objection or response. SK Telecom complied with the KFTC's corrective orders and there have been no complaints filed by other companies in relation to SK Telecom's non-compliance with such orders.

Unfair Business Practices by Telecommunications Carriers

The issuance of corrective orders by both the KFTC and the MIC in connection with subscription fee exemptions is a case which concerns overlapping regulations regarding the same act. Specifically, while the MIC issued its corrective order on the grounds that such exemption constituted discrimination, the KFTC determined that such exemption constituted unfair inducement of competitors' customers.

Also, in examining the new service rates of LG Telecom, the MIC and the KFTC had divergent views. In September 2006, the MIC suggested that the new rates should be modified because LG Telecom's new rates could indirectly exclude competing landline carriers. In contrast, the KFTC determined that the new rates were not sufficiently low to exclude competing landline carriers and approved such new rates.

Other examples of overlapping regulations concern cases in which the two agencies were concurrently conducting investigations the same matter. For example, when the MIC was investigating three mobile telecommunications operators in connection with the opening of wireless networks in 2005, the KFTC was also conducting the same investigation.

In 2004, both the MIC and the KFTC investigated the three mobile telecommunications carriers in connection with false or misleading advertising by those carriers. Even if no corrective orders are issued, concurrent investigations by two agencies for the same matter would be considerably burdensome. A joint investigation was not considered because it was deemed to be ineffective. The MoU executed between the MIC and the KFTC provided the procedures to avoid concurrent investigations, which are explained in the following paragraphs.

Efforts to Eliminate Overlapping Regulations

Essential Facilities

In an effort to prevent overlapping regulations in connection with access to essential facilities in the telecommunications industry, the KFTC and the MIC agreed in March 2001 that the Telecommunications Business Act should take precedence over the MRFTA with respect to essential facilities by signing an MoU.⁷¹ At the time, the KFTC attempted to amend the MRFTA to regulate denial of access to essential facilities as a form of abuse of market dominance. The MIC opposed the amendment because the Telecommunications Business Act already contained provisions regarding essential facilities and the MoU which was ultimately agreed upon is the culmination of the agencies' efforts to resolve the deadlock on such issue.

According to the MoU, the agreed upon procedures are as follows:

First, if the KFTC detects any issues in connection with access to essential facilities in the telecommunications industry, it would notify the MIC and inquire whether the Telecommunications Business Act applies.

Second, the MIC must provide its opinion to the KFTC within 15 days of receipt of the KFTC's inquiry. If the MIC determines that the Telecommunications Business Act applies, it must, within sixty days of providing its opinion to the KFTC, take necessary measures to provide reasonable access to essential facilities.

Third, if the MIC determines that the Telecommunications Business Act applies and it has taken necessary measures or the MIC determines that the matter under consideration is authorised under the Telecommunications Business Act, the KFTC should not apply the MRFTA to such conduct.

Prohibited Practices

With respect to prohibited practices for telecommunications carriers, the MIC and the KFTC agreed to execute an MoU in November 1999.⁷² In such MoU, the MIC and the KFTC agreed to amend the MRFTA's provision that precludes imposition of corrective measures or fines under the MRFTA, if those provisions under the Telecommunications Business Act have already been applied by the MIC. More specifically, the term "against the same act of the same carrier" under the MRFTA was amended to "*on the same grounds* against the same act of the same carrier" (emphasis added). The MIC and the KFTC also agreed to amend the MIC's official notification regarding the types and criteria of prohibited practices by reflecting the intent of the MRFTA to

⁷¹ *Memorandum of Understanding on the Matter of Essential Facilities* (March 19, 2001).

⁷² *The Terms of Agreement in Connection with the Memorandum of Understanding between the Ministry of Information and Communication and the Korea Fair Trade Commission* (November 1999).

the extent possible and through mutual consultation between the agencies. Furthermore, the MIC and the KFTC agreed that acts of false or misleading labelling or advertising by telecommunications carriers would be regulated by the KFTC, whereas advertisements that violate user agreements would be regulated by the MIC.

In 2003, the MIC attempted to elevate the status of its official notification, which defined prohibited practices, to that of an enforcement decree. When the KFTC opposed such an attempt and insisted on resolving the issue of overlapping regulations, the Office of Government Policy Coordination in the Prime Minister's Office intervened. As a result of such intervention, it was decided that unfair business practices in general would be regulated by the KFTC, whereas the MIC would deal with technical matters requiring industry-specific expertise and practices injurious to the interests of telecommunications users.

More specifically, it was decided that the KFTC would investigate and handle unfair collaborative acts (cartels), misleading or false labelling/advertising, unfair inducement of customers, exclusive dealings, abusive pricing and unfair discounts, whereas the MIC would investigate and handle charging of unfair prices, unfair contracts, refusal to interconnect, discriminatory practices against specific customers and discriminatory practices in service selection. As to product bundling, while the KFTC was placed in charge of every industry, including the telecommunications industry, it was decided that the MIC would also have the authority with respect to product bundling in connection with the sale of telecommunications services.

In 2008, the Presidential Council on National Competitiveness, which is a presidential advisory body, and the Ministry of Legislation headed the Overlapping Regulatory Legislation Reform Task Force, which addressed possible solutions to overlapping investigations of and sanctions against unfair business practices in the communications market. Subsequently, the KFTC and the KCC agreed to establish an advisory board to prevent overlapping regulations of unfair business practices in the communications market and minimise inconveniences for businesses by signing a new MoU.

Such MoU also established that one organisation or business under investigation may make a request for an advisory board to convene for the purpose of designating an agency that would be solely responsible for the investigation and any sanctions, and the first meeting of the advisory board, called the "Conference for Prevention of Overlapping Regulation in the Communications Market", was held in February 2009.⁷³

⁷³ KFTC Press Release, *Conference for Prevention of Overlapping Regulations of Unfair Business Practices in the Communications Market Held by the KFTC and the KCC* (February 5, 2009).

Television Home Shopping Commercials

To resolve the problem of overlapping regulations in connection with television home shopping commercials, the KFTC and the Korea Broadcasting Commission (currently the KCC) agreed to execute an MoU in May 2007.⁷⁴ According to such MoU, it was agreed that each agency would be permitted to take necessary measures under the relevant law it administers against television home shopping businesses for their violation of advertisement-related laws.

Such MoU also provided that one agency should suspend its investigation if the other agency was in the process of investigating or completed the investigation of the same matter and to consult with the relevant agency. Additionally, it was decided that one agency is not to take any additional measures if it was determined based upon its consultation with the other agency that such agency's measures comport with the intent of the law it administers.

On the other hand, if it were determined that the other agency's measures were insufficient in contents or their methods, it was decided that the relevant agency would be allowed to take additional measures on the condition that it includes the details of the other agency's measures in its investigation report. If the measures to be taken are financial in nature (e.g., imposition of fines) and the other agency has taken similar measures, it was decided that such fines should be calculated in view of the financial measures that the other agency had already taken.

Recommended Solutions

Legislative Reform and Restrictions on New Overlapping Regulations

The most reliable method of resolving the problem of overlapping regulations in the telecommunications industry is to have a clear division of responsibilities between the regulatory agencies through legislative reform. However, a clear division between the relevant regulatory agency and the KFTC, through legislative reform, without encountering any conflicts, is unlikely to be successful because it would be impossible for any law to encompass all new forms of communications services that utilise ever-advancing information technology and all new forms of unfair business practices in the telecommunications market.

Despite such difficulties, defining the procedures for resolving problems of overlapping regulations in more detail will help. For instance, the aforementioned MoU between the KFTC and the MIC provided various procedures for resolving overlapping regulations and codifying the procedures in similar MoUs and providing more detailed procedures, as required, would significantly reduce overlapping regulations.

It is also crucial to make efforts to limit new regulations that are overlapping and, in order for this to be successful, inter-ministerial consultations that are conducted prior to enactments or amendments of laws must be fully utilised.

⁷⁴ Inter-Ministerial Conference on Overlapping Regulations Reform in Television Home Shopping Commercials (March 2007).

Division of Responsibilities Between the KFTC and the KCC

In order to adequately address the problem of overlapping regulations in the future, basic principles regarding the division of responsibilities between the KFTC and the KCC must be in place. The KFTC, through its enforcement of the MRFTA, is experienced with standards or principles that can apply commonly to all industries. For instance, the KFTC is considered more experienced than the KCC in defining markets and analysing the effects on competition and consumer welfare.

Conversely, the KCC has more expertise than the KFTC regarding the nature or technical aspects of the telecommunications industry. Therefore, stipulating principles for the division of responsibilities between the two agencies in view of each agency's advantages and expertise over the other agency will not only contribute to the advancement of the telecommunications industry, but it will contribute to the protection of consumer welfare.

System of Cooperation Between the KFTC and the KCC

Although past inter-agency MoUs provided for advisory boards to be operated by the agencies involved, such boards have not been fully utilised. Nonetheless, such advisory boards need to be fully utilised in order to standardise the establishment of basic principles and mutual consultation in specific cases.

As a part of the mutual consultations, exchanges of inter-agency personnel could be considered. In the past, large-scale inter-ministerial personnel exchanges took place in Korea, and such exchanges are considered to have contributed significantly to eliminating inter-ministerial conflicts. For instance, the KFTC and the KCC could consider seconding their personnel to the other agency for one or two years.

Furthermore, there is a need to better utilise coordination of responsibilities by upper-level governmental agencies such as the Office of Government Policy Coordination in the Prime Minister's Office. For instance, the conflict in 2003 between the KFTC and the MIC, in which the Office of Government Policy Coordination in the Prime Minister's Office played the role of a mediator, can serve as a model.

Overlapping Regulations in the Financial Industry

History of Overlapping Regulations in the Financial Industry

The financial industry is regulated by the FSC (known as the Financial Supervisory Commission prior to March 2008) under relevant financial laws such as the Banking Act. The MRFTA, which became effective in 1981, did not cover financial and insurance businesses.⁷⁵ However, the

⁷⁵ While Article 2 of the MRFTA provided a definition of an enterprise and included manufacturing, construction, wholesale and retail businesses, as well as miscellaneous businesses prescribed by the Presidential Decree, within its scope, it did not previously cover financial and insurance businesses. However,

Enforcement Decree of the MRFTA, which became effective in July 1984, created problems of overlapping regulations by including financial and insurance businesses within its scope.⁷⁶

The health of the Korean financial industry became the main issue in the course of overcoming the Korean financial crisis in 1997 and the global financial crisis in 2008. As a result, many argued that a system of advanced supervision or regulation was needed to prevent excessive competition in the financial industry and such arguments have been the cause of increasing conflicts between the financial regulators and the KFTC.

Even in the present, many in the financial industry argue that large financial institutions such as large banks are needed. If that school of thought prevails, the financial industry is likely to become highly concentrated and the conflicts between the financial regulators and the KFTC may become worse in the process. The grounds for arguing that mega banks are necessary are, for example, that, even if a Korean company wins a large-scale construction project in a foreign country, a Korean financial institution cannot undertake financing for such project and the Korean company has to rely on foreign financial institutions.

On the contrary, people who oppose mega banks argue that the damage would be greater at the time of a financial crisis if there are mega banks and that the financial industry would be more profitable with small-sized financial institutions because they can perform financial business in line with the conditions of local or regional communities.

The controversies over mega banks clearly came to the fore in Korea in the course of the sale of the Woori Bank financial group. Woori Bank was established through consolidation of insolvent banks by investment of public funds after the 1997 Asian financial crisis. The government is the major shareholder of Woori Bank and is preparing to sell its shares since Woori Bank is now profitable. The Korea Development Bank, a public financial institution, attempted to buy Woori Bank in 2011, arguing that the government should approve its merger because Korea needs a mega bank. However, the Korea Development Bank is not likely to be authorised to acquire Woori Bank at the moment because the leading opposition political party, among others, is strongly opposed to it.

Current Status of Overlapping Regulations in the Financial Industry

Both the MRFTA and financial laws regulate unfair business practices against consumers by financial institutions. For instance, Article 52-2 of the Banking Act prohibits unreasonable

the amendment to the Enforcement Decree of the MRFTA in 1984 brought financial and insurance businesses within the purview of the MRFTA.

⁷⁶ Overlapping regulations were limited to unfair business practices and collaborative acts because the Enforcement Decree provided in the addenda that the MRFTA's scope as to insurance businesses would be limited to those practices. However, subsequent amendments to the MRFTA gradually brought insurance businesses within the MRFTA's fold and the amendment of 1999 completely brought insurance businesses within the MRFTA's scope.

demand for collateral, demand to open an account and deposit a portion of a loan amount in that account (or in an existing account) and unreasonable infringement of customers' rights and interests by taking advantage of superior bargaining power as unfair business practices and these overlap with unfair business practices prohibited under Article 23 of the MRFTA and abuse of market dominance prohibited under Article 3-2 of the MRFTA.

Also, under Article 52-3 of the Banking Act, banks are required to provide information on the range of interest rates and the method of calculating the same, the time when such interest is paid or imposed and supplementary benefits and fees in advertising the bank products, so as not to mislead customers. Article also stipulates that banks are required to comply with the Labelling and Advertising Act, which is administered by the KFTC, when there is information that may be a key factor for customers in selecting bank products. Since the Labelling and Advertising Act prohibits false or misleading, derogatory and unreasonable comparative advertising, there is one law in Korea, which covers both monopoly and unfair trade practice regulation. The official name of this law is also called the "Monopoly Regulation and Fair Trade Act".

The KFTC, which was established based on this law, conducts activities to promote both competition and fair trade practices. The false/exaggerative advertising was also regulated by the Monopoly Regulation and Fair Trade Act when this act was first enacted. The separate "Act on Rationalising Labelling and Advertising" was enacted in 1999, which is also enforced by the KFTC, and also requires important information that may influence consumer decisions to be included in all advertisements, as there is an element of overlapping in regulations.

In particular, the Act on Registration of Credit Business and Protection of Finance Users regulates false or misleading advertising of lenders in a manner similar to the Labelling and Advertising Act. Moreover, the Labelling and Advertising Act does not allow the KFTC to unilaterally investigate financial institutions' advertising and requires the KFTC to report any such advertising it deems unreasonable to the FSC and to make a request to the FSC to handle the matter. The KFTC, however, may handle any case that it directly receives.

The Act on Structural Improvement of the Financial Industry and the Financial Holding Companies Act requires any merger between financial institutions to be authorised by the FSC. In examining a merger proposal, the FSC must determine whether the proposed merger would substantially restrain competition among financial institutions and it must confer with the KFTC in making such determination. Since such Act only requires consultation with the KFTC, there is disagreement as to whether the FSC should fully adopt the KFTC's opinion or whether it may consider the KFTC's opinion only as a reference and then make a different decision.⁷⁷

Since financial laws are silent as to unfair collaborative acts and only the MRFTA regulates such acts, there are no overlapping regulations in that area. Nonetheless, there was disagreement as to whether the MRFTA applies to collective actions of financial institutions if such actions resulted

⁷⁷ Lee, *supra* note 2.

from the administrative guidance of the FSC. In such a case, the Supreme Court of Korea held that the MRFTA applies to any additional agreement that deviates from the FSC's administrative guidance⁷⁸ and the KFTC established the Examination Guideline for Unfair Collective Acts Involving Administrative Guidance in December 2006.

As to standardised contract terms, both the FSC and the KFTC have the authority to examine such terms. The Financial Investment Services and Capital Markets Act, effective as of February 2009, provides that the FSC should report to the KFTC standard contract terms with respect to securities, futures and indirect investments it receives from financial institutions and that the KFTC should request the FSC to issue sanctions.

Examples of Overlapping Regulations

Charging Unreasonable Interest

One example of overlapping regulations is the case in 2005 in which both the KFTC and the FSC sanctioned commercial banks for their failure to adjust interest rates of variable rate loans despite the reduction in the market interest rate. More specifically, despite the one-percent drop in market interest rates between 2002 and 2005, commercial banks continued to apply a fixed interest rate. In March 2005, the FSC determined that such acts by the banks were harmful to the interest of consumers and ordered those banks to lower the interest rates for their loans. The banks refunded the interest that was overcharged to their customers irrespective, of such an order. In June 2005, the KFTC issued a corrective order and imposed an administrative surcharge of US\$6.3mn on such banks and the banks protested that the KFTC's sanction constituted dual regulations.

Collusion Among Automobile Insurance Carriers

From 2003 to 2006, eight automobile insurance companies failed to compensate their policyholders for rental car services while the policyholders' vehicles were being repaired after an accident. In November 2006, the FSC ordered the eight insurance companies to conduct their own investigation and report their findings and, in December 2006, such insurance companies decided to refund the unpaid insurance benefits to their policyholders. Meanwhile, consumer advocacy groups reported the above fact to the KFTC in November 2006 and the KFTC, after its own investigation, found that the insurance companies had collectively agreed not to pay for rental car services, issued a corrective order and imposed administrative surcharges of US\$2mn in November 2007 against such insurance companies.

Efforts to Eliminate Overlapping Regulations

In November 2007, the KFTC and the FSC executed an MoU in an effort to solve the problem of overlapping regulations. Such MoU outlined the division of responsibilities between the agencies with respect to areas such as business combinations, unfair collaborative acts, unfair business

⁷⁸ Supreme Court Case No. 2002Du12052.

practices, false or misleading labelling and advertising and standard contract terms, among other areas, the details of which are discussed below.⁷⁹

Regarding business combinations, the MoU required the FSC, in examining a merger between financial institutions under the Act on the Structural Improvement of the Financial Industry or the Financial Holding Companies Act, to confer with the KFTC regarding the effect of the proposed merger on competition in the relevant market. The MoU also required the KFTC to fully consider the FSC's opinion on financial market-specific issues in its examination of the impact on competition.

With respect to unfair collaborative acts by financial institutions in connection with financial transaction-related issues, such as interest rates, fees and other conditions, the MoU provided that the KFTC would address such matters under the MRFTA. The MoU also provided that the FSC, in performing its duties under the relevant financial laws, may issue administrative guidance and that the MRFTA should not apply to individual actions performed within the scope of such administrative guidance.

Furthermore, the MoU provided that the KFTC should, in examining unfair collaborative acts, fully take into consideration the FSC's opinion as to whether administrative guidance was warranted and the scope and contents thereof and that the FSC, when issuing administrative guidance, should remind financial institutions not to engage in unfair collaborative acts.

In connection with unfair business practices, the MoU provided that each agency may initiate its own investigation and take any measure it deems necessary. However, in order to minimise the burden on financial institutions from overlapping investigations or sanctions, the MoU provided the following guidelines.

First, each agency, prior to commencing an investigation against a particular financial institution, should inquire from the other agency whether such agency was in the process of investigating the same financial institution and keep in strict confidence any information it learns in the process with respect to the other agency's investigation.

Second, if the other agency already commenced an investigation, both agencies are to suspend any ongoing investigation and consult with each other through an advisory board (that is to be subsequently established) regarding the agency that will be in charge of the investigation, as well as the method, duration and time thereof.

Third, if the other agency is in the process of completing, or already has completed, taking corrective measures, no further investigation is to be conducted. In the event that one agency determines that the other agency's measures are consistent with the intent of the law it

⁷⁹ MoU between the Korea Fair Trade Commission and the Financial Supervisory Commission to Establish an Efficient Regulatory System for the Financial Industry (November 27, 2007).

administers, it should not take additional measures. However, if the measures are deemed insufficient, the agency may take additional measures, after consulting with the aforementioned advisory board.

With respect to abuse of market dominance, as well as unfair business transactions of financial institutions against other financial institutions, the MoU placed the KFTC fully in charge.

With respect to false or misleading labelling and advertising, the MoU stipulated that each agency may initiate its own investigation and take any measure it deems necessary under the relevant law it administers. Similar to the case of unfair business practices, the MoU provided that each agency may take additional measures if the other agency has commenced or completed an investigation in connection with false or misleading labelling or advertising and the measures taken by such other agency are deemed insufficient.

Finally, with respect to standard contract terms, the MoU provided that each agency may examine standard contract terms and take necessary measures under the relevant law it administers. The MoU also stated that the two agencies are to jointly examine possible solutions to a reform of the regulatory system as to standard contract terms and to adopt the findings when the relevant law is amended.

Recommended Solutions

The solutions to the problem of overlapping regulations in the financial industry are similar to those suggested for the telecommunications industry, that is, the division of responsibilities between the two agencies should be clearly made through legislative reform, and a detailed agreement or system for consultation should be in place to address any unavoidable overlap in responsibilities.

Conclusion

Since the history of each nation's socioeconomic development is unique, the appropriate relationships between sector-specific regulators and the competition authority are also unique for each nation. Therefore, it is important for each nation to devise a solution that best suits its needs while taking advantage of various examples of other nations.

In an effort to foster cooperation between sector-specific regulators and the competition authority, the Organisation for Economic Cooperation and Development suggests the following: inter-agency exchange of agents or directors, affording the competition authority the opportunity to offer their opinions when a sector-specific regulator is making its decision and the opportunity for sector-specific regulators and the competition authority to informally exchange information.⁸⁰

⁸⁰ Korea Development Institute, *A Study on Methods to Realise Rational Regulation by Sector-Specific Regulators and Competition Authority* (2008).

In the case of Korea, the problem of overlapping regulations has mostly arisen since sector-specific regulators, in amending the laws they administer, have started to regulate areas such as unfair business practices and business combinations, which are areas that have traditionally been under the purview of the KFTC. Inter-ministerial consultations during the legislative process are likely to reduce overlapping regulations significantly and establishing an inter-agency system for cooperation and procedural rules for addressing overlapping regulations must be emphasised. Further, inter-agency personnel exchange must be fully utilised to strengthen mutual understanding and cooperation among agencies.

This article attempts to explain the problems associated with overlapping regulations in the telecommunications and financial industries. Besides the above industries, there are also problems associated with overlapping regulations with respect to electricity and energy-related industries, the broadcasting industry and the medical industry. While the problems associated with overlapping regulations are not as severe in such industries as is the case with the telecommunications industry or financial industry, it is important that such problems be prevented or subsequently controlled. It may be said that the specific methods for prevention or subsequent control would be the same for the telecommunications and financial industries.

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Interaction between the National Competition Authority and National Regulatory Authorities: Conflicts and Solutions (Spain)

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Executive Summary

This paper is delivered in the framework of a larger study, the purpose of which is to devise an effective mechanism to clearly demarcate the jurisdictions of the regulatory bodies in order to minimise the potential for conflict arising out of overlapping jurisdictions *ex ante*, develop a structured, systematic and sustainable process of interactions/dialogue between the competition authority and sector regulatory bodies and, finally, develop a framework for conflict resolution *ex post*. The study seeks to assess how regulatory conflicts between the competition authority and sector regulators can be resolved deriving from the approaches followed by other countries and tailoring them to our needs.

With that aim in mind, the Spanish experience is described focusing in particular on the relations between the telecommunications and energy regulators, on the one hand, and the Spanish Competition Authority, on the other hand. The reason for this is that those authorities are the ones that have a track record long enough to be useful for the purposes of arriving at some useful conclusions. The other authorities regarded by national law as sector regulators (gaming and postal regulators) are of too recent creation to derive any useful lesson. Some reference is included to other regulators, not technically regarded in Spain as sector regulators but which are *de facto* and for some purposes treated as sector regulators.⁸¹

As a starting point, a brief history of the inception of the Competition Authority and the main sector regulators is provided. Afterwards, the experience of existing conflicts is described. Finally, the distribution of powers between sector regulators and the Competition Authority is outlined, as are the legal solutions (reflecting prior experience) devised to avoid or minimise conflicts, which are contained in the most recent laws affecting these matters.

Inception of Competition Law and Select Sector Regulations: Historical Perspective

Competition Law

The first modern precedent of competition legislation enacted in Spain was Law 110/1963, of 20 July, of Repression of Restrictive Practices. This Act was a by-product of the Franco era, a time where private property and freedom of enterprise were protected in Spain, but it is fair to say that

⁸¹ Article 8 of Law 2/2011, of 4 March, on Sustainable Economy, establishes that sector regulators are the telecommunications, energy, postal and gaming authorities.

the economy, or at least substantial parts of it, was largely intervened. This intervention took place, for instance, in the form of large State-owned corporations which controlled key industrial sectors of the economy in areas such as heavy manufacturing, utilities or transportation.⁸² In this context of heavy State intervention in the economy, it is hardly surprising that Law 110/1963, cited, remained, to a large extent, unapplied.

Spain went through its transition into a parliamentary monarchy in the second part of the 1970s. In 1978, Spain gave itself a democratic Constitution, published in the Official Gazette on 29 December 1978. The Constitution enshrined private property as a citizen's right (Article 33.1) and it expressly acknowledged the "freedom of enterprise in the framework of a market economy" (Article 38 of the Constitution).⁸³ The protection of freedom of enterprise provides a legal basis for the enactment of the modern competition law in Spain.

Another historical event key to understand the background of Spain's current competition and economic regulation was the entrance of Spain into the European Communities (currently the European Union) in 1986.⁸⁴ As it is well-known, one of the main pillars or areas of action where the EU is most active is competition law. Article 3 of the Treaty of Functioning of the European Union (TFEU) includes amongst the areas of competence of the EU:

"The Union shall have exclusive competence in the following areas:

[...]

(b) the establishing of the competition rules necessary for the functioning of the internal market."

The system of enforcement of competition policy in Europe has, as its constitutional cornerstone, the current Articles 101 and 102 TFEU. Articles 101 and 102 have direct effect (*i.e.*, they create rights that can be directly invoked by individuals before the national authorities and courts).⁸⁵ In Spain, the primary agency responsible for carrying out the administrative enforcement of Articles 101 and 102 TFEU at the national level is the national Competition Authority, as will be indicated below.

Competition is protected in Spain concurrently by national and European competition law. Both sets of rules are largely similar as to their substance. The test to decide whether one or the other

⁸² The INI (National Institute of Industry) was a State-sponsored conglomerate created by law in 1941, which had in its portfolio companies as emblematic in Spain as power utilities (Endesa), truck manufacturers (Pegaso), car manufacturers (Seat) and many others. Other significant Spanish companies, later privatised after the Franco era, were also State-owned (even if they were not part of INI): e.g., Telefonica, Iberia, Campsa or Tabacalera.

⁸³ Freedom of enterprise is not protected as an "absolute" right. Article 38 of the Constitution itself establishes that the public powers will guarantee the exercise of freedom of enterprise "in accordance with the needs of the general economy and, as the case may be, of planning". As a matter of fact, the intervention of the State in the Spanish economy is still substantial. Firstly, it is in the form of State-owned enterprises, a presence which continues to be considerable, for instance, in connection with the provision of services of general economic interest, *i.e.*, public services. Secondly, the intervention of the State can be felt in the form of regulation, mostly in "regulated" (*e.g.*, telecoms, energy and postal services) industries, but, to a higher or lesser degree, in any economic activity. This is something which seems to be the common denominator of all modern States.

⁸⁴ The Treaty of accession of Spain to the European Communities was signed in Madrid on 12 June 1985 and entered into force on 1st January 1986.

⁸⁵ See, for instance, Judgements of the European Court of Justice in cases *Courage v. Crehan*, case C-453/99, ECR [2001] I-6297 and *Delimitis*, case C-234/89, ECR [1991] I-935.

set of rules (national vs. European) applies lies in the concept of affectation of inter-State trade. A given anticompetitive conduct (*e.g.*, a cartel) will affect inter-State trade within the EU if it is capable of affecting trade between Member States.

The concept of inter-State trade affectation is rather broad and, for practical matters, it indicates that a conduct which may affect more than one Member State will have to be considered under European competition law. Conversely, business conduct which is mostly local (*e.g.*, cartel restricted to a very limited area of a Member State and neither likely nor capable of affecting trade with other Member States) will normally be caught by national law only.⁸⁶

Leaving aside the complexities of the interaction between European and national competition law (both being applicable in Spain), the above explains that, upon accession to the EU, Spain needed to give itself the legal and institutional apparatus necessary to enforce competition law in a new environment. Spain needed to leave behind its obsolete 1960's legislation.

The gap in national competition legislation was bridged by Law 16/1989, of 17 July, for the Defence of Competition. Law 16/1989, cited, was enacted having in mind both Article 38 of the Constitution as well as Spain's accession to the European Union. Law 16/1989 establishes an institutional framework for the application of competition law in Spain that entrusted the Competition Service (*Servicio de Defensa de la Competencia* or SDC) and the Competition Tribunal (*Tribunal de Defensa de la Competencia* or TDC) with the task of enforcing competition law in Spain.⁸⁷ The TDC was established as a non-hierarchical authority, functionally independent, specialised and unique, although formally adhered to the Ministry of Economy. The TDC was the organ in charge (amongst other things) of taking the final administrative decision in competition cases. The SDC, under the direction of the Ministry of Economy, was the organ in charge of investigating possible competition infringements and adopting phase 1 decisions in transactions subject to merger control. Most conflicts between the Competition Authority and national regulatory authorities (NRAs) in Spain took place under the regime of Law 16/1989, cited (see epigraph 3, below).

⁸⁶ The concept of effect on trade between Member States may sometimes lead to practical difficulties as to its interpretation. Generally speaking, it is fair to say that the concept is widely applied, so that conduct with some potential to affect trade streams between Member States is caught. The European Commission issued a few years ago an interpretative communication on the concept (Commission Notice – Guidelines on the effect on trade concept contained in Articles 101 and 102 of the Treaty (OJ C 101, 27 April 2004, p. 81).

⁸⁷ Other authorities which are entrusted with the application of competition law in Spain include (i) regional competition authorities and (ii) civil and commercial courts. The regional authorities are competent to monitor and control business conduct which may fall foul of competition law within the territory of the concerned region. Regional authorities are the result of the decentralised system introduced in Spain by the 1978 Constitution. Law 1/2002, of 21 February, on coordination of competences between the central State and the autonomous communities (regions) provided the legislative basis for the creation of these regional authorities, of which there are a few in Spain (*e.g.*, Madrid, Basque Country, Cataluña, Andalucía, Galicia or Valencia).

Civil and commercial courts have, for a long time, been competent to apply European competition law by virtue of the direct effect of Articles 101 and 102 TFEU (formerly Articles 81 and 82 EC Treaty) (see footnote 6, above). The Supreme Court confirmed this direct effect of Articles 81 and 82 EC Treaty in decisions such as those of 2 June 2000, *DISA*, case 540/2000 or of 15 March 2001, *Petronor*, case 232/2001. A different story was enacting place with damages claims, which were cumbersome and hard to bring under Law 16/1989, cited. For damages claims, see my chapter on Spain on the comparative study with the American Antitrust Institute, *the International Handbook on Private Enforcement of Competition Law*, edited by A.A. Foer and J.W. Cuneo in association with the American Antitrust Institute, 2010.

The entry into force at the European Union level of a new competition enforcement regime by virtue of EC Regulation 1/2003,⁸⁸ the need to have a stronger and more independent Competition Authority and a desire to facilitate damages claims were some of the reasons explaining the enactment of Law 15/2007, of 3 July, for the Defence of Competition (Competition Act). The Competition Act is the piece of legislation currently governing competition enforcement in Spain. Notably, it draws on the experience of conflicts, *inter alia*, with NRAs and provides some rules on coordination of powers with NRAs, which will be discussed in detail in this paper.

Selected Sector Regulators

Following a liberalisation process which had its legislative impulse in a number of European directives in various regulated industries (*e.g.*, telecoms, energy, postal and transportation sectors), Spain adhered to a mainstream international trend to put in place independent NRAs with strong sector expertise necessary to regulate complex businesses hitherto subject to State monopoly.⁸⁹

The Energy Commission (CNE) was created by Law 23/1998, of 7 October, of Hydrocarbons. The Telecommunications regulator (CMT), created in 1996, is currently governed by Law 32/2003, of 3 November, on Telecommunications. Prior to these, the Securities market regulator had been created in 1988.⁹⁰

Most recently, the national gaming Commission has been created by means of Law 13/2011, of 27 May, on Gaming and the Postal Commission, by means of Law 23/2007, of 8 October, of creation of the national Postal Commission.

The Sustainable Economy Act, cited, regards as “sector regulators” the CMT, CNE, the Gaming Commission and the Postal Commission. Given that little experience is still available regarding the Postal and Gaming Commissions, this paper refers mostly to interaction between the CMT and CNE, on the one hand, with the Competition Authority, on the other. When relevant, references are made to other authorities, such as the Bank of Spain, relevant, for instance, in connection with sector mergers.

Historical Conflicts between NRAs and the Competition Authority

In the Telecommunications Sector

As anticipated, the main conflicts of jurisdiction between the NRA and the Competition Authority have taken place in the telecommunications sector.

From a historical perspective, the conflicts registered have taken place, principally, under the regime of the pre-existing Law 16/1989, on Competition, cited, and also under the pre-existing Telecommunications Act. This may indicate that the Competition Act (as recently amended by the Sustainable Economy Act) has introduced some rules of coordination that have minimised the

⁸⁸ EC Regulation 1/2003, of 16 December 2002, on the implementation of the rules on competition laid down in Articles 81 and 82, OJ L1, 4 January 2003, p. 1-25.

⁸⁹ This independence is not as clear-cut, for ultimately these ‘independent’ agencies are subject to a number of mechanisms of functional and political control to the Government or Parliament. See G. DE ENTERRIA, *Curso de Derecho administrativo I*, Madrid, 2006.

⁹⁰ By means of Law 24/1988, of 28 July, of securities markets.

potential for actual conflicts of competence between NRAs and the Competition Authority (as will be seen below).

A well-known case in Spain of conflict between the telecommunications NRA and the Competition Authority took place in the framework of an (arguably aggressive) promotion campaign in the telecoms sector by Telefonica. The NRA considered that the advertising campaign was not contrary to competition. On the contrary, the Competition Authority considered that the promotions were contrary to competition and it forbade those promotions and fined Telefonica. The case went up to the Supreme Court of Spain.⁹¹

The Supreme Court describes the arguments put forward by the parties. From those arguments, it appears that Telefonica had alleged, as a reason weighing in its favour that the sector regulator, the CMT, had refused to grant an injunction requested by some of Telefonica's competitors to put a halt to the advertising campaign under discussion.

Telefonica had in the past, however, also alleged before the CMT that the Competition Authority should have the monopoly (amongst the administrative agencies) to apply competition law. Those arguments were dismissed as inconsistent and the Supreme Court decided that the Competition Authority did have the competence to review a case of anticompetitive conduct by a dominant company.

The case leading to the Supreme Court Decision of 30 June 2006, cited, is remarkable in that the underlying facts reflect contradictory decisions in connection with promotional campaigns, which had been blessed by the CMT, but are condemned as anticompetitive by the Competition Authority. Such inconsistency between the CMT and the Competition Authority was favoured by the (at the time in force) Telecommunications Act⁹² that regulated the powers of the CMT in a rather unclear manner, enabling a choice by the CMT (when faced with a conduct contrary to competition) between referring the case to the Competition Authority or open a procedure itself.⁹³

In parallel with the previous case, the Supreme Court came up with another key decision of 1 February 2006,⁹⁴ which annulled an instruction by the CMT on the grounds that this instruction encroached upon the powers of the Competition Authority. In summary, the facts and reasoning of the Court may be summarised as follows:

- (1) The object of the legal controversy was a binding notice ("Circular") by the CMT regulating advertising campaigns in the telecommunications and media sectors.
- (2) The binding notice characterised some given types of conduct related to advertising as being contrary to the rules forbidding the abuse of a dominant position.
- (3) The binding notice was issued by the CMT under the authority of the (at the time in force) Telecommunications Act, which established that the CMT was competent to adopt the measures necessary to safeguard free competition in the telecommunications markets.

⁹¹ Decision of the Supreme Court of 20 June 2006, RJ\2006\3542

⁹² Law 11/1998, of 24 April, on Telecommunications

⁹³ The courts at some point considered that the CMT could in fact opt out (*i*) for opening a procedure of its own for the breach of the competition rules or (*ii*) refer the case to the Competition Authority (e.g., Decision of the Audiencia Nacional of 17 October 2000, 156/1999).

⁹⁴ Appeal 3661/2003.

- (4) The Court is asked to take a decision on whether or not the CMT is competent to issue rules addressed to telecommunications operators, as a means to categorise abuses of dominant position, in particular, in connection with advertising campaigns.
- (5) The Court acknowledges the fact that sector agencies (such as the CMT) are a new type of creature in Spain (which may explain, to an extent, the relative confusion surrounding their functioning). The Court also recognises that there is a degree of overlap between the powers of the CMT and the Competition Authority, to which the wording of the law may be partly to blame, as repeated amendments to the law would indicate. The wording of the law at the time would attribute some powers to the CMT in connection with competition law, stating that the exercise of powers by the CMT would have to be coordinated with the Competition Authority.

Notwithstanding the foregoing, the law itself stated that such coordination between the sector agency and the Competition Authority was “without prejudice” to the powers of the CMT. This deficient technique in the wording of the law had already been pointed out by the case law in the past (see above).⁹⁵

- (6) The Court focuses on deciding whether it is legal for the CMT to define general types of conduct which are contrary to competition law (as opposed to particular or actual conduct which would have to be reported to the Competition Authority). Once the CMT has defined such general or abstract conduct, if an operator indulges in that particular type of conduct, the CMT would, by virtue of its powers of enforcement of its own guidelines or instructions, be able to prosecute the infringing operator.
- (7) The Court decides that the general configuration of abstract conduct which infringes competition is beyond the powers of the CMT. There are various reasons for the Court’s decision in this regard:
 - (a) The abuse of a dominant position is forbidden by competition law. Whereas it is true that the abuse of dominant position is a *numerus apertus* (i.e., the conducts set out under competition law as abusive are mere examples so that other conducts not expressly foreseen may amount to an abuse), the CMT does not have the power under the law to establish abstract categories of conduct which are deemed abusive (even if that general or abstract categorisation is restricted to the telecommunications and media sectors).
 - (b) The Court rejects the issuance by the CMT of “general” or abstract instructions. However, the court seems to accept that the CMT may issue individual instructions against specific conduct contrary to competition.
 - (c) The enactment by the CMT of abstract rules is inconsistent with the regulatory framework and is paradoxical because, if accepted, it would amount to having a set of rules that binds the operators but does not bind the Competition Authority, which is in fact the specialist organ in charge of enforcing competition law.

⁹⁵ Subsequent legislative amendments sought to bridge in that inconsistency by eliminating the safeguarding of competition from the tasks of the CMT, although not completely, since the new Telecommunications Act 2003 kept the role of “promoting competition in the media markets”.

Other Sectors

Judicial decisions adjudicating on conflicts between NRAs (other than the telecommunications NRA) and the Competition Authority are scarce.

Companies subject to competition proceedings in connection with business conduct which is, or may be, subject to scrutiny by NRAs typically object to the competence of the Competition Authority to review the case on the grounds that the subject-matter of the controversy is of regulatory, not competition, nature. Often, however, there is no actual conflict, but rather, an allegation of one of the parties which is adjudicated by the authority deciding the case. In a competition decision in the gas sector in 2009, for instance, a regional Competition Authority (when faced with an allegation of lack of jurisdiction) has decided that there is no issue with competence because

*“in a case where a given business practice may be contrary to a plurality of offers, the NRA may impose on the operators obligations of different nature, obligations to do or to refrain from engaging in a given conduct and, should the mandate be disobeyed, the NRA may use its sanctioning powers. The task of the competition authorities is different, the latter being competent to determine whether a given conduct amounts to an abuse of a dominant position and, eventually, may be subject to fines under the competition rules”.*⁹⁶

A characterised example may be found in a judicial decision of 29 April 2002.⁹⁷ In this case, a decision of the national Competition Authority had declared the existence of an abuse of dominant position consisting of a refusal to grant access to the electricity grid. The rights of access to the grid are guaranteed both under sector regulation and under competition law (as a refusal to supply from a dominant position in the latter case). That matter had, prior to being decided by the Competition Authority, been the object of decisions by the NRA. In that regard, the court stated that:

“The fact that decisions have been issued by the National Electricity Commission and by the Ministry of Industry in the framework of their competences regarding the same facts does not amount to any obstacle for the decision by the [Competition Authority] and by this Court in [the] light of the Law for the Defence of Competition. [...] It is irrelevant that the technical matter is defined as “network access” or a “request for a power increase”: there is a dominant position [of the supplier companies] and regardless of which is the organ of the Public Administration [...] competent to decide on the matter [from the regulatory standpoint] the organs for the defence of competition have been entrusted by Law 16/1989 with the guarantee of the constitutional economic public order [...]”

In other words, decisions by the Competition Authority are not precluded by prior decisions by the regulator. Both legal orders refer to different issues and are to be decided upon independently.

Demarcating Regulatory Roles in Each Sector

In this part of the study, we focus on which authority has the responsibility for each task in areas such as the safeguarding of competition law, pricing, licensing, merger control, etc.

⁹⁶ Decision of the regional Competition Authority of Valencia of 11 September 2009, file SAN 1/2008

⁹⁷ Appeal nr. 868/1999

As a general remark, the allocation of tasks is well defined by the sector laws, with some historical exceptions, such as the application of competition law, which has led to conflicts in the past (as discussed above).

Administrative Application of Competition Law in Spain (excluding merger control)⁹⁸

The administrative application of Spanish competition law is the competence of the Competition Authority (the national Competition Commission) by virtue of the Competition Act. The administrative application of European competition law in Spain is also a task entrusted to the Competition Authority.⁹⁹

Sector regulators also have some powers of competition law surveillance. In some cases, like in the energy sector, the rules are clear as to the obligation of the sector regulator to refer any competition case to the Competition Authority.¹⁰⁰ In other cases, such as the telecommunications sector, the drafting of the competences of the sector regulator was not so clear and led to a degree of conflict, which has already been described. Based on the experience of previous conflicts (see above), subsequent legislative amendments have sought to minimise the potential for clash between sector regulators such as between the CMT and the Competition Authority. This has been achieved, amongst other things, through cooperative procedures for allocation of tasks and issuance of reports so that the Competition Authority can have a say in regulatory matters affecting competition, and vice versa.

Regulatory Tasks: Licensing, Pricing and Regulatory Compliance

Usually, these tasks are allocated by the sector laws to the relevant sector regulators and there is not much of an issue of coordination between sector regulators and the Competition Authority.

In the case of the financial markets and the banking sector, for instance, licensing and surveillance tasks are entrusted to the national regulators, the national securities commission and the Bank of Spain.¹⁰¹

In the case of the telecommunications sector, matters such as licensing, numbering, spectrum allocation, universal service matters and imposition of regulatory obligations in non-competitive markets are matters for the sector regulator.¹⁰²

Notwithstanding the foregoing, there have been some precedents of potential uncoordinated approach between the sector regulator and the Competition Authority in connection with pricing. Excessive, discriminatory, predatory pricing and price-squeeze type of behaviour is forbidden under the competition laws. At least in one very prominent case where Telefonica was being

⁹⁸ This is without prejudice to the powers of the courts to apply competition law (see discussion above) and the powers of the European Commission to apply European competition law under EC Regulation 1/2003 and related regulatory framework.

⁹⁹ Regulation approved by Royal Decree 2295/2004, of 10 December, relative to the application in Spain of the Community rules on competition.

¹⁰⁰ Function 14 of the list of functions attributed to the energy sector regulator (DA 12 of Law 24/1998, of 7 October, of Hydrocarbons).

¹⁰¹ Law 24/1988, of the securities markets, of 28 July and of Law 13/1994, of 1 June, of autonomy of the Bank of Spain.

¹⁰² Articles 46-48 of the Telecommunications Act, Law 32/2003 of 3 November, on Telecommunications. The sector regulators envisaged by the Telecommunications Act are the CMT, the State Agency of radio communications, the government, various organs of the Ministry of Science and Technology and the relevant organs of the Ministry of the Economy.

accused of margin-squeeze behaviour contrary to Article 102 TFEU,¹⁰³ Telefonica argued before the European Commission that its conduct had already been the object of action by the CMT.

In this regard, however, the European Commission considers (invoking European case law) that it is entitled to issue decisions under Articles 101 and 102 TFEU. The European Commission also declares, interestingly, that the CMT is not a competition authority, but a regulatory authority within the meaning of Article 5 of the Framework Directive (telecoms framework). The European Commission recalls some Spanish decisions, particularly decision AJ 2004/1407 of the CMT, which illustrates how the role of the CMT to safeguard competition is exercised:

“It may not be ignored that this is about the exercise of control, ex ante, of the promotions that the Telefonica group puts in the market, i.e., prevent or neutralize the eventual anticompetitive effects (not to punish, ex post, eventual abuses), that those promotions are capable of causing in the market, by means of imposing obligations, either of not doing (prohibiting the launching of such promotions) or of doing (halting that commercialisation, when that commercialisation is not subject to a reporting obligation [...]).”

Consequently, the European Commission dismisses the point on the grounds that the CMT is not a competition authority and it draws a line between *ex ante* administrative action (more appropriate for regulatory authorities) and *ex post* or punishing action (more appropriate for competition authorities). This reasoning is similar to the one applied by Spanish courts in comparable situations (*e.g.*, see point 3.2 above).

In the energy sector, the powers regarding licensing, pricing, compliance, etc., are attributed to the sector regulator, which is the Energy Agency (CNE), although matters such as licensing are ultimately attributed to the general administration (central State or, under some circumstances and for installations which operate in the territory of a region, the competent organs of the autonomous communities or Spanish regions).¹⁰⁴

Regarding energy mergers, the CNE has powers of authorisation of some types of energy mergers. These powers are distinct from the merger control process subject to competition law principles, which is entrusted to the Competition Authority. However, because of the obvious relationship between merger control and the authorisation to carry out mergers and acquisitions which must be given by the CNE, these powers are described below.

Merger Control: In Particular, the Relationship between Merger Control and the Power to Authorise Energy Mergers by the Energy Regulator (the “function 14”)

Regarding the particular area of merger control, the task of approving mergers and acquisitions which are reportable under Spanish merger control laws is within the competence of the Competition Authority.¹⁰⁵ This is without prejudice to the competence of the European Commission to review mergers of national dimension under particular circumstances of voluntary referrals by merging parties in case of multi-jurisdictional mergers¹⁰⁶ or of upwards referrals of

¹⁰³ European Commission Decision of 4 July 2007 relating to a proceeding under Article 82 of the EC Treaty, case COMP/38.784 – *Wanadoo España v. Telefonica*.

¹⁰⁴ Law 34/1998, of 7 October, of Hydrocarbons, in conjunction with multiple sector regulations, *e.g.*, Regulation 1955/2000.

¹⁰⁵ Articles 7-10 and 55-60 of the Competition Act. In some circumstances and under some conditions, particularly in complex mergers which may be blocked or subject to conditions or divestitures, the government may be ultimately responsible for the final decision.

mergers which, in principle, have national dimension, but end up being reviewed by the European Commission at the request of Member States.¹⁰⁷

Likewise, the competence of the Competition Authority to review mergers of national (Spanish) dimension is without prejudice to (i) the consultative roles of sector regulators, which issue reports in connection with sector mergers (e.g., energy mergers, telecoms mergers and banking mergers) and (ii) the power to authorise energy mergers and acquisitions on the basis of security of supply considerations.

Point (i) is dealt with under epigraph 5, below.

The second point (authorisation powers of the CNE in the framework of mergers and acquisitions), makes the energy sector a unique and particularly interesting sector regarding mergers and acquisitions. Here, the sector regulator (CNE) is afforded two distinct roles: (i) an advisory role in connection with the merger review process, which is described under epigraph 5, below, and (ii) an authorisation role in connection with technical/security of supply issues which *de facto* causes that energy mergers must in parallel gain merger control approval and sector approval for the merger.

The parallel powers of authorisation for energy mergers by the CNE and the Competition Authority are best illustrated by a multi-billion merger in the energy sector that took place in Spain a few years ago. This was the takeover for Endesa, which led to various complex legal battles in the framework of the competition and regulatory approvals required for the merger. These battles involved the Spanish Competition Authority, the European Commission, the CNE and the courts.

This key transaction was initiated by Gas Natural, a Spanish utility, which launched its takeover offer for Endesa in September 2005. The takeover by Gas Natural was informally supported by the Government, but it was, in turn, strongly opposed by Endesa's board. Endesa's lawyers managed to put Gas Natural's offer on hold by persuading the courts (particularly the Supreme Court, competent to review Government phase 2 merger control decisions) to grant interim relief to suspend the merger control decision.¹⁰⁸

Meanwhile, another European utility, E.ON of Germany, launched a competing offer for Endesa. E.ON's competing offer was not to the liking of the Spanish Government for various reasons.

First, from a merger control perspective, since the takeover was launched by a German company realising most of its turnover was outside of Spain, the transaction escaped the national authorities' control: it had European dimension and, therefore, the European Commission had exclusive jurisdiction to review it.¹⁰⁹

¹⁰⁶ Article 4.5 of EC Regulation 1397/2004, of 30 January 2004, of control of concentrations between undertakings (ECMR).

¹⁰⁷ Article 22 ECMR.

¹⁰⁸ At the time the facts took place, Law 16/1989, of 17 July, then in force, established that the Council of Ministers (the Cabinet) was competent to take the final administrative decision to approve (whether or not subject to conditions) or prohibit mergers. The Supreme Court, administrative Section, has sole jurisdiction to review this kind of acts by the Cabinet.

¹⁰⁹ The system of merger control in Europe is based on the principle that mergers with European dimension (and, therefore, subject to review by the European Commission) are within the exclusive competence of the European Commission and need not be notified to individual Member States. Article 21.3 ECMR states that

Second (and of direct relevance to this epigraph), the powers of the CNE to authorise energy mergers from a regulatory (*i.e.*, security of supply) standpoint did not apply to acquisitions of Spanish utilities by a foreign utility. They covered only acquisitions by “regulated” companies, *i.e.*, energy companies subject to Spanish law, but not by foreign utilities, which were not “regulated” for these purposes”.¹¹⁰

In order make sure that the takeover offer by E.ON would not escape the jurisdiction of the CNE, the government amended, by Royal Decree-law,¹¹¹ the wording of the “Function 14”, so that any acquisition of 10 percent or more of the share capital of a “regulated” energy company would be subject to authorisation (regardless of the nature, “regulated” or “unregulated” of the acquirer).¹¹²

The European Commission considered that the regulatory reform operated by Royal Decree law was contrary to Article 21 ECMR and the fundamental economic freedoms of the European Union (freedom of establishment and freedom of circulation of capital). Therefore, the Commission initiated legal proceedings that ended with various Commission Decisions and, ultimately, with a declaration by the European Court of Justice that the actions by the Spanish State were contrary to European law.¹¹³

The Endesa case provides an interesting illustration of how national authorities use the sector regulation process and the merger control review to intervene in high-profile or “strategic” mergers. In the particular case of energy mergers, the CNE has got not only consultation powers within the framework of national merger control proceedings (provided the transaction has national and not European dimension) but also parallel substantive authorisation powers of its own (“Function 14”).

Lessons to be drawn from this case are (*i*) the need to ensure legal certainty by not tampering in the legal process; (*ii*) if possible, unify legal processes in transactional matters; and (*iii*) the need to subject information and authorisation procedures by authorities to tight timetables with limited opportunities to interrupt those timetables.

Instruments of Coordination between the Competition Authority and the NRAs: Framework of Conflict Resolution (*ex-post* framework)

The Competition Act and subsequent legislative amendments have sought to minimise the conflicts between regulatory agencies and the Competition Authority. In this epigraph, we outline the legal mechanisms for coordination, avoidance and resolution of conflicts between the agencies.

“no Member State shall apply its national legislation on competition to any concentration that has a Community dimension.”

¹¹⁰ In the original drafting of the “Function 14” of the functions of the CNE (DA 11, third, of Law 3471998, of 7 October, of Hydrocarbons, cited).

¹¹¹ Royal Decree law 4/2006, of 24 February. The Royal Decree law is a law-making procedure admitted by the Spanish Constitution that enables the Government to approve laws with urgency, subject to subsequent ratification by Parliament.

¹¹² For a detailed account of the facts and legal issues surrounding the *Endesa* case, see my paper on “State intervention in the great merger and acquisition transactions: the *Autostrade* and *Endesa* cases” in the Yearly Review on Commercial Law, Wouters Kluwer, Madrid 2009.

¹¹³ The above is just a summary of the case that took place around the acquisition of Endesa, which, in fact, was far more complex. There was a third offer by Enel, the Italian utility. The European Commission issued various Decisions using Article 21 ECMR as legal basis (Decisions of 26 September 2006 and 20 December 2006, COMP M.4197 and Decision of 5 December 2007, COMP M.4685). Finally, Spain was condemned for a breach of European law caused by the reform of the “Function 14” (Judgement of the European Court of Justice of 22 July 2008, *Commission v. Spain*, case C-207/07).

First, in the area of detection and repression of anticompetitive practices, whenever a regulator in a regulated industry detects the existence of an anticompetitive practice, that regulator has a statutory duty to report that conduct to the Competition Authority. Such a duty is sometimes embedded within the statute of the regulatory agency (such as, for instance, with the CNE, function 12 of the functions of the CNE, cited). But, even if it were not, such a duty would be implied in the duties of the regulatory agency, which acts subject to the law. It is only in some specific cases where the drafting of the particular task of the agency was not so clear that this has led to issues (*i.e.*, in the telecoms sector), already described above.

The (new) Competition Act (2007) contains an Article 17¹¹⁴ which attempts to make coordination between the Competition Authority and sector regulators even closer. In summary:

- (a) Sector regulators will report to the Competition Authority any conducts that they are aware of in the framework of their activity which may be contrary to competition law. This duty of information includes providing the Competition Authority any information or facts that they are aware of and a provision of “determinant” advisory opinion.
- (b) Conversely, sector regulators will require a report (which is non-binding, but is “determinant”, *i.e.*, its advice may only be departed from providing reasons of why the advice is not followed) from the Competition Authority prior to the adoption of any measures that may have an impact in competition in the respective market.
- (c) Sector regulators will issue advisory opinions in the framework of merger control review procedures.
- (d) Sector regulators will also be asked to issue opinions in the case of procedures for breach of any merger conditions attached to a merger decision.
- (e) Finally, if the Competition Authority opens a procedure against a company or companies for breach of the competition rules, the sector regulators issue an opinion on the matter.

Article 17.3 Competition Act contains a general co-ordination mechanism between the Competition Authority and the sector regulators. The Presidents of the sector regulators and the President of the Competition Authority will meet at least once a year to analyse the general orientation that shall guide the respective authorities they preside and establish whatever formal and informal mechanisms required to ensure co-ordination.¹¹⁵

¹¹⁴ Last amended by Law 2/2011, of 4 March, on Sustainable Economy.

¹¹⁵ Even before the enactment of the 2007 Competition Act, some sector regulators had established coordination agreements that put in place protocols for co-ordinated work with the Competition Authority. These agreements established a system that, to an extent, has been replicated by the current law, along with regular meetings between authorities’ presidents. A common decision is adopted between the regulator and the Competition Authority to decide whether the problem can be solved by sole action by either one of the two authorities. If action by both authorities is required, then consistency in the decision-making is to be ensured to avoid contradictions between authorities. M.G. SAGGESE refers to these protocols between the CNE and CMT, on the one hand, and the Competition Authority, on the other: *La coordinación de la Comisión Nacional de la Competencia con los reguladores sectoriales en la nueva Ley de Defensa de la Competencia*, RAP n. 174, Sept-Dec 2007.

Some authors (C. Laguna de Paz) propose alternative safeguards to ensure better coordination, including secondment of officials between authorities, task-sharing inside proceedings (*e.g.*, market definition should be carried out by the Competition Authority) and, in case of conflict, ensure there is a quick system for dispute

Second, in the area of merger control, sector regulators are afforded a key (if only because it is a procedural requirement) consultative role. This consultation role is foreseen by the Competition Act. The way it works in practice may be described as follows:

- (a) Whenever a projected transaction which is reportable under Spanish merger control and which takes place in a regulated sector is notified to the Competition Authority, then the Competition Authority must request an opinion from the relevant sector regulator.¹¹⁶
- (b) The calendar for approval of the merger is interrupted until the sector regulator has delivered its opinion.¹¹⁷ In simple cases, the sector regulator can take relatively little time in providing its opinion, but, in any event, the need for an opinion by a sector regulator is perceived by private parties as a burden in the context of deal-making, since some degree of delay seems inevitable.
- (c) Once the sector regulator has issued its opinion, the process goes on until a final merger control decision by the Competition Authority is reached. The final merger control decision is bound to take into account the advisory opinion by the sector regulator. The opinion of the sector regulator is not mandatory; it is consultative. However, in accordance with Spanish administrative law, if the Competition Authority were to deviate from an opinion by the sector regulator, it would have to provide reasons for such a deviation.¹¹⁸

The provisions of the Competition Act ordering the Competition Authority to request the opinion of sector regulators in regulated industries have been followed in some, but not all, sectors. The reality of the fact is that all sectors are “regulated” to a higher or lesser degree. However, the Competition Authority takes the view (based on the wording of the Competition Act which refers to “sector regulators”) that an opinion must be sought in those cases where there are specific, independent regulators, such as in the cases of banking, energy or telecommunications mergers.

Other sectors which are also highly regulated (insurance and transportation) do not seem to merit an advisory opinion by the regulator (which is not an independent or sector regulator, but rather, the general Public Administration through the competent Ministry or regional equivalent).

Mirroring the Competition Act, some sector regulations contain provisions ordering the sector regulators to provide their opinions in the framework of the merger review process before the Competition Authority.¹¹⁹

In other instances, the provisions that regulate the regulatory role of the sector regulator do not contain an express function of providing advisory opinions in the framework of merger control. However, because these are “sector regulators” with legal autonomy, fitting in the general

resolution (*Autoridades de Defensa de la Competencia y Reguladores Sectoriales. A propósito de la STS de 6 de octubre de 2010*, RCD n. 9, 2011, La Ley/Comentarios).

¹¹⁶ Article 17.2(c) of the Competition Act.

¹¹⁷ Article 37.2(d) of the Competition Act. According to the Competition Act, the maximum suspension of the calendar may not exceed three months. This rule is devised to prevent the merger process from becoming too long in a way that may threaten the merger or acquisition.

¹¹⁸ Article 54.1(c) of Law 30/1992, of 26 November, on administrative procedure.

¹¹⁹ DA 11, Third, 15th of the Hydrocarbons Act, ordering the CNE to issue opinions in the framework of energy mergers and Article 48.4(f) of the Telecommunications Act containing a similar provision.

prescription in the Competition Act ordering that the opinion of sector regulator is sought, the Competition Authority takes the view that an advisory opinion is required.¹²⁰

Conclusion

The Spanish experience suggests the following:

- (a) To a great extent, the issue of conflicts between sector regulators and the Competition Authority is a matter of the last few years. Legal reforms have been put in place to minimise those conflicts and, apparently, they have had a positive impact. The Spanish story, therefore, provides an interesting experience that may enable others to learn going forward.
- (b) Some of the conflicts are rooted on a deficient drafting of the statutes of those authorities. For instance, as we have seen above, this is the case in connection with conflicts between the telecoms regulator and the Competition Authority.
- (c) Likewise, part of the problem may lie in the inherent difficulties that sometimes appear of separating competition and regulatory enforcement in highly regulated sectors.
- (d) In order to minimise conflict in connection with the above points, it appears necessary to duly attempt to delimitate competences and grant preference to the Competition Authority when the case is based on competition law provisions.
- (e) Further, a fluid system of dialogue and coordination of competences (as the one contemplated under Spanish law) between authorities may be advisable.

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¹²⁰ This is the case, for instance, with banking mergers. For a recent example, see the merger Decision of 6 September 2010, *Banco Sabadell / Banco Guipuzcoano*, exp. C-0251/10 on a significant takeover offer in the banking sector.