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**INTERACTIONS BETWEEN COMPETITION AUTHORITIES AND SECTOR REGULATOR –
Contribution from CUTS**

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Please contact Ms. Lynn Robertson [E-mail: Lynn.Robertson@oecd.org], if you have any questions regarding this document.

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Interactions between Competition Authorities and Sector Regulator

Cooperation between Sectoral Regulators and Competition Authority in India

– Contribution from CUTS –

1. Competition law regime went through a jurisprudential shift in India post the economic liberalisation reforms. Like many other pre-1991, the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) was also repealed. The high-level Committee (Raghavan Committee) evaluated the MRTP Act and recommended a new law on competition, in line with the international competition law developments.¹ Thus came the Competition Act 2002, which focused on fostering competition and consumer welfare, and under the Act, the Competition Commission of India (CCI) regulator was also set up, as the general antitrust regulator. There was a philosophical change in India's competition regulatory ecosystem, keeping with the spirit of liberalisation and privatisation. The MRTP Act would be triggered with existence of dominance in the market, which changed to competition law enforcement against abuse of dominant position.

2. Along with this change in competition regulation, another change which was triggered post 1991, was establishment of independent, statutory sector-specific regulatory authorities, such as Securities and Exchange Board of India (SEBI), set up in 1992; Telecom Regulatory Authority of India (TRAI), set up in 1997; Central Electricity Regulatory Commission (CERC), constituted in 1998. Independent regulators are backed by legislation and operate autonomously and with no undue influence from political forces or private entities. This independence, and their relationship with competition authorities, is crucial because their goals are aligned. 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. Moreover, 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 investigates the behavioural and *ex post* issues.²

3. The sectoral regulators can complement the role of the antitrust watchdog to ensure a coherent and consistent policy for the sector.³ This can be achieved only if the sectoral regulators avoid anti-competitive regulatory measures, and take steps to stimulate effective competition through better regulation. These regulations can include interventions to tackle asymmetric information, reduced barriers to entry, setting standards for interoperability and limiting exploitation of behavioural biases.⁴

¹ No 12 of 2003

² <http://callcocca.com/wp-content/uploads/2012/11/Harmonising-Regulatory-Conflicts111.pdf>

³ Competition Regulation and Regulatory Governance - GRIN
<https://www.grin.com/document/432160>

⁴ [Regulatory Management and Reform in India](#)

1. Issue of Overlap: The Challenge to Cooperation

4. Economic regulation and competition policy are interdependent instruments of economic policy which, while distinct, can have overlapping scopes. Competition law seeks to strengthen the market by prohibiting anti-competitive behaviour that gives rise to exercise of abuse market power. Economic regulation addresses ‘market failure’ and is a state-directed control over the market players. Hence, competition policy and economic regulation often share the purpose of enhancing market efficiency, improving economic performance by preventing dominance of market power and avoiding inefficient regulations.⁵ With their converging objectives, both the competition authority and the sectoral regulators aim to improve the economic performance of the country. So there exist overlaps and complementarities between the sector-specific regulators and competition authority.

5. In India, each sectoral regulator was set up with different legislative mandates and as a result of which the perspective and approach towards competition matters may also be different. Some sector regulators were also given the responsibility to promote competition in the areas under their ambit. This objective was later bestowed upon the competition authority, when it was eventually established. Some sectoral laws which were enacted after the Competition Act, 2002, also give sectoral regulators some competition enforcing functions. Since, competition enforcement is a mandate of CCI, a scenario of overlapping jurisdictions and conflicts has been created. There has been a widespread critique of India's complex and unnavigable regulatory architecture that leads to overlap and conflicts. The conflict inherently is between the idea of the sector expertise of sectoral regulators like SEBI vis-a-vis the overarching expertise of CCI in maintaining the integrity of the market for businesses and consumers alike.⁶

6. Despite these common objectives, they have different legislative mandates and statutory goals. The regulatory interface and overlap problem is centred on the degree to which sectors being opened up to greater competition should also be subject to general competition laws. The former opts for structural remedies to market violations, and the latter typically imposes and monitors behavioural conditions on the market players.⁷

7. The powers, functions and jurisdictional aspects of regulators are embedded in their respective statutory frameworks. In the past there have been instances of overlap due to interpretations of the legislative provisions of the parent statute, in a particular situation where both the legislations had a ‘non- obstante clause’ in it.⁸ These provisions have authorised the sectoral regulators to protect consumer interest and promote competition, but not curb anticompetitive practices. However, CCI is required to do both and ensure a level playing field, in addition to curbing anticompetitive practices in any sector.⁹

8. The courts in India have applied various principles in such cases, inter alia, including specific legislation prevails over general legislation, newer legislation prevails over older legislation etc. The Supreme Court had opined that as a principle of

⁵ [CCI vs. SEBI: Overlapping Jurisdiction of CCI and a Sectoral Regulator - IndiaCorpLaw](#)

⁶ <https://www.mca.gov.in/content/mca/global/en/about-us/affiliated-offices/cci.html.html>

⁷ https://www.cci.gov.in/public/images/publications_booklet/en/introduction-to-competition-law-part-5-regulatory-bodies-and-coordination-between-the-competi1652182541.pdf

⁸ <http://competitionlawblog.kluwercompetitionlaw.com/2018/05/24/sectoral-regulation-competition-law-jurisdictional-overlaps-tracing-viable-solution-indian-context/>

⁹ <https://www.oecd.org/regreform/2503205.pdf>

interpretation, *lex specialis* prevails over a general legislation as the special legislation governs only the specific sector. The rationale behind the principle that newer legislation prevails over older legislation is that the legislature is assumed to be aware of the existence of the laws and hence, a ‘non-obstante clause’ in the latter enactment implies an intention on their part on the application of the latter legislation over the former.¹⁰

9. To consider certain examples, recently a matter of jurisdiction over regulation of 'debenture trustees' reached one of the High Courts in India. The question before the court was the jurisdiction of the CCI over the SEBI. The electricity sector regulatory regime can also be problematic in this regard, because the Electricity Act, 2003, specifically empowers the CERC to curb anti-competitive practice. Fortunately, the CERC has not drafted any rules to implement this provision and, thus, there has been no substantive conflict with CCI. Like a standard practice, there is a non-obstante clause in the Electricity Act, which gives the Act an overriding effect over any other legislation in derogation of the Act. It can complicate the situation, if invoked.¹¹

10. Therefore, it is apparent that the issue of jurisdictional conflict between sectoral regulators and competition authority is due to a multiplicity of reasons, such as ambiguous legislative framework, regulatory design and judicial precedents. Even in the telecom sector, this was a longstanding issue.

2. Telecom Sector: The Battle for Turf

2.1. Legislative Framework

11. Regulation in the telecom sector is in the hands of TRAI and Department of Telecom (DoT). TRAI was established in accordance with the Telecom Regulatory Act, 1997, with an aim to regulate telecommunication industry in the country and to protect the interests of the investors and the consumers.¹² Section 38 of the Act provides that the provisions of the Act shall be in addition to any Act which devolves power on the Telegraph Authority to perform any role, function or authority.¹³

12. Therefore, TRAI has a very specific role to play under the Act. Section 11 of the TRAI Act delegates power to TRAI to “facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services”.

13. The preamble of the Competition Act, 2002 read with Section 18 of the legislation delegates to the CCI the duty of “promoting and sustaining competition” in the Indian economy. This implies that the CCI will have principal jurisdiction to regulate conditions of competition in the relevant market of India. Section 18 of the Competition Act 2002 entrusts a duty on the commission to encourage fair competition and protect the interest of participants. CCI is tasked to control and curb the illegal practices or the anti-competitive practices, and on the other hand promote competition and protect the interest of the consumers. Therefore, the two statutes talk about the same objective i.e. fair competition,

¹⁰ Competition Regulation and Regulatory Governance - GRIN <https://www.grin.com/document/432160>

¹¹ <https://www.eastasiaforum.org/2021/05/21/indias-competition-laws-need-to-tackle-regulatory-shopping/>

¹² https://cuts-ccier.org/pdf/Synthesis_Report-Harmonising_Regulatory_Conflicts.pdf

¹³ [Regulatory Tussle: Competition Commission of India v. Controller of Patents & Ors. | Lakshmikumaran & Sridharan Attorneys](#)

protection of the interest of the participants and the consumers and building up an environment which promotes healthy competition. The objectives of both legislations, when read together, intend to create an environment that may facilitate fair competition. In fulfilling the concerned objective, the jurisdiction of TRAI and the CCI overlap, which has led to conflicts in the jurisdiction¹⁴ Although the watchdogs (the CCI and TRAI) share a common goal, they differ in their mandate and approach. The difference in approach adopted by the CCI and TRAI towards a similar objective leads to cases of jurisdictional conflicts.¹⁵

2.2. Judicial Pronouncements

14. On 5 December 2018, a two-judge bench of the Supreme Court in *Competition Commission of India v. Bharti Airtel Limited and Others*¹⁶ addressed and settled the issue of the ongoing jurisdictional battle between the CCI and TRAI. In the case the Supreme Court clarified as to who would have jurisdiction over telecom disputes. The judgement was given with the help of doctrine of harmonious construction.

15. The Supreme Court said that the TRAI regulates the telecom sector and is a specialised body and ensures healthy growth of this sector in India on the other hand CCI's objective is to encourage fair competition and ensure freedom to trade in markets and products. TRAI manages only a particular sector and CCI is the general regulator in the market. The dispute in question was related to interconnectivity agreements, terms of licences of the telecommunications and it became mandatory for the sectoral regulator to act on it. The objective of CCI is different from the objective of TRAI and so are their functions. It is within the jurisdiction of CCI to observe an agreement which is anti-competitive in nature and the effect of that agreement in the market. This function is only covered by the CCI and the TRAI has no jurisdiction in such matters. The Supreme Court did not agree that in such matters the jurisdiction of CCI can be taken away.¹⁷

16. Lastly Supreme Court said that it is the TRAI who shall exercise its jurisdiction first in case of telecom disputes and CCI will have a follow up jurisdiction i.e., if the TRAI feels that an anti-competitive practice is adopted, it shall refer the dispute for adjudication to the CCI.¹⁸

2.3. Present Scenario

17. TRAI¹⁹ is set to supersede antitrust peer CCI²⁰ when it comes to powers to draw up predatory pricing norms in the telecom sector. Under the new proposed draft Telecom Bill (2022), the powers to draw up norms defining predatory prices will now be with the TRAI

¹⁴ [CCI vs TRAI by Dhruv Dhawan.](#)

¹⁵ [Role of CCI in Regulated Sectors: Overlapping Jurisdictions](#)

¹⁶ https://cuts-ccier.org/pdf/Edition-11-Analysis_of_Competition_Cases_in_India.pdf

¹⁷ [Whose jurisdiction is it anyway? India desperately needs a regulatory overhaul](#)

¹⁸ https://main.sci.gov.in/supremecourt/2017/40072/40072_2017_Judgement_05-Dec-2018.pdf

¹⁹ <https://www.financialexpress.com/about/trai/>

²⁰ <https://www.financialexpress.com/about/ci/>

and the CCI will no longer be defining or investigating such issues. The draft Bill empowers TRAI in this area by adding new clauses to sub section (2) of Section 11 of the TRAI Act.²¹

3. New Competition (Amendment) Bill: Failure to address Overlap

18. The recently introduced Competition (Amendment) Bill 202222 seeks to broaden and widen the scope of consultations between CCI and sectoral regulators.²³

19. Legal experts are, however, divided on the issue of the Bill solving for all issues around inter-regulatory coordination.²⁴ The Clauses 16 and 17 of the Bill, by amending Section 21 and Section 21A of the Competition Act, 2002, seek to address the issue of jurisdictional overlap between sectoral regulators and CCI. Though the proposed amendments are steps in the right direction, the same are not sufficient to solve the actual jurisdictional conflicts. This issue has been investigated in detail previously as well by the Standing Committee on Finance (15th Lok Sabha) while deliberating upon the Competition (Amendment) Bill, 2012 recommended replacing “may” with “shall” in Sections 21 and 21A of the Competition Act, 2002, to institutionalise a system of consultations between CCI and statutory regulators.²⁵

20. Therefore, it should be noted that the solution to the given issue lies in making the consultation framework binding on both sets of regulators, the CCI and the sector regulators. The present Bill falls short of creating such a framework.²⁶

4. Need for cooperation: Best Practices

21. The overlaps between CCI and regulators have the potential to transform into a hotbed of dispute due to the multiplicity of sectoral regulators in India. Any one transaction through its range of transactions can be spread over several regulators without one analysing the full picture. This regulatory conundrum poses a hindrance in ease of doing business. Moreover, the direct harm from these conflicts is that consumer protection is forgotten, which should be the most important consideration. The sectoral regulators in India have the power to penalise the commercial entities, but not award compensation to the investor or consumer.

²¹ <https://www.google.com/url?q=https://www.financialexpress.com/industry/technology/predator-y-pricing-trai-to-define-norms-not-cci/2691944/&source=gmail&ust=1667043563841000&usg=AOvVaw2NPXhpr7PHU4-3ZOqOmSiq>

²² <https://prsindia.org/billtrack/the-competition-amendment-bill-2022#:~:text=The%20Bill%20seeks%20to%20amend,rore%20will%20require%20CCI's%20approval.>

²³ <https://www.thehindubusinessline.com/economy/competition-bill-expands-scope-of-inter-regulatory-consultations-says-cci-chief/article65802459.ece>

²⁴ Ibid.

²⁵ Harmonising Regulatory Conflicts; 2011, CUTS International; <http://callcococa.com/wpcontent/uploads/2012/11/Harmonising-Regulatory-Conflicts111.pdf>

²⁶ https://cuts-ccier.org/pdf/submission_to_parliament_standing_committee_on_competition_amendment_bill_2022.pdf

22. 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.

23. The European model follows mandatory consultation between competition authorities and sector regulators. In Mauritius, South Africa and a few other countries, the sector regulators and competition authorities must enter into memoranda of understanding (MoUs) to harmonise their jurisdictional powers. 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 Anatel.²⁷ 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.

24. A change in approach is, thus, needed. The Spanish Government had announced a proposal for merger of competition authority and some sector regulators are in one body. In a large country like India, replacing multiple regulators with a unified regulator is not an option. Also, these specialised regulators bring in a holistic understanding of sectors. So, the approach should rather become more cooperative and collaborative.²⁸

25. In the case of appeals of competition cases, each sector in India has a different appellate body, unlike, say, in Britain where the Competition Appellate Tribunal is an independent judicial body that acts as an oversight body to promote rivalry across sectors. A leaf could be taken from the UK competition regime, under which regulators in the sectors of energy, communications, financial services, payments, health, railways, and aviation go by the competition law. Appeals from the UK Competition and Markets Authority (CMA) and all sectoral regulators are heard by the Competition Appeal Tribunal, common appellate body for competition and all utility sector regulators. A similar model can serve India to promote a culture of competition.²⁹

5. Way forward: Towards harmonious Coordination

26. In India, it is important that the jurisdiction of CCI, as the anti-monopoly watchdog in case of anti-competitive agreements in financial sectors, is not overridden. CCI has fair market and consumer and investor interest at the core of its existence. The penalties levied by CCI are also harsher in comparison.³⁰ Analysis of competition issues in the market - collusion, predatory pricing, market power, etc - should be left in the hands of CCI. The sectoral regulators do not have the resources and antitrust tools to deal with competition issues in the market.

²⁷ National Agency of Telecommunication (ANATEL), National Agency of Energy (ANEEL), National Agency of Terrestrial Transportation (ANTT)

²⁸ <http://iclr.in/wp-content/uploads/2019/08/Vol.1-OVERLAPPING-JURISDICTION-OF-REGULATORS-IN-INDIA-A-NEVER-ENDING-BATTLE.pdf>

²⁹ [We need a competition law regime that fosters rivalry | Mint](#)

³⁰ Dhruv Dhawan, [CCI v. TRAI](#)

5.1. Mandatory Consultative Framework

27. The best approach for India is a type of a concurrent framework which involves continuous mutual mandatory 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.³¹ The latest proposed amendment to the Competition law has not warmed up to the idea of mandating consultation among competition and sectoral regulators even after more than 10 years of its proposal (made during discussions to amend the law in 2011).

28. The model of mandatory cooperation would also ensure non-duplicity of competition enforcement, legal certainty and promote the integrity of CCI. Sector regulators should be rather involved with forecasted technical regulations and structural issues, such as tariffs, third-party access, safety standards and entry-exit conditions. This collaborative model will prevent forum-shopping and deter players from circumventing rules to abuse market dominance.

5.2. Formal and Informal Mechanisms

29. Harmonious coordination between regulators can also be achieved through formal practice and informal consultative mechanisms. A forum can also be established for regular exchange of ideas and policy level coordination between CCI and other regulators. The UK Competition Network is an established forum for cooperation between the CMA and sectoral regulators to encourage stronger competition across the economy. Something similar was proposed in National Competition Policy (NCP)³² to India's Ministry of Corporate Affairs (MCA). Such a forum was established by MCA called the Forum of Indian Regulators (FOIR), with the objective to provide a common platform to all regulators across India.³³ Steps should be taken to revive and strengthen this forum, in the spirit of harmonious coordination.

30. Formal schemes for coordination such as the right to participate/observe proceeding before the other; formal referrals; appeal to a common authority; presence of competition authority on sectoral regulator agency, can be considered. Other mechanisms for coordination should also be explored such as use of experts from one another for facilitating enquiry/investigations; exchange of personnel on deputation or internship basis; participation in each other's training programmes, workshops, seminars, etc.; conducting regular training programmes by CCI for representatives of the sector regulators so that they are in a better position to appreciate various competition issues.³⁴

31. As a matter of policy, formal and informal exchanges between various sectoral regulators and CCI should be encouraged. A close functioning relationship between them is a reform needed for a better regulatory landscape. This would facilitate ease of doing business, increased investments, and economic growth.

³¹ <http://callolcoca.com/wp-content/uploads/2012/11/Harmonising-Regulatory-Conflicts111.pdf>

³² https://www.mca.gov.in/Ministry/pdf/DraftNationalCompetitionPolicyForIndia-28th_July2011.pdf

³³ [https://ica.nic.in/FOIR_About.aspx#:~:text=FOIR%20Centre%20\(IICA\)%20performs%20functions,carrying%20out%20statutory%20compliances%20etc.](https://ica.nic.in/FOIR_About.aspx#:~:text=FOIR%20Centre%20(IICA)%20performs%20functions,carrying%20out%20statutory%20compliances%20etc.)

³⁴ <https://www.cci.gov.in/images/economicconference/en/keynote-address1652336306.pdf>