

SECTORAL REGULATORS & CCI: CONFLICT OR COMPLEMENT:
A STUDY IN THE WAKE OF COMPETITION ACT, 2002

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ABSTRACT

Competition is a crucial element for the functioning of markets in any country. In order to maintain competition in the market in India, the Competition Commission of India (CCI) has been set up. The primary task of the CCI is to prevent activities having appreciable adverse effect on competition within India. This helps in ensuring competition in the market. With the emergence of the LPG era, various sectors of the economy came to the fore, and thus came up sector specific regulators as well. These sector specific regulators, have among other things as their primary functions, the maintenance of competition. Now a question arises, when there are so many sector specific regulators in place to protect consumer interest in terms of competition regulation, is there a need for a CCI dealing exclusively with competition issues in India. Therefore the moot question addressed by the present paper shall be: is there a need of giving sector regulators the power to deal with competition law issues when there is a Competition Commission of India in place to deal with competition regulation for ensuring consumer welfare as provided for under the Consumer Protection Act, 1986.

1. Backdrop:

Competition law and consumer protection law go hand in hand. The ultimate aim of both is to ensure consumer welfare. The aspect of consumer welfare gained prominence with the opening up of the Indian economy in the 90s. Several to and fro transactions took place and the Indian industries went into competition mode with the entry of foreign players in the market. Various sectors of the economy went into competition mode and this demanded better regulation of the respective sectors. With this emerged the concept of sectoral regulators. The Indian regulatory framework provided for various sectoral regulators which looked at both consumer welfare and aspects of competition. Now with the Indian regulatory framework looking good with the existence of sectoral regulators, the Indian Competition Act, 2002 was passed which seeks to act as an umbrella legislation dealing with competitive

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concerns of the various sectors in India. Thus came conflict between the respective sectoral regulators and the apex body established under the Competition Act, 2002, ie: the Competition Commission of India (CCI). This directly sought to affect consumer welfare with the conflict between sectoral regulators and CCI reaching alarming proportions. With this backdrop, the present essay seeks to analyse the aspect of co-existence of sectoral regulators and the CCI and as to whether the CCI should be given exclusive jurisdiction in matters related to competition in order to ensure a higher level of consumer welfare.

2. Introduction:

The primary impact which the sectoral regulators were sought to make was related to consumer welfare. The moot question is: how to ensure consumer welfare. One way of achieving this is to take care of competition concerns arising in the market. This is primarily sought to be done with the help of competition law. The basic purpose of any antitrust law is to ensure consumer welfare. With all this in mind, over a period of time, various regulators for sectors like insurance, banking, telecom, petroleum, etc. have been put in place. Consumer welfare has been ensured by putting in a clause or two about competition regulation in the statutes governing the sectoral regulators. This can be seen by the various legal provisions of the statutes that have been put in place for ensuring smooth competition in the Indian market in the respective sectors. Therefore another question that arises is when we have specific sectoral regulators in place for dealing even with competition law concerns and not issues, is there any need of having a specific body dealing with competition law issues at the national level which shall subsequently govern international business conduct affecting Indian market as well for ensuring consumer welfare. The answer to the aforementioned question forms the basis of the present essay. In order to answer the aforementioned question, one needs to have a look at the various statutes that are in place governing the sectoral regulators. At the outset, it may be mentioned that the following key sectoral regulators are in place governing the regulatory landscape of the respective sectors in India:

1. Securities market – Securities & Exchange Board of India Act, 1992 (SEBI).¹
2. Insurance market – Insurance Regulatory and Development Authority Act, 1999 (IRDA).²
3. Petroleum sector – The Petroleum and Natural Gas Regulatory Board, 2006 (PNGRB).³

¹ Act no.15 of 1992.

² Act no.41 of 1999.

4. Telecom sector – Telecom Regulatory Authority of India Act, 1997 (TRAI).⁴

5. Electricity sector – Electricity Act, 2003.⁵

The present essay shall focus on the abovementioned sectors. A critical analysis of the Competition Act, 2002, reveals that competition regulation is, to some extent, sought to be made the exclusive domain of the Competition Commission of India (CCI), the nodal authority established under the Competition Act, 2002, for dealing with competition law issues affecting the domestic market by way of national as well as international conduct.⁶

3. The Consumer Protection Act, 1986 and competition:

It would be relevant to look here at the purpose of the Consumer Protection Act, 1986 (the ‘COPRA’).⁷ In the primitive stages man used to look after his basic needs. But with the growth in trade, and the subsequent doing away of the barter system, humans realized the value of the money they were earning and the need to spend it wisely. Soon trade started to occur not only at the domestic level but also at the international level and an ever greater need to ensure consumer welfare was required at the national as well as international level.⁸ The United Nations Economic and Social Council has made certain recommendations on the role of the governments in safeguarding the interests of consumers.⁹ In line with the above requirements India enacted its own competition law in the form of Monopolies and

³ Act no.19 of 2006.

⁴ Act no.24 of 1997.

⁵ Act no.36 of 2003.

⁶ India enacted its own competition law in the form of Competition Act, 2002. The object of the Act as stated in the preamble to the Act provides for the establishment of a Competition Commission of India to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. The aforementioned legislation of India takes a leaf out of the US statute books wherein help has been taken in forming the basis of antitrust legislation in India. The primary legal provision of the US statute is section 1 of the Sherman Act, 1890. For a detailed analysis of what the Sherman Act does, please see, *Standard Oil Co. of New Jersey v US*, 221 US 1 (1910).

⁷ Act no.68 of 1986.

⁸ Please see the measures relevant to consumer protection agreed at the inter governmental working group on the Code of Conduct of the Commission on Transnational Corporations at its fourth session in March 1978. (Source: Dr. J.N. Barowalia, *Commentary on the Consumer Protection Act*, 5th ed. Rprt. 2014, Universal Law Publishing Co. New Delhi India at p.3)

⁹*Ibid.* at p.4.

Restrictive Trade Practices Act, 1969 (the 'MRTP Act') as early as 1969. Subsequently the MRTP Act was repealed with the enactment of the Competition Act 2002 of India, in line with the international obligations flowing out of the international trade agreements of the World Trading Organisation (WTO) viz. the GATS and TRIPS.¹⁰ India based its law on consumer protection on the mandate of Article 47 of the Constitution of India.¹¹ Consumer welfare in India also derives its strength from Article 21 of the Constitution of India. The relevant portions of the Constitution of India are Part III and IV relating to fundamental rights and directive principles of state policy respectively talk of consumer welfare and a constructive approach has been taken by the Indian Judiciary as well.¹² Various provisions of the Consumer Protection Act, 1986 as well as the Sale of Goods Act directly state the concept of implied warranty as to the goods being sold in the market which is also the concern of competition law (which applies equally to products as well as services being sold in the market).¹³ Section 8B of the Consumer Protection Act, 1986, provides for one of the objectives of the District Consumer Protection Council as the right to be assured, wherever possible, access to a variety of goods and services at *competitive prices*. Therefore it can be said that the COPRA and the Competition Act, 2002 complement each other.

Antitrust laws take care of almost all concerns relating to consumer welfare. The distributional aspect of competition law in India cannot be ignored as it has been modelled on the international law on antitrust as for example, in the US and EU.¹⁴ When antitrust or competition law does so much, why is there a need of sectoral regulators specifically trying their hand in competition law issues. It needs to be reiterated at this stage of the essay that when we talk of the relevance of sectoral regulators, we are concerned with their efficacy in

¹⁰ For more on the topic please see, T. Ramappa, *Competition Law in India: Policy, Issues and Developments*, 2nd ed. 2009, Oxford University Press at p.8.

¹¹ Part IV, Directive Principles of State Policy, Article 47, Constitution of India. In order to meet the changing circumstances, the Consumer Protection (Amendment) Act, 1993 was enacted. (For more on the topic, please see, Dr. J.N. Barowalia, *Commentary on the Consumer Protection Act*, 5th ed. Rprt. 2014, Universal Law Publishing Co. New Delhi India at p.7).

¹² *Maneka Gandhi (Smt) v Union of India*, AIR 1978 SC 597; *Rudul Sah v State of Bihar*, AIR 1983 SC 1086.

¹³ See sections 12, 13, 14, 15, 16 and 17 of the Sale of Goods Act, 1930.

¹⁴ For the distributional aspect of competition law, and other related topics, please see, Richard A. Posner, *Antitrust Law*, 2nd ed. 2001, The University of Chicago Press, Chicago and London. (Also See, James Maxeiner, *Policy and Methods in German and American Antitrust Law: A Comparative Study*, 1986 ed., Praeger Publications; Cornelis Canenbley, *Enforcing Antitrust Against Foreign Enterprises*, 1981 ed. Springer Science + Business Media B.V.).

terms of competition law issues and nothing else. It needs to be stated that the statutes establishing sector regulators are not in derogation of competition law or vice versa. Both competition law and the laws on sectoral regulators are on the point of tussle when it comes to competition law issues and it is on this aspect, it is stated in the present essay that the establishment of CCI is an exclusive step in the right direction for matters dealing with competition law issues. In the light of above, it would be relevant to look at the mandate of competition issues in the sectors under consideration in the present essay.

4. Competition law issues and the mandate of other sectors:

1. Securities Market:

The securities market in India got a boost with the implementing legislation in the form of Securities & Exchange Board of India, 1992. A sound financial system is the demand of every economy. A sound economy promotes the growth of savings of households and this in turn leads to increased investment in the economy. Savings of people are channelized and it is made available to those in need of them. The activities include production, distribution, exchange and holding of financial instruments or assets of different kinds by financial institutions, banks and other intermediaries of the market. There are various indicators of economic growth and one of them is financial system of a country. Financial markets form a part of the organisational set-up of financial system. Securities market forms a subset of this financial system. The securities market refers to the markets for those financial instruments or claims or obligations that are commonly and readily transferrable by sale.¹⁵ Sections 11(2)(e) and 11(2)(h) of the SEBI Act, 1992, can be termed as the provisions which may result in conflict with the mandate of the CCI. In order to understand the aforementioned statement, one may have a look at section 12A of the SEBI Act so that the duplicity of efforts may be understood perfectly.¹⁶ It is clear after a reading of the aforementioned provisions that SEBI has a clear mandate in dealing with fraudulent and unfair trade practices and also the offence of insider trading. But the need of SEBI in dealing with the trade practices as mentioned

¹⁵ For the functions of SEBI, please see Section 11 of the SEBI Act, 1992.

¹⁶ Sub sections (a), (b) and (c) of section 12A pertain to prohibitions on fraudulent and unfair trade practices. Also See, Regulations 3(b), 3(c) and 3(d) of the *SEBI (Prohibition of Fraudulent and Unfair Trade Practices) Regulations, 2003*. These provisions have been borrowed from the anti fraud provisions existing in the US securities laws. For a detailed discussion on the aforementioned, please see, Sumit Agrawal & Robin Joseph Baby, *Agrawal & Baby on SEBI Act*, Taxmann at p.273.

before can be done away with the coming into being of the CCI. There is a technical aspect that can be highlighted in the present part of the essay. So many firms, brokers, sub broker, underwriters, etc. are involved in the activities of SEBI that there can often be a justification to the numerous rules and regulations on the statute book when it comes to operation and enforcement of SEBI matters. But competition regulation is also a technical job and it should not be left to the mandate of a sector specific body which, may fail to appreciate the nuances of overall economic development of the country.

2. Insurance sector:

The insurance sector has a very important role to play in the economic development of the country. It is only when the people of a country are socially secure that they would be able to work in a better manner for economic development. After having a look at section 14(2) of IRDA Act, it becomes clear that IRDA does not delve too much into competition regulation. This could act as a breather for the CCI but then again there are the IRDA (Scheme of Amalgamation and Transfer of General Insurance Business) Regulations 2011 which provide for powers to IRDA in dealing with or to regulate combinations in the insurance sector which is also subject to the scrutiny of CCI.¹⁷ But this authority is in direct conflict with sections 5 and 6 of the Competition Act, 2002. There is apparent overlapping and duplicity of efforts in providing for legal regulation of the same nature at two different forums. Therefore as per the mandate of the CCI contained in terms of sections 5 and 6 of the Competition Act, 2002, the CCI is the appropriate body to deal with issues related to combinations and regulation of combinations of any nature.

3. Petroleum sector:

The preamble to the PNGRB Act, 2006, states a word or two about promotion of competitive markets and for matters connected therewith or incidental thereto. This clearly indicates that the mandate of the CCI is sought to be transferred by way of the very preamble itself. Therefore the task of promoting and sustaining competitive markets should be left to the CCI itself under the aegis of the Competition Act, 2002. Section 11(a) of the PNGRB Act states that the Board established under the Act shall protect the interests of consumers by fostering fair trade and competition amongst the entities. This is very typical, as there is again sought to be created duplicity of efforts and more importantly duplicity of mandate in the Indian

¹⁷ IRDA Regulations available at www.irda.gov.in (last visited on 29-06-15).

regulatory sector. The PNGRB should be brought under closer scrutiny of the CCI and therefore the requirement of dealing with competition issues at an independent level by the PNGRB Board should be done away with.

4. Telecom sector:

The telecom sector saw the pangs of regulation with the coming into force of the Telecom Regulatory Authority of India Act, 1997. Chapter III of the TRAI Act, 1997, states the powers and functions of the authority (ie: TRAI) under the TRAI Act, 1997.¹⁸ A look at the functions of the TRAI indicates that even though it has been given the powers to promote competition and to prevent it from unfairness wherever possible, it does not have an overriding effect on the powers of the CCI established under the Competition Act, 2002. Therefore there is no problem with this sector but still in order to avoid any multiplicity of efforts, there can be a clear demarcation of the powers to be exercised by the CCI and TRAI respectively.

5. Electricity sector:

The Electricity Act, 2003, is the consolidated piece of law governing the electricity sector in India. Under the Act, the regulator has been conferred powers to deal with anti competitive agreements, abuse of dominant position and combinations pertaining to the electricity sector.¹⁹ Now this is a clear overlapping of functions and efforts to be put in by both the CCI and the regulator established under the Electricity Act, 2003. This needs to be corrected and whatever is the core function of CCI should remain with it.

5. Competition law concerns and establishment of the CCI, a *brave* step towards ensuring consumer welfare:

The establishment of the CCI in India can be termed as a brave step towards ensuring uniformity with respect to competition law concerns and subsequently consumer welfare. The step can be termed as brave because with so many sectoral regulators already in place which are also having jurisdiction to deal with competition law issues, the establishment of an all pervading authority over the competition regulatory landscape can hardly be termed as anything short of brave. The CCI is the authority entrusted to achieve the objects of the

¹⁸ Section 11, TRAI Act, 1997.

¹⁹ Section 60, Electricity Act, 2003.

Competition Act, 2002.²⁰ It would be pertinent to mention at this stage the core areas of the Competition Act, 2002, contained in sections 3, 4, 5 & 6. Section 3 deals with anti competitive agreements, section 4 deals with abuse of dominance, section 5 deals with combinations and section 6 deals with regulation of combinations.²¹ Emphasis has been given to appoint those persons as chairman and members of the Commission who are having *relevant* practical experience of the working of the Indian as well as international industry.²² One should have relevant knowledge of the anti competitive practices, conduct that forms abuse of dominance, combinations and regulation of combinations in India as well as abroad. One of the very important provision of the Competition Act, 2002, is section 49 of the Act. It provides for a competition advocacy role for the CCI. The summation of all the views on the importance of CCI making it an all encompassing body relevant to every sector can be seen from the recommendations of the Raghavan Committee. The relevant part of the Raghavan Committee report in para.6.4.7. and 6.4.8. states that:²³

6.4.7 Competition Advocacy – The mandate of the CCI needs to extend beyond merely enforcing the competition law. It needs to participate more broadly in the formulation of the country’s economic policies, which may adversely affect competitive market structure, business conduct and economic performance. The CCI therefore needs to assume the role of

²⁰ Section 7 of the Competition Act, 2002, provides for the establishment of a Competition Commission of India (CCI) to deal with practices having an adverse effect on competition within India. Section 7(1) vests powers in the Central Government of India to establish the Commission through a notification. For a brief discussion on the comparative law prevalent in other jurisdictions please see, T. Ramappa, *Competition Law in India: Policy, Issues and Developments*, 2nd ed. 2009, Oxford University Press at p.259 - 266.

²¹ For a detailed discussion of the core areas of the Act, please see, S.M. Dugar, *Guide to Competition Law*, VOL.I. 5th ed. 2010, Lexis Nexis Butterworths Wadhwa Nagpur.

²² See, T. Ramappa, *Competition Law in India: Policy, Issues and Developments*, 2nd ed. 2009, Oxford University Press, at p.43.

²³ Source: S.M. Dugar, *Guide to Competition Law*, VOL.I. 5th ed. 2010, Lexis Nexis Butterworths Wadhwa Nagpur at p.1076, 1077. For more on the topic of competition advocacy, please see, T. Ramappa, *Competition Law in India: Policy, Issues and Developments*, 2nd ed. 2009, Oxford University Press at p.339. it may be stated at this juncture of the essay that the mandate of the CCI has been extended so that it participates not only in the enforcement of competition law but also takes part in the formulation of the country’s economic policies.

For a detailed discussion on Duties, Powers and Functions of the Competition Commission of India, please see Addendum on the Competition (Amendment) Act, 2007, *Chapter IV, Duties, Powers and Functions of the Commission: Amendments in Chapter IV of the Act*, as occurring in T. Ramappa, *Competition Law in India: Policy, Issues and Developments*, 2nd ed. 2009, Oxford University Press at p.311.

a competition advocate, acting proactively to bring about governmental policies, that lower barriers to entry, promote deregulation and trade liberalisation and promote competition in the market place.

6.4.8A successful competition advocacy can be viewed in terms of the following:

1. CCI must develop relationship with the Ministries and Departments of the Government, regulatory agencies and other bodies that formulate and administer policies affecting demand and supply position in various markets. Such relationships will facilitate communication and a search for alternatives that are less harmful to competition and consumer welfare.

The relevant provisions of the Competition Act, 2002, of India dealing with competition regulation in particular are sections 18, 20, 21 and 60. Section 18 of the Act deals with duties of the competition commission. It provides that it shall be the duty of the Commission to eliminate practices having adverse effect on competition, to promote and sustain competition in markets in India, *to protect the interests of consumers* and to ensure freedom of trade carried on by other participants in markets in India.²⁴ Section 20 of the Competition Act, 2002, provides for inquiry into combination by commission. The key aspect under section 20 is that the CCI has exclusive powers in dealing with matters which cause appreciable adverse effect on competition within India. Sub clause (4) of section 20 states the factors which may be taken into account for determining whether a combination has or is likely to have appreciable adverse effect on competition within India.²⁵ It needs to be noted that by virtue of section 21 of the Act, respect is given to the existence of other sectoral regulators as well.²⁶ Finally, all deliberations and discussions are laid to rest by virtue of section 60 of the Act which states that the Competition Act, 2002, shall have overriding effect notwithstanding anything inconsistent contained in any other Act for the time being in force. This proves the supremacy of the Competition Commission of India (CCI) beyond all doubt over other sectoral regulators.

²⁴ Section 18, Competition Act, 2002.

²⁵ Section 20, Competition Act, 2002. It provides for the jurisdiction of the Commission as well with respect of various matters.

²⁶ Section 21, Competition Act, 2002. Also See, Section 2(w) of the Competition Act, 2002 where statutory authority has been defined.

It is not that the Competition Commission of India is a paper tiger. It has, on a number of occasions delivered pathbreaking judgments on the feasibility of projects affecting the Indian economy at large and also made some crucial observations with regard to industries in various sectors.²⁷The competing regulatory agendas can be laid to rest with an all pervading CCI in matters of competition regulation. Federal or state governments may have different economic agenda and thus the sectoral regulators agenda may come into conflict with the respective government's agenda. In order to resolve this deadlock, the CCI is the best option to regulate the competition issues at various levels. To quote, 'the country's leading legal experts have complained that the competing regulatory agenda of India's multiple regulators often result in the regulators applying varying interpretations of a stated law, which creates substantial confusion and disrupts settled market practice. A lack of coordination between regulators also wastes taxpayer money since it results in reinvention and duplication.'²⁸CCI has also been active in smelling the presence of an existing cartel or detecting the formation of a potential cartel which has led to establishing the credibility of CCI as a superb regulator when it comes to ensuring consumer welfare.²⁹

6. Lessons for India: Recommendations for better functioning of the CCI under the mandate of the Competition Act, 2002:

- Enforce the provisions which form the core of the Competition Act, 2002, more effectively which shall fall within the exclusive ambit of CCI.

²⁷ See, *CCI might ask Sun Pharma, Ranbaxy to divest products*, Business Standard, New Delhi ed. July 31, 2014; *CCI waits for net neutrality norms before probing telco plans*, Business Standard, New Delhi ed. May 10, 2015; *Avirup Bose: Too many regulators cause a regulatory deficit*, Business Standard, August 18, 2014; *CCI should regulate competition issues of all sectors: Chairman*, Business Standard, New Delhi ed. July 4, 2012.

For an effective and detailed analysis of the functions performed by the CCI, please see, KK Sharma, *Competition Commission Cases: A Compendium of CCI cases from 2009 to 2014*, 2014 ed. Lexis Nexis.

²⁸ *Avirup Bose: Too many regulators cause a regulatory deficit*, Business Standard, August 18, 2014. For more on the topic of sectoral regulators and competition law and for having a view on the supremacy of CCI over other sectoral regulators please see the interview of Shri Ashok Chawla as appeared in Business Standard titled, *I think all sectors would fit into CCI Act's overall architecture: Ashok Chawla*, Business Standard, November 16, 2012.

²⁹ *CCI probing alleged cartelisation in pharma, telecom sectors*, Business Standard, New Delhi ed. September 03, 2012; *Competition regulator smells cartelisation*, Business Standard, New Delhi ed. August 17, 2012.

For more on the topic of cartels, also see, Richard Whish, *Competition Law*, 6th ed. 2009, Oxford University Press, at p.384.

- The mandate available to the CCI by virtue of sections 18, 20, 21 and 60 should be made more effective in the times to come.
- There should be complete *doing away with* of the issues having a competition law angle being dealt with by the regulators established in the respective sectors. This does not mean that the sectoral regulators be abolished but only that the mandate available to them to deal with competition regulation should be done away with.
- There is no need for many different forums for competition law and the establishment of one CCI is sufficient.
- The decisions or opinions given by the CCI should be made mandatory on the sectoral regulators.
- The establishment and functioning of the Competition Appellate Tribunal (COMPAT) is sufficient to provide an alternate forum when it comes to competition law issues and thus no need of sectoral regulators dealing with competition law issues.
- Section 49 of the Competition Act, 2002, should not become a dead letter and competition advocacy should form a part of enforcement of the core functions of the CCI.
- The technical expertise required for handling issues related to a specific sector should be left to the sectoral regulators whereas competition regulation should be left exclusively within the jurisdiction of the CCI established under the aegis of the Competition Act, 2002.
- All competition law matters or issues are to be handed over by the sectoral regulator to the CCI.
- There should be recognised a difference between technical issues and competition law issues for better delineation of functions.
- Remedial measures taken by the sectoral regulators should not conflict with the mandate of the CCI related to competition issues.
- Finally, competition regulation should become the exclusive domain of competition commission of India whereas all other technical issues can be taken care of by the respective sectoral regulators.