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Harmonising Regulatory Conflicts

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Competition agencies and sector regulators have a common objective of promoting healthier economic governance through pro-competitive regulation. The approach, however, is different. The sector regulators look into the issues ex-ante, *whereas the competition authority deals with* ex-post *issues. Despite a common goal, these bodies have different legislative mandates and perspectives for competition issues, and ambiguities. Thus, securing a clear delineation of roles and responsibilities is a growing challenge for most countries dealing with overlap conflicts.*

The criticality of the interface between competition authorities and sector regulators should therefore, be acknowledged. For the same, analyses of the historical genesis along with study of the regimes which have been adopted over the time to pacify the problem is a must. This Briefing Paper has been drawn up from a research study done by CUTS[1] to help the busy reader.

Introduction

The common goal shared by competition authorities and sector regulators is to improve economic performance by preventing market failures and associated economic inefficiencies. The mandated competencies of competition authorities and sector regulators are different.

The former focuses on promoting anticompetitive practices by checking competition abuse, while the latter encompasses technical regulation, such as the assessment of tariffs, entry and exit barriers, third party access, service standards, promotion of competition in the regulated sector etc., thus, indicating a clear difference in the methods and objectives of both. The mooted points have always been the jurisdiction conflicts, overriding powers of the regulator over the competition authority or vice-versa and encroachment issues.

Therefore, policymakers world over are addressing the interface of regulation and competition, where the traditionally monopolistic sectors can be subjected to competition norms rather than being regulated by sector-specific regulation, in order to be more cost effective and save time lapses. However, there is not much analysis on the evolution and jurisprudence of such conflicts, which is why no solution has been reached, and is also the prime focus of the present paper.

Genesis of Jurisdictional Conflicts

A growing number of countries are moving towards liberalisation, privatisation and deregulation of telecommunications, electricity, natural gas, transportation and financial sector service industries, to curb market failures, while others, such as the US have dealt with jurisdictional problems between the two regulatory regimes, for decades.

Jurisprudence of Conflicts

Overlaps and jurisdictional clashes leading to locking of horns between the two regulators is not at all a recent issue. The awakening to issues of conflicts is in consonance with the global trend of utility privatisation and the proliferation of sectorial regulatory agencies and the breeding ground of this problem is most often at the level of domain, rules or institutions.

Historically, there have been two conflicting approaches. First, the American approach, which restricted the reach of competition to sector regulators, at the expense of the consumer and second, the UK, where each sector regulator was given a mandate to deal with competition and regulation issues.

The latter approach has been the most favoured one, followed by many countries such as Chile, New Zealand and Jamaica.

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Rationale for Competition

To understand the rationale behind having competition, we have to first understand, why sectoral regulation is not required, and/or results in market failures. In India, most prone to conflict issues are the network utilities, which are natural monopolies, where turf disputes and legal complexities, are mostly in areas of licencing, market dominance, pricing, mergers and restrictive business practices. All network utilities have displayed high sunk costs and demanded lofty investments.

Therefore, in an economy where competition exists, sectoral regulation is not required as the former will address the inevitable risks of businesses and market externalities. The role of the sectoral regulator should thus be more of a facilitator.

Simmering Issues at Competition and Regulation Interface: Indian Scenario

The competition law boom came to India only after the enactment of the Competition Act, 2002; which replaced the Monopolies and Restrictive Trade Practices Act (MRTPA), 1969; which created two institutions, namely, the Competition Commission of India (CCI) and Competition Appellate Tribunal (COMPAT).

Liberalisation and privatisation brought with it quasi-independent sector regulators, but the set up lacked clarity in distribution of roles between competition authority and sector regulators. Result: court litigation and clashes.

For instance, Reliance Industries Limited filed a complaint with CCI alleging cartelisation against its rivals for supply of aviation fuel to Air India. During investigation, CCI's competence was challenged by the three state-owned companies which claimed that the sector regulator: Petroleum and Natural Gas Regulatory Board had the appropriate jurisdiction. This view was upheld by the Delhi High Court in an interim order. The final disposal is yet to take place.

The electricity sector also projects certain inconsistencies in jurisdictional roles, which have come to light in few cases. For instance, in the case of Delhi Electricity Regulatory Commission (DERC), it objected to CCI's orders against three power distributors for abuse of dominance, stating that these were exclusively under their domain pursuant to Section 60 of the Electricity Act, 2003. However, a contrary position was taken by DERC in another similar case.

In the banking sector, proposals made to exclude the jurisdiction of CCI in mergers was to have been accepted, with the Reserve Bank of India (RBI) only having the power to regulate mergers, under the Banking Laws (Amendment) Act, 2012. Fortunately, this was not done, as the Finance Minister changed and the new one did not wish to dilute CCI's mandate.

Competition Agencies and Sectoral Regulatory Authorities Overlap: International Case Studies

The jurisdiction of regulatory and competition authorities have been overlapping across nations. This brings out how conflicts have emerged between the two authorities, problems arising out of failure to clearly demarcate jurisdiction, identifying potential for conflict and process of solving the conflicts.

Countries have adopted several models to approach the conflicts and address them effectively. International experience favours the 'Institutional Approach' for governing regulatory interface, with three institutional models (sectoral regulation, competition law, concurrent):

1. Primacy to competition agency for economic regulation of sectors.
2. Sector regulators dealing with competition issues in a regulated industry.
3. Competition law enforced through competition authority given primacy over sectoral regulatory law.
4. Concurrent jurisdiction of sector regulator and competition authority.
5. General mandated division of labour.

General approaches taken by countries can be broadly categorised as under:

Concurrent

In this Model, application of competition law in a regulated industry by either the sector regulator or the competition authority, takes place. Here, both the regulators, i.e. the CCI and the respective regulator, possess equal jurisdiction, through a consultative approach. This will help avoiding conflicts on overlapping matters and in case of failure to settle the issues amicably through a referral body of judicial persons having expertise in the field, shall be constituted.

The UK model is also a Concurrent one, where regulators share powers with the Office of Fair Trading to make references to the Competition Commission.

Brazil

The Brazilian Competition Policy System (SBDC) proposed that the administrative bodies (SAE, AE, SDE and CADE) should apply the antitrust legislation as well and request one expert opinion for mergers and anticompetitive behaviour. The Telecom sector presents a model of complementary jurisdiction. ANATEL (National Agency for Telecom) is empowered to enforce competition in the market. General Telecom Law defines the competencies of ANATEL and CADE, however, there is no formal cooperation. A working group established by both bodies addresses the overlap conflict problems. ANATEL is authorised to investigate merger cases and CADE is the disposal authority for banks except in mergers. Still, clarity in division of powers is required.

Coordination

This Model adopts a system of cooperation between the competition authorities and sector regulators. Ireland, for example, has a formal cooperation agreement, envisaged in Section 34 of the Competition Act.

Spain had also introduced requirements for closer cooperation between the two regulators; however, the opinions were non-binding. However, such a framework did not suffice and the government has proposed a new approach by creating a 'Super-regulator' called the National Commission of Markets and Competition, combining the energy, telecom, gaming, postal agencies and airports under the umbrella of the antitrust agencies, to overcome the institutional overlap between the sector regulators having responsibility of the technical nitty-gritties and seeking opinions of the competition authority only on certain matters, while reserving their powers of competition surveillance. Australia and New Zealand also follow the same model.

South Africa

Competition Act was enacted in 1998 constituting an independent Competition Commission having investigative and prosecutorial responsibilities, Competition Appellate Tribunal with adjudicative powers and Competition Appeals Court having a dedicated bench. The Commission has the authority to enforce law and facilitate fair competition in market. Despite the inclusion of the principle of 'concurrency' to address jurisdictional and overlap conflicts, problems could not be resolved. The rising number of telecom and merger cases, explain the state of limbo. Signing of an MoU between the Competition and Telecom sector regulator, lead to further duplication of cases, making the scenario worse. In 2009, Competition Act was amended to include concurrent jurisdiction, repealing relevant sections of Electronic Communications Act.

Mandatory Consultations

There are several other countries where the new laws addressing overlap and jurisdiction issues, make it mandatory for a consultation procedure between the competition agency and the sector regulators, by either forming a common consultation committee or electing a representative from the Competition authority, to regularly assist and act as an ex-officio member of each sector regulator. The latter approach is followed in Zambia.

In India, the current framework provides for consultations between the two regulatory authorities but it is not adequate as the opinions of the authorities in these matters are not binding. However, the proposed amendments seek the inclusion of the same under the Competition (Amendment) Bill, 2012.

Argentina, France and Turkey, also have legal provisions for consultations between Competition authority and sector regulators.

South Korea

Overlap conflicts exist mostly in the Telecom and financial sector with Korea Fair Trade Commission (KFTC) responsible for enforcement of Monopoly Regulation and Fair Trade Act (MRFTA) and sector regulator is Korea Communications Commission (KCC). There have been conflicts between the Ministry of Information and Communication (MIC) – KCC and KFTC; ambiguity in mergers and acquisitions with regard to KCC adopting KFTC's opinion. There are other conflicting provisions such as Article 63 of MRFTA (consultation with KFTC for proposing legislation or amendments); Section 54 of the Telecom Business Act (TBA) (precludes the application of MRFTA in case of anti-competitive practices in the telecom sector); Section 28 of TBA (notification to KCC and authorisation of its service rates). So, there is lack of clarity of responsibility, duplicity of functions and inconsistency of decision and process, uncertainty of regulatory powers in Korea.

Collaborative
In this model, the competition agency is entrusted with the responsibility of enforcing competition and determining whether or not effective competition exists or is absent, to justify price regulation. Administration of price regulation is done by the sector regulator. Mexico has adopted this approach.

Use of Common Appellate Authority
Many countries have common appellate tribunals/ authority, to adjudicate over disputes arising between the competition authority and sector regulator. For instance, in the UK, there is a Competition Appellate Tribunal (COMPAT) and an Anti-monopoly court in Poland.

In India, the common appellate authority is the COMPAT, to hear and dispose of appeals from decisions/orders/directions issued by the CCI. It also acts as the appellate authority called Airports Economic Regulatory Authority Appellate Tribunal, to adjudicate any dispute between two or more service providers, between a service providers and a group of consumer and to hear and dispose appeal against any direction/decision/order of the Airports Economic Regulatory Authority.

Lessons for India and the Way Ahead

Countries world over have adopted approaches to address regulatory overlap conflicts to fit their varied realties. 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.

Transition from Cooperation to Mandatory Consultation
The current procedure only provides for reference by the statutory authority to the Commission and vice-versa, in sections 21 and 21A of the Competition Act, 2002, respectively. But, this does not pacify the problem because the opinion provided by both agencies to each other, are not binding. There has been only one reported case by the Maharashtra Electricity Regulatory Commission, which sought an opinion from CCI, but whether or not the opinion was adopted, is not known.

In this regard, the National Competition Policy, at Para 8.6[2] provides that coordination between sector regulators and the CCI should be made mandatory through suitable provisions in the Competition Act, 2002 and relevant sectoral laws. The same has been incorporated in the proposed 2012 amendment bill, which is awaiting Parliament's approval.

Recommended Approach
The conclusion drawn after carefully studying various jurisdictions is that the best approach for India is a Concurrent framework, envisaging a mechanism for mandatory consultations between sector regulators and competition authorities. Here, demarcation of roles will be a sensitive issue. Thus, the following elements become necessary:

a. Recognition of the roles and competency of the 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 regulators need to appreciate the technical and behavioural differences existent between the two. The sector regulators should have the lead in the *ex-ante* technical issues and competition authority in the largely behavioural *ex-post* issues and where regulators cannot solve issues amicably, joint expert bodies should resolve the dispute.

Endnotes

1 www.iica.in/images/Harmonising%20Regulatory%20Conflicts.pdf.
2 www.mca.gov.in/Ministry/pdf/Revised_Draft_National_Competition_Policy_2011_17nov2011.pdf

This Briefing Paper has been drawn from a research study entitled, 'Harmonising Regulatory Conflicts: *Evolving a Cooperative Regime to Address Conflicts Arising from Jurisdictional Overlaps between Competition and Sector Regulatory Authorities'* done by CUTS for the Indian Institute of Corporate Affairs, New Delhi in November 2012.